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RUSSIA – TARIFF TREATMENT OF CERTAIN AGRICULTURAL AND MANUFACTURING PRODUCTS

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS485/R.

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ANNEX A

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ANNEX A-1

PRELIMINARY RULING OF THE PANEL

2 November 2015

1 INTRODUCTION

1.1. On 24 August 2015, the Russian Federation ("Russia") submitted to the Panel a request for a preliminary ruling (referred to in this document as the "preliminary ruling request") concerning the consistency of the European Union's request for the establishment of a panel (WT/DS485/6) with Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") (referred to in this document as the "panel request").

1.2. Russia's preliminary ruling request raises six main issues. As explained in more detail below, these concern whether the panel request identifies the specific measures at issue; whether the panel request fails to provide the legal basis of the European Union's complaint; whether the panel request expands the scope of the dispute; whether the panel request fails to establish a *prima facie* case in respect of the challenged measures; whether the panel request purports to challenge a measure that does not exist; and whether amendments to the challenged measures fall within the Panel's terms of reference.

1.3. Article 6.2 provides as follows:

> The request for the establishment of a panel shall be 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. In case the applicant requests the establishment of a panel with other than the standard terms of reference, the written request shall include the proposed text of special terms of reference.

1.4. Russia requested the Panel to hand down a ruling prior to the Panel's first substantive meeting with the parties.[1] In a communication dated 26 August 2015, the Panel indicated that, due to the timing of Russia's request and the Panel's need to prepare for the first meeting, it did not expect to be able to rule on Russia's request prior to the first substantive meeting with the parties, held on 15 – 16 September 2015. The Panel informed the parties that it intended to provide further advice on the matter during that meeting.

1.5. On 26 August 2015, the Panel requested the European Union to provide a written response to Russia's request by 3 September 2015. The European Union filed its response on 3 September 2015.

1.6. At the beginning of the Panel's first substantive meeting with the parties on 15 September 2015, the Panel informed the parties that it would provide its conclusions in respect of Russia's preliminary ruling request by 18 September 2015.[2]

1.7. The Panel issued its conclusions on Russia's request to the parties on 18 September 2015.[3] The Panel concluded that the European Union's panel request was not inconsistent with Article 6.2 and therefore it rejected Russia's claims in this respect. The Panel indicated that it would provide detailed reasons in support of its conclusions at a later date, but prior to the date of issuance of its Interim Report. The Panel explained that prior panels had likewise provided detailed reasons only

[1] Russia's preliminary ruling request, para. 68.

[2] The Panel's decision to issue its conclusions as soon as possible was made in the light of Russia's request during its opening oral statement that the Panel "make a ruling … as soon as possible in order to ensure prompt resolution of the dispute and prevent unnecessary spending of resources of the Panel, the Secretariat, and the Parties". Russia's opening oral statement at the Panel's first substantive meeting with the parties, para. 93.

[3] The Panel's conclusions were also circulated to third parties, for their information, on 25 September 2015.

after giving the conclusions in respect of a preliminary ruling request[4], and that it was following this approach in view of Russia's request that this matter be dealt with as soon as possible, and in the interests of efficiency.

1.8. The Panel's conclusions as sent to the parties (and the third parties for information) are reproduced in Annex A to this document. As foreseen in those conclusions, the present document contains the Panel's detailed reasons for its conclusions on Russia's request. This document, as well as the conclusions circulated to the parties on 18 September 2015, will become an integral part of the Panel's Final Report, subject to any changes that may be necessary in light of any comments that may be received from the parties at the interim review stage.

1.9. In preparing these detailed reasons, the Panel has followed the structure used in its conclusions. Consequently, reasons are given in support of six separate conclusions. Where the conclusions were sub-divided, this document explains the Panel's detailed reasoning in respect of each sub-issue.

2 ISSUE 1: WHETHER THE EUROPEAN UNION'S PANEL REQUEST FAILS TO IDENTIFY THE SPECIFIC MEASURES AT ISSUE

2.1. Issue 1 comprises three independent claims. Specifically, according to Russia, the European Union's panel request fails to identify the specific measures at issue by:

a. referring to measures concerning "a number of goods" (paragraph 5), "certain other goods" (paragraph 7), and "a significant number of tariff lines" (paragraph 11);

b. not indicating that any measures are being challenged "as such"; and

c. not indicating that the lack of a ceiling mechanism is a challenged measure.

2.1 Issue 1(a)

2.2. As noted above, the essence of Russia's first claim is that the panel request does not meet the requirements of Article 6.2 because its references to measures concerning "a number of goods" (paragraph 5)[5], "certain other goods" (paragraph 7)[6], and "a significant number of tariff lines" (paragraph 11)[7] fail to identify the specific measures at issue.

2.3. Russia argues that a panel request must identify one or more challenged measures with "sufficient particularity, so as to indicate the nature of the measure and the gist of what is at issue".[8] According to Russia, the European Union's panel request fails to meet this requirement insofar as it contains "vague[] and imprecis[e]"[9] references to "certain goods" (in paragraph 5), "certain other goods" (in paragraph 7), and a "significant number of tariff lines" (in paragraph 11). Although Russia accepts that at least challenged measures 1 – 5 and 7 – 11 are sufficiently

[4] See, for example, Panel Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/R and Add.1 / WT/DS426/R and Add.1, adopted 24 May 2013, as modified by Appellate Body Reports WT/DS412/AB/R / WT/DS426/AB/R, para. 7.8; and *United States – Definitive Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/R, WT/DS178/R, adopted 16 May 2001, paras. 5.15-5.16.

[5] Paragraph 5 reads in relevant part: "Russia subjects a number of goods to import duties inconsistent with its Schedule of Concessions and Commitments annexed to the GATT 1994".

[6] Paragraph 7 reads in relevant part: "[F]or certain other goods (including palm oil and its fractions, refrigerators and combined refrigerator – freezers), the legal instruments referred to below provide for a type/structure of duty that varies from the type/structure of duty recorded in the Schedule".

[7] Paragraph 11 reads in relevant part: "In addition, it appears that the 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".

[8] Russia's preliminary ruling request, para. 7 (citing Appellate Body Report, *US – Continued Zeroing*, para. 169.

[9] Russia's opening oral statement at the Panel's first substantive meeting with the parties, para. 31.

identified in the panel request[10], it maintains that paragraphs 5, 7 and 11 of the panel request challenge *additional* and *distinct* measures that are nevertheless insufficiently specified.

2.4. According to Russia, "paragraph 7 [of the European Union's panel request] deals with 'certain other goods' that are not clearly identified in a manner that would provide certainty as to a particular measure that the European Union is challenging. … [T]his general statement even being illustrated by paragraphs 8, 9 and 11 was not crystallized into any particular measure, except for measures 7-11 that are challenged by the European Union".[11]

2.5. Additionally, in respect of paragraph 11 of the European Union's panel request, Russia argues that "the reference to 'a significant number of tariff lines' is too vague and does not allow for the identification of specific instruments that the reference aims to cover".[12] In Russia's view, the European Union's use of this term in the panel request "shifts the obligation to identify a particular measure onto the Panel", a task that falls outside the scope of the Panel's mandate.[13]

2.6. In consequence, Russia requests the Panel to "issue a preliminary ruling that claims made by the European Union in respect of goods that are not clearly identified in the European Union's [panel request] by an HS code, in particular paragraphs 5, 7 and 11 … thereof … are outside the Panel's terms of reference".[14]

2.7. The European Union disagrees with the claims made by Russia. In the European Union's view, its "panel request is fully in line with the requirements of Article 6.2 because it "describes and enumerates twelve distinct measures at issue, at a level of specificity that goes far beyond the minimum standards required by the jurisprudence".[15]

2.8. In respect of paragraphs 5 and 7 of the panel request, the European Union explains that "[t]he phrase 'certain goods' in paragraph 6 refers to the paper and paperboard products under the specific tariff lines detailed in the remainder of that paragraph". In respect of paragraph 7 of the panel request, the European Union explains that "[t]he phrase 'certain other goods' in paragraph 7 refers to the various products (palm oil and its fractions, refrigerators and combined refrigerator-freezers) described in paragraphs 7-10".[16]

2.9. Finally, in respect of paragraph 11, the European Union explains that "the phrase 'significant number of tariff lines' in paragraph 11 refers to the measure described in that paragraph: the twelfth measure at issue, i.e. the Systematic Duty Variation".[17] According to the European Union, there is nothing in either Article II of the GATT 1994 or Article 6.2 that would "require complainants to define measures at issue in terms of individual tariff lines".[18] Insofar as the twelfth measure at issue challenges a "particular kind of tariff treatment", there is no requirement to identify a "closed list of individual offending tariff lines".[19]

2.10. The Panel begins by recalling that the text of Article 6.2 makes clear that a panel request must, *inter alia*, identify the specific measure or measures at issue. Measures not properly identified fall outside a panel's terms of reference[20], and cannot be the subject of panel findings or recommendations.

2.11. According to the Appellate Body, "the determination of whether a panel request satisfies the requirements of Articles [*sic*] 6.2 must be based on an examination of the panel request on its face

[10] Russia's preliminary ruling request, para. 14.
[11] Russia's preliminary ruling request, para. 8.
[12] Russia's preliminary ruling request, para. 10.
[13] Russia's preliminary ruling request, para. 10.
[14] Russia's preliminary ruling request, para. 14.
[15] European Union's reply to Russia's preliminary ruling request, para. 23.
[16] European Union's reply to Russia's preliminary ruling request, para. 29. The Panel notes that, in its response to Panel question No. 1, Russia agrees that "paragraph 7 does not constitute a separate measure distinct from measures 7 to 11. It should be treated as a chapeau or introduction to the measures 7 to 11".
[17] European Union's reply to Russia's preliminary ruling request, para. 23.
[18] European Union's reply to Russia's preliminary ruling request, para. 30.
[19] European Union's reply to Russia's preliminary ruling request, para. 30.
[20] Appellate Body Reports, *Dominican Republic – Import and Sale of Cigarettes*, para. 120 and *EC and certain member States – Large Civil Aircraft*, para. 790.

as it existed at the time of its filing".[21] Previous disputes also indicate that "[t]he task of assessing the sufficiency of a panel request for the purposes of Article 6.2 may be undertaken on a case-by-case basis, in consideration of the panel request as a whole, and in the light of the attendant circumstances".[22] In respect of the requirement to identify the specific measures at issue, the Appellate Body has explained that "the measures at issue must be identified with sufficient precision so that what is referred to adjudication may be discerned from the panel request".[23] A panel request will satisfy this requirement where it identifies the measure(s) at issue "with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue".[24]

2.12. We first turn to examine paragraph 5 of the European Union's panel request. Russia is correct that that paragraph refers to "a number of goods". However, consistent with the guidance provided by the Appellate Body, it is important to read paragraph 5 in context, which notably includes paragraphs 6 to 11. In our view, paragraph 5 constitutes an introductory paragraph that explains the essence of the European Union's complaint. The specific measures to which that complaint attaches are elaborated not in paragraph 5, but in the six paragraphs that succeed it. The terms "Firstly" and "Secondly" at the beginning of paragraphs 6 and 7, as well as the term "In addition" in paragraph 11, indicate that those paragraphs are intended to flesh out the general statement provided in paragraph 5. It is clear to us, therefore, that paragraph 5 does not purport to put forward a claim that concerns a measure or measures distinct from the twelve measures specifically identified in paragraphs 6 to 11.[25]

2.13. We next turn to examine paragraph 7, which refers to "certain other goods". Here again, this phrase must be read in its context, particularly paragraphs 8 to 10. As we see it, paragraph 7 identifies certain measures at issue only in general terms; the associated tariff lines are provided in paragraphs 8 and 9, respectively. This is apparent from the opening words "In some of those instances" and "In certain other instances" in paragraphs 8 and 9. The relevant "instances" are the "specific variations" that are referred to in paragraph 7. Therefore, paragraph 7 in our view does not purport to identify a challenged measure that is additional to or separate from the seventh to the eleventh measures that are specifically identified in paragraphs 8 to 10.

2.14. We agree that the European Union's use of the word "including" in paragraph 7, when considered in isolation, might initially give rise to some uncertainty. However, paragraphs 8 and 9 refer to the seventh to the eleventh measures, and each of these measures relates to a single tariff line that is identified in paragraph 8 or 9. The products corresponding to these tariff lines are the same products that are identified in paragraph 7 (i.e. palm oil and its fractions, refrigerators and combined refrigerator-freezers). In other words, the products enumerated in paragraph 7 are all accounted for in paragraphs 8 and 9. Moreover, paragraph 11 of the panel request identifies a measure – the twelfth measure – that is distinct from the seventh to the eleventh measure. Therefore, even if the word "including" might initially suggest that there could be challenged measures that relate to products other than those enumerated in paragraph 7, the fact that paragraphs 8 and 9 refer to all enumerated products and that the panel request provides a continuous numbering of the measures in our view indicates to us that paragraph 7, interpreted in the light of its context, encompasses only the seventh to the eleventh measures.[26]

2.15. We turn, finally, to paragraph 11 and the reference it contains to a "significant number of tariff lines". Paragraph 11 identifies the twelfth measure at issue. It is true that this paragraph

[21] Appellate Body Report, *Argentina – Import Measures*, para. 5.48.

[22] Panel Report, *US – FSC (Article 21.5 – EC II)*, para. 7.74. See also Appellate Body Reports, *Canada – Wheat Exports and Grain Imports*, para. 206 and *EC and certain member States – Large Civil Aircraft*, para. 787; Panel Report, *China – Publications and Audiovisual Products*, para. 7.104.

[23] Appellate Body Report, *US – Continued Zeroing*, para. 168.

[24] Appellate Body Report, *US – Continued Zeroing*, para. 169.

[25] Russia, in paragraph 54 of its opening oral statement at the Panel's first substantive meeting with the parties, asked the Panel to rule that the European Union's claims relating to the first to eleventh measures at issue are not precise enough. We note that to the extent that this request for a ruling goes beyond the scope of Russia's preliminary ruling request, paragraph 6 of our Working Procedures, which provides that in the case of the responding party any request for a preliminary ruling be submitted no later than in its first written submission, precludes us from considering it.

[26] Paragraph 6 of the panel request also enumerates covered products in brackets, but it does not use the word "including". However, both paragraphs 6 and 7 have corresponding paragraphs in the request for consultations that use the word "including". It is therefore possible that the word "including" was inadvertently left in paragraph 7, since that word was removed from the text of paragraph 6.

does not identify any particular tariff lines. In our view, however, it is important to bear in mind that the measure identified in paragraph 11 consists in a particular kind of tariff treatment – a particular type of duty variation – rather than the tariff treatment of any one tariff line. This is clearly indicated by the European Union's description of the measure as a "general practice" and the reference to this being "systematically" provided for in the identified legal instruments. In such circumstances, we do not think that the European Union's failure to identify specific tariff lines deprives the description of the twelfth measure of the required specificity. Given the nature of the challenged measure as described by the European Union in its panel request, it does not seem to us incongruous that the European Union chose to identify no individual tariff lines in paragraph 11. Paragraph 11 in our view is thus sufficient to provide a description of the twelfth measure that indicates its nature and the gist of what is at issue.

2.16. We recall in this regard that, according to the Appellate Body, "there may be circumstances in which a party describes a measure in a more generic way, which nonetheless allows the measure to be discerned"[27], and "[a]n assessment of whether a complaining party has identified the specific measures at issue may depend on the particular context in which those measures exist and operate".[28] These statements suggest to us that there is no single way in which a challenged measure must invariably be identified.

2.17. Moreover, we recall that the requirement imposed by Article 6.2 is to identify the specific measure at issue, and not the products governed or affected by that measure.[29] Therefore, we consider that paragraph 11 can be consistent with the requirement to identify the specific measure at issue, even though it does not identify particular tariff lines. In any event, although not identifying particular tariff lines, paragraph 11 indicates the ways in which the challenged measure is alleged to lead to the imposition of customs duties in excess of bound rates, stating that this occurs "in one of the two ways described above (in relation to the seventh, eighth, ninth, tenth and eleventh measure at issue)". The phrase "in one of the two ways described above (in relation to the seventh, eighth, ninth, tenth and eleventh measure at issue)" makes clear that the tariff lines corresponding to the seventh to eleventh measures are themselves part of the "significant number of tariff lines" to which the twelfth measure applies. When read together with the preceding paragraphs, paragraph 11 thus identifies five tariff lines that are subject to the twelfth measure. Accordingly, the panel request in our view does not leave Russia to guess at the content or nature of the challenged measure. It explains the ways in which the measure works and gives a number of examples of the tariff lines currently affected by the measure's operation. In our view, this is sufficient to put Russia on notice of the case it has to answer, and to enable it to begin to prepare its defence, as well as to inform the third parties of the nature of the measures at issue.[30]

2.18. Before proceeding, we think it important to recall the Appellate Body's statement that "the identification of the specific measure at issue, pursuant to Article 6.2, is different from the demonstration of the existence of such measures". As the Appellate Body has explained[31]:

> an examination of the specificity of a panel request does not entail substantive consideration as to what type of measures are susceptible to challenge in WTO dispute settlement. Such consideration may have to be explored by a panel and the parties during the panel proceedings, but is not a prerequisite for the establishment of a panel.

2.19. Accordingly, our finding that the European Union has sufficiently identified the twelfth measure at issue in its panel request, and that that measure is therefore within our terms of reference, does not prejudge such questions as whether the twelfth measure as identified in fact

[27] Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 116.
[28] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 641.
[29] Appellate Body Reports, *EC – Computer Equipment*, para. 67; *EC – Chicken Cuts*, para. 165. Russia, in paragraph 12 of its opening oral statement at the Panel's first substantive meeting with the parties, referred to the Appellate Body's statement at paragraph 103 of its report in *Australia – Salmon* to the effect that "the SPS measure at issue in [that] dispute can *only* be the measure which is *actually* applied to the product at issue". This statement relates to a dispute where the products at issue had been explicitly identified by the complaining party in its panel request and, in our view, does not suggest that a complaining party is required to identify the products at issue in its panel request.
[30] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8.
[31] Appellate Body Report, *US – Continued Zeroing*, para. 169

exists, what is its "precise content"[32], or whether it is a kind of measure that is susceptible to challenge in WTO dispute settlement proceedings. These are not questions to be answered in a panel request, but to be explored during the panel proceedings.

2.2 Issue 1(b)

2.20. Russia's second claim is that the panel request does not meet the requirements of Article 6.2 because it does not indicate that the European Union is challenging any measures "as such".

2.21. Russia asks the Panel to find that the European Union's claims in respect of measures "as such" are outside of the Panel's jurisdiction because "[t]here is no mention in European Union's [panel request] of a measure that contradicts Article II of the GATT 1994 '*as such*'".[33] According to Russia, in failing to identify any measures "as such", the European Union has "failed to indicate the nature of such measure, the gist of what is at issue and a particular provision of the WTO Agreement which 'measures *as such*' are not consistent with".[34]

2.22. The European Union does not accept Russia's position. In its view, Russia's argument is essentially that the European Union's claims are inconsistent with Article 6.2 simply "because the panel request did not use the words 'as such'".[35] According to the European Union, "Article 6.2 does not require complainants to utter magic words"[36], and therefore "when raising an '*as such* challenge', a complainant is in no way required to expressly refer to it as an '*as such* challenge'".[37] Indeed, the European Union notes that the term "as such" is not used in the covered agreements, but is merely "convenient shorthand for challenges against measures setting forth rules or norms that have general and prospective application".[38] In the European Union's view, "[i]t is clear that the European Union is challenging customs duties as provided for in the Common Customs Tariff of the Eurasian Economic Union ("CCT"), which is obviously a legal instrument of general and prospective application. There is no suggestion of an 'as applied' challenge anywhere in the panel request or in the European Union's first written submission".[39]

2.23. The Panel begins its analysis by recalling the Appellate Body's exhortation to complaining parties "to be *especially diligent* in setting out 'as such' claims in their panel requests as clearly as possible".[40] According to the Appellate Body, "[t]hrough straightforward presentations of 'as such' claims, panel requests should leave respondent parties in little doubt" as to the nature of the claims.[41]

2.24. Russia is correct that the words "as such" do not appear in the European Union's panel request. However, in our view, the exhortation to diligently set out "as such" claims does not imply that the words "as such" must be explicitly included in a panel request every time an "as such" claim is put forward. Rather, what matters in our view is whether the "as such" nature of the claim or claims is sufficiently clear from an examination of the panel request as a whole. Indeed, the Appellate Body has observed that the terms "as such" and "as applied" "neither govern[] the definition of a measure for the purposes of WTO dispute settlement, nor define[] exhaustively the types of measures that are susceptible to challenge".[42] The terms were "developed in the jurisprudence as an analytical tool"[43], and they are in many cases a useful "heuristic device".[44]

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[32] Appellate Body Report, *US – Continued Zeroing*, para. 169

[33] Russia's preliminary ruling request, para. 15 (emphasis original); see also Russia's opening oral statement at the Panel's first substantive meeting with the parties, para. 71.

[34] Russia's preliminary ruling request, para. 19 (emphasis original)

[35] European Union's reply to Russia's preliminary ruling request, para. 39.

[36] European Union's reply to Russia's preliminary ruling request, para. 40.

[37] European Union's reply to Russia's preliminary ruling request, para. 41 (emphasis original).

[38] European Union's reply to Russia's preliminary ruling request, para.40; see also European Union's answer to Panel question No. 6, paras. 9 and 10.

[39] European Union's reply to Russia's preliminary ruling request, para. 42.

[40] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*, para. 173 (emphasis original).

[41] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*, para. 173.

[42] Appellate Body Report, *Argentina – Import Measures*, para. 5.102.

[43] Appellate Body Report, *Argentina – Import Measures*, para. 5.102.

[44] Appellate Body Report, *US – Continued Zeroing*, para. 179.

Consequently, we see no basis for concluding that the European Union's panel request is contrary to Article 6.2 merely because it does not use the words "as such".

2.25. We thus proceed to analyse whether the panel request, read as a whole, makes it sufficiently clear that the European Union is challenging the specified measures "as such", rather than as applied. We observe, first, that nowhere does the text of the panel request suggest that the measure being challenged is one or more discrete instances of the application of a particular customs duty to a particular import shipment, importer, or exporting country. Rather, the text indicates that the European Union challenges the customs duties applied by Russia, generally and prospectively, to particular tariff lines, regardless of the affected import shipment, importer, or exporting country. Indeed, paragraph 6 refers to "*ad valorem* duty rates – as provided for in the legal instruments referred to below – that exceed the *ad valorem* bound rates", while paragraph 7 says that "the legal instruments referred to below provide for a type/structure of duty that varies from the type/structure of duty recorded in the Schedule" and results in duties being levied in excess of those provided for in the Schedule. Additionally, paragraphs 8 and 9 speak of "duties … imposed in excess of the bound rates in cases where the customs value of the good is below a certain level" and of Russia "accord[ing] such treatment to ... [specified] tariff lines". In our view, these phrases cannot be read as referring to specific instances of duties being applied in excess of bound rates. Rather, they clearly identify the customs duties applicable in respect of particular tariff lines "as such" as the measures at issue.

2.26. Similarly, in respect of the twelfth measure at issue, paragraph 11 speaks generally of a "type/structure of duty" that is "systematically" applied and that allegedly "leads to the application of duties in excess of those provided for in the Schedule". Here again this language cannot be read as referring to specific instances of tariffs being applied in excess of bound rates. Moreover, it cannot in our view be read as referring to a specific or single instance of the application of the identified duty "type/structure". The use of the word "systematically" makes clear that it is the tariff treatment accorded through the use of a particular duty type/structure in itself that is being challenged, rather than the application of this tariff treatment to any particular tariff line, much less any particular shipment or import transaction.

2.27. In relation to Issue 1(b), it is important to note that such expressions as "applicable duty rate", "the applied duty" and "duties applied", all of which are used in the panel request, do not demonstrate that the European Union is challenging the measures as applied. Rather, these terms, read in their context, clearly serve to distinguish between the *bound rates* contained in Russia's Schedule and the *rates actually levied - or applied* – by Russia pursuant to the CCT. The European Union's claim is that the rates actually *applied* or *applicable* are in excess of the relevant bound rates. But this does not alter the fact that the European Union is challenging the *applied* or *applicable* rates "as such", and not in respect of any particular import transaction, importer, or exporting country.

2.3 Issue 1(c)

2.28. Russia's final claim in respect of specificity is that the panel request, at paragraph 10, fails to meet the requirements of Article 6.2 because it does not identify the lack of a ceiling mechanism as a measure at issue.

2.29. According to Russia, although the panel request alleges that "Russia provides for no mechanism, such as a ceiling on the level of the applied duty", nevertheless "the European Union does not indicate this statement as a measure challenged in its [panel request]". Additionally, in Russia's view "the European Union does not indicate a particular provision of the WTO Agreement that such practice, in the European Union's view, might be inconsistent with".[45] Russia argues that, despite this, the European Union's statements concerning the ceiling mechanism give the impression that the European Union is challenging the alleged lack of a ceiling mechanism as a separate measure.[46] Insofar as this measure was not sufficiently identified in the panel request,

[45] Russia's preliminary ruling request, para. 21; see also Russia's opening oral statement at the Panel's first substantive meeting with the parties, para. 78.

[46] Russia's preliminary ruling request, para. 22.

Russia asks the Panel to find that claims in respect of the "ceiling mechanism" are outside of its terms of reference.[47]

2.30. Alternatively, Russia requests the Panel to treat the European Union's statements in respect of the "ceiling mechanism" as arguments rather than claims.[48]

2.31. In its response to Russia's preliminary ruling request, the European Union clarifies that "[t]he fact that Russia does not apply a mechanism such as a 'ceiling' that would prevent duties from being levied in excess of bound rates is not, in itself, a measure at issue".[49] According to the European Union, the absence of a "ceiling mechanism" is an element of "the overall design and structure of the duties at issue that leads to them being levied in excess of bindings"[50], but is not a "separate and distinct measure at issue".[51]

2.32. In the Panel's view, the European Union's statement that it is not challenging the absence of a "ceiling mechanism" as a separate and distinct measure confirms what is evident on the face of paragraph 10 of the panel request itself. Paragraph 10 opens with the phrase "[i]n relation to the seventh to eleventh measures at issue", thus indicating that the absence of a ceiling mechanism, to which paragraph 10 refers, relates to these measures, but is not itself a separate measure. Indeed, we find persuasive the European Union's argument that the reference to the lack of a ceiling mechanism is an aspect of the overall design and structure of the duties at issue, or is an explanation as to how and why some of the challenged measures allegedly lead to the establishment of duty levels that exceed Russia's bound duty levels.

2.33. In the light of the confirmation provided by the European Union, there is no need for the Panel to rule on this aspect of Russia's preliminary ruling request.

3 ISSUE 2: WHETHER THE PANEL REQUEST FAILS TO PROVIDE THE LEGAL BASIS OF THE CLAIM

3.1. Russia alleges that the panel request fails to provide the legal basis of the European Union's complaint in respect of the twelfth measure because it does not identify the particular Schedule commitments covered by that claim.

3.2. Russia argues that "in respect of such '*significant number of tariff lines*', the European Union … also failed to inform the Russian Federation, third parties and the panel on the legal basis of its complaint".[52] In Russia's view, it is not enough to state that a number of tariff lines are inconsistent with a Member's obligations under Article II.[53] Russia considers that when raising a claim under Article II, the complaining party should identify the particular commitments made by the responding party in its Schedule of Concessions as the latter is an integral part of Article II and the GATT 1994 as a whole.[54] Because the European Union has failed to identify the precise commitments that the twelfth challenged measure allegedly breaches, the claim, according to Russia, "is one-sided and lacks legal basis".[55] In Russia's view, the European Union's claim in respect of the twelfth measure "is merely a statement that '*the whole of the CCT is not in compliance with the whole GATT 1994*'".[56]

3.3. The European Union rejects Russia's objection. In its view, the panel request describes the twelfth measure with "a great deal more" specificity than as simply "the whole CCT".[57] Moreover, "Russia's arguments related to the legal basis are misplaced", because "[t]he legal basis in respect of the twelfth measure … is the obligation of Members not to apply duties that exceed those provided for in its Schedule, as Articles II:1(a) and II:1(b) require. This is clearly indicated in the

[47] Russia's preliminary ruling request, para. 23.
[48] Russia's preliminary ruling request, para. 24.
[49] European Union's reply to Russia's preliminary ruling request, para. 46.
[50] European Union's reply to Russia's preliminary ruling request, para. 46.
[51] European Union's reply to Russia's preliminary ruling request, para. 47.
[52] Russia's preliminary ruling request, para. 12.
[53] Russia's preliminary ruling request, para. 12.
[54] Russia's preliminary ruling request, para. 12; see also Russia's opening oral statement at the Panel's first substantive meeting with the parties, para. 21 and Russia's response to Panel question No. 2.
[55] Russia's preliminary ruling request, para. 12.
[56] Russia's preliminary ruling request, para. 12 (emphasis original).
[57] European Union's reply to Russia's preliminary ruling request, para. 35.

Panel request".[58] In the view of the European Union, "[i]t is unclear why Russia thinks 'the whole GATT 1994' is the legal basis of this complaint".[59]

3.4. Additionally, in its opening oral statement at the Panel's first substantive meeting with the parties, the European Union argued that Article II does not require challenges to be "addressed against individual tariff lines". Rather, according to the European Union, challenges may be "addressed at groups of products defined in terms of their characteristics, or at particular kinds of tariff treatment addressed to a broad group of products".[60]

3.5. The Panel begins by recalling that pursuant to Article 6.2, in addition to identifying the specific measures at issue, a panel request must "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

3.6. According to the Appellate Body, "Article 6.2 of the DSU calls for sufficient clarity with respect to the legal basis of the complaint … [because a] defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defence".[61] More specifically, the legal basis of a claim must be set out in a way that is "sufficient to present the problem clearly".[62] In this connection, the Appellate Body has explained that[63]:

> in order for a panel request to 'present the problem clearly', it must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits. Only by such connection between the measure(s) and the relevant provision(s) can a respondent 'know what case it has to answer, and … begin preparing its defence'.

3.7. In our view, the panel request at issue does provide a brief summary of the legal basis of the European Union's complaint that satisfies this requirement of Article 6.2. The request identifies the twelfth measure as being a "general practice", and it "plainly connects" that measure to the WTO provision with which it is claimed to be inconsistent, i.e. Article II:1 of the GATT 1994. In particular, paragraph 11 of the panel request uses language that mirrors Article II:1(b) of the GATT 1994 when it states that the twelfth measure "leads to the application of duties in excess of those provided for in the Schedule … in one of the two ways described above". Moreover, paragraph 14 of the panel request explicitly states that "each of these measures is inconsistent with … Article II:1(a) and (b)", because Russia has failed to exempt products from other WTO Members "from ordinary customs duties in excess of those set forth and provided in the Russian Federation's Schedule". The expression "each of these measures" clearly includes the twelfth measure identified in paragraph 11.

3.8. Additionally, we recall that the twelfth measure at issue consists in a "general practice" (a particular kind of tariff treatment) rather than the tariff treatment accorded to one or other particular tariff line. In contrast, the first to eleventh measures are tariff-line-specific, that is to say, each of these measures concerns one specific tariff line. For those measures, specification of the tariff lines serves to identify the specific measures at issue. Given this significant difference between the first eleven and the twelfth measures, we are of the view that it was not necessary for the European Union to identify in its panel request any tariff lines affected by the twelfth measure. It is the general practice (a particular kind of tariff treatment) that is being challenged, and not any particular instance of application of that practice to a particular tariff line. Thus it is the legal basis of the claim against the general practice that must be provided in the panel request. In our view, paragraph 11 indicates that the legal basis of the claim is Article II:1. It also presents the problem sufficiently clearly by indicating how, in the absence of a ceiling mechanism, the challenged kind of tariff treatment in either of two ways described in paragraphs 8 and 9 and in certain situations and in relation to a significant number of tariff lines allegedly leads to the imposition of duties that are inconsistent with Article II:1.

[58] European Union's reply to Russia's preliminary ruling request, para. 35.
[59] European Union's reply to Russia's preliminary ruling request, para. 35.
[60] European Union's opening oral statement at the Panel's first substantive meeting with the parties, para. 13.
[61] Appellate Body Report, *Thailand – H-Beams*, para. 88.
[62] Appellate Body Report, *EC – Selected Customs Matters*, para. 168.
[63] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.

3.9. We further recall that a panel request needs to set out the legal claims, but not the legal arguments or factual evidence in support of these claims.[64] In our view, in relation to the twelfth measure, which concerns a particular kind of tariff treatment that is alleged to affect a significant number of tariff lines, those tariff lines may be relevant as arguments or evidence in support of the legal claim concerning the twelfth measure. But their relevance as argument or evidence is not germane to our inquiry under Article 6.2.

3.10. Finally, we are not aware of any general requirement under Article 6.2 under which a complaining party must always identify the relevant Schedule commitment, and in particular the specific tariff line(s), in a panel request when making a claim under Article II:1. In this context, we find relevant the Appellate Body report in *Korea – Various Measures on Beef*. That dispute did not involve a claim under Article II:1, but rather a claim under the Agreement on Agriculture. The Appellate Body's report contains the following finding[65]:

> Although the 'commitment levels' in Korea's Schedule and 'Annex 3' of the *Agreement on Agriculture* were *not explicitly* referred to in the panel requests in this dispute, it is clear that Articles 3 and 6 of the *Agreement on Agriculture*, which *were referred* to in the panel requests, incorporate those terms, either directly through Articles 3.2 and 6.3 … or 'indirectly' … In our view, the commitment levels in Korea's Schedule and the provisions of Annex 3 were in effect referred to in the complaining parties' panel requests, and were, therefore, within the Panel's terms of reference.

3.11. Applying the same logic to Article II:1(b), we note that by its terms it incorporates the responding party's Schedule as well as "[t]he products described in Part I of the Schedule relating to any contracting party" and the associated bound tariff rates. We therefore consider that the tariff lines affected by the twelfth measure and the corresponding bound tariff rates are not outside our terms of reference merely because they have not been individually identified in paragraph 11.

3.12. For the reasons set out above, we conclude that the panel request does not fail to provide a brief summary of the legal basis of the claim sufficient to present the problem clearly. Accordingly, we deny this aspect of Russia's preliminary ruling request.

4 ISSUE 3: WHETHER THE PANEL REQUEST HAS EXPANDED THE SCOPE OF THE DISPUTE

4.1. Issue 3 comprises three independent claims. Specifically, according to Russia, the European Union's panel request, when compared with its request for consultations, has impermissibly expanded the scope of the dispute by identifying as measures at issue:

a. the sixth measure concerning tariff line 4810 92 100 0;

b. the lack of a ceiling mechanism; and

c. the twelfth measure concerning a "significant number of tariff lines".

4.1 Issue 3(a)

4.2. Russia's first claim in this respect is that the European Union has expanded the scope of the dispute by identifying in the panel request the sixth measure concerning tariff line 4810 92 100 0 as a measure at issue.

4.3. Russia argues that this tariff line was not included in the European Union's request for consultations, and that its addition in the panel request "cannot 'reasonably said to have evolved' from the consultations".[66] In the first place, Russia notes that "[t]he European Union was fully aware of the applied tariff line 4810 92 100 0 at the time of its request for consultations".[67] In the second place, Russia argues that paragraph 2 of the European Union's consultations request refers

[64] Appellate Body Report, *EC – Bananas III*, para. 141.
[65] Appellate Body Report, *Korea – Various Measures on Beef*, para. 87 (emphasis original).
[66] Russia's preliminary ruling request, para. 32.
[67] Russia's preliminary ruling request, para. 32.

"only [to] duties the Russian Federation 'subjects' or 'applies'".[68] The consultations request also contains the terms "applied" (in paragraph 3) and "being levied in excess" (in paragraph 4).[69] In Russia's view, these terms circumscribe the temporal scope of the measures "envisaged"[70] by the consultations request, and have the effect of "excluding any future or potential measures".[71] Russia notes that "the European Union clearly confirms that the measure applied in respect of 4810 92 100 0 does not result in duties being levied in excess to those provided in the Schedule CLXV"[72], and thus concludes that "the sixth measure provided for in paragraph 6 of the European Union's [panel request] goes beyond the request for consultations"[73] and "falls outside of the Panel's terms of reference"[74] because it relates to a measure that did not, at the time of the request, result in the imposition of duties in excess of the relevant bound rate.

4.4. In the view of the European Union, "[t]he panel request naturally evolved from the process of consultations by *specifying and narrowing*, rather than *adding to*, the European Union's claims".[75]

4.5. In respect of tariff line 4810 92 100 0, the European Union begins by noting that the five tariff lines listed in the consultations request (which do not include tariff line 4810 92 100 0) were provided "only 'by way of example'"[76], and therefore "[t]he European Union's consultation request is plainly not limited to the tariff lines that are expressly mentioned".[77] Indeed, in the European Union's view, "Russia's attempt to limit the Panel's terms of reference to those examples would make the process of consultations meaningless"[78], and is inconsistent with the Appellate Body's instructions that "precise, exact identity between the consultation and panel requests is not required".[79] The European Union notes that the consultations request "is addressed at particular kinds of tariff treatment of certain goods", including "paper and paperboard"[80], and recalls that tariff line 4810 92 100 0 also "refers to paper and paperboard products".[81] Thus, according to the European Union, "[w]hile this particular 10-digit code was not among the examples mentioned in the consultations request, it was clearly covered by it".[82]

4.6. In response to Russia's argument concerning the temporal limitations implied by the language used in the consultations request, the European Union argues that "[n]othing in Article 4 [of the DSU] required the European Union to specifically 'mention the application in time of particular measures as a matter that is subject to consultations'".[83] The European Union notes that, at any rate, "[a]ccording to the CCT as in force when the panel was established, the *ad valorem* duty applied to that tariff line – as of 1 January 2016 – exceeds the *ad valorem* bound rate".[84] Thus, in the European Union's view, "[t]he fact that tariff line 4810 92 100 0, unlike other examples, is or was subject to a temporary duty of 5% until 31 December 2015 in no way removes it from the scope of the European Union's consultations request".[85]

4.7. Finally, the European Union contends that "[w]hether or not the European Union was aware of the *existence* of that tariff line at a particular point in time is irrelevant", since the precise purpose of consultations is "to obtain a deeper understanding of the measure at issue".[86]

4.8. The Panel begins its analysis by noting that Article 6.2 requires that a Member indicate in its request for the establishment of a panel "whether consultations were held". However, the DSU does not explicitly address the issue presented by Russia's preliminary ruling request, which is

[68] Russia's preliminary ruling request, para. 33.
[69] Russia's preliminary ruling request, para. 33.
[70] Russia's preliminary ruling request, para. 31.
[71] Russia's preliminary ruling request, para. 33.
[72] Russia's preliminary ruling request, para. 34.
[73] Russia's preliminary ruling request, para. 37.
[74] Russia's preliminary ruling request, para. 38.
[75] European Union's reply to Russia's preliminary ruling request, para. 50 (emphasis original).
[76] European Union's reply to Russia's preliminary ruling request, para. 52 and 54.
[77] European Union's reply to Russia's preliminary ruling request, para. 54.
[78] European Union's reply to Russia's preliminary ruling request, para. 54.
[79] European Union's reply to Russia's preliminary ruling request, para. 53 (internal citation omitted).
[80] European Union's reply to Russia's preliminary ruling request, para. 54
[81] European Union's reply to Russia's preliminary ruling request, para. 52.
[82] European Union's reply to Russia's preliminary ruling request, para. 55.
[83] European Union's reply to Russia's preliminary ruling request, para. 56 (internal citations omitted).
[84] European Union's reply to Russia's preliminary ruling request, para. 52.
[85] European Union's reply to Russia's preliminary ruling request, para. 56.
[86] European Union's reply to Russia's preliminary ruling request, para. 56.

whether, and to what extent, the scope of a dispute is limited to the measures explicitly referred to in the request for consultations.[87]

4.9. We find guidance on this issue in the Appellate Body's jurisprudence. In particular, we note the Appellate Body's clarification that Article 6.2 does not "require a *precise and exact* identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel".[88] The Appellate Body has thus cautioned panels against imposing "too rigid a standard for the 'precise and exact identity' between the scope of consultations and the request for the establishment of a panel".[89] According to the Appellate Body, "the requirement under Article 4.4 to identify the measure at issue cannot be too onerous at this initial step in the proceedings"[90], because "this would substitute the request for consultations for the panel request"[91], and give undue emphasis to what is "but the first step in the WTO dispute settlement process".[92]

4.10. Having said that, the Appellate Body has also made clear that the language used in a consultations request should "sufficiently alert[]"[93] the responding party to the "nature and object of the challenge raised by the complainant".[94] In addition, according to the Appellate Body, a complaining party may not "expand the scope of the dispute" in its panel request.[95] Whether the inclusion of a measure in a panel request has expanded the scope of a dispute must be determined "on a case-by-case basis"[96] and "involves scrutinizing the extent to which the identified measure at issue … ha[s] evolved or changed from the consultations request to the panel request".[97] A measure identified in a panel request may fall outside a panel's terms of reference if it "is separate and legally distinct" from the measures identified in the consultations request.[98]

4.11. In addition, the Appellate Body has provided guidance on the extent to which the "legal basis" of a complaint, as distinct from the identified measure(s), must be consistent across a complaining party's consultations and panel requests. According to the Appellate Body, "it is not necessary that the provisions [of the covered agreements] referred to in the request for consultations be identical to those set out in the panel request", provided that the inclusion of any additional provisions in the panel request "may reasonably be said to have evolved from … the subject of consultations"[99], and provided also that the addition of new legal claims does not "change the essence" of the dispute.[100] We note that subsequently the Appellate Body has applied the "change the essence" test also in cases where the inclusion of additional measures in a panel request has been challenged under Article 6.2.[101]

4.12. With these observations in mind, we now turn to the specific issue raised by Russia. The question we must answer is whether the language of the European Union's consultations request encompasses the measure concerning tariff line 4810 92 100 0 – the sixth measure – and was sufficient to "alert" Russia to the nature and object of the challenge made by the European Union, or whether the inclusion of the sixth measure in the panel request has impermissibly "expanded the scope" of the dispute, as Russia claims.

4.13. The relevant language of the consultations request is contained in paragraph 3 of the request, which provides as follows:

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[87] We refer to the consultations request because the Appellate Body indicated that in determining the scope of consultations held in a dispute, panels should look to the text of the consultations request and need not seek to establish what was actually discussed during any consultations meetings between the parties. Appellate Body Report, *US – Upland Cotton*, para. 287.

[88] Appellate Body Report, *Brazil – Aircraft*, para. 132 (emphasis original).

[89] Appellate Body Report, *US – Upland Cotton*, para. 293.

[90] Appellate Body Report, *Argentina – Import Measures*, para. 5.12.

[91] Appellate Body Report, *US – Upland Cotton*, para. 293.

[92] Appellate Body Report, *US – Upland Cotton*, para. 293.

[93] Appellate Body Report, *US – Zeroing (Japan)*, para. 95.

[94] Appellate Body Report, *Argentina – Import Measures*, para. 5.12.

[95] Appellate Body Report, *US – Upland Cotton*, para. 293.

[96] Appellate Body Reports, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 293.

[97] Appellate Body Report, *Argentina – Import Measures*, para. 5.13.

[98] Appellate Body Report, *Argentina – Import Measures*, para. 5.13.

[99] Appellate Body Report, *Mexico – Anti-dumping Measures on Rice*, para. 138.

[100] Appellate Body Report, *Mexico – Anti-dumping Measures on Rice*, para. 138.

[101] Appellate Body Reports, *Argentina – Import Measures*, para. 5.30; and *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 293.

> Firstly, for certain goods, including paper and paperboard, the applied *ad valorem* duty rates – as provided for in the legal instruments referred to below – exceed the *ad valorem* bound rates. By way of example, for five tariff lines (4810 22 900 0, 4810 29 300 0, 4810 92 300 0, 4810 13 800 9 and 4810 19 900 0) the applied duty of 15% or 10% clearly exceeds the bound rate which is set at 5%.

4.14. Although the sixth measure concerns tariff line 4810 92 100 0 and this tariff line is not among the specific tariff lines listed in paragraph 3, the tariff lines that *are* listed there are listed "[b]y way of example". This language indicates that paragraph 3 does not purport to enumerate exhaustively all relevant tariff lines. Moreover, the measures described in paragraph 3 are identified as those that relate to "certain goods, including paper and paperboard" and that result in applied *ad valorem* customs duties that exceed bound *ad valorem* rates.

4.15. In our view, the language in paragraph 3 is thus sufficient to alert Russia to the fact that the European Union's challenge relates to applied *ad valorem* duty rates for a certain category of goods that includes paper and paperboard products. The text therefore can "reasonably be read as establishing a basis from which" the European Union could be expected to "elaborate"[102], including by referring in its panel request to additional tariff lines from the identified category of paper and paperboard products. Like the tariff lines that are listed "by way of example" in the consultations request, tariff line 4810 92 100 0 falls squarely within the tariff lines related to the category of paper and paperboard products.[103]

4.16. As regards the nature and object of the sixth measure as described in the panel request, we note that it involves a (future) applied *ad valorem* duty rate that is claimed to exceed the bound *ad valorem* rate. Thus, the sixth measure is one more specific instance of a relevant good with an applied *ad valorem* rate exceeding the bound *ad valorem* rate. Also, the sixth measure is provided for in the same legal instruments referred to in paragraph 6 of the consultations request. We therefore see no basis for characterizing it as "separate and legally distinct" from the measures concerning the five tariff lines that are enumerated in paragraph 3.

4.17. Russia argues that the sixth measure could not have been properly included in the panel request because paragraph 3 of the consultations request refers in the present tense to applied duty rates that "exceed" the bound rates. In Russia's view, this contrasts with the description of the sixth measure in paragraph 6 of the panel request, which states that the "currently applicable duty rate appears to be equal to the bound rate (5%)", but that "the legal instruments referred to [in the panel request] provide for a duty rate of 15%, and therefore exceeding the bound rate, applicable as from 1 January 2016".

4.18. We agree with Russia that the European Union's complaint about the sixth measure concerns, not an applied rate that was – in the words of the panel request – "currently applicable" when it first requested the establishment of a panel in early 2015, but a future applied rate, "applicable as from 1 January 2016". To that extent, there undeniably exists a difference between, on the one hand, the sixth measure and, on the other hand, the first to fifth measures identified in paragraph 6 of the panel request, all of which concern "currently applicable" applied rates that exceed bound rates. However, we disagree with Russia that paragraph 3 refers only to applied rates that exceeded bound rates at the time of the panel request.

4.19. To recall, paragraph 3 states in relevant part that "for certain goods, including paper and paperboard, the applied *ad valorem* rates – as provided for in the legal instruments referred to below – exceed the *ad valorem* bound rates". As an initial matter, the word "applied" is used in paragraph 3 to contrast the challenged duty rates with the relevant bound rates in Russia's Schedule of Concessions. "Applied" in paragraph 3 of the consultations request thus refers to duty rates provided for in the challenged legal instruments governing the imposition of customs duties on imports into Russia as opposed to the rates bound in Russia's Schedule.

4.20. Next, we note that paragraph 3 refers, without qualification, to "applied *ad valorem* rates". In our view, this language can therefore encompass both current applied rates and future applied rates found in legal instruments. Whether any future applied rate is at issue depends on what is "provided for in the legal instruments referred to below". In our view, an instrument that sets forth

[102] Appellate Body Report, *Argentina – Import Measures*, para. 5.28.
[103] Tariff line 4810 92 100 0 covers "Multi-ply; each layer bleached".

certain tariff treatment as of a future date can properly be said to "provide for" that treatment.[104] Indeed, as is elaborated in paragraph 6 of the panel request, the European Union claims that the legal instruments referred to in both the consultations and the panel requests provide for a future applied *ad valorem* rate of 15% that exceeds the bound *ad valorem* rate.

4.21. In the light of the foregoing, and bearing in mind the Appellate Body jurisprudence referred to in previous paragraphs, the inclusion in the panel request of the sixth measure in our view has not "expanded the scope" of the dispute as it was first circumscribed in the consultations request. Nor do we consider that such inclusion has in any way "changed the essence" of the dispute, given that the sixth measure, as explained, is simply another alleged instance of relevant paper and paperboard products with an applied *ad valorem* duty rate that exceeds the bound *ad valorem* duty rate; that it is applicable in the future does not change the essence of the dispute as circumscribed in paragraph 3. The European Union was entitled and indeed required to definitively "define and delimit"[105] in its panel request the precise scope of the complaint put forward in paragraph 3 of the consultations request.

4.2 Issue 3(b)

4.22. Russia's second claim in respect of Issue 3 is that by referring to the absence of a ceiling mechanism, the European Union's panel request impermissibly expands the scope of the dispute.

4.23. Russia argues that "consultations were not requested in respect of this mechanism" (i.e. the ceiling mechanism), and submits that the mechanism is "an additional instrument" that is not covered by the phrases "subject a number of goods to import duties", "application of duties", "applied duties", or "type/structure and design that result in duties being levied". In Russia's view, "[t]his new claim cannot be 'reasonably said to have evolved' from the consultations", and as such it seeks a preliminary ruling that the ceiling mechanism (or the absence thereof) is beyond the Panel's terms of reference.[106]

4.24. Importantly, we note that this aspect of Russia's preliminary ruling request is conditional: Russia seeks a preliminary ruling on the ceiling mechanism only "in case the Panel would consider the arguments by the European Union in respect of the use by the Russian Federation of the mechanism of 'ceiling' and similar to be a separate measure"[107] or "[i]n case the 'ceiling mechanism' will be declared by the European Union as a separate claim".[108]

4.25. In its response to Russia's request, the European Union reaffirms that "it is not challenging the absence of a 'ceiling' or similar mechanism as a separate measure at issue".[109] The European Union notes, however, that at any rate the absence of a ceiling mechanism is covered by the consultations request because it is "an important aspect of the structure and design of the duties identified under the measures at issue", and "[t]he consultation request expressly refers to that 'structure and design' which results in violations of Articles II:1(a) and II:1(b)".[110] Additionally, according to the European Union, "[t]he issue of the absence of a 'ceiling' or similar mechanism limiting the level of applied duties is clearly implied when discussing the tariff treatment of products subject to combined duties and the design and structure of those duties". In the view of the European Union, the mere fact that that the consultations request did not use the word "ceiling" cannot lead to the result that the ceiling (or absence thereof) is outside of the Panel's terms of reference[111], especially when it is recalled that "[c]onsultations requests are not required to, and indeed cannot be expected to expressly list all individual aspects of a measure's design that may be relevant at the panel stage".[112]

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[104] The Oxford English Dictionary relevantly defines "provide for" as "[m]ake adequate preparation for (a possible event)" as well as "([o]f a law) enable or allow (something to be done)". Oxford English Dictionary Online (http://www.oxforddictionaries.com/definition/english/provide).

[105] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 54.

[106] Russia's preliminary ruling request, para. 42; see also Russia's opening oral statement at the Panel's first substantive meeting with the parties, para. 65.

[107] Russia's preliminary ruling request, para. 39.

[108] Russia's preliminary ruling request, para. 41.

[109] European Union's reply to Russia's preliminary ruling request, para. 60.

[110] European Union's reply to Russia's preliminary ruling request, para. 62.

[111] European Union's reply to Russia's preliminary ruling request, para. 63.

[112] European Union's reply to Russia's preliminary ruling request, para. 62.

4.26. As noted, the Panel does not consider, nor does the European Union argue, that this mechanism is a separate measure at issue. Accordingly, and in the light of the conditional nature of Russia's claim in this respect, we need not, and do not, rule on this aspect of Russia's request.

4.3 Issue 3(c)

4.27. Russia's third claim in respect of the differences between the consultations and panel requests is that the panel request expands the scope of the dispute by identifying the twelfth measure as a challenged measure.

4.28. Russia requests the Panel to find that the claims of the European Union in respect of a "significant number of tariff lines" and the "SDV" (that is, the twelfth measure at issue) were not included in the consultations request, and therefore fall outside of the Panel's jurisdiction.[113] In Russia's view, the application (or non-application) by Russia of "particular mechanisms '*that would prevent the ad valorem equivalents of the applied duties from exceeding the level of the bound duties*'" was not raised in the consultations request.[114] Rather, the consultations request "stated several claims that the Russian Federation allegedly imposes import duties in excess to the bound level provided in its Schedule CLXV", but these claims "did not cover the issue of application of such mechanisms".[115]

4.29. Russia further argues that the inclusion of this measure in the panel request impermissibly "changes the subject matter of the claim of the European Union" because it signals that the dispute "is no longer about the application of duties", it is about the "application of mechanisms additional to [the] simple establishment of levels of applied duties in a legislative act" and thus is about administration of duties.[116] Therefore, in Russia's view, "[t]his new claim cannot 'reasonably be said to have evolved' from the consultations".[117]

4.30. The European Union begins its response to this aspect of Russia's request by observing that "Russia's claim in this respect does not actually seem to address the twelfth measure at issue, or even dispute that this measure was addressed by the consultations request. Rather, it simply repeats the argument that the absence of a 'ceiling' was not mentioned as a measure at issue in the consultations request".[118] Having made this point, the European Union proceeds to argue that the twelfth measure is indeed covered by the consultations request. In particular, the European Union notes that the consultations request specifies two ways in which applied duties exceed bound rates[119]; in the view of the European Union, "[t]he twelfth measure at issue identified by the panel request falls squarely within the second 'way' described by the consultation request".[120] Indeed, according to the European Union, the description of the twelfth measure in the panel request "is … significantly narrowed down in comparison to paragraph 4 of the consultations request". In particular, the description of the twelfth measure is circumscribed by reference to the specific types of duty variation described in respect of the seventh to eleventh measures at issue, and "is further specified by the absence of a mechanism that would prevent the *ad valorem* equivalents of the applied duties from exceeding the bound rates".[121] The European Union thus requests that the Panel reject Russia's claims in this respect.[122]

4.31. The Panel has already explained at paragraphs 4.9. to 4.11. the legal standard to be applied when considering this aspect of Russia's preliminary ruling request. The relevant language of the consultations request is contained in paragraph 4, which provides as follows:

> Secondly, for certain other goods, including palm oil and its fractions, refrigerators and combined refrigerator – freezers, those instruments provide for a type/structure of duty that varies from the type/structure of duty recorded in the Schedule. The structure and design of the specific variations at issue result in duties being levied in

[113] Russia's preliminary ruling request, para. 48.
[114] Russia's preliminary ruling request, para. 46 (emphasis original).
[115] Russia's preliminary ruling request, para. 46.
[116] Russia's preliminary ruling request, para. 46.
[117] Russia's preliminary ruling request, para. 47.
[118] European Union's reply to Russia's preliminary ruling request, para. 66.
[119] European Union's reply to Russia's preliminary ruling request, paras.70 and 72.
[120] European Union's reply to Russia's preliminary ruling request, para. 73.
[121] European Union's reply to Russia's preliminary ruling request, para. 73.
[122] European Union's reply to Russia's preliminary ruling request, para. 74.

> excess of those provided for in the Schedule for these goods where the customs value is below a certain level. This concerns for example the following tariff lines: 1511 90 190 2, 1511 90 990 2 (palm oil) and 8418818001, 8418102001, 8418211000 (refrigerators and combined refrigerator – freezers).

4.32. The panel request contains two main paragraphs that, according to the European Union, originated in paragraph 4 of the consultations request: paragraph 7, which concerns the seventh to eleventh measures at issue, and paragraph 11, which concerns the twelfth measure. Russia objects to the inclusion in the panel request of the second of these paragraphs (paragraph 11). It is useful to set out paragraphs 7 and 11 in full:

> Secondly, for certain other goods (including palm oil and its fractions, refrigerators and combined refrigerator – freezers), the legal instruments referred to below provide for a type/structure of duty that varies from the type/structure of duty recorded in the Schedule. The structure and design of those specific variations results in duties being levied in excess of those provided for in the Schedule for these goods whenever the customs value is below a certain level.
>
> In addition, it appears that the 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, in one of the two ways described above (in relation to the seventh, eighth, ninth, tenth and eleventh measure at issue), without providing for a mechanism that would prevent the ad valorem equivalents of the applied duties from exceeding the level of the bound duties. This general practice constitutes the twelfth measure at issue.

4.33. We note that paragraph 4 of the consultations request and paragraph 11 of the panel request use partly identical language.[123] They both make reference to "a type/structure of duty that varies from the type/structure of duty recorded in the Schedule", and both paragraphs allege that this type/structure of duty "leads to the application of duties in excess of those provided for in the Schedule whenever the customs value is below a certain level".

4.34. It is also apparent that there are some textual differences. Paragraph 4 of the consultations request does not use the phrase "in relation to a significant number of tariff lines" (paragraph 11). But paragraph 4 explicitly states that the five tariff lines that it identifies are provided as "example[s]". This should have alerted Russia that the object of the European Union's challenge was not necessarily limited to those five tariff lines, and that the European Union's challenge could relate to a "significant number of tariff lines" that went beyond the tariff lines specifically identified.

4.35. Paragraph 4 also does not include the phrase "the legal instruments referred to […] *systematically* provide for a type/structure of duty" (paragraph 11; emphasis added). The phrase that it uses instead is "those instruments provide for a type/structure of duty". This phrase does not qualify the word "provide", and therefore does not preclude an interpretation of paragraph 4 as covering also any identified legal instruments that "systematically" provide for the relevant type of duty.[124]

4.36. Additionally, we note that the twelfth measure as described in paragraph 11 of the panel request appears to be provided for in legal instruments that are not "separate and legally distinct"[125] from the legal instruments to which paragraph 4 of the consultations request refers.

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[123] The Appellate Body in *Argentina – Import Measures* similarly highlighted "a high degree of similarity in the language and content of the consultations requests and the panel requests". Appellate Body Report, *Argentina – Import Measures*, para. 5.26.

[124] The Appellate Body in *Argentina – Import Measures* reasoned along similar lines with regard to the consultations request in that dispute, stating that "we see nothing in the language of the consultations request[] that precludes the identification of a single or 'overarching' … measure in the panel request[]". Appellate Body Report, *Argentina – Import Measures*, para. 5.28.

[125] Appellate Body Report, *Argentina – Import Measures*, para. 5.13.

4.37. Based on these considerations, it appears to us that the consultations request "may reasonably be read as establishing a basis from which the complainant[] could legitimately elaborate [its] description of the measure".[126] In our view, the inclusion in the panel request of paragraphs 7 and 11, and more particularly the inclusion in paragraph 11 of the words "systematically" and "in relation to a significant number of tariff lines", constitutes a "permissible elaboration"[127] that serves to "define and delimit"[128] the scope of the complaint put forward in paragraph 4 of the consultations request. In taking this view, we also bear in mind the Appellate Body's admonition that the requirement under Article 4.4 of the DSU that consultations requests identify the measure at issue "cannot be too onerous at this initial step in the proceedings".[129]

4.38. We now turn to the nature and object of the twelfth measure as identified in paragraph 11 of the panel request. We have already observed that paragraph 11 uses terms that are partly identical to those used in paragraph 4. This is so in particular with regard to the language that describes the nature and object of the challenge. As we see it, paragraph 4 alerts Russia to the fact that the European Union is challenging "a type/structure of duty that varies from the type/structure of duty recorded in the Schedule" in a way that leads to duties being levied in excess of those provided for in Russia's Schedule. Given the broad and generic language used in paragraph 4, Russia in our view could "reasonably anticipate"[130] that the challenge would ultimately be either relatively narrow (and concern only the five tariff lines identified by way of "example") or substantially broader than this (and concern a significant number or tariff lines[131]).

4.39. We are cognizant of the structure of the panel request, which distinguishes between the seventh to eleventh measures (paragraphs 7-10) and the twelfth measure (paragraph 11).[132] This documents that there is a difference between the two: the seventh to eleventh measures are specific to individual tariff lines, whereas the twelfth measure relates to a particular type of tariff treatment (duty variation) that is said to reflect a general practice. This difference, however, is material under Article 6.2 only if it establishes that paragraph 11 of the panel request has expanded the scope of the challenge set out in paragraph 4 of the consultations request. We think it has not, for the following reasons.

4.40. Although paragraph 11 frames the twelfth measure differently from the seventh to eleventh measures, it remains a challenge to "a type/structure of duty that varies from the type/structure of duty recorded in the Schedule" in a way that leads, for certain goods other than paper and paperboard, to duties being levied in excess of those provided for in Russia's Schedule. For this reason, we consider that the inclusion in the panel request of paragraph 11 has not "expanded the scope" of the dispute as it was first circumscribed in the consultations request. Instead, we view paragraph 11 as one expression – the other being paragraphs 7-10 of the panel request – of an "elaboration"[133], "refinement"[134] and "reformulation"[135] of the challenge set out in paragraph 4 of the consultations request. As such, paragraph 11 can in our view be considered to have evolved from the language of paragraph 4, without, however, expanding the scope of the dispute defined in the consultations request. We believe that it is precisely to safeguard this possibility of elaboration, refinement and reformulation that the Appellate Body cautioned against imposing a requirement of "precise and exact identity" between the challenged measures identified in consultations and panel requests, respectively.

4.41. We likewise consider that the inclusion in the panel request of paragraph 11 has not changed the essence of the dispute as defined, *inter alia*, in paragraph 4 of the consultations request. As the text of the panel request itself indicates, paragraph 11 in essence sets forth a challenge to a particular type of tariff treatment (duty variation). In our view, the fact that the

[126] Appellate Body Report, *Argentina – Import Measures*, para. 5.28.
[127] Appellate Body Report, *Argentina – Import Measures*, para. 5.30.
[128] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 54.
[129] Appellate Body Report, *Argentina – Import Measures*, para. 5.12.
[130] Appellate Body Reports, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 293.
[131] It can be inferred from paragraph 3 of the consultations request that the challenge set out in paragraph 4 does not concern paper and paperboard products, since text of paragraphs 3 and 4 suggests that there is no overlap between the two in terms of the affected tariff lines.
[132] Paragraph 7, which relates to the seventh to eleventh measures, opens with the word "secondly", whereas paragraph 11, which relates to the twelfth measure, uses the opening phrase "in addition".
[133] Appellate Body Report, *Argentina – Import Measures*, para. 5.29.
[134] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.
[135] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.

twelfth measure seeks to challenge this type of duty variation as a general practice rather than as a tariff-line-specific duty variation (as in the case of the seventh to eleventh measures) does not alter the essence of the European Union's complaint as set out in the consultations request. In either situation, the European Union is complaining about one and the same type of duty variation.

4.42. We note Russia's argument that the twelfth measure concerns, not the application of duties, but the application of ceiling mechanisms and administration of duties. We are unable to agree with this description of the twelfth measure. As explained at paragraph 2.32. we consider that paragraph 11 is about the "establishment of levels of applied duties in a legislative act".[136] Even assuming that the absence of a ceiling mechanism could be viewed as raising an issue of administration of duties, as indicated at paragraph 2.32, the absence of a ceiling mechanism is not itself a challenged measure.

4.43. In the light of the foregoing, and bearing in mind the Appellate Body jurisprudence referred to above, we are of the view that the inclusion in the panel request of the twelfth measure has not "expanded the scope" of the dispute as claimed by Russia.

5 ISSUE 4: WHETHER THE EUROPEAN UNION HAS FAILED TO ESTABLISH A *PRIMA FACIE* CASE IN RESPECT OF MEASURES "AS SUCH" AND THE TWELFTH MEASURE

5.1. This issue concerns Russia's allegation that the panel request fails to establish a *prima* facie case in respect of the measures at issue. In response to a question from the Panel, Russia has clarified that this claim relates to the first eleven measures challenged "as such" as well as the twelfth measure.[137]

5.2. Russia argues that "[t]he European Union fails to establish a *prima facie* case on the measures mentioned above".[138] Referring to the Appellate Body Report in *US – Shrimp II (Viet Nam)*, Russia contends that a complaining party cannot simply designate something as a general practice without explaining what it entails. In Russia's view, the European Union in this dispute has not described with sufficient clarity the alleged general practice being challenged.[139]

5.3. Additionally, Russia recalls that the use by a WTO Member of a duty type different from the type used in that Member's Schedule is not in itself WTO-inconsistent. Rather, in Russia's view, "[a] complaining Member has to additionally prove that the customs duty collected is in fact in excess of the bound rate. Moreover, the WTO Member has to show that the customs duty collected will be in excess of the bound rate every time the duty applies".[140]

5.4. In response to a question from the Panel[141], Russia clarified that it is not seeking a ruling under Article 6.2 that the European Union has failed to make a *prima facie* case *in the panel request*; rather, its argument is that, because the panel request fails to identify these specific measures at issue, the European Union must be taken *a fortiori* to have failed to make a *prima facie* case. Put another way, Russia's position appears to be that insofar as the European Union has failed to specify the measures at issue, it cannot possibly make a *prima facie* case in respect of those measures.

5.5. In its response to Russia's preliminary ruling request, the European Union argues that "[w]hether or not a complainant has made a *prima facie* case is an issue to be addressed by the Panel when deciding on the merits. It is not an issue the Panel should or even *could* decide on in a preliminary ruling".[142] In this connection, the European Union notes that the Appellate Body report in *US – Shrimp II (Viet Nam)*, cited by Russia, "concerns an appellant's burden of proof in the context of review under Article 11 of the DSU. It is unrelated to Article 6.2 of the DSU".[143] In the

[136] Russia's preliminary ruling request, para. 46.
[137] Russia's response to Panel question No. 6.
[138] Russian Federation's preliminary ruling request, para. 49.
[139] Russia's preliminary ruling request, para. 51. See also Russia's opening oral statement at the Panel's first substantive meeting with the parties, paras. 72 and 73.
[140] Russia's preliminary ruling request, para. 53 (emphasis omitted); see also Russia's opening oral statement at the Panel's first substantive meeting with the parties, para. 75.
[141] Russia's response to Panel question No. 5.
[142] European Union's reply to Russia's preliminary ruling request, para. 76 (emphasis original).
[143] European Union's reply to Russia's preliminary ruling request, para. 77.

view of the European Union, the notion that a "complainant is expected to make a *prima facie* case already in the panel request" is one that "clearly cannot be accepted". For the European Union, the sufficiency of a panel request on the one hand and the requirement that a complaining party make a *prima facie* case on the other hand "are very different, arise at distinct stages of the proceedings and should not be conflated". The European Union thus requests the Panel to reject the European Union's request.[144]

5.6. Before concluding its argument on this issue, the European Union also notes three additional points. First, the European Union argues that "the 'mechanism' of how the measures at issue (including the twelfth measure) function is described quite clearly both by the panel request and by its first written submission". Thus, contrary to Russia's claim, "[t]he Systematic Duty Variation was not simply 'designated as a general practice".[145] Second, the European Union contends that Russia's argument that a WTO Member must show that a measure challenged under Article II:1 of the GATT 1994 leads to the application of duties in excess of bound rates in every instance "flies in the face of the Appellate Body's jurisprudence" (and is at any rate a matter for the merits stage of the case).[146] Finally, the European Union notes that because "all of the measures at issue in this dispute are challenged 'as such' … Russia's reference to 'measures "as such"' in the context of its claim on the alleged failure to make a *prima facie* case is insufficiently clear to enable a meaningful response".[147]

5.7. The Panel begins by recalling that "Article 6.2 requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel".[148] Thus, "[t]he question of whether a measure falls within a panel's terms of reference is a threshold issue, distinct from the question of whether the measure is consistent or not with the legal provision(s) of the covered agreement(s) to which a panel request refers".[149] Additionally, and as we noted above, the Appellate Body has clarified that "the identification of the specific measures at issue, pursuant to Article 6.2, is different from the demonstration of the existence of such measures".[150] Thus, a panel request need not contain "a substantive inquiry as to the existence and precise content of the measure".[151]

5.8. As we noted above, Russia has clarified that it is not seeking a finding under Article 6.2 that the panel request itself does not present a *prima facie* case in respect of measures "as such" and the twelfth measure. Rather, Russia's argument appears to be that, because the panel request fails to sufficiently identify the specific measures at issue, the European Union must be held, on the merits, to have failed to establish a *prima facie* case. The logic underpinning this argument seems to be that insofar as the specific measures at issue have not been sufficiently identified, it is *impossible* for the European Union to proceed to make a *prima facie* case during the panel proceedings, and the Panel should therefore find, already at this preliminary stage of the proceedings, that the European Union's relevant claims must fail because its argumentation and evidence will necessarily fall short of establishing a *prima facie* case.

5.9. We do not agree with this argument. As the Appellate Body statements quoted above make clear, the questions whether a panel request meets the requirements of Article 6.2 and whether a complaining party has made out a *prima facie* case in support of a claim of violation are legally distinct. The former relates to a panel's jurisdiction and proper notice of a claim, the latter to the merits of a claim. While Article 6.2 requires that a panel request adequately identify the specific measures at issue to enable the responding party to begin preparing its defence[152], the question whether a complaining party has established a *prima facie* case relates to the burden of proof imposed on a complaining party to present "evidence *and* legal argument"[153] during the course of

[144] European Union's reply to Russia's preliminary ruling request, para. 78.
[145] European Union's reply to Russia's preliminary ruling request, para. 79.
[146] European Union's reply to Russia's preliminary ruling request, para. 80.
[147] European Union's reply to Russia's preliminary ruling request, para. 81.
[148] Appellate Body, *EC – Bananas III*, para. 143 (emphasis original).
[149] Appellate Body Report, *EC – Selected Customs Matters*, para. 131.
[150] Appellate Body Report, *US – Continued Zeroing*, para. 169.
[151] Appellate Body Report, *US – Continued Zeroing*, para. 169.
[152] Appellate Body Report, *Thailand – H-Beams*, para. 88.
[153] Appellate Body Report, *US – Gambling*, para. 140 (emphasis original).

the proceedings which, "in the absence of effective refutation by the defending party, requires the panel, as a matter of law, to rule in favour of the complaining party".[154]

5.10. If Russia were correct that the panel request fails to identify the specific measures at issue (and we have already determined that this is not the case), then the Panel would not have occasion to consider whether the European Union had, in the course of its written and oral submissions, made a *prima facie* case. As Russia itself recognizes, a finding that the relevant measures have not been sufficiently identified would exclude those measures from the Panel's jurisdiction. In that situation, the Panel could not properly proceed to consider the European Union's claims on the merits and assess whether the European Union had presented sufficient evidence and argumentation to establish a *prima facie* case. In other words, in that scenario the Panel would lack the authority to make the finding regarding the existence of a *prima facie* case that Russia appears to be seeking.

5.11. At any rate, we have already determined that the panel request adequately identifies the relevant measures at issue. This disposes of Russia's argument that the European Union has failed or will fail to meet its obligation to establish a *prima facie* case in respect of the relevant measures because they have not been sufficiently identified.

6 ISSUE 5: WHETHER, THE PANEL REQUEST IDENTIFIES A MEASURE THAT DID NOT EXIST AT THE TIME OF PANEL ESTABLISHMENT

6.1. Russia alleges that, in respect of the sixth measure concerning tariff line 4810 92 100 0, the European Union's panel request identifies a measure that did not exist at the time the Panel was established.

6.2. Russia urges the Panel to find that "[t]he 'measure' in respect of tariff line 4810 92 100 0 is invented by the European Union and simply does not exist".[155] Russia notes that the European Union appears to accept that "the duty currently applied [in respect of tariff line 4810 92 100 0] is the one that is in full conformity with Russia's commitments".[156] Additionally, Russia argues that the panel request nowhere claims that this measure, which is consistent with the GATT 1994, is nullifying or impairing benefits accruing to the European Union under the WTO Agreement.[157] In Russia's view, the consequence of this is that, in respect of this claim, there is "[a]n absence of the matter to decide upon".[158]

6.3. Additionally, in Russia's view, the European Union's challenge is based on the "form of the act rather than the substance of the act". The European Union "reads the level of the duty … in isolation from the footnote thereto", but in fact "[i]ntroduction of such footnote is one of the instruments to establish the applied duty rate", and accordingly the rate cannot be read in isolation from the footnote.[159]

6.4. Finally, Russia argues that the European Union's claim against the tariff treatment in respect of tariff line 4810 92 100 0 "boils down to the mere assumption that the Russian Federation might introduce a level of duty that is not consistent with its WTO obligations in [the] future".[160] According to Russia, the European Union has "confirm[ed] that the measure is consistent with Russia's WTO commitments at this point in time"[161], and therefore the claim is "potential and illusive"[162], based on mere "beliefs" about future possibilities.[163]

6.5. The European Union rejects Russia's arguments on this issue. According to the European Union, Russia's position is "puzzling" because "both parties seem to agree" that the tariff line in

[154] Appellate Body Report, *EC – Hormones*, para. 104.
[155] Russia's preliminary ruling request, para. 54.
[156] Russia's opening oral statement at the Panel's first substantive meeting with the parties, para. 60.
[157] Russia's preliminary ruling request, para. 62.
[158] Russia's preliminary ruling request, para. 57.
[159] Russia's preliminary ruling request, para. 58.
[160] Russia's preliminary ruling request, para. 60.
[161] Russia's preliminary ruling request, para. 58.
[162] Russia's preliminary ruling request, para. 61.
[163] Russia's preliminary ruling request, para. 60; Russia's opening oral statement at the Panel's first substantive meeting with the parties, para. 60.

question provides for a WTO-inconsistent duty rate from 1 January 2016[164], and that rate is clearly included in the European Union's identification of the sixth measure at issue.[165] The European Union notes that the Panel's terms of reference include all identified "measures that are in existence at the time of the establishment of the panel"[166], and also emphasizes that "a mandatory measure can be brought before a panel, even if such an adopted measure is not yet in force".[167] In the view of the European Union, the sixth measure at issue was undoubtedly "in force at the time of the establishment of the Panel, even though it only provides for the levying of the higher rate of duty as of a future date".[168]

6.6. Additionally, the European Union rejects Russia's allegation that the claim in respect of this tariff line is unfounded or based on speculation about possible future action. According to the European Union, in respect of this measure, "[n]o guesswork is necessary: the CCT, as in force at the relevant time, makes it plain and legally binding that the duty will exceed bound rates as of 1 January 2016".[169]

6.7. The Panel recalls once again the Appellate Body's statement in *US – Continued Zeroing* that "the identification of the specific measures at issue, pursuant to Article 6.2, is different from a demonstration of the existence of such measures".[170] We agree with Russia that it is necessary to demonstrate that a challenged measure exists; otherwise, a complaining party could not be found to have made a *prima facie* case in support of its claim. However, as also noted above, such demonstration is to be made in the complaining party's written submissions and at a panel's meetings with the parties.[171] A complaining party is not required to establish the existence of a specific measure at issue in its panel request.

6.8. We also consider that a factually incorrect description of a measure in a panel request does not in itself prevent it from being treated as a specific measure at issue within the meaning of Article 6.2. A panel request needs to "indicate the nature of the challenged measure and the gist of what is at issue".[172] If the complaining party has described a specific measure incorrectly, this may be addressed during written and oral argument and it may or may not lead to a failure on the part of the complaining party to prove its case. This will depend on the nature of the error and the particular circumstances of the dispute.

6.9. In respect of the sixth measure at issue concerning tariff line 4810 92 100 0, it is therefore clear to us that the European Union does not need to establish in paragraph 6 of its panel request that this measure existed on the date of panel establishment. Nor does paragraph 6 necessarily need to reflect an accurate description of the measure for it to be properly identified in a panel request as a challenged measure. Equally, the issue whether or not the measure in question was consistent or inconsistent with Article II:1 on the date of establishment is to be assessed by the Panel on the basis, not of the information provided in the panel request, but the written submissions and oral statements made by the parties in the course of the panel proceedings.

6.10. In any event, we also observe that paragraph 6 suggests that, on the date of establishment of the Panel, relevant legal instruments already "provide[d] for" a duty rate (15%) that would be applicable from 1 January 2016, which rate is said to be in excess of the bound rate. Thus, the text of paragraph 6 does not support Russia's argument that the European Union has identified in its panel request a measure that was not in existence when the Panel was established. The text only suggests that the 15% rate was not yet being applied at the time, and not that the rule providing for the 15% rate was not yet in force. We therefore do not agree with Russia that paragraph 6 by its terms refers to a measure that was "simply not in existence" on the date of the

[164] European Union's reply to Russia's preliminary ruling request, para. 83.
[165] European Union's reply to Russia's preliminary ruling request, para. 84; see also European Union's opening oral statement at the Panel's first substantive meeting with the parties, para. 15.
[166] European Union's reply to Russia's preliminary ruling request, para. 85 (citing Appellate Body Report, *EC – Chicken Cuts*, para. 156).
[167] European Union's reply to Russia's preliminary ruling request, para. 85 (citing Panel Report, *Argentina – Textiles and Apparel*, para. 6.45).
[168] European Union's reply to Russia's preliminary ruling request, para. 85.
[169] European Union's reply to Russia's preliminary ruling request, para. 87.
[170] Appellate Body Report, *US – Continued Zeroing*, para. 169.
[171] Appellate Body Report, *US – Continued Zeroing*, para. 169.
[172] Appellate Body Report, *US – Continued Zeroing*, para. 169.

Panel's establishment or that the relevant claim set out in paragraph 6 is based on mere "beliefs" about future possibilities.[173]

6.11. Regarding Russia's allegation that the European Union is complaining about a rate of duty that was not yet being applied when the Panel was established, we note that paragraph 6 appears to suggest that the rate in question is required to be imposed by the relevant legal instruments. We observe in this respect that, as a general rule, a "mandatory measure can be brought before a panel, even if such an adopted measure is not yet in effect".[174] Although the Appellate Body has cautioned panels against applying this rule "in a mechanistic fashion", it appears to us that the general rule remains sound and valid. We therefore consider that a measure that requires allegedly WTO-inconsistent treatment only in the future, relative to the date of panel establishment, can properly be identified in a panel request as a specific measure at issue within the meaning of Article 6.2.

6.12. As a final matter, we note Russia's statement that the panel request does not indicate that the sixth measure at issue is nullifying or impairing benefits accruing to the European Union under the GATT 1994. We simply note in this respect that there is nothing in the panel request to suggest that the European Union is seeking a finding under Article XXIII:1(b) of the GATT 1994. Moreover, the European Union has not suggested that it is making a so-called "non-violation" claim.[175]

7 ISSUE 6: WHETHER AMENDMENTS TO MEASURES IDENTIFIED IN THE PANEL REQUEST ARE WITHIN THE PANEL'S TERMS OF REFERENCE

7.1. This issue concerns the question whether amendments made to the challenged measures subsequent to the Panel's establishment are within the Panel's terms of reference.

7.2. Russia asks the Panel to find that its "terms of reference include such amendments" as may have been made to the measures at issue since the time of the Panel's establishment.[176] In particular, Russia requests the Panel to "decide on the measures of the Russian Federation, in particular, though not exclusively, in respect of palm oil and freezers, as they are actually applied during the course of these proceedings". In Russia's view, considering these amendments will secure a positive solution to this dispute.[177]

7.3. In support of this request, Russia first notes that paragraph 13 of the panel request "covers any amendments, replacements, extensions, implementing measures or other related measures" adopted by Russia or the Eurasian Economic Community.[178] Additionally, Russia recalls the Appellate Body's statement in *Chile – Price Band System* that, in some circumstances, and in order to avoid a complaining party having to "deal with a disputed measure as a 'moving target'", a panel's terms of reference may be "broad enough to include amendments to a measure".[179] On these bases, Russia argues that considering the challenged measures in light of any amendments will not only secure a positive solution to the dispute, but will also "be in compliance with … requirements set out in the said Appellate Body Report", that is, the report in *Chile – Price Band System*.[180]

7.4. The European Union agrees with Russia that "amendments to the various legal instruments covered by the panel request fall within the Panel's terms of reference", and agrees also that a

[173] Russia, in paragraph 56 of its opening oral statement at the Panel's first substantive meeting with the parties, referred to the statement by the Appellate Body, at paragraph 103 of its report in *Australia – Salmon*, that "the SPS measure at issue in [that] dispute can *only* be the measure which is *actually* applied to the product at issue". In our view, this statement relates to the product scope of a measure at issue, and not the temporal scope. In any event, the sixth measure, which provides for the 15% rate, in our view is a measure that was actually applied to the tariff line in question on the date of panel establishment.

[174] See, for example, Panel Report, *Argentina – Textiles and Apparel*, para. 6.45; GATT Panel Report, *US – Superfund*, para. 5.2.2.

[175] The Panel notes that this is confirmed in the European Union's response to Panel question No. 61.

[176] Russia's preliminary ruling request, para. 66.

[177] Russia's preliminary ruling request, para. 66.

[178] Russia's preliminary ruling request, para. 64.

[179] Russia's preliminary ruling request, para. 65.

[180] Russia's preliminary ruling request, para. 66.

responding party should not be able to turn its measures into a "moving target".[181] In the view of the European Union, amendments that increase the applicable duty rate as well as those that decrease it are included in the Panel's terms of reference.[182] The European Union notes, however, that even if Russia were able to establish that an amendment has brought one or more of the challenged duties into conformity with WTO law, "this would not mean that the claims related to those duties are automatically dispensed with. At a minimum, in such a hypothetical scenario, the European Union would be entitled to request the Panel to adopt *findings* concerning the respective violations of Article II of the GATT".[183]

7.5. In the Panel's view, this aspect of Russia's preliminary ruling request does not raise a claim that the European Union's panel request is inconsistent with Article 6.2. Indeed, Russia does not seek a ruling that any particular measure or measures identified in the panel request are *outside* the Panel's terms of reference. To the contrary, Russia encourages the Panel to "decide on the measures of the Russian Federation … as they actually applied during the course of the proceedings"[184], by taking into account amendments that are not explicitly identified in the panel request other than through the general reference in paragraph 13 thereof, and that did not exist on the date of establishment of the Panel. This request raises issues that can be dealt with only at the merits stage of the proceedings, once the parties have addressed the existence, content and operation of the measures identified in the panel request and any amendments thereto.

7.6. In the light of this, we cannot, and do not, make any findings under Article 6.2 in respect of this aspect of Russia's request. We nevertheless note that both parties appear to agree that amendments to the challenged measures come within the Panel's terms of reference. We concur that in principle the panel request admits of consideration of amendments introduced subsequent to the date of establishment of the Panel.

[181] European Union's reply to the Russian Federation's preliminary ruling request, para. 89.
[182] European Union's reply to the Russian Federation's preliminary ruling request, para. 90.
[183] European Union's reply to the Russian Federation's preliminary ruling request, para. 91 (emphasis original); see also European Union's opening oral statement at the Panel's first substantive meeting with the parties, paras. 18 and 19.
[184] Russian Federation's preliminary ruling request, para. 66.

ANNEX
COMMUNICATION FROM THE PANEL
PRELIMINARY RULING

(CONCLUSIONS)

18 September 2015

7.7. Having carefully considered the Russian Federation's request of 24 August 2015 for a preliminary ruling pursuant to Article 6.2 of the DSU, the European Union's reply of 3 September 2015, the parties' oral statements and responses to the Panel's questions of 15 and 16 September 2015, and the third parties' written submissions of 2 September 2015 and oral statements of 16 September 2015, and noting the Russian Federation's request that the Panel rule before the date of the first substantive meeting of the Panel (which was not feasible), the Panel has decided to communicate its conclusions on the Russian Federation's request today, as early as possible following its first substantive meeting. More detailed reasons in support of these conclusions will be provided as soon as possible and prior to the date of issuance of the Interim Panel Report. This approach, which has been followed before[185], is taken in the interest of efficiency of proceedings.

7.8. This Ruling, together with the more detailed reasons supporting it, will become an integral part of the Panel's Final Report, subject to any changes that may be necessary in the light of comments received from the parties at the interim review stage.

7.9. A copy of this Ruling will be transmitted to the third parties for information.

Issue 1 – Whether the European Union's request for establishment of a panel ("panel request") fails to identify the specific measures at issue by:
(a) referring to measures concerning "a number of goods" (paragraph 5), "certain other goods" (paragraph 7) and a "significant number of tariff lines" (paragraph 11);
(b) not indicating that any measures are being challenged "as such"; and
(c) not indicating that the lack of a ceiling mechanism is a challenged measure

7.10. In respect of Issue 1(a) (measures concerning "a number of goods", "certain goods" and a "significant number of tariff lines"), the Panel finds as follows:

a. Paragraph 5 of the panel request, read in the light of the panel request as a whole, does not seek to identify any specific measures that are distinct from the twelve measures identified elsewhere in the panel request. In other words, paragraph 5 should not be read as identifying any challenged measures distinct from those identified elsewhere in the panel request. The Panel therefore rejects the preliminary objection concerning this paragraph.

b. Paragraph 7 of the panel request, read together with paragraphs 8-10 of the panel request, does not seek to identify any specific measures that are distinct from the seventh to the eleventh measures identified at paragraphs 8 and 9 of the panel request. Thus, paragraph 7 should not be read as identifying any challenged measures distinct from those identified at paragraphs 8 and 9 of the panel request. The Panel therefore rejects the preliminary objection concerning this paragraph.

c. Paragraph 11 of the panel request adequately identifies the nature of the specific measure at issue – the twelfth measure – and the gist of what is at issue. The Panel therefore rejects the Russian Federation's claim that this measure is outside its terms of reference because it has not been adequately identified.

[185] See e.g. Panel Reports, Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program, WT/DS412/R and Add.1 / WT/DS426/R and Add.1, adopted 24 May 2013, as modified by Appellate Body Reports WT/DS412/AB/R / WT/DS426/AB/R, para. 7.8; and United States – Definitive Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, WT/DS177/R, WT/DS178/R, adopted 16 May 2001, paras. 5.15-5.16.

7.11. In respect of Issue 1(b) (measures "as such"), the Panel finds that although the term "as such" does not appear in the panel request, it is evident on a plain reading of the panel request that the measures referred to by the Russian Federation and identified by the European Union at paragraphs 49, 53, 122-125 and 140 of the European Union's first written submission are being challenged "as such". The Panel therefore rejects the Russian Federation's claim that these measures are outside its terms of reference because they have not been adequately identified.

7.12. In respect of Issue 1(c) (lack of a ceiling mechanism), the Panel agrees with the Russian Federation that paragraph 10 of the panel request, read together with paragraphs 7-9, does not identify the lack of a ceiling mechanism as a separate "measure at issue" within the meaning of Article 6.2. However, the European Union has confirmed in its reply to the Russian Federation's preliminary ruling request that the lack of a ceiling mechanism is not a specific measure at issue. In the light of this confirmation, there is no need for the Panel to rule on this preliminary objection.

Issue 2 – Whether the panel request fails to adequately inform the Russian Federation and the third parties about the legal basis of the claim in respect of the twelfth measure because it does not identify the particular commitments covered by that claim

7.13. In respect of whether the panel request fails to adequately inform the Russian Federation and the third parties about the legal basis of the European Union's claim in respect of the twelfth measure, the Panel observes that the claim at issue here concerns a general practice rather than individual tariff lines. The Panel does not consider that in such circumstances, specific identification of commitments is always required. Moreover, paragraph 11 of the panel request plainly connects the twelfth measure with the provision with which it is claimed to be inconsistent, thus allowing the Russian Federation to begin to prepare its defence. The Panel therefore rejects the Russian Federation's claim that the European Union's claim in respect of the twelfth measure is outside its terms of reference because it does not provide a brief summary of the legal basis sufficient to present the problem clearly.

Issue 3 – Whether the panel request has expanded the scope of the dispute by including:

(a) the sixth measure concerning tariff line 4810 92 100 0;
(b) the lack of a ceiling mechanism; and
(c) the twelfth measure concerning a "significant number of tariff lines"

7.14. In respect of the sixth measure concerning tariff line 4810 92 100 0, and taking into account relevant guidance from the Appellate Body, the Panel finds that by including that measure, the panel request does not expand the scope of the dispute beyond what is stated at paragraph 3 of the request for consultations. Consistent with paragraph 3, the sixth measure as described in the panel request provides for applied *ad valorem* duty rates that exceed the *ad valorem* bound rates. The Panel therefore rejects the Russian Federation's claim that this measure is outside its terms of reference because it expands the scope of the dispute.

7.15. In respect of the lack of a ceiling mechanism, the Panel notes that this request is conditional on a finding by the Panel that the ceiling mechanism is a "specific measure at issue" within the meaning of Article 6.2. As the Panel has found that the ceiling mechanism is not a "specific measure at issue", it need not, and does not, rule on this preliminary objection.

7.16. In respect of the twelfth measure concerning a significant number of tariff lines, and taking into account relevant guidance from the Appellate Body, the Panel finds that by including that measure, the panel request does not expand the scope of the dispute beyond what is stated at paragraph 4 of the request for consultations. Consistent with paragraph 4, the twelfth measure as described in the panel request concerns a type/structure of duties that varies from the type/structure of duties recorded in the Schedule. The Panel therefore rejects the Russian Federation's claim that this measure is outside its terms of reference because it has expanded the scope of the dispute.

Issue 4 – Whether the European Union has failed to establish a *prima facie* case in respect of "measures as such" and the twelfth measure

7.17. In respect of whether the European Union has failed to establish a *prima facie* case in relation to measures as such and the twelfth measure, the Panel understands from the Russian

Federation's response to Panel question No. 5 that it does not advance a claim based on Article 6.2 that the *panel request* fails to make out a *prima facie* claim in relation to the aforementioned measures. The Panel therefore need not, and does not, make a ruling under Article 6.2 in respect of this issue.

7.18. Moreover, the Panel understands the Russian Federation to argue, in response to Panel question No. 5, that the European Union must be held to have failed to establish a *prima face* case because its panel request does not adequately identify the aforementioned measures. The Panel is unable to accept this argument. The requirement in Article 6.2 to identify the specific measure at issue is separate from the requirement to make a *prima facie* case in support of a claim. The latter requirement relates to the burden of proof imposed on a complaining party to put forward adequate legal arguments and evidence during the panel proceedings. In any event, we also note that if the Panel had determined that the aforementioned measures are not adequately identified in the panel request, then the issue of whether or not the European Union had made out a *prima facie* case regarding those measures would not arise. This is because such a ruling would mean that the measures would fall outside the panel's terms of reference and hence they would not be considered at all.

Issue 5 – Whether, in respect of the sixth measure concerning tariff line 4810 92 100 0, the panel request identifies a measure that did not exist at the time of panel establishment

7.19. In respect of whether the sixth measure was in existence at the time the Panel was established, the Panel notes that Article 6.2 does not require a complaining party to demonstrate that a challenged measure was in existence at the time of panel establishment. Nor does an inquiry under Article 6.2 require substantive consideration regarding the types of measures susceptible to challenge.[186] These latter issues are to be raised and addressed during the course of the panel proceedings. Moreover, the sixth measure as identified in the panel request at issue provides for a rate of duty of 5%, applicable on the date of panel establishment, and also a rate of 15%, applicable from 1 January 2016. The Panel therefore rejects the Russian Federation's claim that the sixth measure is outside its terms of reference because it did not exist at the time of panel establishment.

Issue 6 – Whether amendments to measures identified in the panel request are within the Panel's terms of reference

7.20. In respect of whether amendments to measures identified in the panel request, including measures concerning palm oil and freezers, are within the Panel's terms of reference, the Panel finds that this issue does not constitute a claim that the panel request is inconsistent with Article 6.2. The Panel therefore need not, and does not, make a ruling under Article 6.2 in relation to this issue. The Panel has, however, taken note of the parties' arguments on this issue.

Overall conclusion

7.21. In the light of the above, none of the objections raised by the Russian Federation in its preliminary ruling request under Article 6.2 lead the Panel to dismiss from its inquiry any claims or measures set out in the panel request.

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[186] Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, para. 169.

ANNEX B

WORKING PROCEDURES OF THE PANEL

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ANNEX B-1

WORKING PROCEDURES OF THE PANEL

Adopted on 3 July 2015

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If the European Union requests such a ruling, the Russian Federation shall submit its response to the request in its first written submission. If the Russian Federation requests such a ruling, the European Union shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits

upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that it is practical to do so.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by the Russian Federation could be numbered RUS-1, RUS-2, etc. If the last exhibit in connection with the first submission was numbered RUS-5, the first exhibit of the next submission thus would be numbered RUS-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite the European Union to make an opening statement to present its case first. Subsequently, the Panel shall invite the Russian Federation to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the European Union presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the Russian Federation if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the Russian Federation to present its opening statement, followed by the European Union. If the Russian Federation chooses not to avail itself of that right, the Panel shall invite the European Union to present its

opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions and oral statements, in accordance with the timetable adopted by the Panel. These summaries may also include a summary of responses to questions. Each such executive summary shall not exceed 17 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

Interim review

21. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

23. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

24. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file six paper copies of all documents it submits to the Panel. Exhibits may be filed in four copies on CD-ROM or DVD and two paper copies. Executive summaries may be filed in one single paper copy. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to ****.****@wto.org and ****.****@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

25. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX B-2

ADDITIONAL WORKING PROCEDURES CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 3 July 2015

1. These procedures apply to any business confidential information ("BCI") that a party wishes to submit to the Panel. For the purposes of these procedures, BCI is defined as any information that has been designated as such by the party submitting the information, that is not available in the public domain, and the release of which would seriously prejudice an essential interest of the Member submitting the information.

2. No person may have access to BCI except a member of the Panel or the WTO Secretariat, an employee of a party or third party, and an outside advisor acting on behalf of a party or third party for the purposes of this dispute. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products at issue or an officer or employee of an association of such enterprises.

3. A party or third party having access to BCI shall treat it as confidential, i.e. shall not disclose that information other than to those persons authorized to have access to it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute, including any appeals, compliance or arbitration proceedings, and for no other purpose.

4. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains business confidential information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. In case of exhibits, the party submitting BCI in the form of an Exhibit shall mark it as (BCI) next to the exhibit number (e.g. Exhibit EU-1 (BCI)). Should the party submit specific BCI within a document which is considered to be public, the specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]".

5. Any BCI that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label on the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

6. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.

7. If a party considers that information submitted by the other party should have been designated as BCI and it objects to such submission without BCI designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties. The Panel shall deal with the objection, as appropriate. The same procedure shall be followed if a party considers that information submitted by the other party with the notice "Contains Business Confidential Information" should not be designated as BCI. Each party shall act in good faith and exercise restraint in designating information as BCI. The Panel shall have the right to intervene in any manner that it deems appropriate, if it is of the view that restraint in the designation of BCI is not being exercised.

8. The parties, third parties, the Panel, the WTO Secretariat, and any others who have access to documents containing BCI under the terms of these Additional Working Procedures shall store all documents containing BCI so as to prevent unauthorized access to such information.

9. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not disclose any information that the party has designated as BCI.

10. If (a) pursuant to Article 16.4 of the DSU, the Panel report is adopted by the DSB, or the DSB decides by consensus not to adopt the Panel report, (b) pursuant to Article 12.12 of the DSU, the authority for establishment of the Panel lapses, or (c) pursuant to Article 3.6 of the DSU, a mutually satisfactory solution is notified to the DSB before the Panel completes its task, within a period to be fixed by the Panel, each party and third party shall return all documents (including electronic material and photocopies) containing BCI to the party that submitted such documents, or certify in writing to the Panel and the other party (or the parties, in the case of a third party returning such documents) that all such documents (including electronic material and photocopies) have been destroyed, consistent with the party's record-keeping obligations under its domestic laws. The Panel and the WTO Secretariat shall likewise return all such documents or certify to the parties that all such documents have been destroyed. The WTO Secretariat shall, however, have the right to retain one copy of each of the documents containing BCI for the archives of the WTO or for transmission to the Appellate Body in accordance with paragraph 11 below.

11. If a party formally notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU, the WTO Secretariat will inform the Appellate Body of these procedures and will transmit to the Appellate Body any BCI governed by these procedures as part of the record, including any submissions containing information designated as BCI under these working procedures. Such transmission shall occur separately from the rest of the Panel record, to the extent possible. In the event of an appeal, the Panel and the WTO Secretariat shall return all documents (including electronic material and photocopies) containing BCI to the party that submitted such documents, or certify to the parties that all such documents (including electronic material and photocopies) have been destroyed, except as otherwise provided above. Following the completion or withdrawal of an appeal, the parties and third parties shall promptly return all such documents or certify to the parties that all such documents have been destroyed, taking account of any applicable procedures adopted by the Appellate Body.

ANNEX C

ARGUMENTS OF THE PARTIES

EUROPEAN UNION

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RUSSIAN FEDERATION

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ANNEX C-1

FIRST PART OF THE INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. INTRODUCTION

1. In this integrated executive summary, the European Union ("EU") will summarize the facts and arguments presented to the Panel in its first written submission, its reply to the Russian Federation's ("Russia") preliminary ruling request, its opening and closing oral statements at the first substantive meeting and its responses to the Panel's and Russia's questions.

II. PROCEDURE

2. The EU requested consultations with Russia on 31 October 2014, pursuant *inter alia* to Articles 1 and 4 of the DSU and Article XXII of the GATT 1994. The consultations took place on 28 November 2014 and failed to settle the dispute. The EU requested the establishment of a panel on 26 February 2015. The Panel was established on 25 March 2015.

III. FACTUAL BACKGROUND AND THE MEASURES AT ISSUE

3. The Report of the Working Party on the Accession of the Russian Federation ("Working Party Report"), together with Russia's Schedule, was circulated on 17 November 2011. Russia acceded to the WTO Agreement on 22 August 2012, on the terms set out in the Protocol on the Accession of the Russian Federation ("the Protocol"). Annex I to the Protocol is entitled "Schedule CLXV – The Russian Federation". The Schedule has not been modified since.

4. Russia is a member of the Eurasian Economic Union ("EAEU") and, previously, of the Customs Union of the Republic of Belarus, Republic of Kazakhstan and the Russian Federation ("CU"). The Treaty on the EAEU, codifying and incorporate previously existing legal acts of the CU, entered into force on 1 January 2015.

5. The Common Customs Tariff of the CU, also Russia's customs tariff, was approved by Decision No. 54 of the Board of the Eurasian Economic Commission. Decision No. 112 of the Board of the Eurasian Economic Commission, which entered into force on 1 January 2015, amended Decision No. 54 in order to rename the legal act in question to "Common Customs Tariff of the Eurasian Economic Union" ("CCT").

6. The EU's panel request identified twelve measures at issue. The first eleven relate to the duties applied to certain specific tariff lines in the CCT:

Measure	Tariff line and product category (CCT)	Applied duty (CCT)	Bound duty (Schedule)
1.	4810 22 900 0 (paper and paperboard products)	15%	5%
2.	4810 29 300 0 (paper and paperboard products)	10%	5%
3.	4810 92 300 0 (paper and paperboard products)	15%	5%
4.	4810 13 800 9 (paper and paperboard	10%	5%

Measure	Tariff line and product category (CCT)	Applied duty (CCT)	Bound duty (Schedule)
	products)		
5.	4810 19 900 0 (paper and paperboard products)	10%	5%
6.	4810 92 100 0 (paper and paperboard products)	5%, but 15% as of 1 January 2016	5%
7.	1511 90 190 2 (palm oil and its fractions)	3%, but not less than 0.09 EUR/kg	3%
8.	1511 90 990 2 (palm oil and its fractions)	3%, but not less than 0.09 EUR/kg	3%
9.	8418 10 200 1 (combined refrigerators - freezers)	16.7%, but not less than 0.13 EUR/l	16.7%
10.	8418 10 800 1 (combined refrigerators - freezers)	16%, but not less than 0.156 EUR/l	16.7%; or 16%, but not less than 0.156 EUR/l; whichever is the lower
11.	8418 21 100 0 (refrigerators)	13.3%, but not less than 0.12 EUR/l	14.7%; or 13.3%, but not less than 0.12 EUR/l; whichever is the lower

7. In addition, the EU has identified, as the twelfth measure at issue, the systematic duty variation that affects a significant and changing number of tariff lines throughout the Schedule and leads to the imposition of duties in excess of those provided for in the Schedule whenever the customs value is below a certain level.

8. The measures at issue are implemented through the CCT, as amended *inter alia* by the Decisions cited in the panel request.

IV. RUSSIA'S PRELIMINARY RULING REQUEST

9. In its preliminary ruling request of 24 August 2015, Russia claimed that the panel request fails to identify the specific measures at issue as required by Article 6.2 of the DSU, and that it impermissibly expands the scope of the dispute in comparison with the consultation request. The EU has argued that Russia's preliminary ruling request should be considered inadmissible in part and, in any event, rejected in its entirety.

10. First, Article 6.2 of the DSU does not refer to the identification of the products at issue; rather, it refers to the identification of the specific measures at issue. The panel request clearly identifies and enumerates twelve specific measures at issue. The twelfth measure is clearly identified by the panel request in terms of the particular kind of tariff treatment systematically accorded to a number of tariff lines. Second, when raising an "*as such* challenge", a complainant is in no way required to expressly refer to it as an "*as such* challenge" in its panel request. Third, the fact that Russia does not apply a mechanism such as a "ceiling" that would prevent duties from being levied in excess of bound rates is not, in itself, a measure at issue. It is, however, an aspect of the structure and design of the measures at issue.

11. As the Appellate Body has stated, "precise, exact identity" between the consultation and panel requests is not required. The EU's panel request neither expanded the scope nor changed the essence of the dispute. It naturally evolved from the process of consultations by specifying and narrowing the EU's claims, including with regard to the sixth measure at issue (which was in force at the time of the establishment of the Panel, even though it only provides for the levying of the higher rate of duty as of a future date) and the twelfth measure at issue.

12. The Panel should reject to rule on Russia's claim that the EU failed to establish a *prima facie* case with respect to "measures as such" and the Systematic Duty Variation. Whether a *prima facie* case was made is not an issue the Panel can decide on in a preliminary ruling.

13. Turning to the issue of amendments and changes to applied duties, if a measure at issue existing on the date of the Panel's establishment has ceased to exist during the proceedings, the panel should: find that there was a measure existing on the date of establishment that was WTO inconsistent; find that it ceased to exist during the proceedings; and consequently decide not to make a recommendation. If the measure at issue has been amended so as to aggravate the inconsistency the panel should: find that there was a measure existing on the date of establishment that was WTO inconsistent; find that it was amended during the proceedings but that it remains WTO inconsistent; and consequently make a recommendation that the measure be brought into conformity.

V. THE LEGAL STANDARD UNDER ARTICLE II:1 OF THE GATT 1994

14. Article II:1 reflects a basic object and purpose of the GATT 1994: preserving the value of Members' tariff concessions. Article II:1(a) generally prohibits less favourable treatment of imports than that provided for in a Member's Schedule. Article II:1(b) prohibits a specific kind of practice that will always be inconsistent with Article II:1(a): the application of ordinary customs duties in excess of those provided for in the Schedule.

15. Article II of the GATT 1994 protects competitive opportunities of imported products and not trade flows as such, meaning that a finding of less favourable treatment does not hinge upon the actual marketplace effects of the contested measure. The term "in excess of", in the related context of Article III:2 of the GATT 1994, has been interpreted as referring to even the smallest amount of excess. It is not conditional on a "trade effects" test or qualified by a *de minimis* standard. The same approach should be applied under Article II:1(b). The Appellate Body has made it clear in *Argentina – Textiles and Apparel* that a violation of Articles II:1(a) and II:1(b) can result directly from the "structure and design" of an applied duty.

VI. APPLIED AD VALOREM DUTIES IN EXCESS OF BOUND AD VALOREM RATES

16. The first six measures at issue concern applied *ad valorem* duties applied to paper and paperboard products that exceed bound *ad valorem* rates. For five tariff lines (4810 22 900 0, 4810 29 300 0, 4810 92 300 0, 4810 13 800 9 and 4810 19 900 0), the duty imposed by the CCT is 15% or 10%, whereas the Schedule shows that the bound rate for all five tariff lines is 5%. The fact that Russia imposes these duties in excess of bound rates is further illustrated by several customs declarations exhibited by the EU, showing that a duty of 10% was levied under the tariff lines 4810 19 900 0, 4810 29 300 0 and 4810 13 800 9.

17. Products falling under these five tariff lines are, therefore, subject to ordinary customs duties in excess of those in Russia's Schedule, in violation of Article II:1(b), and, consequently, also of Article II:1(a) of the GATT 1994.

18. The sixth measure at issue concerns the tariff line 4810 92 100 0, for which the bound rate is also 5%. The CCT, at the time of the panel's establishment, provided for a duty of 15%, which was however (by way of a footnote) temporarily reduced to 5% between 20 April 2013 and 31 December 2015.

19. Temporarily reducing a duty that otherwise exceeds the bound rate in this manner violates Article II:1(a) of the GATT 1994. As the panel in *EC – IT Products* held, a temporary suspension of an otherwise infringing duty cannot eliminate the inconsistency with Article II:1(a). While the temporarily reduced duty does not exceed the bound rate, when seen together with the permanent duty which does, it creates considerable uncertainty for exporters and constitutes less favourable treatment under Article II:1(a), even before the expiry of the temporary duty. In any event, the panel can and should find that providing for a higher rate of duty as of 1 January 2016 violates Article II:1(b), and therefore also Article II:1(a) of the GATT 1994. A finding of inconsistency can be made in relation to the future imposition of duties in excess of bound rates.

20. Russia has put forward an amendment adopted several months after the Panel's establishment, which allegedly brings the sixth measure at issue into compliance with Article II. Even assuming that the duty is indeed permanently set at 5% as of 1 September 2015 (which cannot be deduced from Exhibit RUS-1), that cannot take away from the terms of reference of the Panel and there is still a matter to decide upon. The EU is entitled to seek a finding that the measure, as existing at the time of the panel's establishment, violates Article II:1(b) and II:1(a). Such an approach has been followed by numerous panels in the past.

A. Russia's request for rectification and modification of its Schedule

21. On 1 May 2015, a communication by the Russian Federation entitled "Rectification and Modification of Schedules – Schedule CLXV – The Russian Federation" was circulated to WTO Members. This communication sought to modify Russia's Schedule in respect of a number of tariff lines, including 4810 13 800 9, 4810 19 900 0, 4810 22 900 0, 4810 29 300 0, 4810 92 100 0 and 4810 92 300 0, allegedly in order to align them with the results of Russia's bilateral accession negotiations. On the basis of the Decision on Procedures for Modification and Rectification of Schedules of Tariff Concessions ("Rectification Decision"), which, in its relevant part, only applies to "amendments or rearrangements which do not alter the scope of a concession" and "changes and other rectifications of a purely formal character" (paragraph 2), the EU objected to Russia's request on 17 July 2015. As a consequence, the proposed changes cannot be certified and the authentic text of the Schedule remains unchanged.

22. Contrary to Russia's claims, the EU's objection did not "diminish the rights" of Russia under either the Vienna Convention on the Law of Treaties ("VCLT") or the Rectification Decision. Under the Rectification Decision, which is an "other decision of the Contracting Parties to GATT 1947" in the meaning of Annex 1A to the WTO Agreement, any member can object to a rectification request that it considers to be outside the scope of its paragraph 2, i.e. that it considers not to be of a purely formal character or to alter the scope of concessions. If the correction of the alleged error would affect the scope of scheduled concessions, as in the case of Russia's request, the appropriate avenue should be Article XXVIII.

23. The VCLT closely parallels the Rectification Decision. The essential issue under either is whether all parties agree that there is an error. If a single party objects, the alleged error cannot be corrected. The EU's objection to Russia's rectification request in this case clearly cannot constitute *agreement* on the existence of an error.

24. Even if there was some difference between the VCLT and the Rectification Decision, it should be recalled that the VCLT is not among the covered agreements, even though it may be relevant for interpreting them. The DSU does not allow a Panel to disregard the Rectification Decision (a part of the GATT 1994) in favour of Article 79 of the VCLT. Even if Article 79 applied as customary international law, it would be superseded by the Rectification Decision. Article 79 itself states that contracting States can decide upon some other means of correction. Moreover, Russia's rectification request invoked the Rectification Decision and not the VCLT.

25. Russia also suggests that the alleged errors in the Schedule act as a defence against the EU's claims on the first five measures at issue.

26. As a factual matter, it does not appear that any error took place during the preparation of Russia's Schedule. On 21 May 2004, the EU and Russia concluded initial bilateral market access negotiations in the context of Russia's accession to the WTO. Russia provided a list of tariff concessions based on the Harmonized System Nomenclature 1996 ("HS 1996"). The document concluding those negotiations provides, *inter alia*, that the European Communities' acceptance of the list of concessions of the Russian Federation is without prejudice to its right to verify and accept the final consolidated schedule of concessions. This acceptance was based on Russia's Draft Schedule of Concessions and Commitments on Goods (the "Draft Schedule"), formulated on the basis of HS 2007.

27. The results of bilateral negotiations were consolidated and converted into Russia's HS 2007 - based nomenclature, subject to technical corrections and the ultimate approval of both Russia and other Members. Because tariff lines under different nomenclatures have distinct and only partially overlapping coverage, one common transposition methodology is to apply the lowest

rate of any previous tariff line to the whole of the new tariff line. Several Notes by the Secretariat explain that this methodology was followed during Russia's accession process, except insofar as Russia specifically requested the creation of ex-outs, i.e. new tariff lines. The record shows that Russia was involved throughout the technical process of transposition, reviewing its tariff concessions with the *specific purpose* of addressing the kinds of issues with respect to which Russia now claims to have been in error, for at least a year prior to the circulation of its Draft Schedule. Nevertheless, it never requested the creation of ex-outs for the tariff lines at issue in this dispute.

28. Russia's Draft Schedule, circulated to the Membership, contains correlation tables between HS 1996 and HS 2002 and between HS 2002 and HS 2007, expressly marked as "provided by the Russian Federation". The final columns of those tables list the initial and final bound duty rates as 5% for all the paper and paperboard tariff lines addressed in this dispute. The same tables show that each of the relevant tariff lines in the nomenclature used in the Schedule (HS 2007) corresponds to at least one tariff line in the nomenclature used during bilateral negotiations (HS 1996) for which both the initial and the final bound rate was 5%. The tables thus show that there was no error in the formulation of Russia's Schedule, and that Russia itself proposed to the WTO Membership a duty of 5% for the relevant tariff lines while acknowledging that such a duty correctly reflects the results of bilateral negotiations. If any errors took place, they were Russia's. Moreover, even if Russia had erred in providing those rates to the Working Party, it still had an opportunity to propose technical corrections to its Draft Schedule. It failed to do so.

29. More importantly, even if Russia had made an error, or decided that its concessions are higher than it would like, this cannot diminish its obligations under Article II. Russia seems to argue that the EU can only invoke concessions that it itself bilaterally agreed with Russia. It is impossible to limit a Member's concessions in relation to another Member, to the concessions contained in the bilateral "deal" with that Member. First, the MFN obligation would prevent such an approach. Second, by virtue of Article II:1 of the GATT, Russia owes to all other Members treatment no less favourable than that provided in its Schedule. There is no requirement that a Member's concessions must be limited to the concessions contained in that Member's bilateral deals. Had Russia decided to grant further concession unilaterally, it was free to do so, and this could have been a factor in other Members' decisions to agree with Russia's accession as a package.

30. The EU does not claim that Russia violated WTO obligations by pursuing a particular goods classification. The relevant issue is whether duties in the CCT exceed the bound duties in the Schedule. Even if a Member used one tariff nomenclature in its customs tariff and another in its Schedule – which is not the case with Russia, which admits that both the CCT and its Schedule, insofar as the measures at issue are concerned, are based on HS 2007 – it would still have to ensure that whatever duties it applies can never exceed the bound rates in the Schedule. All the relevant changes to Russia's tariff nomenclature occurred before accession and have no bearing on the extent of Russia's tariff concessions.

31. To conclude, it appears to the EU that, instead of having abruptly discovered an "error", Russia is trying to unilaterally reduce the extent of its concessions. This should not be accepted, first, because the certainty and predictability of scheduled concessions is an object and purpose of the GATT 1994; second, because WTO dispute settlement cannot add to or diminish the rights and obligations in the covered agreements (Article 3.2 of the DSU), including those provided by Article II:1 of the GATT 1994 and by Russia's Schedule; third, because it would upset the balance of rights and obligations set up between Russia and other Members on Russia's accession.

VII. APPLIED COMBINED DUTIES IN EXCESS OF BOUND AD VALOREM DUTIES

32. As of the time of the panel's establishment, for products falling under the tariff lines 1511 90 190 2, 1511 90 990 2 (palm oil and its fractions) and 8418 10 200 1 (combined refrigerator - freezers), Russia applies a combined duty (requiring the application of either an *ad valorem* duty or a specific duty) whereas its Schedule provides for an *ad valorem* bound rate. It does so in a way that necessarily results in the application of duties in excess of bound rates for some categories of transactions.

33. In *Argentina – Textiles and Apparel*, the Appellate Body made it clear that the application of a type of duty other than that provided for in a Member's Schedule is not, in itself, necessarily inconsistent with Article II:1 of the GATT 1994. It is, however, inconsistent with that provision to the extent that the structure and design of the measure that imposes customs duties results in ordinary customs duties being levied in excess of those provided in the Schedule. This is true of the structure and design of the duties at issue in this dispute. With respect to all customs values below a certain "break-even price", they result in the levying of customs duties in excess of the bound rates. To that extent, they are inconsistent with Article II:1(b), and therefore also with Article II:1(a) of the GATT 1994.

34. The range of customs values with respect to which duties are imposed in excess can be easily calculated in the abstract for each such tariff line. For example, if the customs value of a product falling under the tariff lines 1511 90 190 2 and 1511 90 990 2 (palm oil and its fractions) is below 3 EUR/kg, the formula "3% but not less than 0,09 EUR/kg" requires the application of the specific duty and thus the levying of a customs duty that exceeds 3% *ad valorem*.

35. Russian authorities have levied such duties in practice, and the *ad valorem* equivalent of the applied duty has in some instances dramatically exceeded the bound rate. Thus, customs declarations exhibited by the EU show that Russian authorities levied duties in the amounts of 5.92% and 5.51% of the customs value under the tariff line 1511 90 190 2, and in amounts between 16.8 and 22.07% of the customs value under tariff line 8418 10 200 1.

36. The EU does not claim that *any* variation in the type of duty breaches Article II. As the Appellate Body found in *Argentina - Textiles and Apparel*, a Member could design a legislative "ceiling" or "cap" on the level of duty applied "which would ensure that, even if the type of duty applied differs from the type provided in that Member's Schedule, the *ad valorem* equivalents of the duties actually applied would not exceed the *ad valorem* duties." In this case, however, no such mechanism exists. The Appellate Body only spoke of such a mechanism as a possibility, rather than an obligation. However, if some such mechanism is not used, all that would remain is a combined duty which, on its face, imposes duties in excess of bound rates for a range of customs values.

37. During proceedings, Russia asked the Panel to consider changes to the duties applied to the two palm oil duties mentioned above as of 1 September 2015. The EU assumes that this change, previously announced by the CCT, took place. Nevertheless, there is still a measure for the Panel to rule on. When the Panel was established, the duty was "3% but not less than 0.09 EUR/kg". The Panel should make findings on that basis, even if it decides to give no specific recommendations.

38. The EU also asks the Panel to consider that, for the ninth measure at issue (combined refrigerator-freezers) the bound duty fell from 16.7% to 15% on 1 September 2015. To the knowledge of the EU, Russia has not yet changed its applied duty (16.7% but not less than 0.13 EUR/l). The extent of the violation has thus increased, since the applied duty will always exceed the new bound rate.

A. Russia's claims related to para. 313 of its Working Party Report

39. Russia invokes paragraphs 313 of the Working Party Report, arguing that it shows that "during accession, the Members agreed not to impose obligation on Russia to convert the duties into the format provided in its schedule." According to Russia, this means that a violation of Article II, in the case of applied combined duties, can only be found on the basis of a calculation of average customs values over three years.

40. Nothing in the paragraphs cited by Russia suggests that Russia is exempt from its duty to respect its own Schedule. Rather than a "GATT minus" rule that reduces the extent of Russia's obligations under the covered agreements, paragraph 313 is a "GATT plus" rule, imposing obligations *on Russia* that are *additional* to its obligations under Article II. It never permits Russia to exceed the bound rates specified in its Schedule. If the commitments in paragraph 313 of the Working Party Report somehow amounted to a reduction of Russia's WTO obligations, the Protocol of Accession or at least the Working Party Report would state so explicitly.

41. Paragraph 313 concerns the relationship between the specific element and the *ad valorem* element of a single combined duty that is contained both in the Schedule and in Russia's tariff. Its purpose is to ensure that the specific element does not exceed the *ad valorem* element of that same duty for the average customs value. If, after performing the calculation Russia refers to, it appeared that the specific element leads to higher duties *on average*, and not just in a minority of cases, then Russia would further reduce the applied specific element *below* its bound level. This reading is also confirmed by the text of paragraph 313, stating: "In no case would the applied duty (whether expressed in *ad valorem* or specific terms and whether determined by the Russian Federation or the competent bodies of the CU) exceed the bound rate of the combined duty."

42. Russia's reading of paragraph 313 of its Working Party Report would effectively invalidate Article II:1(b) of the GATT in relation to Russia. First, it would be impossible to raise an "as applied" challenge against the levying of duties in excess of bound rates in a specific instance. To apply Russia's reading to an example from the EU's Exhibits, it would suggest that a duty levied in the amount of 33.14% of customs value would somehow not be in excess of a bound duty of 16.7% unless three years of customs statistics based on average customs values were also provided. Second, it would allow Russia to generally apply duties in excess of bound rates to a certain percentage of transactions. Third, it could even allow Russia to freely exceed bound duties for some periods of time.

43. Finally, the EU is not aware that Russia has in fact ever performed the exercise described in paragraph 313.

VIII. APPLIED COMBINED DUTIES IN EXCESS OF BOUND COMPLEX COMBINED DUTIES

44. The applied duties in the tenth and eleventh measures could also be described as combined, in the sense that they "combine" a specific element with two *ad valorem* elements. They could also be described as complex combined duties, to contrast them with the simpler examples mentioned in Section VII.

45. For tariff line 8418 10 800 1, the Schedule at the time of the Panel's establishment specified a bound duty of "16.7%; or 16 %, but not less than 0.156 EUR/l; whichever is the lower". As of 1 September 2015, the bound rate is "15%; or 14%, but not less than 0.114 EUR/l; whichever is the lower." As of 1 September 2016, it will be simply 12%. The CCT subjects these products to a duty of "16%, but not less than 0.156 EUR/l". For tariff line 8418 21 100 0, the Schedule at the time of the Panel's establishment specified a bound duty of "14.7%; or 13.3%, but not less than 0.12 EUR/l; whichever is the lower". As of 1 September 2015, the bound rate is 10%. The CCT subjects these products to a duty of "13.3%, but not less than 0.12 EUR/l".

46. The design and structure of these applied duties results in duties being levied in excess of bound rates for a certain range of customs values per litre. Russia provides for no mechanism, such as a ceiling on the level of the applied duty, that would prevent the *ad valorem* equivalents of the duties actually applied from exceeding the level of the bound duties. Below a certain break-even price, the applied tariff will require the imposition of the specific element of the duty (0.156 EUR/l or 0.12 EUR/l). Within that price range, there will be a further subset of cases where the *ad valorem* equivalent of the applied specific duty exceeds 16.7% or 14.7% respectively, which is the maximum rate Russia's Schedule would allow. For that subset of cases, therefore, the CCT is inconsistent with Russia's obligations under Article II:1(b), first sentence, and therefore also under Article II:(1)a of the GATT 1994.

47. A set of customs declarations from 2014 shows duties equivalent to between 25.39% and 33.14% *ad valorem* being levied under the tariff line 8418 10 800 1, exceeding the rate of 16.7%. For the tariff line 8418 21 100 0, a customs declaration from 2015 shows the application of a duty equivalent to 15.07% to this tariff line, exceeding the rate of 14.7% required by the Schedule.

48. As with the claims described in Sections VI and VII, the EU addresses the duties "as such", directly on the basis of their structure and design, and not just individual instances of the application of the duties ("as applied").

49. Finally, as the bound duties have in the meantime fallen, and Russia has, to the knowledge of the EU, not responded to these changes, the extent of the violation has grown. Russia's applied duties will always exceed the new bound duties, regardless of customs value.

IX. THE SYSTEMATIC DUTY VARIATION

50. As the twelfth measure at issue, the EU challenges a more general measure referred to as "the Systematic Duty Variation" or "SDV". The CCT systematically provides, 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, in one of the ways described in Sections VII and VIII (in relation to the seventh to eleventh measure at issue), without providing for a mechanism that would prevent the *ad valorem* equivalents of the applied duties from exceeding the level of the bound duties.

51. Where the bound *ad valorem* rate is equal to the applied *ad valorem* element of the duty, the specific element of the duty will always be applied in excess of bound rates. Where the bound *ad valorem* rate is higher than the *ad valorem* element of the applied duty, the specific element of the duty will still be in excess of bound rates in a subset of cases, again below a certain break-even price. A different way in which the SDV could lead to the imposition of duties above bound rates is where both the Schedule and the CCT provide for combined duties, but the structure and design of the applied duties result in duties being levied in excess of bound rates with respect to a certain range of import prices similarly as with the tariff lines described in Section VIII. Either way, the price range in which duties are imposed in excess of bound rates is easy to calculate and predict, such that it is possible to see precisely *when* and *how* duties will be imposed in excess of bindings.

52. Neither the CCT nor any other legal instrument or practice provide for a mechanism that would ensure that the *ad valorem* equivalent of the applied duty does not surpass the bound *ad* valorem rate. The EU has fully satisfied its burden of proof in respect of the absence of such a mechanism.

53. The EU has submitted to the Panel an Illustrative list containing a number of examples that illustrate the SDV, as well as a table showing that, for the tariff line identified as the seventh measure at issue, as well as for four of the tariff lines contained in the Illustrative list, even the *average* customs value leads to the levying of a duty the *ad valorem* equivalent of which significantly exceeds the bound rate. The claims of the EU with respect to the SDV are not, however, limited to those specific examples. The EU seeks a single general finding, on a single measure at issue, that systematically applying duties in excess of bound rates in the specific way described above, without providing for a mechanism that would prevent the *ad valorem* equivalents of the applied duties from exceeding the level of the bound duties, constitutes a violation of Articles II:1(b) and II:1(a) of the GATT 1994. This finding concerns a particular kind of tariff treatment that has been reliably shown to occur in relation to a significant and changing number of tariff lines in the CCT. Given the nature of the EU's claim, which is different in nature from a claim against an exhaustive list of individual tariff lines, it could only ever be based on evidence contained in an "illustrative list" of affected tariff lines.

54. The defining characteristic of the tariff treatment accorded under the SDV is not the fact that it violates Article II:1, but the precise ways in which it operates. Stated in general terms, it could be expressed as a mathematical formula. For example, any applied duty expressed as "X% but not less than Y per unit of measurement" will exceed a bound rate expressed as "X%" for every customs value below "Y divided by X%".

55. A general finding, as opposed to a finding on a limited number of tariff lines, is necessary, first, because violations resulting from the SDV are not rare and sporadic occurrences. They appear systematically throughout the CCT. Secondly, both the bound duties contained in the Schedule and the applied duties contained in the CCT are subject to frequent changes (according to the website of the EAEU, 136 between 30 August 2012 and 9 June 2015, and 29 between the date of the Panel's establishment and 21 August 2015). By seeking a more general finding against the SDV, the EU is preventing the measures at issue from becoming a "moving target" and getting at the root of the WTO-inconsistency in order to facilitate the prompt and effective resolution of

disputes. Indeed, challenges under Article II:1 of the GATT 1994 do not have to be expressed in terms of individual tariff lines. A measure can be defined in relation to a particular kind of tariff treatment that is imposed repeatedly through a Member's customs tariff. The Appellate Body has found in *EC – Chicken Cuts* that "it is the *measure* at issue that generally will define the *product* at issue."

56. Characterising the SDV as a distinct measure at issue conforms to the provisions of the DSU and to the jurisprudence. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body observed that "in principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings." In *Argentina – Import Measures*, *the* Appellate Body found that what must be shown to demonstrate the existence of any particular measure at issue is a function of "how such measure is described or characterized by the complainant" and the "characteristics of the measure challenged."

57. Evidentiary requirements for the existence of a measure are not mechanistically imposed by any of the analytical labels, such as "as applied" or "as such", that have been used as in previous cases. In *US – Continued Zeroing*, for example, the Appellate Body did not require evidence of general and prospective application, but merely of the use of a methodology as ongoing conduct. Moreover, the "as such/as applied" distinction does not define exhaustively the types of measures that may be subject to challenge in WTO dispute settlement. The use of those terms is context-dependent and does not in itself impose any particular evidentiary requirements (even though all twelve measures at issue in this dispute could be described as "measures as such" in the sense that the EU is not challenging individual instances of the application of a duty in a particular import transaction).

58. The Appellate Body has accepted that a measure within the meaning of Article 3.3 of the DSU can "consist of an ongoing conduct", and the jurisprudence shows that in some circumstances even an "administrative practice", "policy", "concerted action or practice", "consistent practice" or a "methodology" could be measures subject to WTO dispute settlement. An "as such" challenge can be brought against a measure that is not expressed in the form of a written document.

59. The claim against the SDV fulfils the requirements of that jurisprudence. The SDV is implemented in a large number of individual instances that are all contained in a legally binding public instrument: the CCT. All of those instances, like the CCT as a whole, are attributable to Russia, and they are indisputably intended to have, and in fact do have, general and prospective application. The precise content of the SDV, and in particular the way in which it leads to the application of duties above bound rates, has been described. The EU has explained the "concrete instrumentalities" of the SDV, and the Illustrative list details a number of instances of the SDV, demonstrating the systematic application of the SDV.

60. The connection between the individual instances of the SDV is also clear: they all consist in specific kinds of tariff treatment, and are all embodied in the CCT. The types of tariff treatment at issue are described distinctly from the individual instances of the SDV, and the Illustrative list shows that it is actually applied in a significant number of instances. That tariff treatment is widespread and ongoing. It is likely to continue, being provided by the CCT which is a measure of general and *prospective* application

61. The SDV, however, also goes beyond a mere "administrative practice" or "methodology", because all of its individual instances are, in and of themselves, measures of general and prospective application. With this in mind, the EU submits that, if a complainant identifies in detail a particular type of treatment accorded by a legal provision (in this case, the type of tariff treatment at issue); explains why, in the abstract, each such an individual legal provision would violate the covered agreements in the same way; shows why each such individual legal provision would be an act of general and prospective application attributable to a Member; points to a single overriding written legal act of a Member in which all such individual provisions are located (in this case, the CCT); submits evidence of a significant number of examples of such individual legal provisions (in this case, the Illustrative List); and submits evidence of the adverse trade impact of several such individual legal provisions (in this case, Exhibit EU-20), that it thus sufficiently demonstrated the existence of an overriding measure violating the covered agreements that is more general than the individual legal provisions at issue, and would encompass all such individual legal provisions (whether listed as an example by the complainant or not).

62. There would be nothing vague or uncertain about a panel finding and recommendation to the effect that Russia should stop systematically according, by way of the CCT, particular clearly described tariff treatment that inevitably leads to duties being imposed in excess of bound rates for some customs values under each relevant tariff line. The Appellate Body proceeded on such a basis in *Argentina-Textiles and Apparel*, finding a violation with respect to all relevant tariff categories to which the regime of minimum specific import duties applied, on the basis of a general assessment of the structure and design of the duties at issue, without requiring tariff-line specific identification. Following that jurisprudence, there is no reason why all individual instances of the SDV in the CCT, identifiable on the basis of the type of tariff treatment that is accorded, could not fall within the scope of a single measure. The fact that, in this dispute, there is no external written legal instrument stating that the tariff treatment at issue will be applied to some segments of the CCT (although all of its individual instances *are* written legal instruments of general and prospective application) is, in the EU's view, not a relevant distinguishing factor.

63. To conclude, with respect to the SDV, Russia has acted inconsistently with its obligations under Article II:1(b), first sentence, and has therefore also accorded less favourable treatment to imports within the meaning of Article II:(1)a of the GATT 1994.

X. CONCLUSION AND REQUEST FOR FINDINGS

64. The EU requests the Panel to find that Russia's measures, as set out above, are inconsistent with Russia's obligations contained in Article II:1 (a) and (b) of the GATT 1994, and to recommend that the Dispute Settlement Body requests Russia to bring the contested measures into conformity with its obligations under the GATT 1994.

ANNEX C-2

SECOND PART OF THE INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. INTRODUCTION

1. In this integrated executive summary, the European Union ("EU") will summarize the facts and arguments presented to the Panel in its second written submission, its opening and closing oral statement at the second substantive meeting with the parties, its responses to the Panel's second questions and its comments to Russia's responses to the Panel's second questions.

II. THE MEASURES AT ISSUE AND RUSSIA'S REQUEST FOR A PRELIMINARY RULING

2. The Panel's Preliminary Ruling rejected all of Russia's requests and concluded that the EU's panel request fully satisfies the requirements of Article 6.2 of the DSU with respect to all twelve measures. The EU has made it clear that it is challenging twelve measures at issue, eleven of which consist in the tariff treatment accorded to eleven individual tariff lines, and the twelfth of which consists of the SDV. Russia's continued reliance on the arguments raise in its preliminary ruling request cannot succeed.

3. In particular, the EU stresses that neither Article II of the GATT 1994 nor the DSU require each measure at issue to correspond to an individual tariff line, whether specified in Harmonized System ("HS") nomenclature or not. The Appellate Body found that it is the *measure* at issue that generally will define the *product* at issue. Even a "system as a whole" can be challenged as a measure, and measure can be defined simply by "a narrative description of the nature of the measure" (Panel Report, *EC – IT Products*), or in terms of a particular kind of tariff treatment accorded to a broad set of products, like in *Argentina – Textiles and Apparel*. Neither the complainant, nor the respondent, nor the Panel are required to specify an exhaustive list of tariff lines concerned by the twelfth measure at issue at any point in these proceedings. The EU seeks a general finding on a single measure that is not specified in terms of an exhaustive list of tariff lines.

4. Finally, regarding the issue of attribution of the measures at issue to Russia, the EU notes that, in principle, any measure adopted in the context of the EAEU is attributable to Russia. This clearly follows from numerous paragraphs of Russia's Working Party Report. As the *Turkey - Textiles* panel noted, in public international law, a customs union member could be held responsible for the measures taken by the customs union. This gains particular force when the customs union itself is not a WTO Member. If the Panel were to consider that the measures at issue are not attributable to Russia because they are customs union measures, this would mean that EAEU measures would be immune from scrutiny in WTO dispute settlement.

5. The fact that the legal instruments pursuant to which the tariff treatment is accorded are adopted by the bodies of the EAEU does not mean that the measures at issue in this dispute are not Russia's measures, within the meaning of Article 3.3 of the DSU. In these proceedings, no claim has been made that any of the measures at issue are not Russia's measures. It is uncontested that the duties at issue are actually applied by Russia and that this happens pursuant to the legal instruments enacted by the bodies of the EAEU. Russia has even claimed that certain amendments to the CCT bring some of the measures at issue into conformity with Russia's WTO obligations.

III. THE LEGAL STANDARD UNDER ARTICLE II:1 OF THE GATT 1994

6. Under Article II:1(b) Members are prohibited from imposing ordinary customs duties in excess of those set forth and provided in their Schedule. Even the smallest amount of excess is too much. When a panel finds that the applied duty exceeds the bound duty, which can be done on the basis of a straightforward comparison of the structure and design of the duties, the analysis is complete. No trade effects test needs to be performed and no de *minimis* threshold of excess needs to be surpassed (Appellate Body Report, *Japan – Alcoholic Beverages II*). Duties may not

be imposed in excess even with respect to a subset of import transactions under a particular tariff line. Moreover, there would be a violation of Article II:1(b) even if no imports actually took place (Panel Report, *Mexico – Taxes on Soft Drinks*).

7. Russia's arguments related to paragraph 313 of its Working Party Report contradict this jurisprudence, as they would have as consequence that the "smallest amount of excess" would not suffice when Russia is concerned, that goods would have to be actually imported to Russia for a period of at least three years before any conclusions could be drawn on whether the applied duty exceeds the bound rate, and that "as applied" challenges against the levying of duties in excess of bound rates in a single import transaction would be impossible.

8. Russia's earlier arguments related to the alleged error would also upend the basic elements of the analysis under Article II:1 of the GATT 1994. Even if Russia had erred in deciding to propose certain duty rates to the Membership, this can have no consequences on the extent of Russia's tariff concessions.

IV. APPLIED AD VALOREM DUTIES IN EXCESS OF BOUND AD VALOREM RATES

9. Regarding the first five measures at issue, it seems that after Russia's second written submission there is no longer any dispute that they are duties in excess of bound rates, in violation of Article II:1(b) of the GATT 1994. Russia has clarified that its statements on the alleged error, including those invoking Article 79 of the VCLT, were "for information only", that "the current concessions of the Russian Federation are reflected in 'Schedule CLXV'", that the issue of the error is outside of the Panel's terms of reference, and that the Schedule does not provide for a specification of the relevant tariff lines that would include bound duties exceeding 5%. It seems to be undisputed that Russia's Draft Schedule, and final Schedule, were correctly consolidated and transposed into their current format, following normal WTO practice and the methodology that was clearly explained by the WTO Secretariat.

10. Nevertheless, the offending duties – two or three times higher than the bound level – remain in force. The Panel must therefore find that the first five measures violate Article II:1(b), and therefore also Article II:1(a), of the GATT 1994, and recommend that those measures be brought into compliance.

11. Regarding the sixth measure at issue, when the Panel was established, Russia provided for a duty of 15%, which was to be temporarily reduced to 5% until the end of 2015. After an amendment to the Common Customs Tariff (CCT) was adopted during the panel proceedings and entered into force on 1 September 2015, the EU understands that the rate of applied duty is the same as provided in the Schedule.

12. Nevertheless, the EU asks the Panel to find that the measure, as it existed when the Panel was established, violates Article II:1(a) and II:1(b) of the GATT 1994. First, like the measure in *EC – IT Products*, the sixth measure violates Article II:1(a) even while the duty is temporarily reduced, given that the permanent duty is in excess. Second, the measure would violate Article II:1(b) and therefore also Article II:1(a) as soon as the excessive duty begins to be levied. There is no reason why a panel could not make a prospective finding of such a violation, from the vantage point of its time of establishment, nor is there a need to show that products have actually been subject to a particular duty in order to find that the structure and design of that duty violates Article II:1(b) of the GATT 1994. While the *EC - IT Products* Panel focused on the claim of a non-consequential violation of Article II:1(a), it nevertheless found (in any event, this is either implied in its findings or at least not contradictory to them) that a violation of Article II:1(b) would result upon the expiry of the suspension.

13. Regarding the sixth measure, the Preliminary Ruling has already found that a challenge can be made under Article II:1 of the GATT 1994 even before the higher rate of duty begins to be applied. In addition, there is no dispute that the sixth measure exists. The parties agree as to what the CCT provided for when the Panel was established. The Preliminary Ruling has also already decided that, because the EU is not making a so-called "non-violation" claim under Article XXIII:1(b) of the GATT 1994, the EU does not need to separately provide evidence that benefits accruing to it were impaired by the sixth measure. It would be contradictory to allow complainants to challenge measures of general and prospective application such as customs duties before such

measures were ever actually applied, while at the same time requiring them to show the trade impact of those measures in order to establish inconsistency with the covered agreements.

V. APPLIED COMBINED DUTIES IN EXCESS OF BOUND AD VALOREM DUTIES

14. Measures 7-9 should also be assessed as they existed when the Panel was established. There is no disagreement as to what the CCT provided at that point. In terms of law, the EU's position is rooted in well-established jurisprudence on Article II of the GATT 1994, notably *Argentina – Textiles and Apparel*. In general terms, a duty in the form of "X% but not less than Y per unit of measurement" – like the seventh to ninth measures - will exceed a bound rate of X% whenever the customs value is below a certain level or break-even price (specifically, below Y divided by X%), and as long as there is no mechanism such as a ceiling keeping the combined duty below the bound level. Such duties violate Article II:1(b) not just because the type of the duty varies, but because and to the extent that they are in excess. It is clear that in this case there is no additional mechanism, such as a ceiling, that would prevent duties from being levied in excess. Russia's assertions that the EU failed to show the absence of a ceiling amount to a request to prove a negative.

15. Regarding Russia's arguments related to paragraph 313 of its Working Party Report, the EU considers that that paragraph is not relevant to the seventh to ninth measures at issue.

16. First, these measures, as set out in the panel request, consist in combined duties with respect to which the Schedule provides an *ad valorem* rate. Paragraph 313 only concerns situations where both the applied and bound duties are combined (consisting of alternative *ad valorem* and specific elements). This is made clear by the last sentence of paragraph 312, which refers to the combined duty rates in the Schedule, and also by the first sentence of paragraph 313, which refers to the "alternative *ad valorem* duty rate" for a tariff line "in the Schedule." If this were about *ad valorem* bound duties, the Schedule would not contain alternative rates, but just one *ad valorem* rate.

17. Second, paragraph 313 is not relevant because it is an additional and distinct obligation of Russia, and not a way of interpreting, changing or limiting Russia's obligations under Article II of the GATT 1994, or a justification or exemption from that provision. Paragraph 313 makes this quite clear when it states that "in no case would the applied duty… exceed the bound rate of the combined duty".

18. Third, the consequence of the application of the mechanism can only be that an element of a combined duty is reduced further below the bound level, and not that the applied duty can exceed the bound level.

19. While Russia appears to concede that paragraph 313 "does not change Russia's obligation under Article II:1 of the GATT", it clearly construes it in a way that would allow it to exceed bound rates. Russia believes that it could maintain the applied combined duty, as long as the *ad valorem* equivalent of the duty imposed on the average customs value, calculated over three years, did not exceed the *ad valorem* bound rate.

20. When Russia states that paragraph 313 contains a "methodology for calculating *ad valorem* equivalents" that is unique to Russia and "informs the content of Russia's obligations under Article II:1", it is in fact saying that paragraph 313 allows it to exceed bound rates. The EU has explained that the question of *ad valorem* equivalents is a simple question of arithmetic: a levied duty is divided by the customs value. The calculation methods described in paragraph 313 of Russia's Working Party Report and the comparison of applied and bound duties for purposes of Article II:1 are simply two unrelated issues.

21. In Russia's reading, a finding of a violation of Article II:1(b) would require three years of statistics on actual imports showing that duties exceed bound rates *on average*. Therefore, an "as applied" challenge to a duty levied in a single import transaction would be impossible, and Russia could freely exceed the bound rate some of the time, as long as the average customs value over three years remained above the break-even price, at least within each consecutive three year period. Russia could do so not just in a few isolated instances, but in an important proportion of

transactions, as long as the bound rate is respected in respect to an average customs value. This means that Russia is in fact reading paragraph 313 as a "GATT-minus" rule.

22. Moreover, Russia seems to also believe that it could require complainants to provide evidence of specific transactions in which duties were levied in excess *on top* of the evidence related to average customs values. If it could, the evidentiary burden for complainants under Article II:1 of the GATT 1994 would be practically insurmountable.

23. The EU considers that Russia's reading of paragraph 313 must be rejected. In addition, whatever the mechanism described in paragraph 313 does, it is clear from the record of this dispute that Russia is not actually applying it, nor is it informing other Members of the results of its calculations, as that paragraph requires.

24. To summarize, paragraph 313 is an additional obligation of Russia. Its purpose is to minimize the differences between the specific and *ad valorem* elements of a single combined applied duty. It requires Russia, in some cases, to reduce the specific element of a combined duty below its bound rate. Specifically, it imposes an additional obligation that could be infringed even when an applied combined duty is equal to the bound combined duty, but where the results of the three-year calculation "showed that it was necessary to reduce the specific duty rate alternative" so that its "*ad valorem* equivalent… would be no higher than the alternative ad valorem duty rate". As its wording makes clear, paragraph 313 simply never allows Russia to exceed bound rates.

25. With that in mind, the EU notes that paragraph 313 is equally irrelevant with respect to measures 10 and 11 as it is with respect to measures 7-9.

AMENDMENTS AND OTHER CHANGES TO THE RATES OF DUTY

26. Several changes to the levels of duty under measures 7-9 took effect during these proceedings.

27. The current applied duties for measures 7 and 8 seem to be equal to the bound rate of 3%, since the specific element of the applied duties has expired. Consequently, as from 1 September 2015 the CCT appears to provide for an applied duty of 3%, which is equal to the bound rate. The EU nonetheless requests the Panel to adopt findings on these measures, as they existed when the Panel was established.

28. As for the ninth measure on combined refrigerator-freezers, the current applied duty continues to exceed the bound rate, similarly as when the Panel was established. While the *ad valorem* element of the applied duty was reduced from 16.7% to 15%, the specific ("not less than 0.13 EUR/l") has been retained. The EU therefore requests the Panel to find a violation of Article II:1(b), and therefore also of Article II:1(a) of the GATT 1994, and to recommend that the measure is brought into conformity with Russia's WTO obligations.

29. Regarding the ninth measure, the EU has explained the development of the levels of the bound and applied duties in three relevant moments or periods: first, when the panel was established; second, between 1 and 20 September 2015; third, since 20 September 2015. In all three, the applied duty exceeded or exceeds the bound rate, in violation of Article II:1(b) and II:1(a) of the GATT 1994. The EU seeks recommendations to bring this measure into compliance, and thus also the corresponding findings, with reference to the most recent point in time (as amended on 20 September 2015).

30. The previous moments or periods show the development of the measure at issue over time, which is a pertinent a factual issue that the Panel should make findings on. Moreover, if that development shows a persistent situation of WTO-inconsistency, or similar repeated instances of WTO-inconsistency, as is the case here, the Panel should also draw the appropriate legal conclusions. The Panel is not prevented from making the straightforward conclusion that, both when the Panel was established and between 1 and 20 September 2015, the applied duty exceeded the bound rate, which is a clear violation of Article II:1(b) and II:1(a) of the GATT 1994.

31. The Panel's authority to make such findings stems from Articles 7 and 11 of the DSU. Where measures at issue were rendered WTO-consistent during panel proceedings, previous panels have

made findings of WTO-inconsistency as of the time of panel establishment. The *US - Poultry (China)* panel stated that such findings are necessary in order not to deprive the parties of a "meaningful review of the consistency" of the respondent's measure. This concern is valid also in cases where a measure has been amended in a WTO-inconsistent way.

VI. APPLIED COMBINED DUTIES IN EXCESS OF BOUND COMPLEX COMBINED DUTIES

32. Measures 10 and 11, as in force when the Panel was established, violate Article II:1(b) and therefore also Article II:1(a) similarly to measures 7-9. As already explained, below a certain customs value, the applied duties exceed the bound rates.

33. Paragraph 313 is not relevant to the EU's claims against measures 10 and 11. First, those measures do not fall within the scope of that provision, since the bound duties are of a more complex form, consisting of an additional *ad valorem* element. Second, the EU refers to all of the remaining arguments mentioned in connection to this issue under measures 7-9.

34. The EU understands that, after the CCT has been most recently amended during these proceedings, these two duties seem to correspond to the current bound rates. The relevant amendment entered into force on 20 September 2015. There was no other amendment of the applied duty between 1 and 20 September. However, the bound duties for those two tariff lines had changed on 1 September. As explained in detail in the EU's Second Written Submission, this means that, between 1 and 20 September 2015, even the *ad valorem* elements of the applied rates exceeded the bound rates.

35. Because the applied duty seems to no longer exceed the bound rate, the EU seeks no recommendations. The Panel should, however, adopt findings both on the facts relevant to the measures as they developed over time, and on the applicability of and conformity with Article II:1(b) and II:1(a) of the GATT 1994, both with respect to the measures as they existed when the Panel was established, and with respect to the period between 1 and 20 September 2015. In this respect, the EU refers to its arguments in connection to the ninth measure at issue.

VII. THE SYSTEMATIC DUTY VARIATION

36. With respect to the twelfth measure, the EU has explained that Russia systematically provides a particular well-defined type of tariff treatment that has the consequence, for some customs values, that duties will be levied in excess. This measure is therefore in violation of Article II:1(b) of the GATT 1994. The individual instances of the SDV closely parallel each other and consist in the same type of tariff treatment. The bound and applied duties are of the same form, and the only thing that varies are the numbers. The violation takes place, in every individual instance, in the same way and for the same reasons.

37. The EU has throughout its submissions clearly described the three particular types of tariff treatment required by the SDV in mathematical terms. The first and most frequent type of tariff treatment required by the SDV is as follows. The bound duty is *ad valorem* (expressed as "X%"), and the applied duty is combined, consisting of an *ad valorem* and a specific element (expressed as "X% but not less than Y per unit of measurement"). There is no mechanism such as a ceiling that further moderates the level of the applied duty, capable of ensuring that the *ad valorem* equivalent of the applied duty never exceeds "X%". For all tariff lines to which such treatment is accorded, the applied duty will exceed the bound rate (expressed as "X%") for every customs value below "Y divided by X%".

38. The second type is the same as the first type, except that the bound *ad valorem* duty is higher than the *ad valorem* element of the combined applied duty. In such cases (bound duty is "X%"; applied duty is "Z% but not less than Y per unit of measurement", where X>Z), the duty would be applied in excess of bindings whenever the customs value is below "Y divided by X%". The third type is analogous to the tariff treatment under measures 10 and 11. Whenever the applied duty is expressed as "X% but not less than Y per unit of measurement", and the bound duty is expressed as "Z%; or X% but not less than Y per unit of measurement; whichever is the lower" (where Z is higher than X), the duty would be applied in excess of bindings whenever the customs value is below "Y divided by Z%".

39. The second type of tariff treatment is virtually the same as the first, in terms of the assessment of a violation of Article II:1 of the GATT. Both in the first and second type of tariff treatment, the violation occurs in the same way in respect of the range of customs values below the same break-even price. The third type of tariff treatment is somewhat more specific, but it nevertheless shares an important feature with the first two: for some customs values, the structure and design of the duty require the application of a specific duty that exceeds the *ad valorem* rate provided in the Schedule.

40. Because their essential features are the same, the EU has addressed the three types of tariff treatment together. Alternatively, they could also be addressed separately. In light of that, the EU believes that the Panel could also make a finding of inconsistency just by reference to the first, or to the first and second type of tariff treatment. In that case, the EU would not object if the Panel were to exercise judicial economy with respect to the third, or second and third type.

41. The description of the relevant types of tariff treatment makes reference to the bound rates. In particular, whenever the existence or absence of such a ceiling is considered as an aspect of the tariff treatment, or of the structure and design of the duties, a reference to the bound rate is necessary. It would make no sense to speak of the ceiling in isolation from the bound rate.

42. The premise of EU's claim is that the SDV covers duties of a particular type, imposed in cases where the bound duty is of a particular type, without a ceiling or similar mechanism. The preliminary factual conclusion is that, as described, the SDV will in each instance result in the levying of duties in excess, for some customs values. The legal conclusion is that, because duties are levied in excess, even for only some customs values, there would be a violation of Article II:1(b) of the GATT 1994.

43. The EU has submitted a non-exhaustive Illustrative list, the accuracy of which Russia has not objected to, that clearly shows that Russia accords the relevant type of tariff treatment (specifically, the first type of tariff treatment: combined duties with an ad valorem element equal to the bound rate) to a significant number of tariff lines in the CCT. The EU has also provided, in Exhibit EU-20, several examples of such cases where the violation is so extensive that the bound rate is exceeded even for the average customs value (Russia has not objected to any of the latter calculations, even though it has pointed out that the calculation would not have the same result with respect to the tariff line 1511 10 900 2, which was however not among the examples provided by the EU).

44. A general finding that the SDV is inconsistent with Article II:1(b) and Article II:1(a) of the GATT 1994 would be well-grounded in the jurisprudence. It would conform to the approach of the Appellate Body in *Argentina – Textiles and Apparel*, which did not concern an exhaustively defined list of individual tariff lines, but the structure and design of the DIEM regime *as a whole*, because of the design and structure of the particular tariff treatment it accords. In that dispute, the Appellate Body did not need to examine the tariff treatment accorded to each individual tariff line, make findings about the individual break-even prices, average customs values or the usual price ranges, or even compare each individual bound and applied duty. It endorsed the Panel's findings that "the very nature of the minimum specific duty system" will inevitably lead, "in certain instances", to the imposition of duties in excess, and agreed with the Panel that statistics related to only some of the relevant tariff lines provided "reliable information" that duties were imposed in excess. The Appellate Body also considered that it is not necessary to find a violation of Article II:1 "for each and every import transaction in a given tariff category"; rather, the structure and design of the DIEM regime gave sufficient reasons to find a violation with respect to a "certain range of import prices within a relevant tariff category".

45. Moreover, such a finding would conform to the jurisprudence on what constitutes a "measure" under Article 3.3 of the DSU. The measure's existence, precise content and systematic nature are sufficiently demonstrated by describing the tariff treatment at issue and by the Illustrative list and statistics demonstrating the trade impact of such tariff treatment.

46. The SDV could be described as a single general measure that is reflected in a number of more specific rules or norms of general and prospective application, such as the "US 'dolphin-safe' labelling provisions" in *US - Tuna II*. In that sense, it is analogous to a "rule or norm", or to a more general measure that is reflected in a number of specific rules or norms of general and

prospective application. The SDV affects a number of instances of tariff treatment which could all, individually, be challenged as binding and written measures of general and prospective application. Logically, the more general measure cannot be less than that. In this respect, an analogy could be drawn with *US-Tuna II (Mexico)*, where a number of distinct "normative instruments", which could all have constituted a measure attributable to the respondent, were considered together as a single measure.

47. The SDV could also be approached as "ongoing conduct", i.e. conduct that is currently taking place, is likely to continue in the future, and likely to operate prospectively.

48. The Panel should, however, take into account the specific nature of the SDV, primarily the fact that all of the individual instances of the SDV are *in themselves* written measures of general and prospective application, unlike with the measures assessed in *US - Zeroing* and related cases, where complainants attempted to bring together a mere string of individual administrative practices. A practice consists of repeated individual instances of a particular sort of behaviour, which may or may not be isolated, and which may or may not continue. Each individual instance of the SDV – each tariff line in which the tariff treatment covered by the SDV is accorded – could be described as a rule or norm of general or prospective application. Therefore, those instances are not similar to the exercise of administrative discretion in a certain number of individual cases. Each of them covers an indefinite number of individual transactions, and they leave no scope for administrative discretion. They clearly require the application of a particular type of tariff treatment, or three sub-types. The instances of the SDV are not one-off, discrete events that only affect an individual transaction or a set of facts that is clearly circumscribed in time and space. They are transparent, binding legal rules meant to cover all import transactions for particular products. Because of this, the concerns which led the Appellate Body in *US - Zeroing (EC)* to impose a high evidentiary "threshold" on the complainant, and to require "particular rigour" from panels dealing with unwritten measures, are not raised by the SDV.

49. In any event, the EU has never attempted to strictly characterize the SDV as either a "rule or norm", a "practice", or as "ongoing conduct". As the Appellate Body found in *Argentina – Import Measures*, the elements that must be substantiated with evidence and arguments in order to prove the existence of a measure challenged will be informed by how such measure is described or characterized by the complainant. Article 3.3 of the DSU speaks simply of "measures taken by another Member". The concept of a measure is broad; it extends to any act or omission that is attributable to a WTO Member. Therefore, the EU cautions against the mechanistic application of any legal tests for the existence of "ongoing conduct" or "rules or norms".

50. In *US – Zeroing (EC)*, the Appellate Body found that "a panel must carefully examine the concrete instrumentalities that evidence the existence of a purported "rule or norm". In the EU's view, the meaning of that statement is that a complainant may not seek recommendations against a purely hypothetical WTO inconsistency of a measure that has not been shown to exist. In this dispute, the EU has submitted at least two pieces of evidence of "concrete instrumentalities" showing the existence of the SDV. First, the Illustrative list contains a non-exhaustive list of tariff lines to which the particular type of tariff treatment covered by the SDV is accorded. Second, Exhibit EU-20 shows the adverse trade impact of several of the tariff lines identified in the Illustrative list. A "concrete instrumentality" is a way in which something more general is put into practice. The tariff treatment accorded under each of the tariff lines in the Illustrative List and Exhibit EU-20 could, in that sense, be described as a "concrete instrumentality" of the SDV. Those exhibits can thus be said to show the concrete instrumentalities that evidence the existence of the SDV.

51. The precise content of the SDV is the particular kind of tariff treatment it accords. The EU has shown, by way of the Illustrative List, that Russia frequently accords exactly such tariff treatment to a significant number of tariff lines in the CCT. The Illustrative List is also evidence of the systematic nature of that measure.

52. It is important to stress what the SDV is not. Because the SDV is not defined in terms of an exhaustive list of products, neither Article 6.2 of the DSU nor Article II of the GATT 1994 require it to provide an exhaustive identification of "products at issue". Specific identification of each individual tariff line affected by the SDV is not required. The EU is also not challenging the mere fact that the applied duties differ in type or form to the bound duties. The SDV violates Article II:1(b) because it leads to duties being imposed in excess. Contrary to Russia's arguments, the EU

did not need to show a separate written law requiring the SDV. The jurisprudence shows, first, that even unwritten measures, methodologies or concerted practices can be challenged as measures; second, that a general violation of Article II:1(b) can be found without tariff-line level specificity. The EU agrees that this case is different from *Argentina – Textiles and Apparel* insofar as the offending tariff treatment is not described in a separate written measure, but is embedded directly into the CCT, but this practical distinction should not be legally decisive.

53. Russia proposes that the Panel should seek evidence on the price ranges of various products affected by the SDV. This is entirely irrelevant for the EU's claim under Article II:1(b), which is based on the design and structure of duties. Indeed, duties can violate Article II:1(b) even when they have never been actually levied in excess. Russia would also like to see evidence of the average customs value under each tariff line. However, it is well established that Article II:1(b) is violated not only by duties that are in excess on average, but by all duties that are designed so that they could be in excess, even in a small minority of transactions, and even in a hypothetical transaction. Members may not compensate the instances where duties are in excess by other instances where they are not (Panel Report, *Argentina – Hides and Leather*).

54. Finally, the EU is not simply raising an unspecified blanket challenge against an entire piece of legislation without specifying it further, but against a very specific kind of tariff treatment. In fact, Russia would not seem to object if the EU challenged all provisions of the CCT as a single written measure under Article II:1(b). If that is true, however, Russia should not be troubled by the challenge raised against the SDV, which is a great deal more specific.

55. Russia cannot plausibly argue that it cannot bring the SDV into conformity with the GATT 1994 because its Schedule contains too many tariff lines; after all, it defined all those tariff lines itself. Russia can also not argue that it is unsure how to change the relevant duties. The changes to measures 7, 8, 10 and 11 show that Russia is capable of bringing individual instances of the kind of tariff treatment covered by the SDV into conformity with Article II:1 of the GATT 1994. Russia could stop according the tariff treatment at issue by, for example, changing the duties, or by imposing a ceiling or similar mechanism. Even after bringing the SDV into conformity with Article II:1, Russia could still vary the type of duty, and even retain a specific duty, as long as it ensures that duties are not levied in excess of bound rates.

56. In addition, contrary to Russia's statements, no choices need to be made between respecting the terms of paragraph 313 of Russia's Working Party Report and bringing the SDV into compliance with Article II:1 of the GATT 1994. Article II:1 and paragraph 313 are, as the EU has explained, two distinct obligations. Moreover, paragraph 313 simply does not apply to situations where the bound rate is *ad valorem* (first and second type of tariff treatment under the SDV) or to complex combined duties (third type of tariff treatment under the SDV).

57. To conclude, the EU has described in detail a particular kind of tariff treatment and explained why each legal provision according it would violate the covered agreements in the same way, regardless of the individual levels of duty. Each such individual legal provision would qualify as an act of general and prospective application attributable to Russia. The EU has pointed to a single overriding written legal instrument in which all such individual provisions are located: the CCT. The EU has provided a significant number of examples of such individual legal provisions (the Illustrative List) and submitted evidence of the adverse trade impact of several such individual legal provisions (Exhibit EU-20). In the EU's view, this suffices to show that the SDV violates Article II:1(b) and II:1(a) of the GATT 1994.

VIII. CONCLUSION AND REQUEST FOR FINDINGS

58. The EU stands by its request for findings and recommendations with respect to the twelve measures. To the extent that the inconsistency with Article II:1 was addressed through amendments or other changes adopted during these proceedings, the EU nonetheless requests the Panel to adopt findings on the measures as they existed when the Panel was established and, where relevant, as they developed over time.

ANNEX C-3

FIRST PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION

I. Introduction

1. The Russian Federation shows that certain claims advanced by the European Union with respect to the Russian Federation's measures fall outside the terms of references of the Panel. Alternatively the Russian Federation demonstrates that all claims advanced by the EU should be rejected since no inconsistency of the Russian Federation's measures with its obligations under the WTO Agreement, in particular Article II:1 (a) and (b) of the GATT 1994, has been proved.

II. Terms of Reference of the Panel

A. The Failure of the European Union to Identify the Measures Challenged

2. The European Union failed to fulfill the requirements of Article 6.2 of the DSU by failing, using the European Union's terminology, in some instances to "*identify the specific measures at issue*", while in some other instances - to "*provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly*".

3. Taking into account that the present dispute is about the level of applied duties, the measures contested by the European Union should be identified precisely since there are thousands of tariff lines in customs tariff with different applied duties and corresponding to them bound rates.

4. The Schedule of Concession and Commitments lists the pertinent Harmonized System tariff item number, followed by a description of the product and corresponding bound rate, i.e. the Schedule establishes the terms, conditions and qualifications in relation to particular product provided for in the Schedule. The Russian Federation underlines that every tariff line has its own bound rate. Only after examining the concrete tariff line with its bound rate it is possible to determine contracting party's violation or non-violation of Article II of the GATT 1994 by the reason of the excess or non-excess of the applied duty vis-à-vis corresponding bound rate.

5. Thus, the Russian Federation considers unacceptable to use the terms "significant number of tariff lines", "certain goods", "certain other goods" in the Request for Establishment of a Panel in the dispute related to the level of applied customs duties.

6. A Member cannot be in breach of its commitments under Article II in isolation from the commitments set out in that Member's Schedule. Thus reference to a particular commitment in respect of a particular duty for a particular product is a prerequisite for identification of the measure at issue and the legal basis for one's claims in its regard. Otherwise, the failure of the complaining party to indicate the particular commitment, borrowing the Appellate Body's words in *EC – Tariff Preferences,* places "*an unwarranted burden on the responding party*".[1]

7. In Australia – Salmon the Appellate Body gave a clear definition of a measure at issue. "A measure at issue can only be a measure that is actually applied to the product at issue".[2]

8. We see two important elements in this simple sentence. First, there should be clear identification of measure that *is actually applied*. When making "*certain*", using the European Union's terminology again, *claims*, the European Union does not present to the Respondent or the Panel what the European Union believes is *actually applied* by Russia. The European Union made a general statement that there are examples of some duties that the European Union feels to be inconsistent with some of Russia's obligations. However, according to the European Union's own

[1] Appellate Body Report, *EC – Tariff Preferences,* para. 113.
[2] Appellate Body Report, *Australia – Salmon*, para. 103.

statements, is not challenging these examples. It seeks a *more general finding*, leaving it up to the Respondent and the Panel to identify the concrete issues that the European Union would like to challenge. Unlike abstract generalised statements of the European Union, the CCT applied by Russia, as well as any customs tariff of any other Member, is a very concrete document with clearly identified tariff lines and applied duty rates. The statement that certain aspects of the CCT are challenged cannot be considered as indication of "measure at issue".

9. Second element of the sentence quoted from *Australia – Salmon* is the fact that such measure should be actually applied to *the product at issue*. It is not clear what constitutes the product at issue in this dispute since the European Union failed to provide the list of such products that would not be illustrative or would not use terms such as "certain goods", "certain other goods" or "significant number of tariff lines".

10. Article II:1(a) referred to by the European Union requires that a Member shall accord "treatment no less favorable than that provided for in the appropriate Part of the appropriate Schedule"

11. Thus, Article II of the GATT provides the requirements for the tariff treatment of the product specified in the Member's Schedule.

12. As the Appellate Body observed in US – Carbon Steel, "although the listing of the treaty provisions allegedly violated is always a necessary "minimum prerequisite" for compliance with Article 6.2, whether such a listing is sufficient to constitute a "brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2 will depend on the circumstances of each case, and in particular on the extent to which mere reference to a treaty provision sheds light on the nature of the obligation at issue".[3]

13. A Member cannot be in breach of its commitments under Article II in isolation from the commitments set out in that Member's Schedule.

14. In respect of each tariff line being a part of contested measure the Complainant should submit sufficient evidence that the applied duty is in excess of the bound rate. However, the European Union is actually building its position on the invented presumption that the application of type of duty other than set forth in WTO Member Schedule automatically leads to the violation of its WTO obligations. The Russian Federation is not aware of the existence of such a presumption in relation to Article II of GATT 1994 or any other provision of the WTO Agreement.

15. Not knowing the tariff lines which are argued by the European Union, as well as the corresponding bound rate and its obligations with regard to such tariff lines the Russian Federation is deprived of its rights to defend its measures.

16. The defects of the European Union's Request for Consultations and Request for Establishment of a Panel do not allow the EU to pursue claims advanced with a reference to "certain goods" and "significant number of lines"

B. The new claims of the European Union

17. In accordance with Article 4 and 6 of the DSU a complaining party must request consultations, and consultations must be held before a matter may be referred to the Dispute Settlement Body for the establishment of a panel. Consultations requests constitute a prerequisite for panel requests and, as a result, they "*circumscribe the scope of panel requests*".[4] The Appellate Body has held that a panel request cannot include claims (either in relation to "challenged measures", or in relation to "legal bases"), which were not included in the corresponding consultations request, where these "new" claims "*expand the scope of the dispute*",[5] or have the effect of "*changing the essence of the complaint*".[6]

[3] Appellate Body Report*, US – Carbon Steel,* para. 130.
[4] Appellate Body Report, *Mexico – Anti Dumping Measures on Rice*, para. 137.
[5] Appellate Body Report, *US-Upland Cotton*, para. 293.
[6] Appellate Body Report, *Mexico – Anti Dumping Measures on Rice*, paras. 137 and 138.

18. In the Request for Establishment of a Panel the European Union has included a great number of new claims, unlawfully expanding and changing the scope of this dispute as it was set forth in the European Union's Request for Consultations.

The new claims include the following:

- European Union's claim connected with tariff line 4810 92 100 0 set out in paragraph 6 of European Union's Request for Establishment of a Panel and in paragraph 31 of European Union's First Written Submission (i.e., the sixth measure);

- European Union's claim connected with provision of a mechanism, such as a "ceiling" in paragraph 10 and 11 of European Union's Request for Establishment of a Panel;

- European Union's claim connected with a significant number of tariff lines set out in paragraph 11 of European Union's Request for Establishment of a Panel and in paragraphs 7 and 32 of European Union's First Written Submission (i.e., the twelfth measure).

19. The Appellate Body confirmed that Articles 4 and 6 of the DSU do not "require a precise and exact identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel."[7] However, neither the DSU nor the WTO jurisprudence allow adding to the panel request specific measures at issue different from those set out in the request for consultations.

20. By including new measures in the Request for Establishment of a Panel the European Union deprived the Russian Federation of the opportunity to settle the issues related to such measures in amicable way. What is more, by undermining due process objective of notifying the parties and third parties of the nature of a complainant's case the European Union deprived the Russian Federation of its right to fully prepare to defend the challenged measures at issue.

C. Measures 1 – 11

21. In paragraph 52 of the European Union's Reply to Russia's Preliminary Ruling Request with respect to tariff lines 4810 22 900 0, 4810 29 300 0, 4810 92 300 0, 4810 13 800 9 and 4810 19 900 0 (as Russia thought to be measures 1-6 at issue) the European Union stated that: "*It is clear that the five tariff lines are listed only "by way of example""*. In paragraph 54 of its Reply to Russia's Preliminary Ruling Request the European Union stated that "The European Union's consultation request is plainly *not limited to the tariff lines that are expressly mentioned*. […] It refers, inter alia, to groups of goods (paper and paperboard, palm oil and its fractions, refrigerators and combined refrigerators-freezers), and it gives examples on the basis of CCT tariff lines. Its paragraphs 3 and 4 make it clear that the individual tariff lines are listed only "*by way of example*" and "*for example*"".

22. The Russian Federation is of the view that such explanations could be applied to the EU's Request for Establishment of a Panel too. According to the European Union tariff lines mentioned are only "*examples*" and its Request for Establishment of a Panel "*is plainly not limited to the tariff lines that are expressly mentioned*". Consequently it refers to groups of goods. That explains why the European Union in its Request for Establishment of a Panel operates with this concept of unidentified goods.

III. Future application of a measure

23. The EU itself confirms that the duty challenged as measure 6 is actually applied in full conformity with Russia's WTO commitments. Any actually applied WTO-consistent measure may theoretically become WTO-inconsistent in the future, if its application is modified accordingly. At the same time we do not see how the Panel could rule that, under a certain condition, the duty designated by the EU as measure 6 will be inconsistent, the condition being Russia's possible

[7] Appellate Body Report, *Brazil – Aircraft*, para. 132; Appellate Body Report, Appellate Body Report, *US – Upland Cotton*, para. 285.

future inconsistent actions, in particular, as claimed by the EU, termination of temporal application of the duty.

24. The temporary tariff rate of 5% for the tariff line 4810 92 100 0 was established by the Common Customs Tariff by the Decision of the Board of the Customs Union № 77 of 26 May 2014. This information is publicly available. The European Union's Request for the Consultation dated 31 October 2014. In the view of the Russian Federation, it follows from this that the European Union "was fully aware of the applied tariff line 4810 92 100 0 at the time of its Request for Consultations".

25. The Decision of the Board of the Eurasian Economic Commission of 2 June 2015 № 85 which establish the permanent duty of 5% as of 1 September 2015 also was approved before the European Union's First Written Submission dated 27 July 2015.

26. The Appellate Body findings in *US-Gambling* states that "*the DSU provides for the "prompt settlement"*" of situations where Members consider that their benefits under the covered agreements "*are being impaired by measures taken by another Member*". "*The 'measure' must be the source of the alleged impairment, which is in turn the effect resulting from the existence or operation of the 'measure'*".[8]

27. Lacking substantiation of such *effect* from a WTO-compliant duty, in its First Written Submission in the context of the claim on tariff line 4810 92 100 0 the European Union invents new tests for a measure to be consistent with the commitments of a Member under GATT Article II, namely: "*sufficient guarantees of compliance with Article II*" (paragraph 54 of the EU's First Written Submission), "*measures being sufficiently foreseeable to traders in the marketplace*" (paragraph 55 of the EU's First Written Submission), "*necessity of reasoning that could enable some understanding of the likelihood of an extension or the procedure for doing so*" and "*form of a measure*" meaning whether it is in the form of a footnote or other (paragraph 56 of the EU's First Written Submission) and "*future elements to a measure covered by Article II*".

28. The European Union failed to provide any justification for these tests. The European Union offers absolutely no legal theory, evidence, or even argumentation to explain how and why these tests are to be proper in the context of Article II of the GATT 1994 and in WTO jurisprudence in general.

IV. Expired duties

29. Some of the European Union's claims relate to expired duties, for example, the duties for the tariff lines 1511 90 190 2 and 1511 90 990 2.[9] The mentioned tariff lines were subject to a combined duty of 3%, but not less than 0,09 EUR/kg.[10] However, this duty lapsed starting from 1 September 2015[11] and from 1 September 2015 the applied tariff rate is 3%,[12] in full accordance with our obligations as set forth in Russia's Schedule.

30. It should be said that certain amendments to the CCT, including the above one, were introduced in particular due to the requests of the EU itself that we have received prior to these proceedings and its request for consultations. Even though we believed that these duties complied with Russia's obligations, we have satisfied these requests of the EU.

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[8] Appellate Body Report, *US – Gambling*, para.121.

[9] The European Union's First Written Submission, para. 103.

[10] Decision No. 52 of the Council of the Eurasian Economic Commission of 16 July 2014 "On the determination of the import customs duty rates in the Common Customs Tariff of the Customs Union in respect of certain goods in accordance with the obligations of the Russian Federation in the WTO", para. 2, Annex, Footnote 31.

[11] Decision No. 52 of the Council of the Eurasian Economic Commission of 16 July 2014 "On the determination of the import customs duty rates in the Common Customs Tariff of the Customs Union in respect of certain goods in accordance with the obligations of the Russian Federation in the WTO", para. 2, Annex, Footnote 31.

[12] Decision No. 52 of the Council of the Eurasian Economic Commission of 16 July 2014 "On the determination of the import customs duty rates in the Common Customs Tariff of the Customs Union in respect of certain goods in accordance with the obligations of the Russian Federation in the WTO", para. 2, Annex, Footnote 31.

31. While still insisting on that claim, the EU does concede in its own submissions that the duties for tariff lines concerned are applicable only until 31 August 2015. They do not have any legal effect starting from 1 September 2015.

32. The decision of a panel in respect of this measure, as it was applied before 1 September 2015, will not in our view contribute to the positive and prompt resolution of this dispute.

33. For this reason, the Russian Federation as stated in paragraph 66 of its Request for Preliminary Ruling request the Panel to adopt the approach used by the Appellate Body in *Chile – Price Band System* in respect of obtaining from ruling on this matter.

34. This also covers any other amendments to the CCT made after the date of the EU's Request for Consultation or related to the annual changes of the CCT in accordance with the Russia's Staging Matrix on implementation of tariff reduction as terms of its accession to the WTO.

V. Measures as such

35. Article II of the GATT does not incorporate any obligation not to deviate from the type/structure or design of the duty set out in Members Schedule. Therefore, the type/structure or design of the duty different from the Schedule does not a priori result in the application of duties in excess of bound rates provided for in Russia's Schedule that has already been decided by the Appellate Body. Thus, the consistency of a measure to Article II:1(a) and (b) of the GATT should be considered in each particular case. Therefore, there is a very high threshold for a complainant to overcome in order to prove the violation. The European Union has failed to overcome this threshold.

36. The European Union has failed to meet the basic obligation of complaining party – to present the case *prima facie* in respect of measures as such.

37. The Appellate Body in *US - Shrimp II* summarized the scope and content of the obligation of the Complainant to present the case prima facie, in particular:

a prima facie case must be based on evidence and legal arguments put forward by the complaining party in relation to each of the elements of the claim. A complaining party may not "simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency". Nor may a complaining party simply allege facts without relating them to its legal arguments.[13]

38. In fact, being unable to bring sufficient evidence that the contested measures are being applied by the Russian Federation in a manner inconsistent with its WTO obligations, the European Union is trying to present the case as if these measures are inconsistent as such on the basis of their structure and design, irrespective of their actual application. This approach is contrary to the provisions of Article II of the GATT and rulings of the Appellate Body on the matter.

39. A mere fact of application of a type of duty other than that provided for in a Member's Schedule does not clearly define a measure on its face. A complaining Member has to prove that the collected duty is in fact exceeds the bound rate. This approach formulated by the Appellate Body in *Argentina – Textile and Apparel* is now well-established in WTO jurisprudence.

40. Two or even twenty instances the imposed duties were in excess of bound rates cannot serve as a basis for a far-reaching and very serious finding that the contested measures are inconsistent with a WTO Member's obligations by virtue of their structure and design as such. A fortiori, this conclusion cannot be automatically extended to the tariff lines in respect of which the violation has not been proven.

41. It is well established that the measure at issue must be clear enough. When talking about "*as applied*" measure it is often specified as something concrete like a group of goods, actions or non-actions of authorities, legal acts and so on. It is well established in the WTO jurisprudence that measures as such are very serious since the complaining party is contesting not the

[13] Appellate Body Report, *US –Shrimp II (Viet Nam)*, para. 4.23. See also Appellate Body Report, *US – Gambling*, para. 140.

application of measures in particular instances, but, for example, the text of the written instrument as it is. It is for this reason that challenging measures "*as such*" must comply with the highest standards of evidence that the EU failed to fulfill.

VI. Systematic Duty Variation

42. The European Union stated in paragraph 73 of its Reply to Russia's Preliminary Ruling Request that the twelfth measure at issue "*does not refer to all possible scenarios in which the variation in the type of duty results in duties being levied in excess of bound rates below a certain customs value. It only refers, by analogy, to the specific types of variations previously described in connection with the seventh to eleventh measure at issue, and is further specified by the absence of a mechanism that would prevent the ad valorem equivalents of the applied duties from exceeding bound rates*". According to the European Union the 12 measure at issue refers to measures 7-11. It is not clear whether the European Union argues the same matters as in paragraphs 6 – 12 of its of Request for Establishment of a Panel dedicated to 7 -11 measures at issue or the 12 measure at issue is something new, other then what is named as 7-11 measures at issue.

43. Nevertheless, the European Union raises a far-reaching claim that in substance *the whole CCT applied by Russia is not in compliance with GATT Article II*. In our opinion, this very serious allegation should be substantiated by equally serious evidence and arguments. However, there are none of them in the First Written Submission of the European Union or its Reply to Russia's Preliminary Ruling Request.

44. Article II:I (b) of the GATT 1994 reserves the right for a WTO Member to impose duties in any form it feels comfortable with unless they "*excess of those set forth and provided*" in the Schedules.

45. The Russian Federation does not argue that in some instances where clarity is ensured a challenged measure can refer "*to a group of goods that is defined in terms of their physical characteristics*", but argues that in present case it is inadmissible to define goods by the tariff treatment provided to these goods. Such a "*specification*" is defected by its nature. Instead of making a claim that certain duties are applied to certain goods and thus the goods are granted certain treatment and presenting the evidence of its WTO inconsistency, the EU makes a presumption that certain treatment is a priori WTO-inconsistent and there is no need to provide evidence how that treatment violates Russia's obligations in each particular instance.

46. In paragraph 48 of its Reply to Russia's Preliminary Ruling Request the EU comes to a conclusion that "*Russia does not seem to dispute the fact that it does not apply "a 'ceiling', or any other mechanism*".

47. According to this presumption of the EU and taking into account passages just quoted from paragraph 73 of the EU's Reply to Russia's Preliminary Ruling Request, in particular the words that the issue "*is further specified by the absence of a mechanism",* the EU indeed challenges all tariff lines of the CCT. In alternative, the EU has not yet decided what exactly it wishes to challenge.

48. The list of measures (if it actually can be called "a list") is open-ended and not exhaustive, constitutes only "*examples*". It is worth noting that the European Union itself recognizes this deficiency.

49. Due to the fact that the precise content of the measure at issue is ambiguous, it is understandable that the European Union is unable to determine the type of the contested measure. In an attempt to characterize the Systematic Duty Variation the European Union in paragraph 137 of its First Written Submission enumerates almost all types of measures elaborated in the WTO jurisprudence. Among them are administrative practice, policy, concerted action or practice, consistent practice, particular methodology, non-binding measure, "unwritten measure. However, the question remains open as to which of these types of measures the contested measure belongs to. Referring to the 1-11 measures as examples, but not limited to, the European Union make its claims open-ended.

VII. Mechanism such as ceiling

50. Paragraph 11 of the EU's Request for Establishment of a Panel sets out the claim of the EU regarding the non-application by Russia of some mechanism while applying some types of duties. In its First Written Submission the EU, repeats the same claim that without providing for a mechanism as described by the EU Russia applies some of its duties of some types inconsistently with some of its tariff commitments.

51. Moreover, there is no mentioning in paragraphs 1(a) and 1(b) of Article II of the GATT of the type, design and structure of the duty. Neither there is any requirement about any sort of a mechanism. Consequently the European Union is trying to create a new test of consistency with Article II of the GATT and to extend WTO obligations of WTO Members.

52. Furthermore, this claim of the European Union not only lacks the adequate identification of the measures at issue due to its vague scope in the European Union's Request for Establishment of a Panel; it was never covered by the EU Request for Consultations, either. What is more, it also goes beyond Article II:1(a) and (b) of the GATT 1994, because this claim is not about the level of the applied duties, it is about the application of some abstract mechanism additional to simple establishment of levels of applied duties.

VIII. Paragraph 313 of the Working Party Report

53. The European Union failed to provide evidence that measures applied by the Russian Federation are inconsistent with Article II:1(b), first sentence, of the GATT 1994, since calculations provided for by the Complainant as evidence of violation of Russia's WTO obligations do not meet the requirements as provided for in paragraph 313 of the Working Party Report.

54. The mechanism described in paragraph 313 of the Working Party Report sets out that ad valorem equivalent of the specific duty rate for each tariff line should be calculated based on the average customs value. In addition the calculations under this mechanism should be performed as follows:

- Data for the calculations should be taken from a three-year period, determined based on the trade data from a recent five-year representative period and excluding data for years with the highest and lowest trade for that period;

- Data on trade with countries or territories with which the Russian Federation had a Customs Union or free trade agreement would be excluded from the calculation.

55. In this regard, the European Union failed to provide the necessary evidence to substantiate its claims, i.e. the data of average customs value from a three-year period and corresponding calculation demonstrating that the alternative specific duty is higher than the ad valorem bound rate.

56. As the Russian Federation has explained in detail in its first written submission, given the absence of any other mechanism in the *WTO Agreement*, the mechanism set out in paragraph 313 of the Working Party Report setting out the terms of Russia's accession to WTO is the only applicable in this case.

57. The paragraph 313 of the Russia's Working Party Report provides a mechanism for ad valorem equivalent of the specific duty rate for each tariff line in respect of which combined duty is applied by Russia to be calculated. While, on the one hand, this is a commitment of the Russian Federation, on the other hand in certain way it is a commitment of all Members in respect of the Russian Federation.

58. Paragraph 313 is part of paragraph 1450 of the Working Party Report, which states: "the Working Party took note of the explanations and statements of the Russian Federation concerning its foreign trade regime, as reflected in this Report. The Working Party took note of the commitments by the Russian Federation in relation to certain specific matters which are reproduced in paragraphs […], 313, […]. The Working Party took note that these commitments

had been incorporated in paragraph 2 of the Protocol of Accession of the Russian Federation to the WTO".

59. In accordance with paragraph 2 of the Protocol of Accession of the Russian Federation: "This Protocol, which shall include the commitments referred to in paragraph 1450 of the Working Party Report, shall be an integral part of the WTO Agreement".

60. Thus, paragraph 313 establishes the mechanism that a priori guarantees that should the Russian Federation chose to apply a combined duty rate the ad valorem equivalent of the specific duty rate for each tariff line should be calculated in accordance with this procedure in order to establish whether specific element of the duty exceeds the ad valorem equivalent provided for in the Schedule of Russia. This equally applies to Russia when it decides to adopt duties and other Members when they are willing to check the ad valorem equivalent of Russian combined duties. The way paragraph 313 is formulated states that this procedure fully ensures the specific duty not to exceed the ad valorem equivalent.

61. WTO Members agreed that it is the mechanism set forth in paragraph 313 of Russia's Working Party Report that should be used to calculate ad valorem equivalent of a specific duty and to establish whether such duty exceed or equals the ad valorem duty. Any finding to the effect that the combined duty rate exceeds those provided in the Russian's Schedule should be based on both the evidence and arguments following from the results of application of this mechanism. The First Written Submission of the European Union contains neither evidence nor arguments to this extent.

IX. Conclusion and Request for Findings

62. For the reasons provided above, the Russian Federation requests that:

a. in respect of the EU's claims covered by Russia's Request for Preliminary Ruling the Panel finds that such claims fall outside Panel's terms of reference;

b. alternatively if the Panel finds that the EU's claims covered by Russia's Request for Preliminary Ruling fall within Panel's terms of reference and in respect of such EU's claims specifically indicated therein the Panel finds that the EU failed to establish prima facie case;

c. alternatively if the Panel finds that the EU's claims covered by Russia's Request for Preliminary Ruling fall within Panel's terms of reference and in respect of all other remaining claims of the EU the Panel finds that the EU failed to provide the evidence for all such claims raised in these proceeding, and

63. The Russian Federation's measures are consistent with the obligations of the Russian Federation under the WTO Agreement, in particular Article II:1 (a) and (b) of the GATT 1994.

ANNEX C-4

SECOND PART OF THE INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION

I. Introduction

1. In this integrated executive summary, Russia will summarize the facts and arguments presented to the Panel in its Second Written Submission, its opening and closing oral statements at the second substantive meeting, its responses to the Panel's questions and its comments on the EU's responses to the Panel's questions in the context of the second substantive meeting.

II. The sixth measure at issue

2. The duty that constitutes the sixth measure at issue has never been applied in the form that is inconsistent with Russia's Schedule.

3. The EU claims that "the Panel should find that the sixth measure at issue, from the vantage point of the time of the Panel's establishment, violates Article II:1(a) of the GATT 1994 until 31 December 2015, and violates Article II:1(b) and consequently also Article II:1(a) of the GATT 1994 as of 1 January 2016"[1].

4. Despite the fact that the duty of 15% has never been applied by Russia, the EU raised a violation claim related to the sixth measure at issue.

5. Under Article II of the GATT products described in a Member's Schedule shall "on their importation into the territory to which the Schedule relates […] be exempt from ordinary customs duties in excess of those" set out in the Schedule.

6. The Russian Federation notes that by "ordinary customs duty" the Appellate Body means "*a charge imposed on products, on their importation*"[2]. There are two significant elements in the definition of "ordinary customs duty" – products and the *moment of their importation*. In this regard, the Appellate Body concluded that "*a key criterion for a charge to constitute an ordinary customs duty under Article II:1(b) is that it accrue at the moment of importation*"[3]. In *Australia – Salmon* the Appellate Body also concluded that "*a measure at issue can only be a measure that is actually applied to the product at issue*"[4].

7. Accordingly, the definitions of the terms "measure" and "ordinary customs duty" in this context are strikingly similar. The duty may constitute the ordinary customs duty, that is a measure within the meaning of Article II:1(b) of the GATT, only if it is actually applied to the products at the moment of their importation. This is not in any way related to arguments made by the EU about actual imports being present or absent. What the Appellate Body says is "*that the duty should be imposed on goods at the moment of importation should such importation happen*". Should the importation of the products at issue happen from the EU, they will be subject to a duty that is fully consistent with Russia's tariff commitments, which is confirmed by the EU.

8. The EU produced no evidence that the goods of the EU were actually granted treatment less favourable than provided for in Russia's Schedule. Moreover, the EU has agreed that Russia has never applied the duty in excess of its bound rate in relation to the 6th measure at issue. Thus, Russia has never acted in a WTO-inconsistent manner.

9. The EU did not show any link between temporary nature of a particular duty and GATT Article II. By the logic of the EU any temporary duty, irrespectively of its rate and tariff commitments of any Member, would be inconsistent with GATT Article II as the temporary nature

[1] The EU's Second Written Submission, par. 41.
[2] Appellate Body Report, *China – Auto Parts*, para. 153.
[3] Ibid., para. 153.
[4] Appellate Body Report, *Australia – Salmon*, para. 103.

will not provide the traders with the predictability as the EU argues.

III. Measures 7 – 11 at Issue

10. Regarding the seventh to eleventh measures at issue the EU's claims are not about the level of applied duties, but about the difference in structure and design of a duty as provided in Russia's Schedule and the CCT, as well as the "lack" of "mechanism such as ceiling".

11. The fact that the EU challenges the structure and design of a duty rather than the duty itself is confirmed by numerous statements made by the European Union in the course of these proceedings.

12. Thus, the EU in its First Written Submission stated that: "[t] he claims related to combined applied duties described in sections C and D, just like its claims in section B above, address the duties "as such", directly on the basis of their structure and design"[5], "[t]he analysis of the conformity of the duties at issue with Articles II:1(b) and II:1(a) of the GATT 1994 can be performed sufficiently well simply on the basis of the way the duties are designed"[6], "[a]s 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. These claims therefore do not depend on evidence of specific transactions in which duties have actually been levied in excess of bound rates"[7].

13. The EU confirmed that measures 7 – 11 constitute a part of the SDV in its responses to Question №72 from the Panel following the first substantive meeting. According to the EU, one of the key features of the SDV is that "*neither the CCT nor any other legal instrument or practice of the Russian Federation, the Customs Union or EAEU bodies provide for a mechanism that would ensure that the ad valorem equivalent of the applied duty does not surpass the bound ad valorem rate*"[8].

14. These EU's challenges are unsupported. The application of duty with a type/structure other than that provided for in Russia's Schedule is not prohibited, and Russia provided a relevant paragraph of its Working Party Report related to the mechanism for calculation of ad valorem equivalent of specific duty, which was agreed by all WTO Members, including the European Union.

15. As the EU said in paragraph 53 of its Second Written Submission: "whenever the customs value is below a certain threshold or "break-even price", the specific elements of the duties will be levied, and the levied duty will exceed the bound ad valorem duties". This explanation makes all claims of the EU in respect of ceiling mechanism meaningless. And the conclusion to be made is that in no case a WTO Member might apply a specific duty in respect of goods the duties for which are bound in ad valorem format. There can always be one shipment whose customs value will be practically zero: for example, in case of affiliated companies. So no matter whether a Member has a ceiling mechanism in place or not, any specific duty will be WTO-inconsistent. However, the Appellate Body has never said that and, moreover, explicitly allowed Members to depart from the Scheduled type of a duty.

16. Moreover, regarding measures 7, 8, 10 and 11 currently the duties are applied in exactly the same format that is set out in Russia's Schedule. The EU agrees that such amendments were made, however it continues to insist that the Panel should make a finding that the challenged measures are inconsistent with Article II:1 of the GATT.

17. Article 19.1 of the DSU requires that: "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement".

18. The Panel in *US – Poultry* concluded that:

[5] The European Union's First Written Submission, para. 122.
[6] Ibid., para. 123.
[7] Ibid., para.124.
[8] The European Union's First Written Submission, para. 129.

Article 19.1 of the DSU is explicit concerning the recommendation a panel is to make in the event it determines that a measure is inconsistent with a covered agreement: "it shall recommend that the Member concerned bring the measure into conformity with that agreement." (footnotes omitted). However, given that the measure at issue, Section 727 has expired, we do not recommend that the DSB request the United States to bring the relevant measure into conformity with its obligations under the SPS Agreement and the GATT 1994.[9]

IV. Applicability of Paragraph 313 of the Working Party Report

19. According to the European Union, if a WTO Member applies the duty of type, structure and design different from those set out in the Member's Schedule without providing some mechanism "such as ceiling", it will always violate Article II:1(a) and (b) of the GATT 1994.

20. The European Union claimed that "[t]he applied and the bound duty must be compared"[10] and that "the important question for Article II:1(b) is not which "calculation methodology" we use, but simply whether the applied duty exceeds the bound duty, even in a single hypothetical transaction"[11].

21. On the one hand, the EU states that this is incorrect "that the covered agreements entitle Members to use any mechanism for calculating ad valorem equivalents of a specific duty, as long as it is WTO-consistent"[12]. On the other hand, the European Union failed to point to any methodology for calculating ad valorem equivalent of specific duty that would exist within WTO framework.

22. If the WTO Agreement requires Members to use some particular mechanism for calculating ad valorem equivalents of a specific duty, the EU failed to specify this mechanism and the legal basis for its application. If there is no mechanism provided for in the WTO law, and in Russia's view there is no such mechanism, there is only one mechanism that must be applied, i.e., the mechanism set out in paragraph 313 of Russia's Working Party Report.

23. At the same time, both in First and Second Written Submissions the EU provided its "mathematical" calculations in order to support its claims that the duties applied by Russia exceed the bound duty. In order to establish that something is in excess, even for hypothetical situations, one has to use some sort of methodology.

24. When the EU says that something is in excess, it bases its conclusions on some sort of calculations. Even 2 = 1+1 is a calculation methodology. At the same time we have to agree on the terms so we would not end up with 1+1 equaling 3 or 4. We have explicitly agreed on such terms with the entire Membership when we were acceding to the WTO. These terms are set out in paragraph 313 of the Working Party Report. This paragraph is not about giving more or less rights to Russia or other WTO Members under Article II of the GATT, as the EU suggests. It is about how one should convert specific element of a combined duty into its ad valorem equivalent and thus check whether a duty is in excess of the bound duty. The EU failed to provide the Panel and the Respondent with the evidence of required calculations, because the EU preferred its own methodology.

25. As Canada stated, the methodology described under paragraph 313 of the Working Party Report was requested by WTO Members to calculate "*the equivalency between the specific and ad-valorem portions of mixed duty rates*"[13]. "*Paragraph 313 is a methodology for adjusting the specific portion of mixed duty rates. Given that a number of Russian tariff lines remained with mixed tariffs, it was important to have a commitment with respect to the methodology to measure the equivalency of both parts of the tariff*". [14]

26. The EU even appears to suggest that paragraph 313 of the Working Party Reports is

[9] Panel Report, *US – Poultry*, para. 8.7.
[10] Ibid., para. 70.
[11] The European Union's Second Written Submission, para. 72.
[12] The European Union's Second Written Submission, para. 69.
[13] Canada's Responses to Questions from the Panel to the Third Parties, para. 26.
[14] Canada's Responses to Questions from the Panel to the Third Parties, para. 30.

inconsistent with Article II of the GATT. We believe that paragraph 313 is a methodology that is consistent with Russia's WTO obligations and thus it does not modify our obligations under Article II of the GATT. Under Article II Russia should not apply duties in excess of bound rates. Paragraph 313 is the mechanism to establish this "excess".

27. The provisions of paragraph 313 of the Working Party Report are not distinct from Article II:1(a) and (b) of the GATT 1994 in the context of the duties applied by the Russian Federation. Moreover, they inform the content of Russia's obligations under Article II:1.

28. The EU's argument that paragraph 313 of the Working Party Report may only be applied to combined duties set out in Russia's Schedule is unfounded. Nothing in the wording of paragraph 313 or relevant paragraphs of the Working Party Report supports this argument. In this respect, paragraph 313 refers only to "*goods subject to a combined duty*" and not to the bound rates set out in Russia's Schedule.

29. If Russia's Schedule contains a combined duty in respect of a particular product then the duty applied in accordance with the Schedule is a priori WTO consistent and does not require any calculation of its ad valorem equivalent. The ad valorem equivalent is clearly necessary when Schedule of a Member provides for ad valorem duty while that Member chooses to apply a specific or a combined duty.

30. In order to justify the inapplicability of this paragraph to the combined duties applied by Russia, the EU raised the issue of the potential consequences of application of this paragraph.

31. In our view, the consequences of application of this paragraph have no bearing on the issue of its applicability. At least we are not aware of such a technique of interpretation of international treaties under the Vienna Convention on the Law of Treaties or jurisprudence developed by the Appellate Body in this respect.

32. The EU claims that the word "alternative" supports its position. However, the EU makes a far-reaching conclusion from the word that states nothing more than the fact that combined duties are alternatives to ad valorem or specific duties. In case of paragraph 313 combined duties applied by Russia are indeed alternatives to ad valorem duty rates for tariff lines in the Schedule. There is no contradiction in that respect between the text of paragraph 313 of Russia's Working Party Report and Russia's statement on the scope of this paragraph.

33. The EU also bases its conclusions of inapplicability of this paragraph also on the presumption that this would be a violation of Article II. We do not consider provisions of our Working Party Report to be in any way WTO-inconsistent. In any case paragraph 313 of the Working Party Report forms part of the terms of Russia's accession to the WTO agreed by all Members, including the EU.

34. Russia does not believe that there is a way that might invalidate paragraph 313 and will make it inapplicable for the purposes it was originally designed for – that is, calculation of ad valorem equivalents of a specific element of all combined duties applied by Russia. The fact that the EU prefers a different methodology does duties does not decrease the applicability of this particular provision of the Working Party Report for any purpose, including for the purposes of this dispute.

V. The SDV

35. With respect to the 12th measure referred to as the SDV, the EU failed to meet the higher requirements for challenging the measure at issue, as such.

36. The EU claims that Russian Federation in a systematic manner provides certain tariff treatment that is WTO inconsistent. From the statements of the EU, which tend to contradict each other, we managed to gather that there are two elements to those challenges. The EU seems to be claiming: first, the tariff treatment at issue constitutes an unwritten practice of Russia to apply duties that are different in their type/structure from those that are set out in Russia's Schedule and second, all of those duties result in application of duties in excess of those set out in Russia's Schedule.

37. In order to prove its position the EU produced an Illustrative list which cannot, however, be considered as an evidence of anything, except for the fact that Russia does apply duties.

38. The EU tries to establish likeliness between the case of the DIEM treatment considered in *Argentina – Textiles* and what the EU calls the SDV. However, this is quite a stretch.

39. Argentina provided for a specific mechanism set out in a separate written instrument. This mechanism was applied to a limited number of goods set out in that instrument. This mechanism constituted a set of rules in accordance with which the level of an applied duty was established. All these characteristics and especially the last one, allowed to state that this was a single measure applied to various products.

40. The EU tries to cover with the SDV umbrella the measures that are individual and by their nature do not possess any similar characteristics, except for the fact that they are duties and they are set out in the CCT. However, there are thousands of other measures that possess the same characteristics, actually, the whole CCT.

41. The EU then tries to attribute to these individual measures another characteristic in order to support its claims that there is a single SDV measure. It was summarized by the EU in paragraph 48 of the EU's Opening Statement – the duty exceeds the ad valorem rate provided in the Schedule.

42. Without prejudice to Russia's position that it does not agree with such qualification of the duties applied by Russia, we have to note that we disagree that it is appropriate to use WTO-inconsistency as a characteristic that would allow individual applied duties to be joined together in a single SDV measure. Russia would like to draw the Panel's attention to paragraph 33 of the EU's Opening Statement at the second substantive meeting where it elaborates "three closely connected types" of tariff treatment subject to the challenge. According to paragraph 11 of the EU's Request for Establishment of the Panel the EU challenges "the 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, in one of the two ways described above" (in relation to measures 7-11 at issue). The tariff treatment that the EU describes through tariff treatment of type 2 in footnote 82 in the EU's Second Written Submission as well as paragraph 47 of its Opening Statement is a new development that was not provided for in the EU's Request for Establishment of the Panel. For this reason it should not be considered by the panel.

43. The EU failed to establish that what it refers to as the "whole" or the SDV is a separate measure and that it actually exists. We would repeat that *Argentina – Textile* is not a relevant case in this context. It dealt with a mechanism or a system of establishing the level of a duty. What the EU challenges in this dispute is not a system or a mechanism. It challenges individual duties as it became clear after these statements of the EU. Neither the CCT nor any other instrument of Russia, or its unwritten practice, which does not exist, requires an application of a mechanism of calculation of the level of the duty that is similar to *Argentina – Textiles*, other than the one provided for in paragraph 313 of the Working Party Report. The CCT itself establishes individual duties and in that respect each duty should be considered as an individual measure.

44. The EU uses a reverse logic when it comes to the issue of the SDV. It presumes that if the inconsistency is found in respect of one duty that differs by its type/structure from the one set out in Schedule, this means that all duties that are different are inconsistent.

45. The SDV, in the EU's view, is a measure inconsistent with Russia's WTO commitments, while both parties agree that mere difference in structure of applied and bound duties does not result in violation of the WTO Agreement. So the question is which differences constitute a WTO inconsistency. In our view, that should be determined on a case by case basis. General conclusion that the EU seeks would mean that finding of inconsistency of one applied duty would automatically mean that any other duty that is different in its structure from the bound structure is WTO inconsistent. As the EU noted in paragraph 102 of its Second Written Submission – the SDV consists of individual instances. Even though we do not agree with the concept of the SDV, we agree that the duties are individual. For each individual duty the inconsistency should be established based on individual set of evidence. However, the EU in it First Written Submission

stated that it does not challenge individual applied duties in the context of the SDV. Even the basic mathematical approach that the EU uses does not allow to determine that the sum of elements is WTO inconsistent without determination that the elements are WTO inconsistent.

46. The Russian Federation fully agrees with paragraph 12 of Brazil's third party written submission that "a complainant challenging an unwritten measure, comprised of different allegedly violations of the WTO rules, has to adduce sufficient evidence on the existence and precise content of this measure, on how its different components operate together as part of a single measure and how a single measure exists as distinct from its components".

47. While the EU's challenge is aimed at the SDV "*as a single general measure*", all evidence provided by the EU relates to its instances. Such evidence does not correspond to the ambitions challenge the EU is bringing against the SDV as such. Just like providing a few examples of application of a measure cannot alone constitute a challenge of that measure as such, providing evidence of WTO inconsistency of such examples cannot serve as the proof of WTO inconsistency of the measure challenged.

48. As the United States noted: "a mere showing of repeated actions is not sufficient to establish the existence of a rule or norm of general and prospective application"[15]. The EU failed to provide any evidence to show that the duties believed by the EU to be covered by the SDV-claims are repeated actions and are linked together. We believe that all duties included in the CCT are separate from each other. The only common characteristic that they all possess is that they are set out in one document – the CCT. We believe there is no justification, at least the EU failed to produce any, why certain duties set out in the CCT, which we are still uncertain about, constitute a separate administrative practice or more general policy separate from other duties.

49. Another EU's argument is that the SDV is subject to frequent changes and that is why it is a moving target. The Russian Federation is of the view that the failure of the complainant to specify the measure, its precise content and provide evidence of its inconsistency by reference to this or any other argument cannot be justified. Nothing precluded the EU to specify all tariff lines through the CCT which in its view violate Russia's obligations, in particular Article II of the GATT, considering the fact that the applied duty rate of tariff lines set out in the CCT is publicly available information.

VI. Conclusion and Request for Findings

50. The Russian Federation respectfully requests that:

1. The Panel considers the measures 7 – 8, 10 and 11 in the amended form and makes a finding that these measures are consistent with Russia's obligations under GATT Article II:1.

2. The Panel makes a finding that measure 6 is WTO-consistent. Alternatively, that the Panel considers the measure 6 in the amended form and makes a finding that this measure is consistent with Russia's obligations under GATT Article II:1.

3. The Panel makes no ruling in respect of the so-called SDV. Alternatively, that the Panel finds that the EU failed to provide sufficient evidence in respect of existence of so-called SDV and its inconsistency with Russia's WTO commitments.

4. The Panel finds that the EU failed to provide sufficient evidence that the duties applied by the Russian Federation of the type/structure/design different from those set out in Russia's Schedule, including those identified under measures 6-12 as described by the EU, are inconsistent with Russia's WTO commitments.

5. The Panel finds that the measures 6 – 12 are not inconsistent with the commitments of the Russian Federation under the WTO Agreement, including GATT Article II:1.

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[15] The United States Third Party Submission, para. 46.

ANNEX D

ARGUMENTS OF THE THIRD PARTIES

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ANNEX D-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

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 CITIED.

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 PROHIBITIS 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 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.

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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.
[4] Appellate Body Report, *Argentina — Textiles and Apparel*, paragraph 46.
[5] Appellate Body Report, *Japan – Alcoholic Beverages II*, page. 23.

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].

[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.

ANNEX D-2

EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1. In Brazil's view, the legal analysis to be performed by the Panel in this dispute should follow a two-tiered sequence. First, the Panel is required to make a determination concerning the relevant bound tariffs the respondent has committed to respect according to its Schedule of Concessions. In other words, the Panel's task is to determine whether the changes introduced by Russia to its Schedule should be considered a valid rectification falling under the scope of the Decision on Procedures for Modification and Rectification of Schedules of Tariff Concessions ("Decision")[1]. Based on its findings on this matter, the Panel will then have to decide, on a second level, on the consistency of the challenged tariffs with these commitments. Brazil will address these matters separately.

2. The first matter at issue relates to the procedures available to Members to introduce purely formal rectifications to their schedule which do not alter the substantive scope of the commitments. In the present case, the European Union argues that the modifications put in place by Russia within the framework of the Decision amounted to substantial changes of bound tariffs, and therefore could only be implemented through the mechanism of modification of schedules established by article XXVIII of GATT 1994. Moreover, in the complainant's view, as those modifications were objected by a Member, they could not be considered effective. Consequently, the original text of the Schedule should prevail in the assessment of the consistency of the tariffs applied or expected to be applied by Russia.

3. In turn, Russia submits that the modifications aimed at rectifying an error made during the consolidation of the Schedule and in the transposition of tariff lines from HS 1996 to HS 2007, and, therefore, should be considered of a technical nature, thus falling under the scope of application of the Decision.

4. On this topic, two determinations are particularly relevant. First, the Panel is required to find, based on an objective assessment of the facts available, whether or not Russia has properly established that the authentic text of its Schedule is the one that comprised the proposed rectifications, which provide for additional specifications and higher bound rates for some HS subheadings. Second, the Panel will have to establish what is the legal weight to be accorded to the European Union's objection to the requested "modifications and rectifications" pursuant to paragraph 3 of the Decision.

5. Brazil believes that this analysis has to be undertaken under the premise that changes in Members' Schedules of Concessions are not without consequences. The respect of Members to their bound tariffs is one of the cornerstones of the multilateral trading system. In this sense, it is of paramount importance to preserve the "balance of concessions carefully negotiated between members" as the Appellate Body stated in Argentina – Textiles and Apparel[2], making sure that the mechanism of modification and rectification established by Decision is properly applied.

6. Brazil understands that the Decision does not elaborate on the kind of modification or rectification that can be made through its mechanism. However, a key requirement that can be identified in this text is that the change sought by a Member does not "alter the scope" of the relevant concession. Therefore, rectifications of a "purely formal character" could be made through the mechanism provided for in the Decision. Changes that affect trade opportunities afforded by a given concession, on the other hand, alter the scope of the relevant concession, and, as such, would amount, in Brazil's view, to a withdrawal or modification of a concession within the meaning of Article XXVIII. Any kind of modification deemed to introduce substantial changes concerning bound tariffs in the WTO should follow the procedure set forth in Article XXVIII of the GATT 1994, so as to guarantee a broad participation of the Membership in the process and to preserve the previously mentioned balance of concessions.

[1] Document L/4962.
[2] Appellate Body Report, A*rgentina – Textiles and Apparel,* para. 47.

7. The same rationale should also be considered when assessing the implications of reclassification of goods into new tariff lines that may result in bound tariffs higher than those initially agreed upon by Members. As clarified by the Appellate Body in EC – Chicken Cuts[3], reclassification resulting in the imposition of higher duties than those originally established in a Member's Schedule of Concessions violates Articles II:1(a) and (b) of the GATT 1994.

8. Once this first matter is assessed and the relevant bound tariffs are properly established, the Panel should then be able to rule on the consistency of the challenged measures vis-à-vis those commitments.

9. According to the European Union, there are three different factual situations that have to be addressed in the present dispute and that result in customs duties being levied in excess of bound tariff rates, thus violating Articles II:1(a) and (b) of the GATT 1994. The first situation is that of *ad valorem* duties currently in place and that exceed the bound rates; the second is that of *ad valorem* duties that are temporarily suspended, but are expected to be charged in excess of the bound rates; and lastly those situations in which the application of combined types of duties result in excess of bound rates.

10. Brazil would like to stress that whenever it is established that the applied tariff by a Member results in duties being levied in excess of the bound tariffs, a breach of Article II occurs and must be redressed. In Brazil´s view, this would be the case regardless of the specific design and structure of the bound and applied duties. Brazil agrees with the Appellate Body in *Argentina – Textiles and Apparel*[4] that a Member enjoys a degree of discretion concerning the types of duties it applies, as long as the application of these duties do not result in tariffs that would surpass the equivalent tariff commitments enshrined in the respective Schedule of concession. In this case, however, in order to establish a violation of Article II, the complainant is required to demonstrate that the application of the relevant duties will necessarily lead, in all or in certain circumstances, to the imposition of tariff in excess of those provided in the Member's Schedule, thus denying imports the treatment to which the Member has committed.

11. A more complex question arises in respect of Article II and duties that are not currently applied but are expected to be charged in the future in excess of the bound rates. In order to make a proper assessment, the Panel will have to make a determination concerning the specific terms of the future application of the tariffs. If it is correct that the challenged tariffs mentioned in the present case, although suspended, will necessarily be applied and will result in excess of the bound rates in a certain timeframe, then it should fall within the Panel's terms of reference. Brazil would like to recall that it is well recognized that a measure may be challenged under the WTO dispute settlement rules even when they are not yet in force, provided that the measure existed by the time the Panel request was made and its entry into force is certain and automatic at a future date. In addition, as Japan recalled in its third-party submission, two cases, *EC – IT Products* and *Chile – Alcoholic Beverages*, have concluded, respectively, that "the duty suspension measure does not eliminate the inconsistency with Article II.1(a)" and that in cases where the law is certain and definitive the panel considered "it appropriate to examine the law to determine its consistency".

12. Regarding the European Union claims that Russia engaged in a "systematic duty variation" that should be considered, as such, a breach of Article II:1(a) and (b) of the GATT, Brazil agrees with the view put forth by the other third parties in this dispute that a complainant challenging an unwritten measure, comprised of different allegedly violations of the WTO rules, has to adduce sufficient evidence on the existence and precise content of this measure, on how its different components operate together as part of a single measure and how a single measure exists as distinct from its components.

13. Precisely with respect to these last points, Brazil understands that one of the possible ways to demonstrate how the different components of an alleged unwritten measure operate together as part of a single measure is to look into the effects caused by them in the real world. For example, one could mention several formal rules that discipline the importation and marketing of a given product in a given country. These measures may not, in themselves, forbid the importation of the referred product in a manner inconsistent with WTO rules; their application in practice, when

[3] Appellate Body Report *EC – Chicken Cuts*, para. 346.
[4] Appelate Body Report, *Argentina – Textiles and Apparel*, para. 54.

combined, can have the effect of prohibiting imports. Since "unwritten measures" do not contain, by definition, a text to be assessed, the panels are required to determine how the components of this alleged unwritten measure impact the decisions taken by the relevant economic agents. In the given example, the fact that operators are not effectively importing the product – with no other reason to justify this commercial behavior – might constitute evidence that an unwritten measure, composed of different components, does exist.

14. Finally, Brazil would like to comment on the circumstances in which 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.

15. It is important to bear in mind that this issue touches upon the essence of the Panel's terms of reference, and, consequently, the due process rights of the parties. In this sense, the analysis of an alleged expansion of the scope of the dispute must be carefully undertaken in a case-by-case basis, bearing two basic objectives in mind: first, to prevent the inclusion of aspects unrelated to the subject matter of the dispute as initially identified in the consultations' request, something that could undermine the respondent's right to have sufficient information regarding the claim; and, second, to provide sufficient flexibility to the complaining party to adjust its case in light of aspects related to the subject matter that were not known prior to the consultations.

16. With respect to the first point above, Brazil understands that the panel request should derive from the process of consultations. Accordingly, the request for consultation should, on the one hand, be able to provide notice to the defendant regarding the nature of the dispute and, thus, should necessarily inform the panel request. A more significant departure from the subject matter identified in the consultations' request would imply a substantial change in the essence of the dispute, affecting the ability of the responding party to defend itself.

17. With respect to the second point, it is important to recall that the process of consultations is designed not only to offer Members an opportunity to resolve the issue previously to the establishment of a panel, but also to better inform the Parties about the measures at issue. It is thus expected that new pieces of information or legislation that were not previously of general knowledge be presented to the Parties during the course of consultations and become part of the matter to be examined. The panel in *Japan-Film* recognized the possibility of inclusion of a new measure not explicitly included in the consultation request in a panel request, provided that this new measure is "subsidiary or so closely related to a 'measure' specifically defined." This should not, in any case, result in a change in the essence of the dispute.

ANNEX D-3

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

1. A central purpose of the GATT is to reduce and bind tariffs. WTO Members bind tariff rates by including them in Schedules of Concessions annexed to the GATT. Tariff bindings add security and predictability to the GATT/WTO system and are a central obligation in that respect. Duties that have been bound cannot be unilaterally revised upwards. GATT Articles II:1(a) and II:1(b) reflect these objectives by requiring Members to preserve the value of concessions negotiated with their trading partners and bound in their Schedules. WTO jurisprudence establishes that violations of GATT Article II can take many forms, and provides Members a wide latitude to challenge measures that detract from these concessions, both as applied and as such, and whether written or not.

I. INTERPRETATION OF ARTICLE S II:1(A) AND II:1(B) OF THE GATT 1994

2. In acceding to the WTO, a Member agrees to be bound by all obligations contained in the WTO Agreement, the covered agreements and the terms set out in its Accession Protocol, which include the tariff commitments set out in its Schedule. A Member must adhere to its negotiated tariff rates and cannot charge duties greater than the amounts set out in its Schedule. Once a tariff concession is agreed and bound in a Member's Schedule, the imposition of duties in excess of the bound rate would upset the balance of concessions among Members and violate Article II of the GATT 1994.

3. Article II:1(a) requires a Member to accord treatment no less favourable than that provided for in its Schedule. The "treatment provided for in a Member's Schedule" consists of all commitments on customs duties, but also non-tariff concessions and reductions in or the elimination of export duties and taxes. Article II:1(b) is more specific and prohibits the imposition of ordinary customs duties in excess of those set forth and provided in a Member's Schedule. In *Argentina – Textiles and Apparel*, the Appellate Body explained that Article II:1(a) contains a general prohibition against according treatment less favourable to imports while Paragraph (b) prohibits a specific kind of practice – namely, requiring Members not to charge "ordinary customs duties in excess of those provided" in the Schedule (para 46). While a measure on a matter other than customs duties can provide less favourable treatment than that provided for in a Member's Schedule and still be consistent with Article II:1(b), the application of customs duties "in excess of" the bound rates will always be inconsistent with Article II:1(a).

4. In each Member's Schedule a bound tariff provides an upper limit on the amount of duty that may be imposed. The ordinary meaning of the term "in excess of" captures the mere fact of exceeding or surpassing that amount. The Appellate Body in *Japan – Alcoholic Beverages II* found that the term "in excess of" in Article III:2 means that "[e]ven the smallest amount of 'excess' is too much" (p. 21). This finding is also relevant to the interpretation of Article II:1(b). If a Member levies ordinary customs duties in excess of the bound rates provided for in its Schedule, whether this results from the application of a different type of duty or by a measure's structure or design, the Member is acting inconsistently with its obligations under Article II:1(b).

5. In the case of the mixed duties at issue, Russia's customs officials collect the greater of the *ad valorem* or the specific duties applicable, with no upper limit on the specific duty that may be imposed, while its bound rates are expressed in *ad valorem* amounts. The absence of a ceiling or cap mechanism in calculating specific duties means that they could be applied in excess of the bound rate at any time, with no predictability to importers and exporters.

6. Paragraph 313 of Russia's Working Party Report provides a methodology for adjusting the specific component of mixed duty rates to ensure the equivalency between the specific and *ad-valorem* portions of mixed duty rates. The inclusion of this predictable and transparent methodology limits Russia's discretion to change the specific portion of the duties. The correct application of the methodology would ensure that the applied duty (whether expressed in *ad valorem* or specific terms and whether determined by Russia or the competent bodies of the Customs Union) would never exceed the bound rate for the implicated tariff lines, thereby ensuring compliance with Article II:1(b).

7. A Member can increase its bound protection on a given tariff line if it follows the multilateral process included in GATT Article XXVIII. This process protects previously-made concessions because the Member wishing to raise its duties on a bound item will typically negotiate compensation with a subset of the WTO Membership that has been most severely affected by the change. The agreed compensation will be applied on an MFN basis.

8. The Decision on Procedures for Modification and Rectification of Schedules of Tariff Concessions (GATT BISD/27S/25) covers the certification of changes in the authentic texts of schedules of tariff concessions. Earlier in 2015 Russia notified the WTO of "technical changes" to its Schedule pursuant to Paragraph 2 of that Decision but the European Union objected to Russia's rectifications. The European Union alleges that Russia's "technical changes" alter the scope of concessions with respect to the goods concerned, would result in an increase of bound rates, and cannot be considered as rectifications of a purely formal character within the terms of Paragraph 2 of the Decision. Given the European Union's objection, the authentic text of Russia's Schedule has not been modified.

II. EUROPEAN UNION'S AS SUCH CLAIMS

9. The European Union's claims challenge individual instances of the application of customs duties to paper and paperboard, palm oil and its fractions, and combined refrigerators-freezers and refrigerators "as applied". They also address the duties "as such" on the basis of their structure and design. The European Union challenges systematic duty variations (SDV) "as such" to the extent that it results in the application of ordinary customs duties in excess of those provided in Russia's Schedule.

10. The Appellate Body has established in *Argentina – Import Measures* that a Member's measures can be challenged as such, that is, independently from its application in a specific case, in WTO dispute settlement proceedings (para. 5.101). In *Argentina – Textiles and Apparel*, the Appellate Body found a violation with respect to tariff categories to which a regime of minimum specific import duties applied. The central element of the analysis was that the structure and design of the regime led to an infringement of Argentina's obligations under Article II:1 for all implicated tariff categories (paras. 60-62). The structure of Russia's measure results in a similar violation. The measure imposes customs duties on merchandise imports, levied either as an *ad valorem* tariff or as a specific tariff. These are collected at the border by Russian customs authorities. They are clearly "ordinary customs duties" within the meaning of Article II:1(b) that as such result in the application of customs duties in excess of the bound rate. The Panel need not undertake further analysis on the structure of the measure to determine whether it is caught by Article II.

11. In *EC – Selected Customs Matters*, the Appellate Body agreed that a Member is also allowed to challenge another Member's system as a whole or overall. It further established that challenging the design or structure of a system is permissible (para. 175). A finding on the system as a whole is necessary in this case because violations resulting from the SDV appear throughout the Common Customs Tariff. They are best described as individual instances of a more general phenomenon that must be brought into compliance with Article II of the GATT 1994.

12. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body pointed out that, if a measure could not be challenged "as such" but only in the instances of its application, this would lead to a multiplicity of litigation. Allowing claims against a measure "as such" thus "serves the purpose of preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated" (para. 82). The European Union's "as such" challenge serves this function, avoiding the need for multiple challenges against individual instances of the Common Customs Tariff's application.

13. The European Union's "as such" challenge also addresses two atypical aspects of the measures at issue. First, the "as such" claim addresses Russia's suspended measures, for example the *ad valorem* duty of 15% on certain paper and paper board products (tariff line 4810 92 100 0) that Russia claims does not apply between 20 April 2013 and 31 December 2015 and has been superseded by a recent administrative decision establishing a constant duty rate of 5%. Even if this tariff is currently suspended as Russia claims, nothing prevents the Panel from making a finding of inconsistency in relation to the future imposition of duties in excess of bound rates.

14. Second, the "as such" claim addresses the application of temporary duties, for example the applied duty rate on palm oil and its fractions (tariff lines 1511 90 190 2 and 1511 90 990 2) that may have expired on 31 August 2015. Canada refers to the statement of the Panel in *Indonesia – Autos*: "in previous GATT/WTO cases, where a measure included in the terms of reference was otherwise terminated or amended after the commencement of the panel proceedings, panels have nevertheless made findings in respect of such a measure" (para. 14.9). With so many variations in the application of supposedly bound duties, this case is particularly apt for such a finding and the "as such" claim is the appropriate procedure for seeking it.

15. Legislation as such can be challenged regardless of whether it is mandatory or discretionary. The mandatory or discretionary nature of the measure is relevant, if at all, only as part of the panel's assessment of whether the measure is, as such, inconsistent with particular obligations. The mandatory/discretionary distinction is inapplicable in the context of Article II:1 of the GATT 1994 given the nature of tariff concessions. Article II:1(b) provides that imports of products described in a Member's Schedule "shall" be exempt from ordinary customs duties in excess of those set forth in that Schedule. A Member's schedule attached to the GATT 1994 and implemented into its domestic legislation is mandatory.

16. Finally, a measure can be challenged even if it is not in the form of a written instrument. The Appellate Body established in *US – Zeroing (EC)* that acts setting forth rules or norms that are intended to have general and prospective application are measures subject to WTO dispute settlement (paras. 197-198). The determination of such measures should be based on the content and substance of the alleged measure, and not merely on its form. The mere fact that a rule or norm is not expressed in the form of a written instrument is not determinative of the issue of whether it can be challenged, as such, in dispute settlement proceedings.

17. When bringing a challenge against such an unwritten rule or norm, a complaining party must clearly establish: (i) that the rule or norm is attributable to the responding Member; (ii) the precise content of the rule or norm; and (iii) the rule or norm does have general and prospective application. The Appellate Body report *Argentina – Import Measures* leaves it open to the complaining party to characterize the conduct at issue as one measure or a series of measures, but it will be up to the complaining party to substantiate its position with evidence relating to the requirements or instruments at issue. As the Appellate Body stated, that might include evidence of their legal status and the relationship between them, including whether a certain instrument has autonomous status. What form this evidence would take would have to depend on the measure(s) in question (para. 5.108).

ANNEX D-4

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHILE[1]

1. Mr. Chairman, distinguished members of the panel, the delegation of Chile, as a third party in this dispute, welcomes the opportunity to present its view regarding certain systemic issues raised in this dispute.

2. Chile considers especially important to emphasize that, in the discussion of this panel a correct interpretation and application of Article II of GATT 1994 raised by the European Union, is ensured. Such standard constitutes a structural element of the system of reciprocal concessions which underpins the WTO. In this regard, Article II in consideration, not only aims to ensure that competitive conditions for the products covered by each Member's schedule are maintained, but also protects the delicate balance of commitments reflected on them. In this regard, Article II of GATT creates a context of certainty and predictability that encourages and promotes international trade.

3. Chile considers relevant to refer to the meaning of "in excess" as stated on Article II. 1 (b). As has been interpreted by the Appellate Body, "in excess" must refer to even the smallest increment over the amount inscribed in the schedule that may occur. Therefore, it must be considered, that the slight difference on the applied tariff above the upper limit set by the bound tariff, suffice to configure an infringement of Article II.1 (b).

4. Also in the light of what has already been pointed out, it's in the interest of Chile to emphasize that, as indicated by the Appellate Body in Argentina - Textiles and Apparel, the very structure and design of an applied tariff, as rule of general application, it may result in a violation of Article II.1 paragraphs a) and b), if such structure allows to calculate a greater value over the bounded tariff. In this regard, tariffs can be challenged "as such", without necessity to previously asses that such duties have been applied to a particular trade flow, since it's the tariff structure - higher than the bound level - what triggers the violation of the rule in question.

Again, thank you very much for this opportunity.

[1] Chile has requested that its oral statement serve as its executive summary.

ANNEX D-5

EXECUTIVE SUMMARY OF THE ARGUMENTS OF COLOMBIA

1. Colombia will provide its views on: a) Whether a temporarily not applied measure falls under the terms of reference of the Panel, and b) The need to use GATT Article VII:2 as relevant context for the interpretation of GATT Article II:1(b). Additionally in regards of the question posed by the panel to the third parties, Colombia will refer to question 4 (b): How could undervaluation or under-invoicing be a situation that would allow for surpassing of bound rates?

a) Whether a temporarily not applied measure falls under the terms of reference of the Panel

2. The EU argues that for tariff line 4810 92 100 0 "Section X, Chapter 48 of the CCT provides for an ad valorem duty of 15% for these products. According to footnote 14, however, the CCT provides for a temporary reduction of the ad valorem duty to 5% between 20 April 2013 and 31 December 2015."[1] On the other hand, Russia argues that the measure at issue "simply does not exist"[2] and that "is not the practice of GATT/WTO panels to rule on measures which have expired or which have been repealed or withdrawn."[3] Colombia disagrees with the Russian Federation statement, because the fact that a measure does not "temporarily apply" does not mean that such measure does not exist.

3. Following the criteria the AB provided in *US – Gambling* in regards of the requirements a measure must meet in order to be subjected to dispute settlement[4] Colombia considers that in this case CCT Section X, Chapter 48 is indeed a measure under these terms. This measure not temporarily applied is attributable to the Russian Federation and its existence is the source of the alleged impairment by the European Union. Additionally, Colombia considers that in virtue of the mandate of DSU Article 3.3, notwithstanding that it is not clear from the parties' submissions that the measure at issue is currently affecting the operation of the GATT 1994, such analysis cannot be prejudged by excluding the measure from dispute settlement proceedings.

b) The need to use GATT Article VII:2 as relevant context for the interpretation of GATT Article II:1(b)

4. In relation to GATT Articles II:1 (a) and (b) Colombia states that, although it agrees in general terms with the interpretation developed by the AB under these provisions, it is to be pointed out that in certain cases such a straightforward approach may not be the most appropriate way to determine if a tariff measure of a member is in breach of these obligations.

5. GATT Article VII and the CVA, being part of the text of the covered agreements, are relevant context for interpreting the terms of GATT Article II:1(b). GATT Article VII: 2 prohibits goods from being valued taking into account criteria other than their actual value, and specially forbids the valuation of goods using arbitrary or fictitious values. Additionally, CVA Article 1 restates the preeminence of the use of the transaction value as the primary customs valuation method. Thus, in view of the above, given the importance of the valuation of goods in the analysis of the design and structure of a tariff measure, Colombia considers that the interpretation of GATT Article II: 1 (a) and (b) needs to be informed by GATT Article VII and the CVA, in the sense that these provisions sets forth the rules for the valuation of goods for custom purposes.

c) How could undervaluation or under-invoicing be a situation that would allow for surpassing of bound rates?

6. Article II:1 (b) sets an obligation that applies to products "on their importation". An "importation" occurs when a product enters into the territory of other Member fulfilling formalities

[1] EU First Written Submission, para. 52.
[2] Russia Federation First Written Submission, para. 30
[3] Russia Federation First Written Submission, para. 31
[4] Appellate Body Report, US - Gambling, para. 121

and legal requirements of the country of destination. International trade operations made with illicit purposes could not be considered as "importations" under article II:1 (b) of the GATT 1994.

7. Such interpretation finds support in article II:1 (a), which accords treatment no less favorable to the "commerce" of the other Members. The term "commerce" necessarily refers to licit commerce. It would be meaningless that article II provides an obligation for a Member to grant treatment no less favorable to the entry of products which violates their formalities or legal requirements.

8. In Colombia's view, if a Member has proved undervaluation or under-invoicing through economic studies or context of a specific situation, among others, and such determination leads a Panel to a finding that the importation of products has been conducted for illicit purposes, a Panel should conclude that international trade operations made with illicit purposes cannot be considered as "importations" under article II:1 (b) of the GATT 1994, thus, the aforementioned provision of the GATT 1994 would not be applicable.

9. Therefore, there is no situation whether undervaluation or under-invoicing would allow a Member for surpassing the bound rates. Simply, when reviewing measures adopted to prevent phenomena related to international criminal or other security – related situations, panels should dismiss the application of article II:1 b) for the protection of the international community.

ANNEX D-6

EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. INTRODUCTION

1. Japan's third party submission focuses on legal issues and principles, rather than factual issues.

II. COMMENTS ON THE GENERAL LEGAL STANDARD UNDER ARTICLE II OF THE GATT 1994

2. Japan wishes to clarify and emphasize how strict the standard is under Article II of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and how Members should strictly comply therewith.

3. One of the fundamental principles of Article II:1(a) of the GATT 1994 is that a Member should not impose duties in excess of the bound rates provided in its Schedule. As confirmed by the Appellate Body in *Argentina – Textiles and Apparel*, there is some flexibility in designing a type of duty applied. However, the Appellate Body expressly noted that such flexibility does not apply to the upper limit provided in a Member's Schedule by stating that "[T]he application of a type of duty different from the type provided for in a Member's Schedule is inconsistent with Article II:1(b), first sentence, of the GATT 1994 to the extent that it results in ordinary customs duties being levied *in excess of* those provided for in that Member's Schedule."[1]

4. It could also be understood that the Appellate Body demonstrated how its interpretation is not impractical by stating that "… it is possible, under certain circumstances, for a Member to design a legislative 'ceiling' or 'cap' on the level of duty applied *which would ensure that*, even if the type of duty applied differs from the type provided for in that Member's Schedule, the *ad valorem* equivalents of the duties actually applied *would not exceed* the *ad valorem* duties provided for in the Member's Schedule."[2] Accordingly, Japan is of the view that even the slightest excess of the bound rate is not permissible under Article II of the GATT 1994.

5. This conclusion can be further explained and elaborated based on the nature of tariff concessions as well as the object and purpose of the GATT 1994. First of all, it must be noted that the Appellate Body stated in *Argentina – Textiles and Apparel* that "[O]nce a tariff concession is agreed and bound in a Member's Schedule, a reduction in its value by the imposition of duties in excess of the bound tariff rate would upset the *balance of concessions* among Members."[3] With such nature of the tariff concessions in mind, Japan's view is that the "balance of concessions" is premised on a *definite* line carefully drawn as the bound rates. That balance cannot be achieved if this line is made flexible by permitting a *de minimis* standard. In addition, if this line is rendered vague or illusory, it would easily frustrate "*the security and predictability* of 'the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade'" that has been confirmed as "an object and purpose of the WTO Agreement, generally, as well as of the GATT 1994" by the Appellate Body in *EC – Computer Equipment*.[4] The conclusion that each Member must fully and strictly comply with Article II of the GATT 1994 is supported by such nature of the tariff concessions as well as the object and purpose of the GATT 1994. Simply put, if there is a slightest excess of duties, then the concessions thoughtfully agreed upon by the Members will be seriously compromised.

6. The above strict standard calls for the obligation under Article II of the GATT 1994 not to exceed the tariff bindings to be applied to *each* product. A Member must not impose duties that are even slightly in excess of the bound rates since there is no *de minimis* standard in the application of Article II of the GATT 1994. Similarly, a Member must not determine whether it is imposing duties in excess of the bound rate for certain products that fall under a tariff line by

[1] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 55. (emphasis added)
[2] Ibid. para. 54. (emphasis added)
[3] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47.(emphasis added)
[4] Appellate Body Report, *EC – Computer Equipment*, para. 82. (emphasis added)

looking at the subject products as a whole, by, for example, off-setting the excess duties on *some* products with duties below the bound rates on *some other* products. To permit any such *de minimis* standard or off-setting of any kind would render violations of Article II of the GATT 1994 unclear and subjective thereby undermining the "security and predictability"[5] of the tariff concessions. It should also be noted that, the panel in *EC – IT Products* found that the imposition on *at least some products* that fell within the relevant duty-free concession of a duty in excess of that provided in the subject Schedule was in violation of Articl II:1(b) of the GATT 1994.[6] Therefore, Article II of the GATT 1994 should be strictly complied with. Not even the slightest excess of duties of *any* kind is permissible and no off-setting should be tolerated.

III. APPLIED DUTIES "AS SUCH" ARE INCONSISTENT WITH THE GATT 1994

A. Claims related to applied ad valorem duties in excess of bound ad valorem rates

(1) Currently applicable *ad valorem* duties exceeding the bound rates

7. Japan agrees with the European Union that the five tariff lines 4810 22 900 0, 4810 29 300 0, 4810 92 300 0, 4810 13 800 9 and 4810 19 900 0 provided in the Common Customs Tariff of the Eurasian Economic Union (CCT), which provide for *ad valorem* applied rates of 10% or 15% in excess of the *ad valorem* bound rate of 5% provided for in the Schedule of the Russian Federation (Russia), are in violation of Article II:1(b) of the GATT 1994, and consequently, of Article II:1(a) thereof.

(2) *Ad valorem* duties exceeding the bound rates that are temporarily not applied

8. Regarding tariff line 4810 92 100 0, Russia's Schedule provides for a bound rate of 5% while the CCT provides for an *ad valorem* duty of 15% for products under this tariff line. However, the *ad valorem* duty of 5%, which is equivalent to the bound rate, is to be temporarily applied from 20 April 2013 to 31 December 2015 (inclusive).[7] Thereafter, from 1 January 2016, the applied duty of 15% will exceed the bound rate.

9. Japan notes that Russia's temporary reduction as provided in Decision No. 77 is identical to the duty suspension measure that was at issue in *EC – IT Products* and similarly does not eliminate the inconsistency of tariff line 4810 92 100 0 with Article II:1(a) of the GATT 1994 because "there remains the potential of deleterious effects on competition."[8]

10. Moreover, in *Chile – Alcoholic Beverages*, the panel aptly allowed a law that consisted of new *ad valorem* tax rates applicable from a certain day in the future to be examined as a measure based on its mandatory and definitive nature.[9] Applying the panel's approach in *Chile – Alcoholic Beverages*, tariff line 4810 92 100 0 "has been enacted but not implemented;" it is mandatory there being "no discretion allowed in its enforcement;" and it is "certain and definitive."[10] To such extent, Japan agrees with the European Union that the aforesaid tariff line accords treatment less favourable than that provided in Russia's Schedule, which results in a violation of Article II:1(a) of the GATT 1994.

11. Japan is also of the view that the panel's findings in *US – Superfund* and *Argentina – Textiles and Apparel* can be extended to Article II:1(b) of the GATT 1994. In *US – Superfund*, the panel permitted the challenge of a mandatory tax measure not yet in force because there exists a rationale to "protect expectations of the contracting parties as to the competitive relationship

[5] Ibid.
[6] Panel Report, *EC – IT Products*, para. 7.1503. (emphasis added)
[7] Note 14C, Decision No. 77 of the Board of the Eurasian Economic Commission of 26 May 2014 amending the Single Commodity Nomenclature of Foreign Economic Activities of the Customs Union and the Common Customs Tariff of the Customs Union in respect of certain goods in accordance with the WTO accession commitments of the Russian Federation and approving the draft Decision of the Council of Eurasian Economic Commission (Decision No. 77), Exhibit EU-5.
[8] Panel Report, *EC – IT Products*, para. 7.761.
[9] Panel Report, *Chile – Alcoholic Beverages*, fn 413.
[10] Ibid.

between heir (sic) products and those of the other contracting parties," and that Article III is meant "not only to protect current trade but also to create the predictability needed to plan future trade."[11] In *Argentina – Textiles and Apparel*, the panel noted that "[T]he very existence of mandatory legislation providing for an internal tax, without it being applied to a particular imported product" may be challenged under Article III:2 of the GATT 1994.[12]

12. In this regard, Japan is of the view that the Panel, in examining whether tariff line 4810 92 100 also constitutes a violation of Article II:1(b) of the GATT 1994, could take into account the mandatory and definitive nature of such tariff line, which will certainly take effect from 1 January 2016 without need of any further governmental action, and that the current structure and design thereof *but for* the temporary duty reduction regime clearly has the potential of violating the tariff binding of Russia.

(3) Statements made by Russia in its request for rectification and modification of its Schedule

13. Japan is of the opinion that if a Member wishes to modify a concession in its Schedule, which will alter the scope of the concession, instead of the procedure provided in the Declaration on Procedures for Modification and Rectification of Schedule of Tariff Concessions[13] (Decision on Certification Procedures),[14] the correct procedure should be the one provided in Article XXVIII of the GATT 1994, which involves negotiations and consultations with the relevant Members.

B. Claims related to applied combined duties in excess of bound ad valorem duties

14. Since Article II of the GATT 1994 demands full and strict compliance for each product, Japan agrees with the European Union that the tariff treatment of the products under tariff lines 1511 90 190 2, 1511 90 990 2 and 8418 10 2001 results in violation of Article II:1(b) of the GATT 1994, and consequently, of Article II:1(a) thereof.[15]

C. Claims related to applied combined duties in excess of the bound combined duties

15. Japan reiterates that Article II of the GATT 1994 demands full and strict compliance for each product. Thus, in the absence of any mechanism that would prevent the subject applied rates from exceeding the bound rates, Japan agrees with the European Union's assertion that the tariff treatment of the products under the tariff lines 8418 10 800 1 and 8418 21 100 0 results in violation of Article II:1(b), and consequently, of Article II:1(a) thereof.[16]

D. The characterization of the claims

16. Japan agrees with the European Union's assertion that a Member's customs tariff can be challenged as an "as such" claim because it is a legal instrument with general and prospective application attributable to that Member, and its precise content can be established.[17]

17. This conclusion is in line with the finding of the panel in *EC – IT Products* that if the duty-free concessions do include the subject products therein, and if the effect of the subject measures

[11] GATT Panel Report, *US – Superfund*, para. 5.2.2.
[12] Panel Report, *Argentina – Textiles and Apparel*, para. 6.45.
[13] L/4962.
[14] Paragraph 2 of the Decision on Certification Procedures permits the certification of two kinds of changes, namely: (a) changes arising from amendments or rearrangements which do not alter the scope of a concession that are introduced in national customs tariffs in respect of bound items; and (b) other rectifications of a purely formal character.
[15] European Union's first written submission, para. 103.
[16] Ibid. paras. 111 and 120.
[17] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172, and Appellate Body Report, *US – Zeroing (EC)*, para. 198.

is necessarily to deny such products duty-free treatment, then it would consider that an "as such" breach of that Member's commitments will have been established.[18]

E. Claims related to the systematic variations in the type of duty without mechanisms to prevent duties from being applied in excess of those provided in the Schedule

18. The European Union is also challenging what it considers a "more general measure," the Systematic Duty Variation or the SDV,[19] as a violation of Article II:1(b) and II:1(a) of the GATT 1994 *as such*.[20]

19. Firstly, Japan is of the view that the Panel should explore the precise content including the product scope and the existence of the SDV in the way the European Union described and characterized in its submission. In this regard, Japan believes that to prove the existence of a single measure composed of several instruments as a norm of general and prospective application, evidence is needed of how the different components operate together as part of a single measure and how the single measure exists distinctly from its components. Based on this understanding, if there is a large number of different components involved, then generally, it may be more difficult to establish how these instruments operate together. In other words, the evidential standard will be higher in such cases.

20. Secondly, Japan is of the view that the Panel should consider the legal implications of the consequent recommendation of the Dispute Settlement Body. It should be noted that the European Union's illustrative list[21] that allegedly compose the SDV is not a closed one, and thus, the SDV effectively includes all of the tariff lines that Russia may design in the future. In addition to the legal consequence which the European Union has explained with respect to a "moving target,"[22] Japan would like to note that, if a WTO-inconsistent measure is not precisely identified and consists of an unlimited number of different components, and the product scope is open-ended, then the duty under any tariff line, which is applied in a specific way involving the SDV in the future, would also be considered in violation of Article II of the GATT 1994. Such duty under such tariff line, which is applied in such specific way in the future, would also be deemed as a measure (i.e. the SDV) not being complied with in a proceeding under Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) without the responding party having the chance to defend the WTO-consistency of such tariff line from the panel level.[23]

IV. CONCLUSION

21. Based on the foregoing, Japan respectfully requests the Panel to carefully scrutinize the measures at issue in light of the strict standard required by Article II of the GATT 1994.

[18] Panel Report, *EC – IT Products*, para. 7.113.
[19] European Union's first written submission, para. 127.
[20] Ibid. para. 131.
[21] Illustrative list of discrepancies related to the European Union's SDV claim, Exhibit EU-19.
[22] European Union's first written submission, para. 134.
[23] As described by the United States, it is worth noting what measures could be subject to review as a measure taken to comply in a proceeding under Article 21.5 of the DSU. See the United States' third party oral statement, paras. 13 and 14.

ANNEX D-7

EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY

I. A MEMBER CANNOT IMPOSE ORDINARY CUSTOMS DUTIES IN EXCESS OF THE LEVEL OF THE BOUND TARIFFS

1. GATT Article II enshrines a central purpose of the agreement: to reduce and bind tariffs. This adds security and predictability to the WTO system. Norway would like to stress that duties that have been bound, cannot be unilaterally revised upwards; the multilateral process embedded in Article XXVIII of the GATT has to be observed.

2. In the case at hand, the European Union ("EU") claims that the Russian Federation ("Russia") violates Articles II:1(a) and II:1(b) of the GATT, by subjecting a number of goods to duties inconsistent with its Schedule.[1] Article II:1(a) obliges WTO Members to accord tariff treatment *no less favourable than that provided for in their Schedules*. Likewise, according to Article II:1(b), imported products shall be exempt from "ordinary duties" and "all other duties and charges of any kind" *in excess of* those notified in the Schedule submitted by a WTO Member.

3. The Appellate Body has underlined the close relationship between Article II:1(a) and (b): "Paragraph (a) of Article II:1 contains a general prohibition against according treatment less favourable to imports than that provided for in a Member's Schedule. **Paragraph (b) prohibits a specific kind of practice that will always be inconsistent with paragraph (a): that is, the application of ordinary customs duties in excess of those provided for in the Schedule.** Because the language of Article II:1(b), first sentence, is more specific and germane to the case at hand, our interpretative analysis begins with, and focuses on, that provision."[2]

4. Thus, exceeding bound tariffs in violation of Article II:1(b) automatically entails a violation of Article II:1(a).[3] We therefore agree with the EU that all that is required in order to find a violation of both Articles II:1(a) and (b) is the existence of ordinary customs duties that are in excess of those provided in the Schedule.[4]

5. Russia objects to the consistent interpretation of the term "in excess of" in Article II:1(b) laid down by panels and the Appellate Body. Norway disagrees with this contestation. The ordinary meaning of "in excess of" is "of more than" or "over".[5] This meaning is so clear, so explicit, that it simply cannot be interpreted in any other way in order to give meaning in the context of Article II:1(b). Norway cannot see that the wording of Article II:1(b) is equivocal or inconclusive in any sense. This is probably the reason why the Appellate Body has not dwelled on this expression in previous cases concerning the interpretation of Article II:1(b), but rather implicitly adopts the said interpretation of the term.[6] Norway thus agrees with the EU regarding the interpretation of the term "in excess of".

II. CERTAIN INTERPRETATIVE ISSUES RELATED TO THE EU'S CLAIMS REGARDING THE TARIFF LINES 1511 90 190 2 AND 1511 90 990 2

6. Norway would furthermore like to highlight two interpretative issues related to the EU's claims regarding products falling under the tariff lines 1511 90 190 2 and 1511 90 990 2 (palm oil and its fractions). While Russia's Schedule provides for an *ad valorem* bound duty rate of 3%, Russia applies a combined duty of 3%, but not less than 0.09 EUR/kg, to these tariff lines.

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[1] First Written Submission by the EU, para. 34.
[2] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 45, emphasis added.
[3] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47.
[4] First Written Submission of the EU, para. 38.
[5] Collins English Dictionary, HarperCollins Publishers, Glasgow, 9 ed., 2007.
[6] Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 51-53.

a) The requirement to identify the specific measure at issue in the panel request

7. Russia argues that, as these combined duties will only be applied until 31 August 2015, the Panel should not consider these duties as they do not constitute a measure for the Panel to rule on.[7] Norway understands this as a reference to the requirement to identify the specific "measure" at issue in the request for the establishment of a panel in Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). Norway does not address this question in detail, but simply notes that the Appellate Body in *US – Zeroing (Article 21.5 – Japan)* stated that DSU Article 6.2 does not set out an express temporal condition or limitation.[8] In the case at hand, the measure in question was indeed in existence at the time of the establishment of the panel, and specifically identified in the request for the establishment of a panel. Norway thus struggles to see how the duties in question cannot be considered a "measure" within the meaning of DSU Article 6.2.

15. As the panel in *EC – IT Products* stated, in the context of measures that came into force after the establishment of the panel and whether these were within the panel's terms of reference, "this is to prevent the possibility that the procedural requirements of WTO dispute settlement result in a situation where measure could completely evade review".[9] A system where measures that are applied for a set time frame cannot be addressed through the dispute settlement mechanism, would leave considerable room for circumvention of the rules. The effect on the traders of a measure applied for a certain time frame may be substantial. Additionally, as the EU points out, the temporary character of such a measure is a source of considerable uncertainty for traders and other WTO Members.[10] Furthermore, if measures that apply for a set time frame cannot be challenged if they expire in the middle of the dispute settlement process, it would make the timing of the request for establishment of a panel the vital point of departure, not the measure itself. It would push a Member towards initialising a panel process sooner rather than later, at the sacrifice of constructive consultations, in fear of losing the right of having the measure examined by a panel. To sustain Russia's objection would, similarly to the panel's finding in *EC – Fasteners (China)*, "not be consistent with the effective functioning of the WTO dispute settlement system, as it might lead to inappropriate legal manoeuvres to avoid dispute settlement, inconsistent with the obligation of Members to engage in dispute settlement "in good faith in an effort to resolve the dispute"".[11]

b) A member cannot apply combined duties in excess of bound *ad valorem* duties

16. Russia further sets out that even if the measure is to be in place after 1 September 2015, setting out a combined duty of 3% but not less than 0.09 EUR/kg, it does not entail a violation of Russia's commitments under the WTO Agreement, as the mere fact that the form of applied duty varies from the form contained in its Schedule does not create a WTO inconsistency.[12] Norway would like to point out that the Appellate Body has explicitly found that "the application of a type of duty different from the type provided for in a Member's Schedule is inconsistent with Article II:1(b), first sentence, of the GATT 1994 to the extent that it results in ordinary customs duties being levied in excess of those provided for in that Member's Schedule."[13] The key is whether the change in type of duty results in ordinary customs duties being levied in excess of the scheduled duties, as explicitly set out in Article II:1(b). As the Appellate Body has set out, the question of whether this is the case will depend on the structure and design of the measure.[14] The Appellate Body also specifically offered a way to design such a measure that would ensure it did not in fact violate Article II, namely by designing a legislative "ceiling" or "cap" on the level of duty applied.[15] Hence, if a WTO Member does want to apply a duty different from the scheduled duty, this would be a way of doing that which would ensure conformity with that Member's WTO obligations.

[7] First Written Submission of Russia, para. 103.
[8] Appellate Body Report, *US – Zeroing (Article 21.5 – Japan),* para. 121.
[9] Panel Report, *EC – IT Products*, para. 7.140.
[10] First Written Submission of the EU, para. 81.
[11] Panel Report, *EC – Fasteners (China),* para. 7.34.
[12] First Written Submission of Russia, para. 104.
[13] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 55.
[14] Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 54-55.
[15] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 54.

17. The EU has offered convincing evidence as to how Russia, with regards to the two tariff lines mentioned above, in addition to tariff line 8418 10 200 1,[16] specifically and expressly requires customs officials to collect the greater of the *ad valorem* or the specific duty applicable, with no upper limit on the level of the *ad valorem* equivalent of the specific duty that may be imposed.[17] In Norway's view, this clearly leads to ordinary customs duties being levied in excess of those provided for in Russia's Schedule. Norway cannot see that Russia has offered any evidence as to how this is not the case.

III. THE APPLICATION OF AD VALOREM DUTIES EXCEEDING THE BOUND RATES THAT ARE TEMPORARILY NOT APPLIED

19. The facts relating to tariff line 4810 92 100 0 (certain paper and paper board products), as the case stood at the date of the establishment of the panel, seem to be undisputed: the bound rate for this tariff line is 5%, while the Common Customs Tariff of the Eurasian Economic Union provides for an *ad valorem* duty of 15% for these products. However, there has been a temporary reduction of the *ad valorem* duty to 5% between 20 April 2013 and 31 December 2015.

20. In its First Written Submission, Russia submits that a 5% *ad valorem* duty will be applied on a permanent basis to this tariff line in the future.[18] Russia thus argues that the measure described by the European Union (EU) "simply does not exist"[19] and that the Panel should 1) abstain from making a finding on this measure as it falls outside its terms of reference,[20] and 2) find the measure in accordance with Russia's WTO commitments.[21]

21. Norway understands Russia's statements as a reference to Articles 6.2 and 7.1 of the DSU. In terms of the temporal limitations of a panel's terms of reference, the Appellate Body has underlined that "[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence **at the time of the establishment of the panel**".[22] As we know, the Panel in this case was established on 25 March 2015. Norway thus struggles to see how the measure identified by the EU is not within the Panel's terms of reference.

22. The question is then whether Decision no. 85 of the Board of the Eurasian Economic Commission, adopted after the date of the establishment of the Panel, is <u>also</u> within the Panel's terms of reference. Norway will not go into detail on this question, but notes that the EU seems to agree that this could be the case.[23] If this approach is followed, a duty of 5% would be applied to the tariff line in question, thus ending the application of WTO-inconsistent duties. This would however not necessarily mean that the claims related to these duties are automatically dispersed with. Norway refers to the panel in *Japan – Film*, which observed that there are several cases where panels have proceeded to adjudicate claims involving measures which no longer exist or which are no longer being applied.[24] In those cases, the measures typically had been applied in the very recent past, as is the case in the case at hand. For example, the panel in *EEC — Measure on Animal Feed Proteins*, ruled on a discontinued measure, but one that had terminated after the terms of reference of the panel had already been agreed. In line with this, even if the Panel should find that Decision no. 85 is within the Panel's terms of reference, it should still rule on the measure as identified by the EU. This would counteract the possibility of having to chase a moving target and would be in line with the object and purpose of the dispute settlement system, as contained in DSU Article 3.2 and 3.3.

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[16] Certain combined refrigerators and freezers.
[17] First Written Submission of the EU, paras. 84-103.
[18] First Written Submission of Russia, para. 29.
[19] First Written Submission of Russia, para. 30, Request for a Preliminary Ruling pursuant to Article 6.2 by Russia, para. 54.
[20] First Written Submission of Russia, para. 42, and Request for a Preliminary Ruling pursuant to Article 6.2 by Russia, para. 63.
[21] First Written Submission of Russia, para. 42.
[22] Appellate Body Report, *EC – Chicken Cuts*, para. 156, emphasis added.
[23] Reply to Russia's Preliminary Ruling Request by the EU, para. 90.
[24] Panel Report, *Japan – Film*, para. 10.58.

23. As for the consistency of the measure identified by the EU with Russia's WTO commitments, Norway agrees with the EU that a temporary reduction of a duty that exceeds the bound rate is not in accordance with GATT Article II:1(a).[25] The panel in *EC – IT Products* underlined that "…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." Norway agrees with the EU that the measure at issue corresponds to the situation in *EC – IT Products*. The duty suspension creates the potential of deleterious effects on competition and is thus inconsistent with Article II:1(a).

IV. THE CIRCUMSTANCES IN WHICH THE INCLUSION OF A MEASURE IN A PANEL REQUEST THAT WAS NOT INCLUDED IN A CONSULTATIONS REQUEST WILL "EXPAND THE SCOPE" OR "CHANGE THE ESSENCE" OF A DISPUTE

24. Whether the complaining party has expanded 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.[26]

25. To assist in this assessment, the Panel may find guidance in previous jurisprudence, where the focus has been on the relationship between the measures in the consultation request and those in the panel request. Emphasis has been placed on whether or not additional measures found in the panel request are "legally distinct" from the ones identified in the consultation request, or whether the particular measures are sufficiently legally related to fall within the panel's terms of reference.[27] To this end, panels and the Appellate Body have analysed, amongst other factors, the similarities and differences between the content of the measures, the government agencies that have issued them, and the legal linkages between the measures.[28]

[25] First Written Submission of the EU, para. 53.
[26] Appellate Body Report, *US – Shrimp (Thailand)/US – Customs Bond Directive*, para. 293.
[27] See for instance the Appellate Body Report, *US – Certain EC Products*, paras. 60-82.
[28] Panel Report, *US – Continued Zeroing,* para. 7.26.

ANNEX D-8

EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE

1. Ukraine believes that this is an important dispute in the context of application of Articles II (a) and II (b) of the GATT 1994 both due to systemic and trade interests of the involved WTO members.

2. Ukraine considers Russia's arguments in its Request for a preliminary ruling expansion of the measures at issue in the Request for establishment of the Panel too narrow and contrary to the WTO jurisprudence at hand.

3. First, the Appellate Body in Brazil – Aircraft decided that the additional measures can be considered by the Panel as long as they *"relate"* to the subject of the consultations (or are the *"same"* measure) and *"did not change the essence"* of the disputed measure. Next, the Appellate Body in US – Upland Cotton stated that no strict identity between the scope of the consultations and the request for the panel establishment was required *"as long as the complaining party does not expand the scope of the dispute".* Moreover, the Appellate Body in Mexico – Rice considered that the legal basis of the request for panel establishment has not to 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"* or *"the addition of provisions must not have the effect of changing the essence of the complaint".* Finally, the Appellate Body in the US – Shrimp dispute declared that *this issue has to be determined by panel "on a case-by-case basis"*.

4. Taking into account these explanations, Ukraine considers that the panel, on a case-by-case basis, can consider additional measures or legal provisions as long as they:

- are the same measure in fact or clearly relate to the disputed measures;
- do not change the essence of the disputed measures;
- could have evolved from the subject of the consultations.

5. First, the additional claim on tariff line 4810 92 100 0 is intimately related to the ones affecting other five tariff lines cited in the Request for Consultations by the EU and constitutes the same alleged misapplication of the "*ad valorem duty rates*". Second, concerning *"palm oil and its fractions, refrigerators and combined refrigerator – freezers",* the lack of a mechanism to prevent a measure that differs in structure from the one in Russian Federation's Schedule of Concessions and Commitments annexed to the GATT 1994 from exceeding the level of the bound duties clearly relates to the measures included in the Request for Consultations by the European Union. It does not change the essence of these measures and is a clear development of the claims that were subject of the consultations. Finally, while the "twelfth claim" about the violation of the GATT principles in a number of tariff lines with the same mechanisms as the ones discussed in the consultations is the largest claim added after the Request for Consultations by the European Union was submitted, it still concerns the application of the same mechanisms enabled by the same provisions as the ones covered by the consultations. An alleged systematic violation does not change the legal or factual aspects of the other disputed measures and could have been discovered during the consultations stage.

6. Despite the claims of the Russian Federation, Ukraine does not agree that an obligation exists to establish the fact of levying duties in excess of the bound rate every time the disputed measure is applied to prove a violation of Article II(b) of the GATT 1994. Quite contrary, the Appellate Body in the Argentina — Textiles and Apparel found a violation of Article II(b) of the GATT 1994 because the disputed measure results in the levying of customs duties in excess of the bound rate *"with respect to a certain range of import prices".* Therefore, a measure can be in violation of Article II (b) of the GATT 1994 if it allows for a collection of customs duties in excess of the bound rate in certain conditions.

7. On the measures at issue, Ukraine finds that the European Union pointed out a number of inconsistencies in the tariff treatment of certain goods by the Russian Federation.

8. Specifically, administering ad valorem duties in excess of the ad valorem bound rate comprise a simple and clear-cut violation of Article II:1 (b) of the GATT 1994. Therefore, Ukraine supports the European Union's position regarding the disputed measures 1-6.

9. Ukraine also considers that a measure can violate the referred provision if it allows for a collection of customs duties in excess of the bound rate in certain price conditions. Specifically, if a measure by its structure and design, results, with respect to a certain range of import prices in any relevant tariff category to which it applies, in the levying of customs duties in excess of the bound rate" is in violation of Article II:1 (b) of the GATT 1994. Taking into account these legal explanations, Ukraine agrees with the European Union's assertions that the measures 7-11 are administered in violation of Article II:1(b) of the GATT 1994.

10. Moreover, an application of customs duties in excess of those in a Member's Schedule, inconsistent with the first sentence of Article II:1(b), also constitutes "less favourable" treatment under the provisions of Article II:1(a) as concluded by the Appellate Body in *Argentina – Textiles and Apparel*.

11. Ukraine agrees with the European Union that the disputed duties are administered in a way not consistent with Article II:1 (a) and (b) of the GATT 1994.

ANNEX D-9

EXECUTIVE SUMMARY OF THE ARGUMENTS OF UNITED STATES

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 31 December 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 31 December 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 31 December 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.