IN THE WORLD TRADE ORGANISATION

Russian Federation – Tariff Treatment of Certain Agricultural and Manufacturing Products

WT/DS485

Third Party Submission

by

Norway

Geneva

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I. INTRODUCTION

1. Norway welcomes the opportunity to be heard and to present its views as a third party in this dispute concerning the interpretation of Articles II:1(a) and II:1(b) of the General Agreement on Tariffs and Trade ("GATT").

2. In this written submission, Norway will not address all of the issues upon which there is disagreement between the parties to the dispute. Rather, Norway will confine itself to discuss certain legal aspects concerning changes in tariff protection after their consolidation.

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

3. GATT Article II enshrines a central purpose of the agreement: to reduce and bind tariffs. After negotiations on tariff liberalisation based on reciprocity, WTO Members can bind tariff rates by including them in Schedules of Concession annexed to the GATT. Tariff bindings add security and predictability to the WTO system. As such, Article II is an essential obligation of 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.

4. 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] The relevant parts of Article II provide as follows:

> ***Article II***
>
> *Schedules of Concessions*
>
> 1. (*a*) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

[1] First Written Submission by the EU, para. 34.

> (*b*) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

5. Article II is designed to protect the tariff bindings. This is apparent from the wording of Article II:1(a), which 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.

6. This explicit wording is furthermore underpinned by the object and purpose of the GATT. In accordance with the general rules of treaty interpretation set out in Article 31 of the Vienna Convention on the Law of the Treaties, Article II:1(a) and (b) must be read in their context and in light of the object and purpose of the GATT. The Appellate Body has stated that Article II reflects a basic objective and purpose of the GATT, namely "to preserve the value of tariff concessions negotiated by a Member with its trading partners, and bound in that Member's schedule".[2] Hence, the Appellate Body has set out that "once 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]

7. It follows from this that there is a close relationship between Article II:1(a) and (b). Again, we refer to the Appellate Body's previous statement on this very issue:

> "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."[4]

[2] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47.
[3] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47.
[4] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 45, emphasis added.

8. Thus, exceeding bound tariffs in violation of Article II:1(b) automatically entails a violation of Article II:1(a).[5] 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.[6]

9. For a charge to constitute an "ordinary customs duty", the obligation to pay it must occur "on" importation of the products in question.[7] However, Russia does not seem to contend that the measure at hand deals with such ordinary custom duties. Russia does however object to the consistent interpretation of the term "in excess of", and argues that said expression in Article II:1(b) should not be interpreted in the same way as panels and the Appellate Body has interpreted it in the context of Article III:2.[8] Russia does not offer any alternative interpretation of the expression, beyond simply arguing that it cannot have the same meaning as in the context of Article III:2. Norway disagrees with this contestation.

10. The ordinary meaning of "in excess of" is "of more than" or "over".[9] 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). The Appellate Body's statement in *Japan – Alcoholic Beverages II*, in the context of Article III:2 is just another way of putting this: "Even the smallest amount of excess is too much".[10] The bound duty is the red line; anything above this will entail a violation of Article II:1(b), and hence Article II:1(a). 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. In *Argentina – Textiles and Apparel*, the bound rate at issue was 35%. In its discussion on the question of whether the ordinary customs duties were in excess of those provided in the Schedule of Argentine, the Appellate Body simply refers to the applied duties in question as "less than" 35% or "greater than" 35%.[11]

[5] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47.
[6] First Written Submission of the EU, para. 38.
[7] Appellate Body Report, *China – Auto Parts*, para. 153.
[8] First Written Submission of Russia, paras. 16-19.
[9] Collins English Dictionary, HarperCollins Publishers, Glasgow, 9 ed., 2007.
[10] Appellate Body Report, *Japan – Alcoholic Beverages II*, para. 23. This finding was followed by the panel in *Argentina – Hides and Leather* (Panel Report, *Argentina – Hides and Leather*, para. 11.243).
[11] Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 51-53.

11. In light of the above, Norway agrees with the EU regarding the interpretation of the term "in excess of".

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

12. 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.

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

13. 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.[12] 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 will 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:

> "Apart from the reference in the present tense to the fact that the complainant must identify the measures 'at issue', Article 6.2 does not set out an express temporal condition or limitation on the measures that can be identified in a panel request. Indeed, in *US — Upland Cotton*, where the issue was raised in the context of measures that had expired prior to the panel proceedings, the Appellate Body explained that 'nothing inherent in the term 'at issue' sheds light on whether measures at issue must be currently in force, or whether they may be measures whose legislative basis has expired'. In *EC — Chicken Cuts*, the Appellate Body stated 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.' Nevertheless, the Appellate Body also stated in that case that "measures enacted subsequent to the establishment of the panel may, in certain limited circumstances, fall within a panel's terms of reference". "[13]

[12] First Written Submission of Russia, para. 103.
[13] Appellate Body Report, *US – Zeroing (Article 21.5 – Japan),* para. 121.

14. 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".[14] 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.[15] 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. From a systemic point of view, bearing in mind the current workload of the dispute settlement system, the timing of the request for the establishment of a panel should not be the deciding factor. 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"".[16]

[14] Panel Report, *EC – IT Products*, para. 7.140.
[15] First Written Submission of the EU, para. 81.
[16] Panel Report, *EC – Fasteners (China),* para. 7.34.

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.[17] 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."[18] Hence, not all departures from the type of duty set out in a Member's Schedule will entail a violation of Article II. The key is whether they result 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.[19] The Appellate Body also specifically offered a way to design such a measure that would ensure it did not in fact violate Article II:

> "We note 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."[20]

17. Russia argues that this designation of a "ceiling" or a "cap" is a possibility for a WTO Member, but not an obligation. Norway agrees that the Appellate Body has indeed explicitly described a mechanism that would ensure compatibility with Article II, and that this is not an obligation as such. However, 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 that those duties are not being levied in excess of the scheduled duties, in violation of its WTO obligations.

[17] First Written Submission of Russia, para. 104.
[18] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 55.
[19] Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 54-55.
[20] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 54.

18. 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,[21] 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.[22] 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.

IV. CONCLUSION

19. Norway respectfully requests the Panel to take account of the considerations set out above when evaluating the claims set forth by the EU.

[21] Certain combined refrigerators and freezers.
[22] First Written Submission of the EU, paras. 84-103.