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RUSSIA – TARIFF TREATMENT OF CERTAIN AGRICULTURAL AND MANUFACTURING PRODUCTS

REPORT OF THE PANEL

TABLE OF CONTENTS

LIST OF ANNEXES

ANNEX A

PRELIMINARY RULING OF THE PANEL

ANNEX B

WORKING PROCEDURES OF THE PANEL

ANNEX C

ARGUMENTS OF THE PARTIES

EUROPEAN UNION

RUSSIAN FEDERATION

ANNEX D

ARGUMENTS OF THE THIRD PARTIES

WTO AND GATT CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Argentina – Hides and Leather	Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, p. 1779
Argentina – Import Measures	Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
Argentina – Textiles and Apparel	Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, p. 1003
Argentina – Textiles and Apparel	Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, adopted 22 April 1998, as modified by Appellate Body Report WT/DS56/AB/R, DSR 1998:III, p. 1033
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
Brazil – Aircraft	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1161
Canada – Renewable Energy / Canada – Feed-in Tariff Program	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 , DSR 2013:I, p. 237
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
Chile – Alcoholic Beverages	Panel Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/R, WT/DS110/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS87/AB/R, WT/DS110/AB/R, DSR 2000:I, p. 303
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
China – Auto Parts	Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, p. 3
China – Electronic Payment Services	Panel Report, *China – Certain Measures Affecting Electronic Payment Services*, WT/DS413/R and Add.1, adopted 31 August 2012, DSR 2012:X, p. 5305
China – Publications and Audiovisual Products	Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2010:II, p. 261
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
Colombia – Textiles	Panel Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/R and Add.1, circulated to WTO Members 27 November 2015 [appeal/adoption pending]
Dominican Republic – Import and Sale of Cigarettes	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, p. 7367
EC – Approval and Marketing of Biotech Products	Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, Add.1 to Add.9 and Corr.1 / WT/DS292/R, Add.1 to Add.9 and Corr.1 / WT/DS293/R, Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, p. 847
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591

Short Title	Full Case Title and Citation
EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
EC – Computer Equipment	Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, p. 1851
EC – Computer Equipment	Panel Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/R, WT/DS67/R, WT/DS68/R, adopted 22 June 1998, as modified by Appellate Body Report WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, DSR 1998:V, p. 1891
EC – Fasteners (China)	Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, DSR 2011:VIII, p. 4289
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – IT Products	Panel Reports, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, DSR 2010:III, p. 933
EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
EC – Tariff Preferences	Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, p. 925
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
Japan – Film	Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, p. 1179
Korea – Various Measures on Beef	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5
Mexico – Anti-Dumping Measures on Rice	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675
Mexico – Taxes on Soft Drinks	Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, adopted 24 March 2006, as modified by Appellate Body Report WT/DS308/AB/R, DSR 2006:I, p. 43
Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 2701
Ukraine – Passenger Cars	Panel Report, *Ukraine – Definitive Safeguard Measures on Certain Passenger Cars*, WT/DS468/R and Add.1, adopted 20 July 2015
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Certain EC Products	Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, p. 373

Short Title	Full Case Title and Citation
US – COOL	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R, DSR 2012:VI, p. 2745
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291

EXHIBITS REFERRED TO IN THIS REPORT

Exhibit	Title	Short title
EU-1	Communication from the Committee on Market Access, Rectification and Modification of Schedules, Schedule CLXV – The Russian Federation, 1 May 2015, G/MA/TAR/RS/406; and EU objection to the request of the Russian Federation to modify/rectify its WTO bound accession schedule CLXV	Russia's Request for Rectification
EU-3	Decision No. 54 of the Board of the Eurasian Economic Commission of 16 July 2012 "On the Common Customs Tariff Regulation of the Customs Union of the Republic of Belarus, Republic of Kazakhstan and the Russian Federation" (entered into force on 23.08.2012) – relevant parts in English and Russian	Decision No. 54
EU-4	Decision No. 9 of the Board of the Eurasian Economic Commission of 29 January 2014 "On the determination of the import customs duty rates in the Common Customs Tariff of the Customs Union with regard to certain types of paper and paperboard" – in English and Russian	Decision No. 9
EU-5	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 – relevant parts in English and Russian	Decision No. 77
EU-6	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" – in English and Russian	Decision No. 52
EU-7	Decision No. 47 of the Council of the Eurasian Economic Commission of 23 June 2014 "Amending the Single Commodity Nomenclature of Foreign Economic Activity of the Customs Union and the Common Customs Tariff of the Customs Union in respect of certain goods in accordance with the obligations of the Russian Federation to the WTO" – relevant parts in English and Russian	Decision No. 47
EU-8	Decision No. 103 of the Board of the Eurasian Economic Commission of 7 July 2014, Moscow "On the determination of the import customs duty rates in the Common Customs Tariff of the Customs Union with regard to certain types of tires and retreated tires and certain types of footwear in accordance with the obligations of the Russian Federation in the WTO and on the approval of the draft decision of the Council of the Eurasian Economic Commission" – in English and Russian	Decision No. 103
EU-9	Excerpts from Schedule CLXV – The Russian Federation, Annex I to the Protocol of Accession of the Russian Federation, circulated in WT/ACC/RUS/70/Ad.1	Russia's Schedule
EU-10	Declaration of goods and supplementary list of 28 October 2014 – in English and Russian	Declarations of Goods and Supplementary Lists to Declarations of Goods
EU-11	Declarations of goods of 17 June, 9 April, 16 June, 5 May, 3 June, 6 June, 16 June and 3 June 2015 respectively – in English and Russian	Declarations of Goods and Supplementary Lists to Declarations of Goods
EU-12	Declaration of goods and supplementary list of 7 June 2015 – in English and Russian	Declarations of Goods and Supplementary Lists to Declarations of Goods
EU-13	Declaration of goods of 15 October 2014 – in English and Russian	Declarations of Goods and Supplementary Lists to Declarations of Goods
EU-14	Declaration of goods of 05 November 2014 and the supplementary lists – in English and Russian	Declarations of Goods and Supplementary Lists to Declarations of Goods
EU-15	Declaration of goods of 6 December 2013 and the supplementary lists – in English and Russian	Declarations of Goods and Supplementary Lists to Declarations of Goods
EU-16	Declaration of goods and supplementary lists of 19 September 2014 – in English and Russian	Declarations of Goods and Supplementary Lists to Declarations of Goods

Exhibit	Title	Short title
EU-17	Declaration of goods and supplementary lists of 10 April 2015 – in English and Russian	Declarations of Goods and Supplementary Lists to Declarations of Goods
EU-18	Declaration of goods and supplementary lists of 14 June 2015 – in English and Russian	Declarations of Goods and Supplementary Lists to Declarations of Goods
EU-19	Illustrative List of discrepancies related to the European Union's claim on the Systematic Duty Variation	Illustrative List
EU-20	Specific cases of discrepancies, customs statistics of foreign trade of Russian Federation	Customs Statistics
RUS-9	Decision No. 54 of the Council of the Eurasian Economic Commission of 21 August 2015 "On the establishment of import duties of the Common Customs Tariff of the Eurasian Economic Union in respect of certain goods in accordance with the commitments of the Russian Federation to the WTO" – in English and Russian	Decision No. 54
RUS-10	Decision No. 85 of the Board of the Eurasian Economic Commission of 2 June 2015 "On amending the single Commodity Nomenclature of Foreign Economic Activity of the Eurasian Economic Union applied to certain types of goods according to the commitments of the Russian Federation under the WTO" – in English and Russian	Decision No. 85

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
1980 Decision	Decision of 26 March 1980 on Procedures for Modification and Rectification of Schedules of Tariff Concessions, L/4962, adopted by the Council, C/M/139
BCI	Business Confidential Information
CCT	Common Customs Tariff of the Eurasian Economic Union
Collins English Dictionary online	Collins English Dictionary online, <http://www.collinsdictionary.com/dictionary/english>
Customs Valuation Agreement	Agreement on Implementation of Article VII of the GATT 1994
DSB	Dispute Settlement Body
Decision No. 9	Decision No. 9 of the Board of the Eurasian Economic Commission
Decision No. 47	Decision No. 47 of the Council of the Eurasian Economic Commission
Decision No. 52	Decision No. 52 of the Council of the Eurasian Economic Commission
Decision No. 54 of the Board	Decision No. 54 of the Board of the Eurasian Economic Commission
Decision No. 54 of the Council	Decision No. 54 of the Council of the Eurasian Economic Commission
Decision No. 77	Decision No. 77 of the Board of the Eurasian Economic Commission
Decision No. 85	Decision No. 85 of the Board of the Eurasian Economic Commission
Decision No. 103	Decision No. 103 of the Board of the Eurasian Economic Commission
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EAEU	Eurasian Economic Union
EAEU Treaty	Treaty on the Eurasian Economic Union
EU	European Union
EUR	Euro
GATT 1994	General Agreement on Tariffs and Trade 1994
Oxford English Dictionary online	Oxford English Dictionary online, <http://www.oed.com>
Paragraph 313	Paragraph 313 of the Report of the Working Party on the Accession of Russia, WT/ACC/RUS/70, WT/MIN(11)/2
Russia	Russian Federation
Russia's Accession Protocol	Protocol on the Accession of the Russian Federation, 17 December 2011, WT/MIN(11)/24, WT/L/839
Russia's Request for Rectification	Communication from the Committee on Market Access, Rectification and Modification of Schedules, Schedule CLXV – The Russian Federation, 1 May 2015, G/MA/TAR/RS/406
Russia's Schedule	Schedule CLXV – The Russian Federation, Annex I to the Protocol of Accession of the Russian Federation, circulated in WT/ACC/RUS/70/Ad.1
Russia's Working Party Report	Report of the Working Party on the Accession of Russia, WT/ACC/RUS/70, WT/MIN(11)/2
SDV	Systematic Duty Variation
Shorter Oxford English Dictionary	New Shorter Oxford English Dictionary, 2007 (6th edition), Volumes 1 and 2
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by the European Union

1.1. On 31 October 2014, the European Union requested consultations with the Russian Federation (Russia) pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 19 of the Agreement on Implementation of Article VII of the GATT 1994 (Customs Valuation Agreement) with respect to the measures and claims set out below.[1]

1.2. The following Members asked to join the consultations: Ukraine (on 6 November 2014)[2]; Japan (on 14 November 2014)[3]; the United States (on 14 November 2014)[4]; and Indonesia (on 14 November 2014).[5] The DSB did not receive a notification from Russia accepting these requests.

1.3. Consultations were held on 28 November 2014.[6]

1.2 Panel establishment and composition

1.4. On 26 February 2015, the European Union requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.[7] At its meeting on 25 March 2015, the Dispute Settlement Body (DSB) established a panel pursuant to the request of the European Union in document WT/DS485/6, in accordance with Article 6 of the DSU.[8]

1.5. The Panel's terms of reference are the following[9]:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the European Union in document WT/DS485/6 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

1.6. On 8 June 2015, the European Union requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 18 June 2015, the Director-General accordingly composed the Panel as follows[10]:

Chairperson:	Mr Ronald Saborío Soto
Members:	Mr Esteban Conejos, Jr. Mr Gustavo Lunazzi

1.7. Australia, Brazil, Canada, Chile, China, Colombia, India, Japan, the Republic of Korea, Moldova, Norway, Singapore, Ukraine, and the United States notified their interest in participating in the Panel proceedings as third parties.

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[1] Request for Consultations by the European Union, WT/DS485/1, 4 November 2014.
[2] Request to Join Consultations – Communication from Ukraine, WT/DS485/2, 10 November 2014.
[3] Request to Join Consultations – Communication from Japan, WT/DS485/3, 18 November 2014.
[4] Request to Join Consultations – Communication from the United States, WT/DS485/4, 18 November 2014.
[5] Request to Join Consultations – Communication from Indonesia, WT/DS485/5, 18 November 2014.
[6] Request for the Establishment of a Panel by the European Union, WT/DS485/6, 27 February 2015.
[7] Request for the Establishment of a Panel by the European Union, WT/DS485/6, 27 February 2015.
[8] Minutes of Meeting held in the Centre William Rappard on 25 March 2015, WT/DSB/M/359, 1 May 2015, para. 6.4.
[9] Constitution of the Panel established at the Request of the European Union – Note by the Secretariat, WT/DS485/7, 19 June 2015.
[10] Constitution of the Panel established at the Request of the European Union – Note by the Secretariat, WT/DS485/7, 19 June 2015.

1.3 Panel proceedings

1.3.1 General

1.8. The Panel held its organizational meeting with the parties on 30 June 2015. After consultation with the parties, the Panel adopted its Working Procedures[11] and timetable on 3 July 2015.

1.9. The European Union filed its first written submission on 27 July 2015. Russia filed its first written submission on 24 August 2015. Third party submissions were received on 2 September 2015 from Australia, Canada, Colombia, Japan, Norway, Ukraine, and the United States.

1.10. The Panel held a first substantive meeting with the parties from 15 to 16 September 2015. A session with the third parties took place on 16 September 2015.

1.11. The parties filed their rebuttal submissions on 20 October 2015.

1.12. The Panel held a second substantive meeting with the parties from 23 to 24 November 2015. On 22 December 2015, the Panel issued the Draft Descriptive Part of its Report to the parties. The Panel issued its Interim Report to the parties on 24 February 2016. The Panel issued its Final Report to the parties on 8 April 2016.

1.3.2 Working procedures on Business Confidential Information (BCI)

1.13. On 30 June 2015, the European Union requested the Panel to adopt additional working procedures to protect any BCI that the parties might submit to it. In support of this request, the European Union provided a proposal for BCI procedures. On 3 July 2015, the Panel transmitted its own draft BCI procedures to the parties. On 8 July 2015, the European Union provided comments on the draft prepared by the Panel. In the light of these comments, the Panel on 14 July 2015 adopted Additional Working Procedures Concerning Business Confidential Information.[12] Neither party submitted BCI to the Panel during the course of the proceedings.

1.3.3 Preliminary ruling

1.14. On 24 August 2015, Russia submitted to the Panel a request for a preliminary ruling pursuant to Article 6.2 of the DSU. The European Union was given and used the opportunity to respond in writing to Russia's request on 3 September 2015. The parties were also advised that they could comment on Russia's request during their opening oral statements at the Panel's first substantive meeting with the parties. The Panel additionally advised the third parties that they could comment on Russia's request in their written submissions to the Panel, or in their oral statements at the third party session conducted in the context of the Panel's first substantive meeting. Taking into account Russia's request that the Panel issue a preliminary ruling prior to the first substantive meeting (which the Panel considered not to be feasible) and Russia's reiteration at the first substantive meeting that the Panel should rule on Russia's request as soon as possible, the Panel issued its conclusions on Russia's request for a preliminary ruling on 18 September 2015, shortly after the end of the first substantive meeting.

1.15. The Panel issued its detailed reasons in support of its conclusions on 2 November 2015. On the same date, the Panel asked the parties whether they would object to early circulation of the detailed reasons to the Membership. On 5 November 2015, the European Union indicated that it would support early circulation. On the same date, however, Russia objected to circulation, indicating that its objection was without prejudice to Russia's general position on the issue of circulation of preliminary rulings to the Membership of the WTO, or to Russia's position on such circulation in any other ongoing or future dispute to which it is or may be a party or third party.

[11] See the Panel's Working Procedures in Annex B-1.
[12] See the Panel's Additional Working Procedures on BCI in Annex B-2.

Accordingly, the Panel advised the parties on 10 November 2015 that it would not circulate its detailed reasons prior to its Final Report.[13]

2 FACTUAL ASPECTS

2.1 The measures at issue

2.1. The European Union challenges 12 measures related to Russia's tariff treatment of certain agricultural and manufacturing products.

2.2. The first eleven measures are customs duties provided for in the Common Customs Tariff of the Eurasian Economic Community (CCT) in respect of the following tariff lines[14]:

a. 4810 22 900 0 (certain kinds of light-weighted coated paper)

b. 4810 29 300 0 (certain paper and paperboard products in rolls)

c. 4810 92 300 0 (certain multi-ply paper and paperboard products with only one outer layer bleached)

d. 4810 13 800 9 (certain paper and paperboard products in rolls)

e. 4810 19 900 0 (certain paper and paperboard products)

f. 4810 92 100 0 (certain multi-ply paper and paperboard products with each layer bleached)

g. 1511 90 190 2 (certain palm oil products in tare of capacity 20,000 kg or less)

h. 1511 90 900 2 (certain palm oil products in tare of capacity 20,000 kg or less)

i. 8418 10 200 1 (freezers refrigerators household type)

j. 8418 10 800 1 (freezers refrigerators household type)

k. 8418 21 800 0 (compression-type refrigerators of a capacity exceeding 340 litres)

2.3. The European Union characterizes the twelfth measure at issue as "a more general measure consisting in systematic duty variations, to the extent that they result in the application of duties in excess of bound rates".[15] This measure, which the European Union refers to as the "systematic duty variation" (SDV)[16], consists in "systematically according certain clearly described types of tariff treatment that lead, in each individual instance of such tariff treatment, to duties being levied in excess of bound rates".[17]

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. The European Union requests that the Panel find that the measures at issue are, or were at the time of the Panel's establishment, inconsistent with Russia's obligations under Articles II:1 (a) and II:1(b) of the GATT 1994. The European Union further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that Russia bring its measures into conformity with its WTO obligations, to the extent that it has not already done so.

[13] The Panel's conclusions on Russia's request for a preliminary ruling, as well as the detailed reasons, are contained in Annex A-1 of this Report.
[14] European Union's first written submission, para. 31.
[15] European Union's first written submission, para. 127.
[16] European Union's first written submission, para. 127.
[17] European Union's second written submission, para. 95.

3.2. Russia requests that the Panel find that the European Union's claims are outside the Panel's terms of reference. Additionally, Russia requests the Panel to find that the sixth, seventh, eighth, tenth, and eleventh measures challenged by the European Union have been amended or otherwise changed since the time of the Panel's establishment, and are now consistent with Russia's obligations under Article II:1(a) and (b) of the GATT 1994. Russia also requests the Panel to find that, in respect of the sixth to twelfth challenged measures, the European Union failed to provide sufficient evidence in support of its claims. Finally, in respect of the twelfth measure at issue, Russia requests the Panel to find that the European Union failed to specify the norms and laws establishing the measure and its precise content, or else to find that the European Union failed to establish that the measure exists and is inconsistent with Russia's obligations under Article II:1(a) and (b).[18]

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, and C-4).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Australia, Brazil, Canada, Chile, Colombia, Japan, Norway, Ukraine, and the United States are reflected in their executive summaries, provided in accordance with paragraph 20 of the Working Procedures adopted by the Panel (see Annexes D-1, D-2, D-3, D-4, D-5, D-6, D-7, D-8, and D-9).

6 INTERIM REVIEW

6.1. On 24 February 2016, the Panel issued its Interim Report to the parties. On 9 March 2016, the European Union and Russia each submitted written requests for the Panel to review aspects of the Interim Report. On 23 March 2016, the European Union and Russia submitted comments on each other's requests for review. Neither party requested an interim review meeting.

6.2. In accordance with Article 15.3 of the DSU, this section of the Panel Report sets out the Panel's response to the parties' requests made at the interim review stage.

6.3. In addition to the changes indicated below that the Panel made in response to the parties' requests for substantive modifications, the Panel corrected typographical errors and other non-substantive editorial clarifications in the Report, including those identified by the parties.

6.1 General interpretative issues arising under Article II:1(b), first sentence, of the GATT 1994

6.4. Regarding paragraph 7.14, the European Union requests that the Panel add a reference to Russia's arguments in respect of (a) the definition of an ordinary customs duty in the jurisprudence of the Appellate Body, and (b) the evidence required to establish an inconsistency with Article II:1(b), first sentence.

6.5. The Panel does not consider it necessary to refer to the arguments of Russia that the European Union has identified in the context of paragraph 7.14. That paragraph, and section 7.2 of the Report more generally, is not intended to provide a comprehensive overview of all issues relating to the interpretation of Article II:1(b), first sentence. Rather, it addresses certain specific legal issues raised by the parties. Accordingly, we do not think it is necessary to recall the arguments mentioned by the European Union in paragraph 7.14. We do note, however, that issue (b) is discussed three paragraphs down in paragraph 7.17. Similarly, issue (a) is dealt with in paragraph 7.93. In the light of these considerations, we made no change in response to the European Union's comment.

[18] Russia's first written submission, para. 195; second written submission, para. 108.

6.2 Claims concerning applied *ad valorem* duty rates that allegedly exceed bound *ad valorem* duty rates (the first to sixth measures)

6.6. Regarding paragraphs 7.34 and 7.129, the European Union notes that it has not argued that a temporary duty reduction in itself violates Article II:1(a). Rather, it has challenged the temporary duty reduction in light of the fact that the measure foresaw future tariff treatment in excess of the bound duty rate. The European Union requests that the Panel modify paragraphs 7.34 and 7.129 to reflect this. The European Union also notes that the Panel correctly characterized its relevant claim at paragraph 7.130.

6.7. The Panel made appropriate changes to paragraphs 7.34, 7.129, and 8.1(c)(iii).

6.8. Regarding paragraphs 7.42 to 7.43, the European Union requests the Panel to reflect certain arguments in its response to Panel question number 123.

6.9. The Panel made appropriate changes to paragraph 7.43. Regarding paragraph 7.46, the European Union requests the Panel to omit or qualify the fourth sentence. The European Union notes that it addressed both the fact that Russia's customs duties are prescribed by the CCT and the fact that Russian customs authorities are required to, and do in fact, levy those duties in individual import transactions. The European Union also suggests that the Panel refer to a presumption that Russian customs authorities are legally required to apply the duties contained in the CCT in each and every individual import transaction. In the European Union's view, the presumption would better captured by the verb "impose" than the verb "apply". Additionally, the European Union requests that, for greater clarity, the paragraph be modified to take into account certain statements by Russia in its responses to Panel question numbers 34 and 52. According to the European Union, these responses indicate that the adoption of customs duties applied by Russia is in the hands of the EAEU.

6.10. The Panel deleted the fourth sentence of the paragraph. However, for the sake of consistency with the rest of the findings, we do not find it appropriate to use the verb "impose" instead of "apply". Also, paragraph 7.46 already makes clear that the European Union challenges duty rates that Russian customs authorities are legally required to apply. Finally, we see no need to add to paragraph 7.46 by referring to elements of the identified statements of Russia. We also note that paragraph 7.42 already makes a related point.

6.11. Regarding paragraph 7.53, the European Union requests the Panel to add a reference to Russia's statements that the Vienna Convention on the Law of Treaties (Vienna Convention) and the Decision of 26 March 1980 on Procedures for Modification and Rectification of Schedules of Tariff Concessions (1980 Decision) apply cumulatively, and that Article 79 of the Vienna Convention constitutes a rule of customary international law.

6.12. The Panel made appropriate changes to paragraphs 7.52 and 7.53.

6.13. Regarding paragraphs 7.80, 7.100, 7.101, 7.119, 7.174, 7.175, 7.198, 7.215, 7.261 and 7.262, as well as footnotes 290, 295, 296 and 343, the European Union requests that, since Russia may have more than one customs authority, the term "customs authority" in these paragraphs and footnotes be changed to "customs authorities".

6.14. Russia objects to the European Union's request. According to Russia, Russia has one customs authority – the "Federal Customs Service". Russia points out that that term is used in paragraph 306 of Russia's Working Party Report.

6.15. The Panel retained the references to "customs authority" in its Report. However, we wish to clarify that this term is used generally to refer to the authority or authorities in Russia responsible for the application to imports of customs duties provided for in the CCT.

6.16. Regarding paragraph 7.100, the European Union submits that Russia's customs authorities are not and were not at liberty to modify the rates of customs duties, but are and were required to apply the duties provided for in the CCT. The European Union therefore requests that the paragraph in question state that customs authorities were required to "apply" a duty rate as from

1 January 2016, rather than that they were required to "increase" the duty rate as from 1 January 2016.

6.17. Russia agrees with the European Union that its customs authority is not, and was not, at liberty to modify the duty rates. In this connection, Russia again refers to paragraph 306 of its Working Party Report. Russia therefore asks the Panel to take into account the European Union's comment.

6.18. The Panel made appropriate changes to paragraph 7.100.

6.19. Regarding paragraph 7.107, the European Union requests that the Panel clarify that Russia proposed that the Panel should follow the approach taken by the panel in *EC – IT Products* only with respect to the sixth measure's conformity with the first sentence of Article II:1(b).

6.20. The Panel made appropriate changes to paragraph 7.107.

6.21. Regarding paragraph 7.114, the European Union requests the Panel to clarify the cross-reference, by replacing the reference to section 7.3.2.3 with a reference to specific paragraphs of the Report.

6.22. The Panel made appropriate changes to paragraph 7.114.

6.3 Claims concerning applied combined duty rates that allegedly exceed bound duty rates (the seventh to eleventh measures at issue)

6.23. Regarding paragraph 7.161, the European Union states that it has not characterised the seventh and eighth measures as measures that have expired, but rather has stated that those measures ceased to apply as from 1 September 2015 and were not replaced by another duty. The European Union therefore requests the Panel to clarify the wording of that paragraph.

6.24. The Panel made appropriate changes to paragraph 7.161.

6.25. Regarding paragraphs 7.168 to 7.169, as well as other relevant paragraphs in the same section, the European Union requests that they be modified to make reference to an argument put forward by Russia. According to the European Union, Russia argues that to establish an inconsistency of the relevant combined applied duties with Article II:1(b), the complaining party should provide evidence of application of duties in excess of the bound rates for a particular price range related to the products in question, because certain products may in practice be traded in price ranges in which duties would not exceed bound rates.

6.26. The Panel considers that this argument by Russia is addressed by its findings in section 7.2 on general interpretative issues. We fail to see the connection between Russia's argument regarding how to demonstrate inconsistency with Article II:1(b), first sentence, and paragraphs 7.168 and 7.169, which concern the issue of the precise measure on which we should make findings. We therefore made no change to the section that contains paragraphs 7.168 and 7.169. However, we modified paragraphs 7.14 and 7.17, which are part of section 7.2, to reflect Russia's argument.

6.27. Regarding paragraph 7.175, the European Union states that it has not argued that Russia never applied a cap for any tariff line, at any point in the past. The European Union requests the Panel to clarify the paragraph accordingly.

6.28. The Panel made appropriate changes to paragraph 7.175.

6.29. Regarding paragraph 7.187, the European Union requests that the Panel explicitly refer to Russia's argument in paragraph 33 of Russia's second written submission that paragraph 313 of Russia's Working Party Report informs the content of Russia's obligations under Article II:1.

6.30. The Panel made appropriate changes to paragraph 7.187, as well as a corresponding change to paragraph 7.183.

6.31. Regarding the final sentence of paragraph 7.194, the European Union requests the Panel to clarify that it is making an observation concerning the explicit wording of paragraph 313.

6.32. The Panel made appropriate changes to paragraph 7.194.

6.33. Regarding paragraph 7.198, the European Union notes that paragraph 313 of Russia's Working Party Report aims to ensure that the specific element of an applied combined duty does not exceed the *ad valorem* element of that same duty for the average customs value calculated over three years, rather than seeking to ensure that the same amount of duty is levied, in every particular transaction or on average. The European Union requests the Panel to clarify its statement in paragraph 7.198 accordingly.

6.34. The Panel made appropriate changes at paragraph 7.198, as well as corresponding changes to paragraphs 7.197 and 7.200.

6.35. Regarding paragraph 7.202, the European Union requests the Panel to insert specific language concerning the applicability of Article II:1(b) even in the absence of actual import transactions and a reference to the Panel's analysis at paragraphs 7.15 to 7.17 of the Report.

6.36. The Panel made appropriate changes to paragraph 7.202, including to footnote 271.

6.37. Regarding the first two sentences of paragraph 7.205, the European Union notes that Russia in its responses to Panel question numbers 70, 90 and 97(c) explicitly confirmed the Panel's understanding. The European Union requests the Panel to make reference to those statements.

6.38. The Panel added a reference to Russia's statements to footnote 260, which contain the Panel's summary of Russia's arguments on this issue.

6.39. Regarding footnote 272, the European Union requests the Panel to replace the words "based on" with "in conformity with", in order to avoid giving the impression that the Customs Valuation Agreement forms the basis of the Panel's reasoning in this section.

6.40. The Panel made appropriate changes to footnote 272.

6.41. Regarding paragraph 7.215, the European Union requests that the word "above" be replaced with the words "in excess of".

6.42. The Panel notes that its use of the word "above" in paragraph 7.215 is consistent with its general use of this term throughout the Report. We also note that we have used the expression "in excess of" in our conclusions sections. We therefore made no change in response to the European Union's comment.

6.43. Regarding paragraphs 7.215 and 7.217, the European Union requests a modification to these paragraphs and other related paragraphs. According to the European Union, the Panel should repeat or make reference to the more general finding in paragraphs 7.168 and 7.169, as well as parts of paragraph 7.171, that the design and structure of an applied duty in the form of "x% but not less than y per unit of measurement", where the bound duty is simply "x%", indicates inconsistency with Article II:1(b).

6.44. Russia objects to the European Union's request. According to Russia, the Panel's findings in paragraphs 7.215 and 7.217 cannot be considered as a general finding that the design and structure of a duty in the form "x%, but not less than y per unit of measurement", where the bound duty is x%, indicates inconsistency with Article II:1(b). Rather, Russia considers that these paragraphs only concern the ninth measure at issue, because the value of "y" in respect of the ninth measure was the same before and after that measure was amended.

6.45. The Panel notes that paragraphs 7.168, 7.169, and 7.171 of the Panel's Report do not make any "general findings" regarding the consistency of a duty rate of a particular design or structure. Those particular paragraphs do not find that the duties are inconsistent merely by virtue of their design or structure. Those paragraphs rather concern whether the Panel should consider the measure at issue as it existed at the time of the Panel's establishment or as amended.. Paragraphs

7.168 to 7.169 indicate only that the design and structure of the relevant applied duty rate did not change following amendment. Paragraph 7.171, when read in full, indicates that in deciding which precise measure to rule on, we did not rely solely on the design and structure of the measure, but rather looked at the precise values assigned to the *ad valorem* element of the duty rate during the relevant periods. Indeed, the Panel only made findings regarding the measures' consistency later in the Report, after examining in detail the evidence submitted by the parties. We therefore made no change to paragraphs 7.215 or 7.217 in response to the European Union's request.

6.46. Regarding paragraph 7.216 and other related paragraphs in the Report, the European Union requests that these paragraphs be modified to take account of the European Union's statements in paragraphs 85 and 87 of its first written submission that the break-even price can be determined mathematically, and paragraph 58 of its second written submission, stating that an 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%", as long as there is no additional mechanism like a ceiling.

6.47. The Panel notes that footnote 245 of its Report already reflects relevant statements by the European Union. Nevertheless, we made appropriate changes to clarify paragraphs 7.216, 7.219 and 7.265.

6.48. Regarding Figures 1 to 4 in paragraphs 7.216, 7.220, 7.264 and 7.265, the European Union requests the Panel to indicate the break-even price on the lower axis, given that, in its view, all the other relevant values on the lower axis are provided, and the Figures were clearly drawn up on the basis of a certain value for the break-even prices.

6.49. The Panel does not accept the European Union's assertion regarding the basis for preparing the Figures. Nevertheless, as Figures 1 to 4 in paragraphs 7.216, 7.220, 7.264 and 7.265 could be simplified further without losing their illustrative value, we did so.

6.50. Regarding paragraphs 7.222 and 7.267, the European Union states that the Panel is required to examine all evidence submitted to it, and therefore requests the Panel to replace the words "to have regard to" with the words "base our reasoning on".

6.51. The Panel made appropriate changes at paragraph 7.222, as well as a corresponding change at paragraph 7.267.

6.4 Claims concerning the twelfth measure ("Systematic Duty Variation")

6.52. Regarding paragraph 7.357, Russia requests the Panel to reflect argumentation set out in Russia's opening statement at the second meeting of the Panel. Russia proposes wording to that effect.

6.53. The European Union objects to Russia's request. According to the European Union, Russia's proposed modifications are not relevant since none of them concern the issue of a "significant number" of tariff lines.

6.54. The Panel considers that some of the arguments indicated in Russia's request are relevant to the issue identified at paragraph 7.357. Accordingly, we made appropriate changes to paragraph 7.357.

6.55. Regarding paragraph 7.372, Russia requests the Panel to reflect its responses to Question Nos. 106 and 107. Russia proposes wording to that effect.

6.56. The European Union objects to Russia's request. According to the European Union, Russia's proposed modifications would diminish the clarity of the Panel's Report.

6.57. The Panel considers that some of the arguments indicated in Russia's request are relevant to the discussion already reflected at paragraph 7.372. Accordingly, we made appropriate changes to that paragraph.

6.58. Regarding paragraph 7.395, Russia requests the Panel to reflect its argumentation set forth in its opening and closing statements at the second meeting of the Panel, as well as in its comments on the European Union's response to Question No. 117. Russia proposes wording to that effect.

6.59. The European Union objects to Russia's request. According to the European Union, the arguments indicated in Russia's request are not significantly different from those mentioned in the footnote accompanying paragraph 7.395, and in any event do not warrant the conclusion that they go to the question of whether the SDV could be said to be "general".

6.60. The Panel considers that some of the arguments indicated in Russia's request are relevant to the issue identified at paragraph 7.395. Accordingly, we made appropriate changes to paragraph 7.395, and deleted the accompanying footnote because it was no longer necessary in view of the change.

6.61. Regarding paragraph 7.408, the European Union states that the Report in other sections recognizes and analyses the relationship of the duties contained in the Illustrative List to the European Union's claims related to the Systematic Duty Variation (SDV). According to the European Union, it is therefore incorrect to say that those duties "do not relate to specific measures at issue covered by the panel request". The European Union further states that if the phrase were to refer to something other than the SDV, it would seem out of place and unnecessary for the Panel's reasoning with respect to its conclusion on the SDV. The European Union therefore requests that this sentence be omitted.

6.62. Russia objects to the European Union's request. In Russia's view, the sentence in question correctly reflects the fact that the European Union challenged the SDV as a single measure, but did not challenge the individual duties that constitute the SDV. According to Russia, the Panel made the necessary findings to secure a positive solution to the dispute.

6.63. The Panel deleted the relevant sentence at paragraph 7.408, as it was not essential.

7 FINDINGS

7.1 Overview of claims

7.1. In its request for the establishment of a panel, the European Union identifies 12 measures at issue, claiming that each of these 12 measures is inconsistent with Article II:1(a) and (b), first sentence, of the GATT 1994.[19]

7.2. Article II:1(a) and (b), first sentence, state in relevant part that:

> (a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.
>
> (b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein.

7.3. The first 11 challenged measures consist of customs duties required to be applied by Russia concerning 11 distinct tariff lines:

[19] In its request for establishment of a panel (panel request), the European Union claimed that Russia acted inconsistently with Article II:1(b), second sentence, of the GATT 1994. The European Union has not made this claim in its subsequent submissions and statements. The Panel does not, therefore, address this claim in these findings.

Challenged measure	Tariff line	Product category
The first measure	4810 22 900 0	Paper and paperboard products
The second measure	4810 29 300 0	Paper and paperboard products
The third measure	4810 92 300 0	Paper and paperboard products
The fourth measure	4810 13 800 9	Paper and paperboard products
The fifth measure	4810 19 900 0	Paper and paperboard products
The sixth measure	4810 92 100 0	Palm oil and its fractions
The seventh measure	1511 90 190 2	Palm oil and its fractions
The eighth measure	1511 90 990 2	Palm oil and its fractions
The ninth measure	8418 10 200 1	Combined refrigerator-freezers
The tenth measure	8418 10 800 1	Combined refrigerator-freezers
The eleventh measure	8418 21 100 0	Refrigerators

7.4. In addition, the European Union challenges as the twelfth measure an alleged unwritten measure that it terms the "Systematic Duty Variation" (SDV).

7.5. The European Union's 12 claims[20] can be grouped into three categories:

a. The first to sixth claims all relate to applied *ad valorem* duty rates allegedly in excess of bound *ad valorem* duty rates;

b. The seventh to eleventh claims all relate to applied combined duty rates allegedly in excess of bound duty rates:

   i. The seventh to ninth claims all relate to applied combined duty rates allegedly in excess of bound *ad valorem* duty rates;

   ii. The tenth and eleventh claims both relate to applied combined duty rates allegedly in excess of bound combined duty rates; and

c. The twelfth claim relates to the SDV, which allegedly results in an unspecified number of applied combined duty rates in excess of bound duty rates.

7.6. The Panel notes that the parties in this dispute have used the term "combined" duty rates as it is used in the Working Party Report on Russia's Accession (Russia's Working Party Report), to refer to duty rates sometimes described as "mixed" duty rates.[21] Paragraph 311 of Russia's Working Party Report explains that "combined (mixed) duties [a]re expressed in terms of alternative rates, one as an *ad valorem* rate and the other as a specific rate that serve[s] as a minimum rate of duty".[22] Such duties take the form "x% but not less than y per unit". For the purposes of this Report, we also use the term "combined" duty rates to refer to combined duties that include an additional *ad valorem* element. These duties take the form "z%; or x% but not less than y per unit; whichever is the lower". In respect of all 12 claims, the European Union requests the Panel to find that Russia is or was required to apply duty rates in excess of the relevant bound duty rates in Russia's Schedule of Concessions (Schedule)[23], and that Russia therefore acted inconsistently with Article II:1(b), first sentence. The European Union additionally requests the Panel to find as a consequence that Russia has also acted inconsistently with Article II:1(a), by according to imports from other Members treatment less favourable than that provided for in its Schedule. The European Union challenges all 12 measures as such, and not as applied.[24]

7.7. In respect of the sixth measure, the European Union has made two distinct claims. The first claim concerns the *ad valorem* duty rate that was provided for at the time of the Panel's establishment, but which was to become effective only on 1 January 2016. The European Union requests that in respect of the duty rate to be applied as of 1 January 2016, the Panel make a

[20] To recall, in respect of each "claim", the European Union requests findings under both Article II:1(a) and (b), first sentence.

[21] Report of the Working Party on the Accession of Russia, WT/ACC/RUS/70, WT/MIN(11)/2, (Russia's Working Party Report), para. 311.

[22] Russia's Working Party Report, para. 311.

[23] Schedule CLXV – The Russian Federation, Annex I to the Protocol of Accession of the Russian Federation, circulated in WT/ACC/RUS/70/Ad.1, (Russia's Schedule), (Exhibit EU-9).

[24] Annex A-1, Preliminary Ruling, paras. 2.25-2.26.

finding of inconsistency with Article II:1(b), first sentence, and consequently Article II:1(a). The European Union's second claim concerns the temporary reduction of the applied duty rate to the level of the bound duty rate. This reduced duty rate was allegedly in force at the time of the Panel's establishment. The European Union requests the Panel to find that at the time of the Panel's establishment Russia was required to act inconsistently with Article II:1(a) because it only temporarily reduced the applied duty rate to the level of the bound duty rate.

7.8. As noted in paragraph 1.14 above, Russia submitted a request for a preliminary ruling pursuant to Article 6.2 of the DSU. Russia challenged a number of aspects of the European Union's panel request. Russia requested the Panel to find that all of the European Union's claims were outside the Panel's terms of reference.[25] The Panel's preliminary ruling is contained in Annex A-1 of this Report, and forms an integral part of the present findings. As indicated therein, we concluded that none of the claims or measures identified by European Union in its panel request falls outside the Panel's terms of reference.

7.9. As regards the merits of the European Union's claims, Russia initially requested that the Panel reject all of the European Union's claims in this dispute. Subsequently, Russia requested only that the Panel reject the European Union's claims in respect of the sixth to twelfth measures at issue.[26]

7.10. The Panel will address the European Union's claims in three separate parts, consistent with the three categories described in paragraph 7.5 above. We shall first address the European Union's claims in respect of applied[27] *ad valorem* duty rates allegedly in excess of bound duty rates (the first to sixth measures); second, we address the European Union's claims in respect of applied combined duty rates allegedly in excess of bound duty rates (the seventh to eleventh measures); and third, we address the European Union's claim in respect of the SDV (the twelfth measure).

7.2 General interpretative issues arising under Article II:1(b), first sentence, of the GATT 1994

7.11. As all 12 of the challenged measures are claimed to be in breach of Article II:1(b), first sentence, we will address as a preliminary matter two general interpretative issues that arise in the context of Article II:1(b), first sentence.

7.12. First, the European Union argues that because Article II:1 protects competitive opportunities of imported products and not trade flows as such, a finding of inconsistency with Article II:1 does not hinge upon the actual effects of the contested measure in the marketplace.[28] The European Union also notes that Appellate Body jurisprudence indicates that a finding of inconsistency under Article II:1(b), first sentence, can result directly from the structure and design of an applied customs duty.[29] Therefore, according to the European Union, all that is required to ground a finding of inconsistency with Article II:1 is the existence of ordinary customs duties that are in excess of those provided in the relevant schedule.[30]

7.13. Second, the European Union notes that the phrase "in excess of" not only appears in Article II:1(b), first sentence, but also in Article III:2, first sentence, of the GATT 1994[31], where it has been interpreted as prohibiting even the smallest amount of excess, and is not conditional on a trade effects test, qualified by a *de minimis* standard, or contingent on showing evidence of actual

[25] Russia's request for a preliminary ruling, para. 67.

[26] Russia's second written submission, para. 108. See also generally Russia's opening and closing statements at the first and second meetings of the Panel.

[27] We use the term "applied" duty rates to mean duty rates either "actually applied" or "applicable".

[28] European Union's first written submission, para. 38 (referring to Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 215 and 221; and Panel Reports, *Argentina – Hides and Leather*, para. 11.20; *US – COOL*, para. 7.571; *EC – IT Products*, para. 7.762).

[29] European Union's first written submission, para. 40 (referring to Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 53-54).

[30] European Union's first written submission, para. 38 (referring to Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 215 and 221; and Panel Reports, *Argentina – Hides and Leather*, para. 11.20; *US – COOL*, para. 7.571; *EC – IT Products*, para. 7.762).

[31] Article III:2, first sentence, requires that Members not impose on products imported from other Members internal taxes (or other internal charges) in excess of those applied to like domestic products.

transactions in which taxes or duties were applied "in excess".[32] The European Union argues that Article II:1(b), first sentence, similarly applies to duties that are in excess of bound duty rates even when the margin by which they exceed those duty rates is small, even when they exceed those duty rates only with respect to some categories of transactions, and even when it cannot be positively established that actual transactions have already taken place.[33]

7.14. Russia submits that the European Union has failed to explain "why this analogy [to Article III:2] is … appropriate". In Russia's view, the European Union's interpretation is merely an "unsubstantiated assertion".[34] Thus, Russia argues, the European Union has failed to meet its burden of proof. Russia additionally argues in respect of evidence of actual import transactions that where a complaining party alleges that an applied duty rate exceeds the bound duty rate only within a certain price range, the complaining party should provide evidence of the actual application of duties in excess of the bound rates because the relevant products may in practice be traded in price ranges in which the applied duties would not exceed the bound rates.[35]

7.15. The Panel first addresses the issue of whether, in a dispute involving as such claims, a finding of inconsistency with Article II:1(b), first sentence, is conditional on evidence of actual import transactions concerning products falling within the relevant tariff lines, or on a "trade effects" test (that is to say, evidence of adverse trade effects resulting from the challenged measures).

7.16. With respect to evidence of actual import transactions, we note that in *Colombia – Textiles*[36], the responding party argued that the complaining party had not established a *prima facie* case because it had not "provided any evidence to show 'that apparel and footwear [we]re being imported at prices which violated the levels bound by [the responding party].'"[37] The panel in that dispute stated that:

> [I]n *Argentina – Textiles and Apparel,* in reaching a finding of inconsistency with Article II:1 of the GATT 1994, the panel and the Appellate Body based themselves on the "very nature" (in the words of the panel) or the "structure and design" (in the words of the Appellate Body) of the measure at issue. The empirical evidence on the application of the measure examined by the Panel [in *Argentina – Textiles and Apparel*] did not constitute indispensable evidence for its analysis but rather served to confirm the previous conclusions regarding the "nature" of the measure.
>
> In the context of [*Colombia – Textiles*], … Decree No. 456 is sufficient in itself to conduct an analysis of whether Panama has established a *prima facie* case that the compound tariff is inconsistent with Article II:1(a) and Article II:1(b), first sentence, of the GATT 1994.[38]

7.17. We see no reason to follow a different approach in respect of this issue. Thus, we will conduct our analysis on the basis that a finding of inconsistency under Article II:1(b), first sentence, does not require a complaining party to demonstrate the existence of actual transactions concerning products falling within the alleged tariff lines. It follows that a complaining party also does not need to demonstrate the existence of actual transactions involving relevant products that fall within particular price ranges. Indeed, we note that prices may change over time. Therefore, we do not consider that the absence of evidence of actual transactions in a given price range proves that transactions in that price range would or could never exist.

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[32] European Union's first written submission, para. 40 (referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 23, DSR 1996:I, 97, at 115; and Panel Report, *Mexico – Taxes on Soft Drinks*, paras. 8.52 and 8.57).

[33] European Union's first written submission, para. 40.

[34] Russia's first written submission, para. 19.

[35] Russia's first written submission, paras. 18-19; second written submission, para. 75.

[36] We note that the panel report in *Colombia – Textiles* was circulated subsequent to the second meeting of the Panel with the parties in this dispute.

[37] Panel Report, *Colombia – Textiles*, para. 7.113 (referring to Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 53, 55 and 62, and quoting Colombia's opening statement at the first meeting of the Panel, para. 60).

[38] Panel Report, *Colombia – Textiles*, paras. 7.122-7.123. (footnote omitted) See also paras. 7.113-7.124.

7.18. In respect of adverse trade effects, the Appellate Body has explained that trade effects are "irrelevant" to findings under Article III of the GATT 1994 because "Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products."[39] The panel in *EC – IT Products* explained that, similarly, Article II generally, without reference to any particular paragraph, protects expectations of a competitive relationship (or conditions of competition) and not expectations of any particular trade volume.[40] This is in accord with the statement of the panel in *Argentina – Hides and Leather* that "Article XI:1, like Articles I, II and III … protects competitive opportunities of imported products, not trade flows."[41] Further support for the view that evidence of actual trade effects is not essential can be found in the Appellate Body's observation that "the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade".[42] As Article II:1(b), first sentence, is concerned with tariff bindings and thus market access conditions, it is difficult to think of another discipline of the GATT 1994 for which it would be more true to say that it is intended to protect not only existing trade, but also the security and predictability needed to conduct future trade. Thus, in accordance with the jurisprudence cited above, we consider that Article II:1(b), first sentence, protects conditions of competition, and not trade volumes.

7.19. This view is consistent with the approach followed by the Appellate Body in *Argentina – Textiles and Apparel.* As mentioned above, there the Appellate Body indicated that a finding of inconsistency with Article II:1(b), first sentence, can be made on the basis of the structure and design of an impugned duty.[43] The Appellate Body did not rely on any evidence of adverse trade effects in making its findings of inconsistency. Similarly, and as discussed above, the panel in *Colombia – Textiles* made findings of inconsistency based solely on the "text" of the relevant measures.[44]

7.20. For these reasons, we will conduct our analysis on the basis that a finding of inconsistency under Article II:1(b), first sentence, does not require a complaining party to demonstrate adverse trade effects concerning products falling within the relevant tariff lines.

7.21. On the second issue, whether Article II:1(b), first sentence, permits an applied duty rate to exceed the relevant bound duty rate up to a *de minimis* level, we recall that Article II:1(b), first sentence, prohibits the imposition of ordinary customs duties "in excess" of those set forth in a Schedule.[45] The Appellate Body stated in this respect that "[a] tariff binding in a Member's Schedule provides an upper limit on the amount of duty that may be imposed, and a Member is permitted to impose a duty that is *less than that* provided for in its Schedule."[46] Similarly, the panel in *EC – IT Products* stated that "if we were to determine that the applied duty rate exceeds the bound duty rate, then … the application of customs duties would be 'in excess' of those provided for in the EC Schedule".[47] While these statements do not explicitly address the issue of a *de minimis* exception, they equally do not suggest that Members may exceed the bound duty rates even minimally. A more specific inquiry is therefore in order.

7.22. The dictionary definition of the noun "excess" is "[t]he amount by which one number or quantity exceeds another".[48] More specifically, "in excess of" means "more than".[49] Thus, as a textual matter, a particular number or quantity is "in excess of" another number or quantity if it is greater, regardless of the extent to which it is greater.

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[39] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 15, DSR 1996:I, 97, at 110.
[40] Panel Report, *EC – IT Products*, para. 7.757.
[41] Panel Report, *Argentina – Hides and Leather*, para. 11.20 (footnotes omitted).
[42] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82 (footnote omitted).
[43] Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 53, 55 and 62.
[44] Panel Report, *Colombia – Textiles*, para. 7.123.
[45] We have explained above that a finding of inconsistency with Article II:1(b), first sentence, requires no demonstration of adverse trade effects. Consequently, it is not relevant to examine whether there could be adverse trade effects that are *de minimis*.
[46] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 46 (emphasis added).
[47] Panel Report, *EC – IT Products*, para. 7.102.
[48] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 886.
[49] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 886.

7.23. Looking at the context of Article II:1(b), first sentence, we note that Article III:2, first sentence, of the GATT 1994 is cast in very similar terms and in fact uses the phrase "in excess of":

> The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject … to internal taxes or other internal charges of any kind *in excess* of those applied … to like domestic products (emphasis added).

7.24. The Appellate Body has interpreted this provision to mean that:

> Even the smallest amount of "excess" is too much. The prohibition of discriminatory taxes in Article III:2, first sentence, is not conditional on a "trade effects test" nor is it qualified by a *de minimis* standard.[50]

7.25. Russia effectively asks us to take no notice of this statement concerning Article III:2, first sentence, in our interpretative analysis under Article II:1(b), first sentence. Indisputably, these are two different provisions with different scopes of application. Article III:2, first sentence, concerns internal taxes applied to imported goods, whereas Article II:1(b), first sentence, relates to customs duties applied to imports at the border. However, both Articles II:1(b) and III:2 concern the imposition of charges on products, and both provisions require an assessment of whether an imposed charge "exceeds" another charge (the customs duty set forth in a Member's schedule or the internal tax applied to like domestic products). Moreover, both customs duties and internal taxes can, from an economic perspective, be used as instruments to afford protection to domestic production. Taking into account the Appellate Body's interpretation o in respect of Article III:2, first sentence, it would be incongruous if an internal tax could *not* be used to provide even the slightest degree of protection to domestic "like" products under Article III:2, first sentence, but additional protection *could* be provided to such products through the application of a duty rate that slightly exceeds the bound duty rate.

7.26. In view of the aforementioned substantial similarities between Articles II:1(b), first sentence, and III:2, first sentence, it appears to us that the Appellate Body's interpretation of the identical phrase "in excess of" in Article III:2, first sentence, is relevant to the interpretation of Article II:1(b), first sentence, and that these two provisions should be interpreted harmoniously. We observe in addition that this being an interpretative issue, we do not agree with Russia that it was for the European Union to prove the legal correctness of its reliance on jurisprudence concerning Article III:2, first sentence.[51]

7.27. We turn, finally, to the object and purpose of the GATT 1994, which the Appellate Body has stated is "to preserve the value of tariff concessions negotiated by a Member with its trading partners, and bound in that Member's Schedule".[52] The Appellate Body has further explained that "the security and predictability of 'the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade' is an object and purpose of the *WTO Agreement*, generally, as well as of the GATT 1994".[53] In our view, a *de minimis* exception to the obligation not to exceed tariff bindings, far from preserving the value of tariff concessions, would allow importing Members to diminish their value, however slightly. Such an exception would also detract from the security and predictability of tariff concessions inasmuch as it would then be unclear *ex ante* precisely what tariff treatment would be accorded to imports.

7.28. In the light of the text, context, and object and purpose of Article II:1(b) first sentence, we find that Article II:1(b), first sentence, admits of no *de minimis* exception. Consequently, an

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[50] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 23, DSR 1996:I, 97, at 115 (footnotes omitted).

[51] Appellate Body Report, *EC – Tariff Preferences*, para. 105 ("[I]t is not the responsibility of the [party invoking a WTO provision] to provide us with the legal interpretation to be given to [that] particular provision").

[52] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47.

[53] Appellate Body Report *EC – Computer Equipment*, para. 82 (referring to Panel Report, *EC - Computer Equipment*, para. 8.25). See also Appellate Body Report, *EC – Chicken Cuts*, para. 243; and Panel Report, *Colombia – Textiles*, para. 7.128).

importing Member in our view must not exceed a tariff binding, even if the extent of the excess is only minimal.

7.29. As an additional but separate matter, it is useful to address in this section one additional interpretative issue arising in respect of Article II:1(b), first sentence, even though it is relevant only to the claims concerning the seventh to eleventh measures. In that context, the European Union has argued that under Article III:2, first sentence, Members may not balance more favourable treatment of imported products in some instances against less favourable treatment of the same imported products in other instances.[54] The European Union argues that this interpretation applies equally in the context of Article II:1.

7.30. Russia has not contested this particular argument. However, we recall Russia's general concerns regarding the appropriateness of transposing jurisprudence concerning Article III:2 to Article II:1.[55]

7.31. We note in this regard that according to the panel in *Argentina – Hides and Leather*:

> The mere fact that, under certain circumstances, imports are taxed at a lower rate than internal sales is not sufficient to exclude a violation of Article III:2, first sentence, in accordance with the well-established principle that more favourable treatment of imports in certain instances may not be balanced against less favourable treatment of imports in other cases.[56]

7.32. Moreover, we find relevant the following observation by the Appellate Body, which refers specifically to the imposition of customs duties in excess of a bound duty rate:

> There is no indication in previous Appellate Body Reports addressing the *Anti-Dumping Agreement* or in the Harmonized System to indicate that levying tariffs in excess of a bound rate on the importation of a product could be "offset" or justified by levying tariffs below the bound rate on another importation of that product.[57]

7.33. In this respect, we recall that Article II:1(b), first sentence, is not subject to a *de minimis* exception. Logically, this finding must also cover a minor (or major) departure from a bound duty rate in respect of particular import transactions even if accompanied or followed by application of a symmetrically lower duty rate in respect of other import transactions. We consider that the reasoning we have developed above in paragraphs 7.21 to 7.28 applies with equal force to the interpretative issue at hand. We therefore find that Article II:1(b), first sentence, prohibits duties imposed in excess of a bound duty, even if these duties are balanced or offset (at the same time or later) by duties imposed on identical products that are below the bound duty.

7.3 Claims concerning applied *ad valorem* duty rates that allegedly exceed bound *ad valorem* duty rates (the first to sixth measures)

7.34. The Panel now turns to assess the European Union's first set of claims, which concern the first to sixth measures at issue. The European Union claims that the *ad valorem* duty rates that the CCT requires Russia to apply in respect of these measures are in excess of the bound *ad valorem* duty rates contained in Russia's Schedule. According to the European Union, the measures are therefore inconsistent as such with Article II:1(b), first sentence, of the GATT 1994, and consequently Article II:1(a) of the GATT 1994. As mentioned above[58], the sixth measure involves a temporary reduction of the applied duty rate. According to the European Union, this temporary duty reduction also renders the sixth measure independently inconsistent as such with Article II:1(a) of the GATT 1994, as the measure at the same time provides for a future duty rate

[54] European Union's second written submission, para. 73 (referring to Panel Report, *Argentina – Hides and Leather*, para. 11.260).
[55] See paragraph 7.14 above.
[56] Panel Report, *Argentina – Hides and Leather*, para. 8.176 (referring to GATT Panel Reports, *US - Tobacco*, para. 98; *US - Section 337*, para. 5.14; and Panel Report, *US - Gasoline*, paras. 6.14-6.15).
[57] Appellate Body Report, *US –Softwood Lumber V (Article 21.5 – Canada)*, para. 115.
[58] See paragraph 7.7 above.

that exceeds the bound duty rate. We therefore address the first to fifth measures together, before addressing the sixth measure separately.

7.3.1 Claims concerning the first to fifth measures

7.35. We first turn to the European Union's claims concerning the first to fifth measures at issue, which concern *ad valorem* duty rates required to be applied by Russia in respect of tariff lines 4810 22 900 0, 4810 29 300 0, 4810 92 300 0, 4810 19 900 0, and 4810 13 800 9.

7.36. The European Union claims that the duty rates required to be applied by Russia in respect of these tariff lines are in excess of the relevant bound duty rates, and that is the first to fifth measures are therefore inconsistent as such with Article II:1(b), first sentence, and consequently inconsistent as such with Article II:1(a), of the GATT 1994.[59]

7.37. Russia initially suggested that the relevant bound duty rates inscribed in its Schedule reflect errors, and that it attempted to correct those errors in its Schedule. According to Russia, the European Union did not act in good faith by objecting to this attempt.[60] Subsequently, Russia stated that it was not raising this as a defence.[61] Russia did not put forward additional arguments specific to these claims of the European Union.

7.38. The Panel will proceed by describing the measures and applied duty rates at issue, before assessing the consistency of the challenged measures under Article II:1.

7.3.1.1 Measures and applied duty rates at issue

7.39. According to the European Union, Russia imposes an *ad valorem* duty rate of 15% for products imported under tariff lines 4810 22 900 0 and 4810 92 300 0, as required by the CCT as amended by Decision No. 54 of the Board of the Eurasian Economic Commission (Decision No. 54). Additionally, according to the European Union, Russia imposes an *ad valorem* duty rate of 10% for products imported under tariff lines 4810 29 300 0, 4810 13 800 9, and 4810 19 900 0, as required by the CCT as amended by Decision No. 9 of the Board of the Eurasian Economic Commission (Decision No. 9) and Decision No. 77 of the Board of the Eurasian Economic Commission (Decision No. 77).[62]

7.40. Russia has not specifically contested that it imposes these duty rates as required by the CCT.

7.41. The Panel notes that there is no dispute between the parties as to the *ad valorem* duty rates required to be applied by Russia in respect of the first five measures. Based on the evidence presented, we find that the relevant applied duty rates are as follows:

Challenged measure	Tariff line	Russia's applied duty rate
The first measure	4810 22 900 0	15%[63]
The second measure	4810 29 300 0	10%[64]
The third measure	4810 92 300 0	15%[65]
The fourth measure	4810 13 800 9	10%[66]
The fifth measure	4810 19 900 0	10%[67]

[59] European Union's first written submission, para. 50.
[60] Russia's first written submission, paras. 47-64 and 80-86.
[61] Russia's responses to Panel question Nos. 40 and 59.
[62] The European Union indicates that all duty rates required to be applied by Russia and challenged in these proceedings can be located within the Common Customs Tariff of the Eurasian Economic Union (CCT), as amended by certain Decisions of the Council of the Eurasian Economic Commission, and certain Decisions of the Board of the Eurasian Economic Commission. European Union's first written submission, para. 33.
[63] Section X, Chapter 48 of the CCT, as amended by Decision No. 54 of the Board of the Eurasian Economic Commission, (Decision No. 54 of the Board), (Exhibit EU-3).
[64] Section X, Chapter 48 of the CCT, as amended by Decision No. 9 of the Board of the Eurasian Economic Commission, (Decision No. 9), (Exhibit EU-4).
[65] Decision No. 54 of the Board, (Exhibit EU-3).
[66] Decision No. 9, (Exhibit EU-4); Section X, Chapter 48 of the CCT, as amended by Decision No. 77 of the Board of the Eurasian Economic Commission, (Decision No. 77), (Exhibit EU-5).

7.42. In respect of these measures, we also observe that they were not adopted by Russia, but by the Eurasian Economic Union (EAEU), an international organization of which Russia is a member state.

7.43. The European Union argues that Russia is responsible for the challenged measures because Russia committed in its Working Party Report to ensure that measures adopted by the EAEU would be aligned with Russia's WTO obligations. The European Union refers to various provisions of Russia's Working Party Report in support of this assertion. According to the European Union, the EAEU is a customs union and, in its view, the panel report in *Turkey – Textiles* stands for the proposition that the members of a customs union may be held responsible in WTO dispute settlement for acts of that customs union, at least in certain circumstances. In the European Union's view, the fact that the legal instruments pursuant to which the types of tariff treatment at issue in this dispute are accorded were adopted by the bodies of the EAEU does not mean that the measures at issue are not Russia's measures, within the meaning of Article 3.3 of the DSU. The European Union states that the CCT is Russia's customs tariff. The European Union additionally notes that Russia has treated the challenged measures as if they were its own measures, and has not denied that it actually applies duty rates enacted by the EAEU or that this happens pursuant to legal instruments enacted by bodies of the EAEU.[68]

7.44. Russia has not commented on this issue.

7.45. In considering this issue, the Panel first notes Russia's Working Party Report, which indicates that Russia is obliged both under general international law and its domestic law to apply the duty rates contained in the CCT.[69] We further note the evidence submitted by the European Union, which includes a number of customs declarations concerning specific import transactions, including transactions under the tariff lines at issue in this dispute. These customs declarations demonstrate that, for the relevant tariff lines, Russia has applied the duty rates set forth in the CCT.[70] Customs declarations have been presented in support of the first to fifth and seventh to eleventh measures.

7.46. It is clear to us that the act of applying the duty rates (i.e. the levying of duties at the time of importation) is directly attributable to Russia. However, as we have indicated, the European Union challenges the measures at issue "as such", independently of any act of application. More specifically, it challenges duty rates that Russia is required by the CCT to apply. Nevertheless, the aforementioned two elements, i.e. Russia's international and domestic law obligations in respect of the CCT and Russia's demonstrated conduct in respect of duty rates contained in the CCT, in our view justify a presumption that Russia applies the duty rates contained in the CCT that are at issue in this dispute. In our view, the relevant CCT requirements are attributable to Russia, insofar as, on the evidence before us, it can be presumed that the CCT requirements will lead to the relevant duty rates being applied by Russia. Russia has not sought to rebut that presumption. Nor has Russia otherwise contested the European Union's assertion that the challenged measures are

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[67] Decision No. 9, (Exhibit EU-4); Decision No. 77, (Exhibit EU-5).

[68] European Union's first written submission, paras. 22-27 (referring to Russia's Working Party Report, paras. 154-155, 185, 214 and 275) and fn 14 (referring to Panel Report, *Turkey – Textiles*, para. 9.6); responses to Panel question Nos. 111 and 123.

[69] As stated at paragraph 157 of Russia's Working Party Report (cited in the European Union's response to Panel question No. 123):

> The representative of the Russian Federation explained that [Customs Union] Agreements, once they entered into force, were international treaties of the Russian Federation, and, with the exception of the Constitution of the Russian Federation and Federal constitutional laws, would prevail, in the event of a conflict, over the provisions of Federal laws and other normative legal acts in the Russian Federation. With regard to [Customs Union] Commission Decisions, he explained that the status of such Decisions in the legal system of the Russian Federation corresponded to that which the Decision would have had, if it had been adopted by the Federal Executive Body responsible for regulating the subject matter at the moment when the CU Commission was delegated the relevant authority. Russia's Working Party Report, para. 157.

As explained elsewhere by the European Union, the Customs Union of the Republic of Belarus, Republic of Kazakhstan and the Russian Federation preceded the formation of the EAEU. European Union's first written submission, para. 22.

[70] See Declarations of Goods and Supplementary Lists to those Declarations of Goods, (Exhibits EU-10, EU-11, EU-12, EU-13, EU-14, EU-15, EU-16, EU-17 and EU-18).

attributable to Russia. In fact, Russia has asked the Panel to consider some of the measures as subsequently amended by the EAEU, and to make positive findings that these amended measures are consistent with Russia's WTO obligations.[71] In asking the Panel to find that the measures at issue are consistent with its WTO obligations, Russia seems to us to rely on amended duty rates that the CCT requires Russia to apply, in an attempt to demonstrate Russia's compliance with its WTO obligations.

7.47. In the light of the foregoing, we proceed with our analysis of the first to fifth measures on the basis that the CCT requirements establishing the duty rates applicable to the tariff lines at issue are attributable to Russia.

7.3.1.2 Consistency with Article II:1(b), first sentence, of the GATT 1994

7.48. The European Union claims that the first to fifth measures are inconsistent with Article II:1(b), first sentence, and consequently Article II:1(a). Given that the European Union's claim under Article II:1(a) is a consequential claim, we commence our analysis with the claim under Article II:1(b), first sentence. The Appellate Body and previous panels have followed this approach where the imposition of a customs duty was challenged under both Article II:1(a) and (b), first sentence, since the language of Article II:1(b), first sentence, "is more specific and germane".[72]

7.49. To determine, as Article II:1(b), first sentence, requires, whether a product has been subject to ordinary customs duties "in excess of those set forth and provided" in Russia's Schedule, it is first necessary to ascertain the relevant bound duty rates. Next, we must examine whether the challenged measures impose applied duty rates "in excess" of the bound duty rates, resulting in the imposition of duties in excess of those provided in the Schedule, and are therefore inconsistent with Article II:1(b), first sentence.

7.3.1.2.1 Relevant bound duty rates

7.50. The European Union contends that the bound *ad valorem* duty rate in Russia's Schedule is 5% for all five tariff lines at issue.[73] The European Union points out in this respect that after the establishment of this Panel, Russia initiated a procedure for a formal rectification and modification of its Schedule, including the bound duty rates for these five tariff lines, based on alleged errors in the Schedule that was annexed to its Protocol of Accession[74], evidenced, in Russia's view, by discrepancies between the Schedule and the bilateral agreements signed by Russia and certain Members prior to Russia's accession. In the European Union's view, Russia's proposed modification can have no bearing on the claims before the Panel, because the European Union objected to Russia's request for modification, and consequently the authentic text of the Schedule remained unchanged.[75]

7.51. The European Union also submits that, in any event, no such alleged error occurred. The European Union points out that Russia's Draft Schedule was prepared and submitted by Russia, ultimately verified by Russia and the other Members, and became Russia's Schedule as of the date of accession. The European Union considers that no error was made in the process of compiling Russia's Schedule, and if any error was made, it could only be attributed to Russia itself. In the

[71] Russia's second written submission, para. 108. In this connection, we recall Russia's comment at the first meeting of the Panel that "certain amendments to the CCT were introduced in particular due to the requests of the European Union 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 European Union". Russia's opening statement at the first meeting of the Panel, para. 86. We note in this respect paragraph 275 of Russia's Working Party Report (which is incorporated into paragraph 2 of its Protocol of Accession by way of reference to paragraph 1450 of the Working Party Report), in which Russia undertook to ensure that "from the date of accession, the application of all laws, regulations and other measures affecting importation or exportation of goods, whether by the Russian Federation or the competent bodies of the [Customs Union], would be in conformity with relevant provisions of the WTO Agreement". European Union's first written submission, para. 26.

[72] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 45.

[73] European Union's first written submission, paras. 42-47 and 50.

[74] Protocol on the Accession of the Russian Federation, 17 December 2011, WT/MIN(11)/24, WT/L/839, (Russia's Accession Protocol).

[75] European Union's first written submission, paras. 17-21 and 62-63.

European Union's view, to permit Russia to amend its Schedule in the context of a dispute would diminish the value and certainty of Members' concessions, thus not only contravening the basic objectives of the GATT 1994, but also diminishing the rights and obligations provided in the covered agreements, an act expressly prohibited by Article 3.2 of the DSU.[76]

7.52. Russia initially argued that it had attempted to rectify and modify its "Schedule of Concessions and Commitments on Goods"[77] under the 1980 Decision on Procedures for Modification and Rectification of Schedules of Tariff Concessions (1980 Decision)[78], to correct an error of a purely formal character in its Schedule, and that the European Union's objection to that attempt was not made in good faith.[79] Russia argued that under paragraph 325 of its Accession Protocol, its Schedule could not contain anything that went beyond the results of the bilateral market access negotiations that took place during its accession. According to Russia, the current commitments in its Schedule do not properly reflect the results of the bilateral market access negotiations. Russia maintained that errors occurred in the transposition of its draft commitments from the World Customs Organization Harmonized System Nomenclature 1996 to the Harmonized System Nomenclature 2007, and that those errors were ultimately included in its Schedule. Russia noted that its currently applied duty rates (at least in respect of the first to fifth measures) are not in excess of the duty rates indicated in the "Bilateral Protocol on Market Access on Goods between the Russian Federation and the European Union".[80] Furthermore, Russia noted that Article 79 of the Vienna Convention on the Law of Treaties (Vienna Convention) is part of customary international law and provides for rules regarding correction of errors in treaties. Russia suggested that the European Union, by objecting only to the formal "character" of the error rather than the existence of the error, had implicitly acknowledged the presence of errors in the Schedule, and therefore diminished Russia's rights under Article 79.[81]

7.53. In responses to subsequent questions from the Panel, Russia indicated that it was not challenging the European Union's objection to the request for rectification of its Schedule. Russia indicated that its statements on this issue were "for information purposes only, and reflect[] the reaction to the questions raised by the European Union in its First Written Submission".[82] Additionally, Russia stated that, in its view, Article 79 of the Vienna Convention establishes general rules for correction of errors, and that such general rules may be applied cumulatively with, and may clarify, the provisions of the 1980 Decision.[83] Nevertheless, Russia stated that "[t]he current concessions of Russia are reflected in 'Schedule CLXV'."[84]

7.54. Based on the foregoing, the Panel notes that for purposes of the present proceedings, there is no dispute between the parties as to the status of the relevant bound duty rates contained in Russia's Schedule. In considering this issue, we observe that paragraph 2 of the 1980 Decision allows Members to introduce changes in the authentic texts of the Schedules to reflect "amendments or rearrangements which do not alter the scope of a concession", as well as "other rectifications of a purely formal character". Paragraph 3 states that any proposed "changes … shall be communicated by the Director-General to all the contracting parties and shall become a Certification *provided that no objection has been raised by a contracting party within three months*".[85] In responses to questions from the Panel, Russia acknowledged that when its proposed

[76] European Union's first written submission, paras. 77-78.

[77] Communication from the Committee on Market Access, Rectification and Modification of Schedules, Schedule CLXV – The Russian Federation, 1 May 2015, G/MA/TAR/RS/406, (Russia's Request for Rectification), (Exhibit EU-1).

[78] Decision of 26 March 1980 on Procedures for Modification and Rectification of Schedules of Tariff Concessions, L/4962, adopted by the Council, C/M/139, (1980 Decision); and Russia's Request for Rectification, (Exhibit EU-1).

[79] Russia's first written submission, paras. 47-64 and 80-86.

[80] Russia's first written submission, para. 45.

[81] Russia's first written submission, paras 94-97. See also Russia's response to Panel question No. 40.

[82] Russia's response to Panel question No. 40. Russia also observed that "[a]s the Russian Federation stated at the first meeting the issue of rectification was raised by the European Union in its First Written Submission, the response of the Russian Federation on this issue is just a reaction to the statement made by the EU". Russia's response to Panel question No. 59.

[83] Russia's response to Panel question No. 57.

[84] Russia's response to Panel question No. 50. See also Russia's opening statement at the second meeting of the Panel, para. 8; and Russia's response to Panel question No. 59.

[85] 1980 Decision, para. 3 (emphasis added).

rectification was circulated in document G/MA/TAR/RS/406[86] in accordance with its request, both the European Union and Japan objected to Russia's proposed rectification.[87] No further action was taken with respect to Russia's Schedule. In particular, no certification was circulated by the Director-General. As indicated, Russia is not challenging the European Union's objection in the context of the present proceedings and has not questioned Japan's objection. Thus, for the purposes of our task in this dispute, Russia's Schedule remains unaltered.

7.55. Furthermore, we note that under Article 79 of the Vienna Convention, a treaty error can be corrected either following an agreement between the signatory states and the contracting states as to the existence of an error (under the first paragraph of Article 79), or in the absence of an objection to a proposed correction of an error that has been notified by a treaty depositary (under the second paragraph).[88] In the light of Russia's position that "[t]he current concessions of Russia are reflected in 'Schedule CLXV'", and bearing in mind that Russia has not invoked Article 79 in this case but refers to it only for information, it seems to us that there is no need for us to examine whether Article 79 applies in this dispute or whether it could be applied cumulatively with the 1980 Decision. We observe in any event that, even if it did apply, as indicated above, both the European Union and Japan objected to Russia's proposed rectification. In these circumstances, we see no basis on which the alleged error in Russia's Schedule could be considered to have been corrected under either paragraph of Article 79. On the basis of the foregoing, we find that there has been no change to the relevant bound duty rates contained in Russia's current Schedule.

7.56. In the light of the above, we find that the duty rates are 5% in respect of all five tariff lines corresponding to the first to fifth measures at issue.[89]

7.3.1.2.2 Comparison of applied and bound duty rates

7.57. The European Union argues that Russia is required to apply a duty rate of 15% in respect of the first and third measures, and of 10% in respect of the second, fourth, and fifth measures. The European Union notes that the bound *ad valorem* duty rate is 5% for all five tariff lines. According to the European Union, products falling under these five tariff lines are therefore subject to ordinary customs duties in excess of those provided in Russia's Schedule, which is inconsistent with Article II:1(b), first sentence.[90]

7.58. Russia did not specifically contest that its applied duty rates exceed the corresponding bound duty rates in respect of the first to fifth measures.[91]

7.59. The Panel notes that in the case of the first to fifth measures, for which the applied and bound duty rates are both expressed in *ad valorem* terms, the determination of whether Russia has imposed excessive customs duties is straightforward.[92]

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[86] Russia's Request for Rectification, (Exhibit EU-1).

[87] Russia's response to Panel question No. 40; EU objection to the request of the Russian Federation to modify/rectify its WTO bound accession schedule CLXV, (Exhibit EU-1).

[88] Article 79 of the Vienna Convention provides as follows:

> 1. Where, after the authentication of the text of a treaty, the signatory States and the contracting States are agreed that it contains an error, the error shall, unless they decide upon some other means of correction, be corrected …
>
> 2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and the contracting States of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit: (a) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a procès-verbal of the rectification of the text and communicate a copy of it to the parties and to the States entitled to become parties to the treaty; (b) an objection has been raised, the depositary shall communicate the objection to the signatory States and to the contracting States.

[89] Russia's Schedule, (Exhibit EU-9).

[90] European Union's first written submission, paras. 42-47 and 50.

[91] In addition to Russia's statements noted in paragraph 7.53 above, we note that in its second written submission, the Russian Federation did not address the first to fifth measures, and did not make any request of the Panel in respect of these measures. See generally Russia's second written submission and statements at the second meeting of the Panel.

[92] The panel in *Colombia – Textiles* stated in this regard that:

7.60. As explained in sections 7.3.1.1 and 7.3.1.2.1 above, the relevant applied and bound duty rates are as follows:

Tariff line	Russia's applied duty rate	Russia's bound duty rate[93]
4810 22 900 0	15%[94]	5%
4810 29 300 0	10%[95]	5%
4810 92 300 0	15%[96]	5%
4810 13 800 9	10%[97]	5%
4810 19 900 0	10%[98]	5%

7.61. A direct comparison of Russia's applied and bound *ad valorem* duty rates in respect of the first to fifth measures at issue indicates that for each measure, Russia has imposed ordinary customs duties higher than those set forth and provided in its Schedule.[99]

7.3.1.2.3 Conclusion

7.62. For the reasons set out above, the Panel finds that for each of the first five measures (namely the duties required to be applied by Russia in respect of tariff lines 4810 22 900 0, 4810 29 300 0, 4810 92 300 0, 4810 13 800 9, 4810 19 900 0), the applied a*d valorem* duty rate is higher than the bound a*d valorem* duty rate contained in Russia's Schedule, resulting in the imposition of ordinary customs duties in excess of those set forth and provided in Russia's Schedule. We therefore conclude that Russia is required to apply duties in excess of those set forth in its Schedule, contrary to Article II:1(b), first sentence.

7.3.1.3 Consistency with Article II:1(a) of the GATT 1994

7.63. Turning now to the European Union's claim under Article II:1(a), the European Union argues that Article II:1(b), first sentence, prohibits a specific kind of practice that will always be inconsistent with Article II:1(a). The European Union argues that while paragraph 1(a) prohibits less favourable treatment of imports than that provided for in a Member's Schedule, paragraph 1(b), first sentence, prohibits the imposition of ordinary customs duties in excess of those provided in the Schedule. According to the European Union, if a customs duty is levied on a product in excess of that provided in a Member's Schedule, this adversely affects the conditions of competition for that product, meaning that there is less favourable treatment.[100] The European Union maintains that since Russia is required to impose duties in excess of those provided in its Schedule, contrary to Article II:1(b), first sentence, it is also acting inconsistently with Article II:1(a).[101]

7.64. Russia did not provide a specific response to this claim of the European Union.

The examination of a measure's consistency with Article II:1(b), first sentence, of the GATT 1994 necessarily requires a comparison between the tariff treatment accorded by the challenged measure to imports of the products concerned, on the one hand, and the bound level established in the responding Member's Schedule of Concessions, on the other. Where both the tariff provided for in the measure at issue and the tariff bound in the Schedule are expressed in the same terms (for example, in *ad valorem* terms or in specific terms), the comparison may be straightforward. Panel Report, *Colombia – Textiles*, para. 7.145.

[93] Russia's Schedule, (Exhibit EU-9).

[94] Decision No. 54 of the Board, (Exhibit EU-3).

[95] Decision No. 9, (Exhibit EU-4).

[96] Decision No. 54 of the Board, (Exhibit EU-3).

[97] Decision No. 9, (Exhibit EU-4); Decision No. 77, (Exhibit EU-5).

[98] Decision No. 9, (Exhibit EU-4); Decision No. 77, (Exhibit EU-5).

[99] We note that the European Union has provided evidence allegedly showing actual imports being subject to customs duties higher than those set forth in Russia's Schedule. See Declarations of Goods and Supplementary Lists to Declarations of Goods, (Exhibits EU-10 and EU-11). However, given our finding in section 7.2 above that neither trade effects nor actual import transactions need be demonstrated in order to make a finding of inconsistency under Article II:1(b), first sentence, we find it unnecessary to address this evidence. This approach accords with that of the panel in *Colombia – Textiles*. See Panel Report, *Colombia – Textiles*, para. 7.124.

[100] European Union's first written submission, paras. 37-38 (referring to Appellate Body Report, *Argentina – Textiles and Apparel*, para. 45).

[101] European Union's first written submission, para. 50.

7.65. The Panel recalls the statement of the Appellate Body that:

> [T]he principle of judicial economy "allows a panel to refrain from making multiple findings that the same measure is *inconsistent* with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute". Thus, panels need address only those claims "which must be addressed in order to resolve the matter in issue in the dispute", and panels "may refrain from ruling on every claim as long as it does not lead to a 'partial resolution of the matter'." Nonetheless, the Appellate Body has cautioned that "[t]o provide only a partial resolution of the matter at issue would be false judicial economy", and that "[a] panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members".[102]

7.66. We have concluded in section 7.3.1.2.3 above that Russia is required to apply duties in excess of those set forth in its Schedule, contrary to Article II:1(b), first sentence. In the light of this, we see no need, for the purpose of resolving this dispute, to make additional findings as to whether, as a consequence of that conclusion, Russia is also acting inconsistently with Article II:1(a).[103] We therefore exercise judicial economy and decline to make findings with respect to this claim.

7.3.2 Claims concerning the sixth measure

7.67. The Panel now turns to claims concerning the sixth measure at issue, namely an *ad valorem* duty rate required to be applied by Russia in respect of tariff line 4810 92 100 0. To recall, the European Union's claims concerning the sixth measure are different from, and more complex to assess, than those concerning the first to fifth measures.

7.68. The European Union claims that, at the time of the Panel's establishment, Russia was required to apply a duty rate in respect of tariff line 4810 92 100 0 that was inconsistent with its obligations under Article II:1(a) and (b), first sentence, of the GATT 1994. According to the European Union, at the time of the Panel's establishment, the CCT provided for a 15% duty rate for tariff line 4810 92 100 0, but the duty regime in existence at the time temporarily reduced the duty rate of 15% to 5%. The European Union contends that on 1 January 2016 the temporary duty reduction was to be discontinued and the duty rate was to revert to 15%. The European Union submits that at the time of the Panel's establishment the sixth measure was inconsistent with Article II:1(a) and (b), first sentence, in two ways. First, the European Union claims that a temporary reduction of the duty rate "cannot sufficiently guarantee compliance" with Article II:1(a), at least when duties will be levied in excess of bound rates as soon as the period of reduction ends.[104] In the European Union's view, the temporary duty reduction at issue accorded treatment less favourable than that provided for in Russia's Schedule to imports of the European Union. Second, the European Union submits that Russia's tariff treatment of products under tariff line 4810 92 100 0 was inconsistent as such with Article II:1(b), first sentence, and consequently inconsistent as such with Article II:1(a), because it consisted in the application of a duty rate higher than the bound duty rate provided in Russia's Schedule, resulting in the imposition of ordinary customs duties in excess of those provided in Russia's Schedule.[105]

7.69. Russia argues in respect of the European Union's claim under Article II:1(b), first sentence, that the European Union has not proven the existence of the measure. In Russia's view, the

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[102] Appellate Body Report, *Argentina – Import Measures*, para. 5.190 (quoting Appellate Body Reports, *Canada – Wheat Exports and Grain Imports*, para. 133; *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, p. 340; *US – Tuna II (Mexico)*, paras. 403-404; *US – Upland Cotton*, para. 732; *Australia – Salmon*, para. 223). (footnotes omitted; emphasis original)

[103] We note that previous panels have followed such an approach where a claim was made only as a consequence of a finding of inconsistency in respect of another claim. See for example Panel Report, *Ukraine – Passenger Cars*, para. 7.109. See also Panel Report, *US – Upland Cotton*, fn 1061.

[104] European Union's first written submission, para. 54.

[105] European Union's first written submission, paras. 53-58; opening statement at the first meeting of the Panel, para. 30; second written submission, para. 41; opening statement at the second meeting of the Panel, para. 9.

allegedly WTO-inconsistent rate of 15% has never actually been applied to products imported under tariff line 4810 92 100 0. Russia submits that, accordingly, the measure described by the European Union "simply does not exist", and the Panel should therefore refrain from ruling on it. Alternatively, Russia argues that the Panel should make findings on the measure as amended by Decision No. 85 of the Board of the Eurasian Economic Commission (Decision No. 85).[106] Regarding the European Union's claim under Article II:1(a), Russia contests the European Union's proposed legal standard for assessing the temporary duty reduction and questions whether the European Union has met its burden of proof.[107]

7.70. The Panel will first address the measure and applied duty rate at issue before turning to the preliminary issues raised by Russia. Thereafter, we will address the European Union's claim under Article II:1(b), first sentence, and consequential claim under Article II:1(a), before turning to the European Union's independent claim under Article II:1(a).

7.3.2.1 Measure and applied duty rate at issue

7.71. According to the European Union, at the time of the Panel's establishment, Russia imposed an *ad valorem* duty rate of 15% for products imported under tariff line 4810 92 100 0, as required by the CCT as amended by Decision No. 77 of the Board of the Eurasian Economic Commission (Decision No. 77).[108] Nevertheless, as also noted by the European Union, footnote 14C of Decision No. 77 provided for a temporary reduction of the *ad valorem* duty rate to 5%, between 20 April 2013 and 31 December 2015 inclusive.[109] The European Union accepts that the duty rate required to be applied by Russia at the time of the Panel's establishment was therefore equal to the bound duty rate of 5%. However, the European Union highlights that at the time of the Panel's establishment, the CCT, as amended by Decision No. 77, required a duty rate of 15% to be levied as of 1 January 2016.[110] The European Union requests the Panel to make findings on the sixth measure from the "vantage point" of the Panel's establishment.[111]

7.72. Russia does not contest the European Union's description of the relevant duty rate provided for at the time of the Panel's establishment.

7.73. The Panel notes that there is no dispute between the parties as to the duty rate applied by Russia on the date of the Panel's establishment, as contained in the CCT as amended by Decision No. 77.[112] Based on the evidence presented, we find that the applied duty rate for the sixth measure on the date of the Panel's establishment was as follows:

Challenged measure	Tariff line	Russia's applied duty rate at date of Panel's establishment
The sixth measure	4810 92 100 0	5% (until 31 December 2015); 15% (from 1 January 2016)[113]

7.3.2.1.1 Relevant measure on which to make findings

7.74. Regarding the measure at issue, we must address, in addition, whether the sixth measure actually existed at the time of the Panel's establishment, and if so, whether we should make findings on the measure as it existed at the time of the Panel's establishment or on the measure in its amended form.

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[106] Russia's first written submission, paras. 29-30; second written submission, para. 13; opening statement at the second meeting of the Panel, para. 17. Decision No. 85 of the Board of the Eurasian Economic Commission, (Decision No. 85), (Exhibit RUS-10). Decision No. 85 is discussed further below in paras. 7.67-7.78.

[107] Russia's first written submission, paras. 21-22 and 25.

[108] Decision No. 77, (Exhibit EU-5).

[109] Decision No. 77, (Exhibit EU-5), fn 14C.

[110] European Union's first written submission, paras. 51-52.

[111] European Union's second written submission, para. 42.

[112] We also note that there is no dispute between the parties, and we accept, that the CCT requirement establishing the duty rate applicable to the tariff line at issue is attributable to Russia. See paragraphs 7.42 to 7.47 above.

[113] Section X, Chapter 48 of the CCT, as amended by Decision No. 77, (Exhibit EU-5).

7.75. Russia argues, due to footnote 14C of Decision No. 77, which set a duty rate of 5% until 31 December 2015, the sixth measure at issue was never applied in a manner inconsistent with Russia's Schedule. Russia argues that by virtue of the temporary duty reduction and Decision No. 85, the sixth measure as described by the European Union "simply does not exist".[114] Russia therefore requests the Panel to find that the sixth measure is WTO-consistent, or "alternatively" to consider the sixth measure in its "amended" form and make a finding that the measure is consistent with Russia's obligations under Article II:1.[115] Russia notes in this respect that Decision No. 85 of the Board of the Eurasian Economic Commission[116] established a "constant duty of 5%" as of 1 September 2015.[117]

7.76. The European Union does not dispute that the current applied duty rate contained in the CCT, as amended by Decision No. 85, is 5%, as from 1 September 2015.[118] The European Union insists, however, that at the time of the Panel's establishment, both the future applied duty rate (15%) and the temporarily reduced rate itself (5%) existed and were contained in a binding legal instrument. In the European Union's view, the fact that a permanent rate of duty is not applied until a certain predefined future date cannot mean that such duty rate does not exist, or even that it is not in force. Rather, the European Union argues, such a duty rate is in force even though it will only be applied as of a future date.[119]

7.77. Additionally, the European Union submits that it is asking the Panel to adopt findings on the sixth measure as it existed at the time, or from the "vantage point", of the Panel's establishment.[120] The European Union argues that Decision No. 85 cannot affect the terms of reference of the Panel. According to the European Union, the European Union is entitled, at a minimum, to a finding that the measure as it existed at the time of the Panel's establishment was inconsistent with Article II:1.[121]

7.78. The Panel notes that the parties disagree over, first, whether or not the sixth measure at issue existed at the time of the Panel's establishment, and second whether, even if the measure did exist, the Panel should make findings on the measure as amended by Decision No. 85, or as it existed at the time of the Panel's establishment. We address these issues in that order.

7.79. We note that Decision No. 77, which was in force at the time of the Panel's establishment, states that "the Board of the Eurasian Economic Commission has decided as follows: … a) from 1 September 2014: … to establish import customs duty rates from the Customs Union Common Customs Tariff pursuant to Annex No 3".[122] Annex No. 3 sets a duty rate of 15% for tariff line 4810 92 100 0.[123] Significantly, however, footnote 14C, concerning tariff line 4810 92 100 0, states that "Import customs duty at the rate of 5% of the customs value is applied from 20.04.2013 to 31.12.2015 inclusive."[124] Thus, Decision No. 77 sets out a rule establishing a permanent duty rate of 15% for tariff line 4810 92 100 0, and a footnote that temporarily reduces that duty rate to 5%.

7.80. It is clear to us from the legal structure of Decision No. 77 – a general rule establishing a permanent duty rate and an accompanying footnote establishing a temporary, lower duty rate – that on the date of the Panel's establishment, Russia's customs authority was required to apply the temporary duty rate of 5%, and was required to apply the duty rate of 15% as from 1 January 2016. Thus, the rule requiring the future applied duty rate (15%) was in force on the date of the Panel's establishment, even though that rate had not yet been applied.

[114] Russia's first written submission, para. 30.
[115] Russia's second written submission, para. 108.
[116] Decision No. 85, (Exhibit RUS-10).
[117] Russia's first written submission, para. 29 and fn 9; Russia's second written submission, para. 17.
[118] European Union's response to Panel question No. 10;second written submission, para. 42.
[119] European Union's opening statement at the second meeting of the Panel, para. 28; response to Panel question No. 120; second written submission, para. 40.
[120] European Union's second written submission, para. 42.
[121] European Union's opening statement at the first meeting of the Panel, paras, 36-37; second written submission, paras. 42 and 52.
[122] Decision No. 77, (Exhibit EU-5).
[123] Decision No. 77, (Exhibit EU-5).
[124] Decision No. 77, (Exhibit EU-5).

7.81. On this basis, we find that the measure challenged by the European Union (namely the duty rate of 15% required to be applied as from 1 January 2016) was in existence on the date of the Panel's establishment.[125] We are unable to agree with Russia that a measure in force on the date of the Panel's establishment "does not exist" simply because it will be implemented at a later time.

7.82. We now turn to the question of whether the Panel should nevertheless make findings only in respect of the measure "in its amended form", as requested by Russia.[126] We note that Decision No. 77 amended the CCT. Decision No. 85 came into effect on 1 September 2015, during the Panel proceedings.[127] It likewise amends the CCT, but does not include any explicit reference to Decision No. 77. It therefore would not appear to either amend or formally repeal Decision No. 77 as such. As Russia confirmed that the duty rate has been 5% as from 1 September 2015, we understand that Decision No. 85 takes precedence over Decision No. 77 in respect of amending the CCT.[128]

7.83. In considering whether to make findings only in respect of the duty rate contained in the CCT after it was amended by Decision No. 85, we note that the Appellate Body has repeatedly indicated that in situations where a measure has been amended during panel proceedings, a complaining party is nevertheless entitled to seek and obtain findings on the measure as it existed at the time of the panel's establishment.[129] We also note that in *Chile – Price Band System,* the Appellate Body made findings on the measure as amended during the panel proceedings. The Appellate Body explained that, in that instance, such findings were necessary "to secure a positive solution to the dispute and to make sufficiently precise recommendations and rulings so as to allow for prompt compliance".[130] We further note that the complaining party in that dispute agreed that it was appropriate for the panel to make findings on the measure as amended.[131] The Appellate Body elaborated that such an approach does not "condone a practice of amending measures during dispute settlement proceedings if such changes are made with a view to shielding a measure from scrutiny … [and] the demands of due process are such that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'".[132]

7.84. In the present dispute, the European Union as the complaining party requested findings only on the measure as it existed at the time of the Panel's establishment.[133] As our terms of reference include the measure as it existed at that time and Article 11 of the DSU requires us to make an "objective assessment of the matter", we can examine the WTO-consistency of the measure as it existed at that time. Regarding whether we should make findings on the sixth measure in its current form, we consider that, for the reasons explained by the Appellate Body in *Chile – Price Band System* (relating to the possibility of shielding a measure from scrutiny and the demands of due process, and referred to above), it would not be appropriate to do so in the absence of a specific request from the European Union. In the light of the foregoing, we decline Russia's request to make findings on the basis of the duty rate established by Decision No. 85.

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[125] A similar issue was addressed in our Preliminary Ruling, where we stated that the European Union's panel request in respect of the sixth measure "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 [the Panel Request] refers to a measure that was 'simply not in existence' on the date of the Panel's establishment". See Annex A-1, para. 6.10. As indicated above, having reviewed the evidence, we now find that the measure existed at the time of the Panel's establishment.

[126] Russia's second written submission, para. 108.

[127] Decision No. 85 states that "the Board of the Eurasian Economic Commission has decided to: 1. To amend the … Common Customs Tariff of the Eurasian Economic Union … as follows: a) from 1 September 2015: … To establish the rates of import customs duties of the Common Customs Tariff of the Eurasian Economic Union, according to the Annex No. 3". Decision No. 85, (Exhibit RUS-10).

[128] According to Russia, in accordance with Decision No. 85, "as of 1 September 2015 the permanent import duty at the rate of 5% is applied". Russia's response to Panel question No. 28.

[129] Appellate Body Reports, *EC – Selected Customs Matters*, para. 187; *China – Raw Materials*, para. 360.

[130] Appellate Body Report, *Chile – Price Band System*, para. 143 (footnotes omitted).

[131] Appellate Body Report, *Chile – Price Band System*, para. 133.

[132] Appellate Body Report, *Chile – Price Band System*, para. 144.

[133] We note that the European Union's panel request states that "[f]or each of the [challenged] measures … [the] request also covers any amendments, replacements, extensions, implementing measures or other related measures adopted by [the relevant bodies]". European Union's panel request, p. 3. Thus, if the European Union had wished to do so, it could have sought to bring Decision No. 85 within the Panel's terms of reference.

7.85. Nevertheless, we note that, according to the Appellate Body, panels must take into account relevant amendments and other relevant developments if and when they make recommendations under Article 19 of the DSU.[134] The Appellate Body has explained in this regard that "[i]n general, in cases where the measure at issue consists of a law or regulation that has been repealed during the panel proceedings, it would seem there would be no need for a panel to make a recommendation in order to resolve the dispute."[135] Although Decision No. 77 does not appear to have been formally repealed, the relevant applied duty rate has been amended by Decision No. 85. We will take appropriate account of this change in making any recommendations under Article 19.

7.3.2.2 Preliminary issues

7.86. Before turning to examine the consistency of the sixth measure with Article II:1(a) and (b), first sentence, it is useful to deal with a number of preliminary issues concerning that measure.

7.3.2.2.1 Duty "actually applied" to the product at issue "on [its] importation"

7.87. The first issue we consider is Russia's argument that a duty only constitutes an "ordinary customs duty" on which a Panel may make findings under Article II:1(b), first sentence, if it is actually applied to a product on its importation.

7.88. Russia argues that a duty is a "duty" within the meaning of Article II:1(b), first sentence, only if it is or was actually applied to products at the moment of their importation.[136] In support of its position, Russia refers to the Appellate Body report in *Australia – Salmon*. According to Russia, the Appellate Body in that dispute determined that a measure must be "actually applied" to the product at issue.[137] In addition, Russia points to Article II:1(b), first sentence, itself, which provides that products must not "on their importation" be subject to duties in excess of those set forth in a Member's Schedule.[138] Russia infers from this that the duty to be examined by the Panel under Article II:1(b), first sentence, is the duty that is imposed on goods at the moment of importation, "should such importation happen".[139] Russia maintains that, since the duty rate of 15% was never and will never be applied (given that Decision No. 85 provides for a constant duty rate of 5%), the sixth measure as challenged by the European Union under Article II:1(b), first sentence, does not constitute a measure on which the Panel can rule. Moreover, Russia submits that should there be imports of the product at issue from the European Union, they would be subject to a duty that is fully consistent with Russia's tariff commitments.[140]

7.89. The European Union argues that the Appellate Body in *Australia – Salmon* stated that the measure at issue, because it was defined in terms of a specific product at issue, could not include a rule that applies to a different product. The European Union asserts that this issue has nothing to do with the question of whether the consistency of a measure can be determined by a panel before that measure has been applied in practice.[141]

7.90. The Panel notes that the Appellate Body in *Australia – Salmon* stated in relevant part that "the measure at issue in this dispute can *only* be the measure which is *actually* applied to the product at issue".[142] The Appellate Body went on to state that:

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[134] See for example, Appellate Body Reports, *US – Certain EC Products*, para. 81; *Dominican Republic – Import and Sale of Cigarettes*, para. 129.

[135] Appellate Body Report, *China – Raw Materials*, para. 264.

[136] Russia's opening statement at the first meeting of the Panel, paras. 11-13 (referring to Appellate Body Report, *Australia – Salmon*, para. 103); second written submission, para. 12; opening statement at the second meeting of the Panel, para. 16.

[137] Russia's opening statement at the first meeting of the Panel, paras. 11-13 (referring to Appellate Body Report, *Australia – Salmon*, para. 103).

[138] Russia's opening statement at the second meeting of the Panel, para. 15.

[139] Russia's opening statement at the second meeting of the Panel, para. 17.

[140] Russia's first written submission, para. 32; response to Panel question No. 61; opening statement at the second meeting of the Panel, paras. 14-17.

[141] European Union's second written submission, para. 46.

[142] Appellate Body Report, *Australia – Salmon*, para. 103 (emphasis original).

> The product at issue is fresh, chilled or frozen salmon and the SPS measure applicable to fresh, chilled or frozen salmon is the import prohibition set forth in QP86A. The heat-treatment requirement provided for in the 1988 Conditions applies only to smoked salmon and salmon roe, not to fresh, chilled or frozen salmon.[143]

7.91. It is therefore clear to us that the Appellate Body's reference to "actual application", as relied upon by Russia, concerned the question of whether the product at issue in that dispute was within the product scope of the challenged measure. In other words, the issue was whether the challenged measure was actually applied – or as the Appellate Body also said in the second statement quoted above, was "applicable" – to the *products* at issue (rather than different products), and not whether that measure applied to those products *at the time of their importation*.[144]

7.92. In respect of the measure at issue, we have determined that it was clear, from the vantage point of the date of the Panel's establishment, that as from 1 January 2016, the duty rate applicable to a product falling within tariff line 4810 92 100 0 was to be 15%.[145] Furthermore, as we have pointed out above, a complaining party need not provide evidence of actual import transactions to substantiate a claim that the imposition of a duty rate is inconsistent with Article II:1 as such.[146] It follows from this proposition that a panel can make findings in respect of a duty rate even if, on the date of the panel's establishment, the challenged duty rate has not yet been "actually applied" on the importation of the relevant product. For these reasons, we are unable to accept Russia's contention that the Appellate Body report in *Australia – Salmon* supports the conclusion that the sixth measure, insofar as it provided for the future duty rate of 15%, was not a measure on which the Panel can make findings.

7.93. As for the phrase "on their importation" in Article II:1(b), first sentence, we agree with Russia that Article II:1(b), first sentence, applies to duties imposed on products "on their importation". Russia argues that the duty rate that was required to be imposed under Decision No. 77 is not a duty rate subject to Article II:1(b), first sentence, because it never was and never will be actually applied "on the importation" of the relevant product. Russia argues that it will instead apply the duty rate imposed under Decision No. 85. In considering this argument, we recall, as an initial matter, that we are assessing the situation as it existed on the date of the Panel's establishment. At that time, Decision No. 85 did not exist, and the duty rate that was to be applied on the importation of the relevant product from 1 January 2016 was 15%. Although Decision No. 85 subsequently amended that duty rate, on the date of the Panel's establishment, the CCT, as amended by Decision No. 77, provided for a rate concerning a "duty" to be applied as from 1 January 2016 "on the importation" of the relevant product.[147] In other words, Decision No. 77 concerned a "duty" within the meaning of Article II:1(b), first sentence, that was to be applied in the future. Decision No. 85 did not exist at the time of the Panel's establishment, and therefore is not relevant to an assessment of the measure as it existed at that time. We therefore consider that the sixth measure concerns an "ordinary customs duty" within the meaning of Article II:1(b), first sentence.

7.3.2.2.2 Future application of the challenged duty rate

7.94. We now turn to consider whether the Panel can make findings in respect of the applied duty rate of 15%, even though at the time of the Panel's establishment that rate was to be applied only in the future, namely on 1 January 2016.

7.95. In the European Union's view, nothing prevents the Panel from making a finding of inconsistency in relation to the future imposition of duties in excess of bound duties. According to

[143] Appellate Body Report, *Australia – Salmon*, para. 103.
[144] See also Annex A-1, fn 173.
[145] See paragraphs 7.73 and 7.80 to 7.81 above.
[146] See paragraphs 7.16 to 7.17 above.
[147] We consider this interpretation to be consistent with the Appellate Body's statement in *China – Auto Parts* that "an ordinary customs duty is a charge imposed on *products*, *on their importation*". Appellate Body Report, *China – Auto Parts*, para. 153. (emphasis original) This statement refers simply to the obligation contained in Article II:1(b), first sentence, and does not imply that a duty that has yet to be applied to products on their importation is not a "duty" within the meaning of that obligation, or cannot be the subject of findings by a panel before that duty is applied.

the European Union, the duty rate to be applied on 1 January 2016 was already required by the CCT, as amended by Decision No. 77, which existed on the date of the Panel's establishment. The European Union notes that the GATT panel in *US – Superfund* found it permissible to challenge a mandatory measure that is not yet in force, at least where the entry into force is automatic at a future date and does not depend on further legislative action. The European Union argues that a duty may consequently violate Article II:1 "regardless of whether it was ever levied".[148] Therefore, the European Union submits, the Panel "can (in procedural terms) and should (in substantive terms)"[149] find that Russia has acted inconsistently with Article II:1(b), first sentence, and consequently with Article II:1(a), by providing for the application, as of a future date, of duties in excess of those provided for in its Schedule.[150]

7.96. Russia responds that accepting the European Union's approach would "result in a possibility for any future panels to determine that any measure that is presently consistent with the WTO agreement is actually inconsistent with it if it is modified in [a] WTO-inconsistent manner".[151] Such a finding would, according to Russia, be tantamount to finding that an applied duty rate that is equal to a Member's bound rate is nevertheless "inconsistent now, if it is levied in excess [of] bound rates in the future".[152]

7.97. The European Union counters that it is not challenging the "mere possibility" that Russia might act inconsistently with Article II:1(b), first sentence. Rather, the European Union explains that it is challenging the measure as it actually existed at the time of the Panel's establishment. According to the European Union, the future developments referred to by Russia (i.e. the application as from 1 January 2016 of a duty rate of 15%) were neither hypothetical nor separate from the challenged measure. Rather, the challenged measure prescribed a particular kind of tariff treatment as of a future date.[153]

7.98. As an initial matter, the Panel recalls that, as discussed in paragraphs 7.15 to 7.17 and 7.20 above, a complaining party need not demonstrate the existence of "actual" imports to substantiate a claim that the imposition of a customs duty as such is inconsistent with Article II:1. We therefore see no basis on which to exclude from dispute settlement proceedings a measure that is in force, but which has yet to be applied.

7.99. We further recall that, according to the Appellate Body, rules or norms of general and prospective application that "mandate" particular action can be found, as such, to be WTO-inconsistent.[154] Decision No. 77 in our view sets forth a duty rate of general and prospective application insofar as it specifies a duty rate applicable to all import transactions under the relevant tariff line. That being the case, we proceed to examine whether Decision No. 77 mandates the imposition of that duty rate in the future.

7.100. The dictionary defines the term "mandatory" as "[o]f the nature of, pertaining to, or conveying a command or mandate" or "[o]f an action: obligatory in consequences of a command, compulsory".[155] Thus, a mandatory legal provision is one that makes it compulsory to take certain action, i.e. it requires that the action be taken. We have already determined above that, on the date of the Panel's establishment, Decision No. 77 required Russia's customs authority to apply an increased duty rate of 15% as from 1 January 2016. There is no language in Decision No. 77 that vests "discretionary authority" in Russia's customs authority regarding whether to apply the 15% duty rate.[156] The increase in the duty rate was definitive, and was expressed as occurring

[148] European Union's opening statement at the second meeting of the Panel, para. 13.
[149] European Union's first written submission, para. 61.
[150] European Union's first written submission, paras. 58 and 60-61; opening statement at the first meeting of the Panel, para. 30; second written submission, paras. 41, 44-47, and 52; opening statement at the second meeting of the Panel, paras. 9-10 and 12-13.
[151] Russia's first written submission, para. 38.
[152] Russia's first written submission, para. 38.
[153] European Union's opening statement at the Panel's first meeting, para. 38; second written submission, para. 41.
[154] Appellate Body Reports, *US – Section 211 Appropriations Act*, para. 259; *US – 1916 Act*, para. 88; *Argentina – Import Measures*, para. 5.101.
[155] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1694.
[156] Appellate Body Report, *US – Section 211*, para. 259.

automatically and by virtue of the measure itself, without any need for implementing or other intervening action. The fact that the EAEU could, and in fact did, pass a new Decision modifying the duty rate for the tariff line in question does not demonstrate that the future applied duty rate at issue, as provided for at the time of the Panel's establishment, was discretionary. To the contrary, the adoption of the new decision would appear to confirm that Decision No. 77 did not confer any discretion on Russia's customs authority to apply the lower duty rate of 5% beyond 31 December 2015. Indeed, but for the adoption of Decision No. 85, the applied duty rate as from 1 January 2016 would have been 15%.

7.101. We therefore find that the sixth measure was mandatory insofar as Russia's customs authority was, at the time of the Panel's establishment, required to apply a duty rate of 15% as from 1 January 2016.

7.102. We next address whether, despite being mandatory, the sixth measure cannot be found to be WTO-inconsistent because the mandatory action (i.e. the application of the 15% duty rate as from 1 January 2016) lay in the future. This issue has been addressed in two previous panel reports, including an adopted GATT panel report.[157] The GATT panel in *US – Superfund* found, in the context of Article III:2 of the GATT 1947, that "existing legislation" that "mandates" GATT-inconsistent action could be found to be inconsistent even if "administrative acts implementing it" had not yet been undertaken.[158] Similarly, the WTO panel in *Chile – Alcoholic Beverages* made findings in the context of Article III:2 on a measure that had "been enacted but not [yet] implemented".[159] Addressing that measure, the panel observed that there appeared "to be no discretion allowed in its enforcement … The law [wa]s certain and definitive".[160] We also find it instructive to recall once more the Appellate Body's observation that:

> [*T*]*he disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade.* This objective would be frustrated if instruments setting out rules or norms inconsistent with a Member's obligations could not be brought before a panel once they have been adopted and irrespective of any particular instance of application of such rules or norms.[161]

7.103. As we have said above[162], it is difficult to think of another provision of the GATT 1994 besides Article II:1(b), first sentence, for which it would be more apt to say that it is intended to protect not only existing trade, but also the security and predictability needed to conduct future trade. On that basis and like, notably, the GATT panel in *US – Superfund*[163], we consider that a panel can in principle find an existing measure to be inconsistent as such with a provision such as Article II:1(b), first sentence, even if that measure mandates WTO-inconsistent action that will take place only in the future.[164]

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[157] According to the Appellate Body, "[a]dopted [GATT] panel reports are an important part of the GATT acquis. … They … should be taken into account where they are relevant to any dispute". Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 13, DSR 1996:I, 97, at 108.

[158] GATT Panel Report, *US – Superfund*, para. 5.2.2.

[159] Panel Report, *Chile – Alcoholic Beverages*, fn 413.

[160] Panel Report, *Chile – Alcoholic Beverages*, fn 413.

[161] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82. (emphasis added)

[162] See paragraph 7.18 above.

[163] That GATT panel addressed the issue in the light of Articles III and XI of the GATT 1947, not Article II. GATT Panel Report, *US – Superfund*, para. 5.2.2.

[164] We note that the GATT panel in *US – Superfund* analysed whether the mandated future WTO-inconsistent action would take place "within a time frame within which the trade and investment decisions that could be influenced by the tax are taken". GATT Panel Report, *US – Superfund*, para. 5.2.2. The parties to this dispute did not address this legal issue directly. For the purposes of disposing of the claim before us, it is not necessary to determine whether an analysis of the length of the delay in the application of the future duty rate is required. Indeed, even assuming for the sake of argument that such an analysis were required (as the GATT panel in *US – Superfund* appears to have considered), this element would be met here. We note that the higher duty rate required by the CCT, as amended by Decision No. 77, was to have been applied on 1 January 2016, and the Panel was established on 25 March 2015. Thus, the higher duty rate would have been applied approximately nine months after the Panel's establishment. In contrast, the internal tax at issue in *US – Superfund* was to go into effect 22 months after the establishment of the GATT panel, and the GATT panel considered this to be a time period in which trade and investment decisions could be influenced. GATT Panel

7.104. Applying this to the sixth measure, it follows that we can make findings on whether the future applied duty rate of 15%, required by the CCT as amended by Decision No. 77 to be imposed from 1 January 2016, would have resulted in duties that were inconsistent with Article II:1(b), first sentence. Moreover, in our view, we can make findings in respect of the future applied duty rate even if the rate required to be applied at the time of the Panel's establishment was no higher than the relevant bound duty rate. There is nothing illogical about saying that a measure raises no issue of WTO-consistency insofar as its current applied rate is concerned, but does raise an issue of WTO-consistency insofar as its mandatory future applied rate is concerned.

7.105. We therefore consider that we can make findings on whether the future duty rate of 15% required by the CCT as amended by Decision No. 77 would have been inconsistent with Article II:1(b), first sentence, even taking into account that that duty rate was to be applied only some nine months after the Panel's establishment.

7.3.2.2.3 Temporary duty reduction

7.106. We now turn to examine whether the temporary reduction of the duty rate to 5% could eliminate a possible finding of inconsistency in respect of the future applied duty rate of 15%.

7.107. Russia argues that in *EC – IT Products* the panel correctly found no inconsistency with Article II:1(b), first sentence, because the measure at issue, a WTO-inconsistent duty rate, had been temporarily suspended.[165] In Russia's view, footnote 14C in Decision No. 77 likewise acts as a temporary duty suspension, and for this reason the Panel should follow the approach taken in *EC – IT Products* in this respect.[166]

7.108. The European Union responds by noting that the panel in *EC – IT Products* limited itself to findings on a situation in which a duty suspension is in force. The European Union asserts that the sixth measure would violate Article II:1(b), first sentence, and therefore also Article II:1(a), as soon as the duty begins to be levied at a rate of 15%. The European Union sees no reason why a panel could not make a prospective finding of such a violation, from the vantage point of its time of establishment. Specifically, the European Union considers that a thorough reading of the panel report in *EC – IT Products* fully supports the proposition that a temporarily suspended or reduced duty that is otherwise in excess would be inconsistent with Article II:1 upon the automatic expiry of the suspension.[167]

7.109. The Panel understands Russia to be arguing that a temporary duty reduction can "eliminate" any inconsistency with Article II:1(b), first sentence, by lowering the actually applied duty rate to a WTO-consistent level.[168] In considering this argument, we recall that, according to the panel in *EC – IT Products*, the measures at issue in that dispute imposed duties in excess of those set forth in the Schedule, but the inconsistency with Article II:1(b), first sentence, was eliminated through a temporary duty suspension lowering the applied duty rate to the level of the duty rate bound in the relevant Schedule.[169] The panel stated that:

> It must be borne in mind that Council Regulation No. 179/2009 that is currently in effect, suspends the application of duties on certain displays … To the extent that Council Regulation No. 179/2009 suspends duties levied on products that the European Communities is obliged to provide duty-free treatment for … neither [of the measures at issue] actually imposes duties in excess of those set forth in the EC Schedule. Accordingly, the duty suspension eliminates the inconsistency with the European Communities' obligations under Article II:1(b). In other words, but for the

Report, *US – Superfund*, paras. 1.3 and 5.2.1. Given the substantially shorter time-frame in the present dispute, we are satisfied that as of the date of the Panel's establishment, the mandatory future duty rate of 15% could affect trade and investment plans and decisions of producers and exporters outside Russia, including those of the European Union.

[165] Russia's first written submission, para. 33.

[166] Russia's first written submission, paras. 33 and 34.

[167] European Union's second written submission, para. 44; opening statement at the second meeting of the Panel, para. 9; response to Panel question No. 89.

[168] Russia's first written submission, paras. 33-34 (referring to Panel Report, *EC – IT Products*, paras. 7.758 and 7.763).

[169] Panel Report, *EC – IT Products*, paras. 7.740 and 7.744-7.745.

duty suspension, the measures at issue are inconsistent with Article II:1(b) of the GATT 1994.[170]

7.110. The panel in *EC – IT Products* was not requested by the complaining parties to make findings in respect of any mandatory duty rate to be applied in the future, after the end of the period of suspension.[171] Rather, the findings of the panel in *EC – IT Products* were directed to the duty rates applied during the period of suspension.[172] Furthermore, the panel explained that "to the extent the duty suspension were not applicable … or if the suspension measure were to be repealed or annulled", then the measure *would* result in duties being levied in a manner inconsistent with Article II:1(b), first sentence.[173] This suggests that, in the panel's view, the duty rates that would have applied, if and when the duty suspension ended, were the underlying permanent duty rates, and their application would have resulted in duties being levied in excess of bound duties, inconsistently with Article II:1(b), first sentence.

7.111. On this basis, it appears to us that the panel in *EC – IT Products* was concerned with a duty rate applied *during* the period of suspension, whereas we are concerned with a duty rate to be applied *following* the expiry of the period of duty reduction introduced in footnote 14C of Decision No. 77. Therefore, the approach taken by the panel in *EC – IT Products* is in our view not directly relevant to our assessment of the future applied rate at issue in our dispute. Nor do we consider that this approach precludes any finding of consistency or inconsistency in respect of a mandatory future applied duty rate.

7.3.2.3 Consistency with Article II:1(b), first sentence, of the GATT 1994

7.112. Turning now to assess the consistency of the sixth measure with Article II:1, as stated above, we find it appropriate to first address the European Union's claims under Article II:1(b), first sentence, and the alleged consequential inconsistency with Article II:1(a), before turning to the European Union's independent claim under Article II:1(a).[174] We also note in this respect that the European Union has presented all of its claims concerning other measures in this order, stating that in the light of the Appellate Body's comments in *Argentina – Textiles and Apparel*, the "analysis should begin with and focus on" Article II:1(b), first sentence.[175]

7.113. The European Union claims that the sixth measure, as it existed at the time of the Panel's establishment, was inconsistent with Article II:1(b), first sentence, because it subjected products imported under tariff line 4810 92 100 0 to duties in excess of the bound duties as of 1 January 2016.

7.114. Russia rejects the European Union's claim for the reasons described in the Panel's summaries of Russia's arguments in section 7.3.2.2 above.

7.115. The Panel has already rejected Russia's arguments in section 7.3.2.2 above. Notably, we found that we can make findings on whether the mandatory future applied duty rate of 15% resulted in the application of duties that were inconsistent with Article II:1(b), first sentence. We therefore proceed directly to a comparison of the applied and bound duty rates.

7.3.2.3.1 Comparison of applied and bound duty rates

7.116. The European Union argues that, at the time of the Panel's establishment, Russia's mandatory future applied duty rate was 15%, whereas the bound *ad valorem* duty rate was 5%. According to the European Union, products falling under the relevant tariff line are therefore

[170] Panel Report, *EC – IT Products*, para. 7.744.
[171] Panel Report, *EC – IT Products*, para. 3.2.
[172] Panel Report, *EC – IT Products*, para. 3.2.
[173] Panel Report, *EC – IT Products*, para. 7.745.
[174] We follow this approach for the reasons set out in paragraph 7.48 above.
[175] European Union's first written submission, para. 37 (referring to Appellate Body Report, *Argentina – Textiles and Apparel*, para. 45).

subject to duties in excess of those in Russia's Schedule, contrary to Article II:1(b), first sentence.[176]

7.117. Russia does not specifically contest that the mandatory future applied duty rate exceeds the corresponding bound duty rate in respect of the sixth measure.[177]

7.118. The Panel recalls that the determination of whether Russia has imposed excessive duties is straightforward when the applied and bound duty rates are both expressed in *ad valorem* terms.[178] Comparing the relevant applied and bound duty rates, we note that there is no dispute between the parties regarding the bound duty rate, which is 5%.[179] Thus, the relevant applied and bound duty rates are as follows:

Tariff line	Russia's applied duty rate provided for at date of Panel's establishment	Russia's bound duty rate[180]
4810 92 100 0	5% (until 31 December 2015); 15% (from 1 January 2016)[181]	5%

7.119. A direct comparison of Russia's future applied *ad valorem* duty rate and its bound *ad valorem* duty rate indicates that, on the date of the Panel's establishment, Russia's customs authority was required, as of 1 January 2016, to impose duties higher than those set forth and provided in its Schedule.

7.3.2.3.2 Conclusion

7.120. For the reasons set out above, the Panel finds that the sixth measure (namely the mandatory future application of a duty rate of 15%, concerning tariff line 4810 92 100 0) is a measure that existed on the date of establishment of the Panel. That measure mandates the imposition from 1 January 2016 of an a*d valorem* duty rate higher than the bound *ad valorem* duty rate contained in Russia's Schedule, requiring the imposition of ordinary customs duties in excess of those set forth and provided in Russia's Schedule. Therefore, we conclude that, in respect of the sixth measure as it existed at the time of the Panel's establishment, Russia was required to apply duties in excess of those set forth in its Schedule, contrary to Article II:1(b), first sentence.

7.3.2.3.3 Nullification or impairment of benefits

7.121. Article 3.8 of the DSU provides that:

> In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

7.122. Russia argues that the duty rate of 15%, which was mandated to be applied as from 1 January 2016, was never actually applied, *inter alia*, because of the adoption of Decision No. 85, which imposed a duty rate of 5%. Russia recalls statements by the Appellate Body to the effect that dispute settlement necessarily concerns situations in which a measure nullifies or impairs benefits.[182] In Russia's view, the European Union has failed to provide evidence that the challenged measure nullified or impaired benefits accruing to the European Union.[183]

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[176] European Union's first written submission, para. 51. See also Russia's Schedule, (Exhibit EU-9).

[177] See generally Russia's second written submission and statements at the second meeting of the Panel.

[178] See paragraph 7.59 above.

[179] The European Union states that the bound rate for this tariff line, as provided and set forth in Russia's Schedule, is 5%. European Union's first written submission, para. 51. See also Russia's Schedule, (Exhibit EU-9). This is not disputed by Russia.

[180] Russia's Schedule, (Exhibit EU-9).

[181] Section X, Chapter 48 of the CCT, as amended by Decision No. 77, (Exhibit EU-5).

[182] Appellate Body Reports, *US – Gambling*, para. 121 ("The DSU provides for the 'prompt settlement' of situations where Members consider that their benefits under the covered agreements 'are being impaired by

7.123. The European Union responds that it is not making a "non-violation" claim under Article XXIII:1(b) of the GATT 1994, and is therefore not required to separately show how the measure at issue impairs the benefits accruing to it. According to the European Union, the violation of the covered agreements is, in itself, impairing the benefits accruing to the European Union as well as other Members. Thus, in the European Union's view, once the violation is established, no further evidence of the impairment of benefits is required.[184]

7.124. The Panel observes that under the terms of Article 3.8, since we have found a breach of the obligation contained in Article II:1(b), first sentence, there is "normally" a presumption that that breach has an adverse impact on the European Union and other Members. We do not consider the mere fact that the breach in respect of the sixth measure arises from the mandatory future application of a specified duty rate to be sufficient to displace the "normal" presumption of adverse impact.[185] Nor has Russia advanced any argument to persuade us otherwise.

7.125. Regarding the adoption of Decision No. 85, we note that the issue before the Panel is whether the duty rate required to be applied under Decision No. 77 caused nullification or impairment. Although Decision No. 85 had not been adopted at the time of the Panel's establishment, its subsequent adoption does not have the effect of eliminating any nullification or impairment that existed at the time of the Panel's establishment, as it did not have retroactive effect. Having said this, as indicated, our recommendation under Article 19 of the DSU takes account of the existence of Decision No. 85.

7.126. In the light of the foregoing, the Panel concludes that its finding of inconsistency under Article II:1(b), first sentence, creates a presumption of nullification or impairment of the European Union's benefits, and that Russia has not rebutted that presumption.

7.3.2.4 Consistency with Article II:1(a) of the GATT 1994 (consequential claim)

7.127. The European Union requested that in the event the Panel finds that Russia acted inconsistently with Article II:1(b), first sentence, of the GATT 1994, the Panel make a consequential finding of inconsistency under Article II:1(a) of the GATT 1994.[186]

7.128. The Panel sees no need, for the purpose of resolving this dispute, to make additional findings regarding whether as a consequence of a finding of inconsistency under Article II:1(b), first sentence, Russia also acted inconsistently with Article II:1(a). We therefore exercise judicial economy and decline to make findings with respect to this claim.

7.3.2.5 Consistency of the sixth measure with Article II:1(a) of the GATT 1994 (independent claim)

7.129. We turn now to the European Union's additional claim that the sixth measure is inconsistent as such with Article II:1(a) of the GATT 1994 because it provides for a temporary duty reduction and at the same time establishes a future duty rate that exceeds the bound duty rate. We note as an initial matter that this claim differs from the European Union's claim of a consequential inconsistency under Article II:1(a) resulting from a finding of inconsistency under Article II:1(b), first sentence. By contrast, this independent claim addresses a different aspect of the measure – namely the temporary nature of the 5% duty rate required to be applied by Russia prior to 1 January 2016 – and we therefore do not consider it appropriate to exercise judicial economy on this claim.

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measures taken by another Member' … [Such] measure must be the source of the alleged impairment, which is in turn the effect resulting from the existence or operation of the 'measure'"); *US – Corrosion-Resistant Steel Sunset Review*, para. 86 ("[A] measure attributable to a Member may be submitted to dispute settlement provided only that another Member has taken the view, in good faith, that the measure nullifies or impairs benefits accruing to it").

[183] Russia's response to Panel question No. 61; second written submission, para. 15.

[184] European Union's response to Panel question No. 61; second written submission, paras. 48-49.

[185] We also recall that in this instance the future application of the offending duty rate was merely months away.

[186] European Union's first written submission, para. 61.

7.130. The European Union submits that, at the time of the Panel's establishment the sixth measure provided for a rate of duty in excess of the relevant bound rate, but temporarily reduced that duty. The European Union argues that such temporary duty reductions cannot sufficiently guarantee compliance with Article II:1(a), at least when it is clear from the outset that duties will continue to be levied in excess of bound duty rates as soon as the period of the temporary reduction ends. Comparing the facts of the present case to those at issue in *EC – IT Products*, the European Union submits that the sixth measure, even during the period of duty reduction, was inconsistent with Article II:1(a) because it was "insufficiently foreseeable to traders in the marketplace".[187] In the European Union's view, this lack of foreseeability "creates deleterious effects on competition, and therefore less favourable treatment in the meaning of Article II:1(a), even though the current applied rate is not in excess of bound levels".[188] It does this, according to the European Union, because "envisaging a future duty in excess of bound rates is likely to restrict trade even before the higher duty becomes applicable".[189] In the European Union's view, exporters might scale down their existing operations in anticipation of a higher duty, or refrain from expanding their production capacity or developing commercial relationships with importers and distributers. In sum, the European Union argues that by only temporarily applying tariff treatment within the limits prescribed by its Schedule, and providing at the same time for a future duty that exceeds the bound rate, Russia, at the time of the Panel's establishment, accorded to imports treatment less favourable than that provided for in its Schedule.[190]

7.131. Russia responds that nothing in the WTO Agreement prohibits a Member from applying duties on a temporary basis, provided that the duty is consistent with the WTO Agreement. According to Russia, while Article II:1 requires WTO Members to levy duties in conformity with their schedules, nothing in that Article refers to the character of the duties applied.[191]

7.132. Russia further argues that the European Union's claim effectively introduces new tests for a measure's consistency with Article II:1(a). In Russia's view, the European Union's references to "sufficient guarantees of compliance with Article II" and "measures being sufficiently foreseeable to traders in the marketplace", among others, are intended to show that the sixth measure, which is otherwise consistent with Russia's commitments, in fact violates Article II:1(a). However, according to Russia, the European Union has failed to provide any justification for its position that these tests are present in Article II:1(a) or relevant in the present case.[192]

7.133. Russia submits, finally, that the European Union has failed to provide any evidence of trade uncertainty related to the existence of a temporary duty. Indeed, according to Russia, it is difficult to reconcile the European Union's claim in respect of unpredictability for traders with the certainty expressed by the European Union, in the context of its claim under Article II:1(b), first sentence, that as of 1 January 2016 the temporary duty rate of 5% would be replaced by a permanent duty rate of 15%. In Russia's view, the European Union should "make a choice: whether the measure is predictable or unpredictable".[193] In sum, Russia's position is that there is no evidence that, in respect of the sixth measure, goods from the European Union have ever been subject to treatment less favourable than that provided for in Russia's Schedule.[194]

7.134. The Panel notes that the European Union's claim under Article II:1(a) of the GATT 1994 is based on reasoning developed in the unappealed panel report in *EC – IT Products*. It is therefore useful to recall at the outset that panel's pertinent findings before considering whether they shed light on the European Union's claim concerning the sixth measure at issue.

[187] European Union's first written submission, para. 55.
[188] European Union's first written submission, para. 56.
[189] European Union's second written submission, para. 44.
[190] European Union's first written submission, paras. 53-57; opening statement at the first meeting of the Panel, paras. 29-30; responses to Panel question Nos. 15 and 48; second written submission, paras. 41 and 44; opening statement at the second meeting of the Panel, para. 9; response to Panel question No. 88.
[191] Russia's first written submission, paras. 22-23; second written submission, para. 16.
[192] Russia's first written submission, para. 38; second written submission, para. 16; opening statement at the second meeting of the Panel, para. 19.
[193] Russia's opening statement at the second meeting of the Panel, para. 20.
[194] Russia's first written submission, para. 25; opening statement at the second meeting of the Panel, para. 20.

7.135. In *EC – IT Products*, the panel found that certain duty measures of the European Communities were inconsistent with Article II:1(b), first sentence, but that the application by the European Communities of a temporary "duty suspension"[195] "eliminate[d] that inconsistency" to the extent of the suspension.[196] The panel then turned to consider whether the duty suspension also eliminated the consequential inconsistency with Article II:1(a) that would otherwise follow from a finding of inconsistency with Article II:1(b), first sentence.

7.136. In this respect, the panel first noted that the temporary duty suspension had been published on 31 March 2009, but was applied retroactively for the period January to March 2009. The suspension was set to expire on 31 December 2010. The suspension at issue was the third in a succession of duty suspensions applicable to the relevant products. The first suspension was published on 31 March 2005 with effect from 1 January 2005 through 31 December 2006. The second was published on 19 March 2007 with effect from 1 January that year. The third suspension – the one in force at the time the *EC – IT Products* panel was established – enlarged the scope of application of the previous suspensions. Based on the foregoing, the panel observed that the duty suspension regime put in place by the European Communities had been renewed biennially, with each suspension set to expire without automatic renewal. Prior suspensions had been extended only pursuant to formal action taken by the EC Council. The panel also noted that all three suspensions had applied retroactively during the period January to March of the relevant years.[197]

7.137. The panel then proceeded to observe that although a suspension on imports had been formally in effect for at least five years, the suspension was temporary in nature, and was subject to formal extension or amendment. Additionally, the measures implementing the duty suspension did not set out any specific conditions under which it could have been withdrawn or otherwise not renewed. Thus, according to the panel, "the duty suspension in force at any particular time may expire, be repealed, or be amended to increase or decrease coverage."[198]

7.138. Finally, the panel noted that unlike the tariff treatment under the duty suspension regime, the tariff treatment accorded under the European Communities' Common Customs Tariff was not contingent on renewal or extension. The panel found this distinction to be significant, because "continuous tariff treatment provides foreseeability for traders operating in the marketplace".[199] Additionally, the tariff treatment provided in the European Communities' Common Customs Tariff was prospective, whereas the duty suspension regime had been applied retroactively on a number of occasions. On the basis of these considerations, the panel found 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".[200]

7.139. Two points are worth highlighting in relation to this finding. First, the panel did not find that the European Communities' use of a temporary duty suspension was, in itself, inconsistent with Article II:1(a). It found rather that the use of a temporary duty suspension did not "eliminate" the inconsistency with Article II:1(b), first sentence, caused by a different measure imposing WTO-inconsistent duties. Thus, we do not read the panel's finding as suggesting that the duty suspension itself gave rise to an independent breach of Article II:1(a), but only that it failed to "eliminate" the consequential breach of that provision caused by the WTO-inconsistent duties.

7.140. Second, the panel's finding that the duty suspension did not "eliminate" the consequential inconsistency with Article II:1(a) was based on a careful analysis of the features of the challenged measure as a whole, including the offending duties and the temporary duty suspension.[201] Particularly important, in the panel's view, were the following facts: (a) the duty suspension regime had been in place for a total of five years, yet there was no certainty that the suspension in force at the time would be renewed upon the termination of a given suspension period; (b) the

[195] Panel Report, *EC – IT Products*, para. 7.744.
[196] Panel Report, *EC – IT Products*, para. 7.744.
[197] Panel Report, *EC – IT Products*, paras. 7.758–7.759.
[198] Panel Report, *EC – IT Products*, para. 7.760.
[199] Panel Report, *EC – IT Products*, para. 7.761.
[200] Panel Report, *EC – IT Products*, para. 7.761. According to the panel, "if a measure adversely affects the conditions of competition for a product from that which it is entitled to enjoy under a Schedule, this would be less favourable treatment under Article II:1(a)." Panel Report, *EC – IT Products*, para. 7.757.
[201] Panel Report, *EC – IT Products*, para. 7.763.

individual suspensions provided no information concerning the conditions under which the suspension would be terminated or otherwise not renewed; and (c) each individual suspension had terminated in December of a given year and been renewed only in March of the following year, with retroactive effect from January of the same year. These features were central to the panel's finding that the temporary duty suspension did not eliminate the potential for deleterious effects on competition caused by WTO-inconsistent duties. These features made it difficult to predict, in advance, whether the duty suspension "would expire, be repealed, or be amended", and thus gave rise to a lack of "foreseeability for traders operating in the marketplace".[202]

7.141. Turning to the European Union's claim, the European Union argues that the temporary duty reduction applied in respect of the sixth measure "creates deleterious effects on competition, and therefore less favourable treatment in the meaning of Article II:1(a)".[203] The European Union therefore asks the Panel to find that "[b]y making tariff treatment within the limits prescribed by its Schedule temporary and providing at the same time for a future duty that exceeds the bound rate, Russia has accorded less favourable treatment than that provided for in its Schedule".[204] In considering this argument, we recall that, as we explained above, the panel in *EC – IT Products* did not find that the duty suspension in that case was itself inconsistent with Article II:1(a). We therefore do not agree with the European Union that "[a] lack of 'foreseeability for traders operating in the marketplace' was mentioned by the panel in *EC – IT Products* as a reason *for the finding* of less favourable treatment".[205] The panel's finding of less favourable treatment was linked to, and stemmed from, the WTO-inconsistent duties themselves.

7.142. In addition, we consider that the temporary duty reduction at issue in the present case is significantly different from the temporary duty suspension at issue in *EC – IT Products*. In the first place, in the case of the sixth measure we are not dealing with a duty suspension. The sixth measure does not raise the issue of whether the applied rate in force at the time of the Panel's establishment could eliminate an inconsistency arising from another rate in force at the same time. Only the 5% duty rate was being applied by Russia at the time.

7.143. Moreover, unlike in *EC – IT Products*, there is no indication in the present case that the temporary duty reduction either had been or could have been renewed or extended. To the contrary, pursuant to footnote 14C of Decision No. 77, the temporary reduction was to terminate on 31 December 2015, with the applicable duty rate reverting to 15% on 1 January 2016.[206] There is nothing in the text of that Decision to suggest that the duty reduction could either have been extended beyond 31 December 2015 or terminated prior to 31 December 2015. Therefore, we see no basis on which to find that there was any uncertainty as to whether the duty reduction would be extended or when it would terminate. The footnote itself indicates that it would apply only until 31 December 2015.

7.144. Finally, and again as distinct from the measure at issue in *EC – IT Products*, Decision No. 77, which provides for the duty reduction at issue here, was exclusively prospective in application.

7.145. In our view, therefore, it was foreseeable for traders in the marketplace that, until 31 December 2015, goods imported under the relevant tariff line would be subject to an *ad valorem* duty rate of 5%, but that from 1 January 2016 they would be subject to an *ad valorem* duty rate of 15%. Thus, we find that the temporary duty reduction at issue in this case did not reduce foreseeability for traders in the marketplace regarding the applicable tariff treatment. Indeed, we have relied precisely on the foreseeability of the duty rate reverting to 15% on 1 January 2016 to support our conclusion that at the time of the Panel's establishment the sixth measure was inconsistent with Article II:1(b), first sentence.

[202] Panel Report, *EC – IT Products*, para. 7.761.
[203] European Union's first written submission, para. 56.
[204] European Union's first written submission, para. 57.
[205] European Union's response to Panel question No. 48 (emphasis added) (referring to Panel Report, *EC – IT Products*, para. 7.761).
[206] See paragraphs 7.73 and 7.80 to 7.81.

7.146. As regards the European Union's argument that "envisaging a future duty in excess of bound rates is likely to restrict trade even before the higher duty becomes applicable"[207], we consider that any such effect would not be the result of the temporary application of a duty rate of 5%.[208] Rather, any such effect would be the result of the application from 1 January 2016 of the duty rate of 15%. The findings we have made above under Article II:1(b), first sentence, concerning the duty rate of 15% are in our view sufficient to address the European Union's argument.

7.147. We turn, finally, to examine the European Union's argument that, in the light of the panel report in *EC – IT Products*, a temporary duty reduction does not "sufficiently guarantee" compliance with Article II:1, and therefore creates deleterious effects on competition, at least when it is clear from the outset that duties will continue to be levied in excess of bound duty rates as soon as the period of the temporary reduction ends.[209] We note as an initial matter that the panel in *EC – IT Products* pointed out that the European Union "sets forth its tariff bindings in the EC Schedule pursuant to annual amendments to the autonomous duty rate in the CCT".[210] It observed in this context that duty treatment cannot be guaranteed in an absolute sense.[211] We agree with this observation. The European Union questions, however, whether the temporary duty reduction at issue in our dispute "sufficiently" guarantees compliance.

7.148. In our view, the panel report in *EC – IT Products* does not stand for the proposition that a temporary duty provides insufficient guarantees of compliance, and is therefore inconsistent with Article II:1(a), whenever it is clear at the time the temporary duty is in force that it will later be replaced by a duty that exceeds the tariff binding. The panel report in *EC – IT Products* indicates only that a lack of continuous tariff treatment may lead to a lack of foreseeability.[212] We have already determined, however, that the temporary duty reduction at issue in the present dispute did not give rise to a lack of foreseeability, noting, *inter alia*, that it was prospective and had not been retroactively applied. Moreover, the European Union has not identified any other aspect of the sixth measure that in its view suggests that the temporary duty reduction provides insufficient guarantees of compliance with Article II:1. We thus reject this contention by the European Union.

7.3.2.5.1 Conclusion

7.149. For the reasons set out above, the Panel finds that the European Union has not demonstrated that the temporary duty rate of 5% required to be applied by Russia at the time of the Panel's establishment created deleterious effects on competition due to either a lack of foreseeability or insufficient guarantees of compliance with Article II:1. We therefore conclude that the European Union has not established that the sixth measure accords to imports treatment less favourable than that provided in the Schedule, contrary to Article II:1(a) and independently of any finding of inconsistency under Article II:1(b), first sentence.

7.4 Claims concerning applied combined duty rates that allegedly exceed bound duty rates (the seventh to eleventh measures at issue)

7.150. The Panel now turns to the European Union's second set of claims, which concern the seventh to eleventh measures at issue. The European Union claims that the combined duty rates that the CCT requires Russia to apply in respect of these measures are in excess of the bound duty rates contained in Russia's Schedule. According to the European Union, the measures are therefore inconsistent as such with Article II:1(b), first sentence, of the GATT 1994, and consequently Article II:1(a) of the GATT 1994.

7.151. We recall that the seventh to ninth measures at issue are combined duties allegedly required to be applied in excess of *ad valorem* bound duty rates, while the tenth and eleventh

[207] European Union's second written submission, para. 44.
[208] Indeed, it appears to us that any such effect would result even if at the time of the Panel's establishment no duty had been applied to the goods at issue.
[209] European Union's first written submission, para. 54.
[210] Panel Report, *EC – IT Products*, para. 7.761.
[211] The panel report stated that "no amount of autonomous duty-free coverage can be assured in an absolute sense." Panel Report, *EC – IT Products*, para. 7.761.
[212] Panel Report, *EC – IT Products*, para. 7.761.

measures are combined duties allegedly required to be applied in excess of combined duty rates. In recognition of this distinction, we deal with the two groups of claims separately, beginning with the claims concerning the seventh to ninth measures.

7.4.1 Claims concerning the seventh to ninth measures

7.152. We turn first to the European Union's claims in respect of the duty rates required to be applied by Russia in respect of tariff lines 1511 90 190 2 (the seventh measure), 1511 90 990 2 (the eighth measure), and 8418 10 200 1 (the ninth measure). The European Union claims that Russia is required to apply duties on goods falling within these tariff lines that are inconsistent with Article II:1(b), first sentence, of the GATT 1994, and consequently Article II:1(a) of the GATT 1994.

7.4.1.1 Measures and applied rates at issue

7.153. The European Union argues that, in respect of goods falling under the seventh, eighth, and ninth measures, the structure and design of the duties required to be applied by Russia result in duties being levied in excess of bound rates with respect to a certain range of import prices.[213]

7.154. The European Union argues that, at the time of the Panel's establishment, Decision No. 52 of the Council of the Eurasian Economic Commission imposed an *ad valorem* duty rate of 3% for goods imported under tariff lines 1511 90 190 2 (the seventh measure) and 1511 90 990 2 (the eighth measure). Nevertheless, as also noted by the European Union, footnote 13C of Decision No. 52 subjected goods imported under these tariff lines to a duty rate of 3%, but not less than 0.09 EUR/kg[214], between 1 August 2014 and 31 August 2015. The European Union accepts that the duty rate required to be applied by Russia in respect of these tariff lines reverted to an *ad valorem* rate of 3% on 1 September 2015.[215]

7.155. The European Union further argues that, at the time of the Panel's establishment, the CCT, as amended by Decision No. 103 of the Board of the Eurasian Economic Commission[216] and Decision No. 52 of the Council of the Eurasian Economic Commission[217], imposed a combined duty rate of "16.7%, but not less than 0.13 EUR/l"[218] for goods imported under tariff line 8418 10 200 1 (the ninth measure). However, as also noted by the European Union, Decision No. 54 of the Council of the Eurasian Economic Commission[219], which entered into force on 20 September 2015[220], imposed a new duty rate of "15%, but not less than 0.13 EUR/l".

7.156. Russia does not contest the European Union's description of these three measures at issue.

7.157. The Panel notes that there is no dispute between the parties as to the duty rates required to be applied by Russia in respect of the seventh to ninth measures, either at the time of the Panel's establishment or subsequently.[221] Based on the evidence presented, we find that the duty rates required to be applied by Russia in respect of the seventh, eighth, and ninth measures, on the date of the Panel's establishment and currently, are as follows:

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[213] European Union's first written submission, para. 79; second written submission, paras. 53 and 55.
[214] That is, EUR 0.09 per kilogram.
[215] European Union's first written submission, para. 81; second written submission, para. 53; response to Panel question No. 91.
[216] Decision No. 103 of the Board of the Eurasian Economic Commission, (Decision No. 103), (Exhibit EU-8).
[217] Decision No. 52 of the Council of the Eurasian Economic Commission, (Decision No. 52), (Exhibit EU-6).
[218] That is, EUR 0.13 per litre.
[219] Decision No. 54 of the Council of the Eurasian Economic Commission, (Decision No. 54 of the Council), (Exhibit RUS-9).
[220] European Union's second written submission, para. 81; Russia's responses to Panel question Nos. 94- 95.
[221] We also note that there is no dispute between the parties, and we accept, that the CCT requirements establishing the duty rates applicable to the tariff lines at issue are attributable to Russia. See paragraphs 7.42 to 7.47 above.

Measure	Tariff line	Russia's applied duty rate provided for at date of Panel's establishment	Russia's current applied rate
The seventh measure	1511 90 190 2	3%, but not less than 0.09 EUR/kg[222]	3% as of 1 September 2015[223]
The eighth measure	1511 90 990 2	3%, but not less than 0.09 EUR/kg[224]	3% as of 1 September 2015[225]
The ninth measure	8418 10 200 1	16.7%, but not less than 0.13 EUR/l[226]	15% but not less than 0.13 EUR/l, as of 20 September 2015[227]

7.4.1.1.1 "Expired" and amended measures

7.158. At this point, we find it useful to deal with two issues that have arisen concerning the identity and susceptibility to challenge of the seventh, eighth, and ninth measures. The first issue concerns the question of whether the seventh and eighth measures, which Russia claims have "expired" during these proceedings, nevertheless constitute measures on which the Panel may make findings. The second issue concerns the way in which the Panel should deal with the ninth measure, which was amended during the course of the proceedings.

7.4.1.1.1.1 Whether the seventh and eighth measures have "expired"

7.159. The first issue we need to consider is whether the seventh and eighth measures have "expired", and what consequences would follow if they have.

7.160. Russia argues that the European Union's panel request brings within the scope of the Panel's jurisdiction "any amendments, replacements, extensions, implementing measures" or other measures "related" to the challenged measures.[228] Russia therefore requests the Panel to decide on Russia's measures, including the seventh and eighth measures, as they have actually been applied during the course of the proceedings. According to Russia, the challenged duty rates in respect of tariff lines 1511 90 190 2 and 1511 90 990 2 expired on 31 August 2015, and were in each case replaced with an *ad valorem* rate of 3%, which is exactly the same as the corresponding duty rates in Russia's Schedule. Consequently, in Russia's view the Panel should not consider the duty rates challenged by the European Union, as they did not have legal effect after 1 September 2015 and therefore their examination would not assist the Panel in securing a positive solution to the dispute. According to Russia, the fact that the duty rates for these two tariff lines have been brought into conformity with Russia's Schedule means that the Panel "has no measure at issue to rule on".[229] Russia therefore asks the Panel to dismiss the European Union's claims.[230]

7.161. According to the European Union, the Panel's terms of reference were set at the time of its establishment, and the Panel should therefore make findings with respect to the measures as in force on that date. The European Union has clarified, however, that it does not seek

[222] Section II, Chapter 15 of the CCT, as amended by Decision No. 52, (Exhibit EU-6) (by virtue of Footnote 31C, this rate was applied between 1 September 2014 and 31 August 2015).
[223] Section II, Chapter 15 of the CCT, as amended by Decision No. 52, (Exhibit EU-6) (by virtue of Footnote 31C, this rate is applied from 1 September 2015).
[224] Section II, Chapter 15 of the CCT, as amended by Decision No. 52, (Exhibit EU-6) (by virtue of Footnote 31C, this rate was applied between 1 September 2014 and 31 August 2015).
[225] Section II, Chapter 15 of the CCT, as amended by Decision No. 52, (Exhibit EU-6) (by virtue of Footnote 31C, this rate is applied from 1 September 2015).
[226] Section XVI, Chapter 84 of the CCT, as amended by Decision No. 52, (Exhibit EU-6); and Decision No. 103, (Exhibit EU-8).
[227] Section XVI, Chapter 84 of the CCT, as amended by Decision No. 54 of the Council, (Exhibit RUS-9) (by virtue of Footnote 42C, this rate applies from the date of the Decision's entry into force until 31 August 2016, after which date it reverts to 15%). Decision No. 54 of the Council was published on 10 September 2015 and entered into force, in accordance with its paragraph 3, on 20 September 2015. European Union's second written submission, para. 84; Russia's response to Panel question No. 95.
[228] European Union's request for establishment of a panel, para. 13.
[229] Russia's first written submission, para. 106.
[230] Russia's first written submission, paras. 99, 101, 103, 105-106 and 108; responses to Panel question Nos. 24 and 68-69; second written submission, para. 5, 8 and 9; opening statement at the second meeting of the Panel, para. 40.

recommendations under Article 19 of the DSU with respect to measures that have ceased to apply, including the seventh and eighth measures.[231]

7.162. The Panel recalls its discussion, in the context of the sixth measure at issue, of the legal implications of a change made subsequent to a panel's establishment that affects a challenged measure.[232] As we explained, a measure that is modified subsequent to a panel's establishment does not, simply by virtue of that modification, cease to be a measure for the purposes of WTO dispute settlement. Even if an allegedly WTO-inconsistent measure is brought into conformity during the course of the proceedings, a panel may still be required, pursuant to its terms of reference and Article 11 of the DSU, to make findings in respect of the measure as it existed at the time of the panel's establishment[233], at least where the complaining party has not requested the panel to consider the measure as subsequently changed. The fact that a measure has been brought into conformity with the covered agreements subsequent to a panel's establishment may, however, have implications for what recommendations, if any, a panel decides to make.[234]

7.163. Applying these principles to the facts before us, we cannot agree with Russia that the seventh and eighth measures as they existed at the time of the Panel's establishment do not constitute measures on which we may make findings. We note in this respect that the European Union has only requested that we make findings on those measures as they existed at that time.[235] Accordingly, both our terms of reference and Article 11 of the DSU, which requires us to make an "objective assessment of the matter", compel us to examine the WTO-consistency of these measures as they existed at the time the Panel was established. It would not be appropriate, in the absence of a specific request from the European Union, for us to examine the seventh and eighth measures in their current form ("as they are currently applied"[236], to use Russia's words) rather than as they existed at the time of the Panel's establishment. However, we will take appropriate account of any relevant changes made to the measures at issue when making our recommendations (if any).

7.4.1.1.1.2 Whether the Panel should consider the ninth measure as amended

7.164. The second issue facing us is whether the Panel should consider the ninth measure at issue as it existed at the time of the Panel's establishment, as it existed from 1 to 20 September 2015, or as amended from 20 September 2015.

7.165. Both parties recognize that Russia's bound rate fell on 1 September 2015. They also agree that the ninth measure was amended during the course of these proceedings, and that that amendment entered into effect on 20 September 2015.[237] However, according to the European Union, the measure remains inconsistent with Russia's obligations under Article II:1(b), first sentence. Thus, according to the European Union, the ninth measure as amended continues to result in the imposition of customs duties in excess of those provided for in Russia's Schedule.

7.166. In the light of these developments, the European Union asks the Panel to make findings concerning the ninth measure as it existed (i) at the time of the Panel's establishment; (ii) between 1 and 20 September 2015, during which time the extent of the measure's inconsistency was, according to the European Union, "aggravated"[238]; and (iii) as amended, from 20 September 2015 onwards.[239]

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[231] European Union's opening statement at the first meeting of the Panel, para. 70; second written submission, para. 82; opening statement at the second meeting of the Panel, para. 25; response to Panel question No. 91.

[232] See section 7.3.2.1.1 above.

[233] Panel Report, *Chile – Price Band System,* paras. 7.7–7.8.

[234] Appellate Body Report, *US – Certain EC Products*, paras. 81 and 129. See also our discussion of this issue in the context of the sixth measure, in paragraph 7.85 above.

[235] European Union's second written submission, para. 82.

[236] Russia's first written submission, para. 101.

[237] Russia's response to Panel question No. 42; second written submission, para. 5; and European Union's second written submission, fn 71.

[238] European Union's response to Panel question No. 10.

[239] European Union's second written submission, para. 85; response to Panel question No. 92.

7.167. Russia has not responded specifically to this aspect of the European Union's request for findings. Nevertheless, in the Panel's view, the extensive findings requested by the European Union may not be necessary in order to secure a positive solution to this dispute, for the following reasons.

7.168. Addressing first the European Union's first and third requests (i.e. that the Panel make findings on the ninth measure both as it existed at the time of the Panel's establishment and as amended from 20 September 2015), we note that the nature of the inconsistency alleged to have existed at the time of the Panel's establishment is essentially the same as that alleged to exist following the measure's amendment as of 20 September 2015. Specifically, both claims concern the requirement to apply a duty rate expressed as "x%, but not less than y per unit of measurement" in respect of products imported under a tariff line bound simply as x% (that is, in *ad valorem* terms). It is only the numerical value of "x" (as it figures in both the applied and bound duty rates) that has changed during the course of these proceedings.[240]

7.169. Accordingly, our view is that a finding in respect of the measure as amended would be sufficient to address the issues raised by this claim. Such a finding would not leave open the question of whether the measure as it existed at the time of the Panel's establishment was consistent with Russia's WTO obligations or not. As we have explained, the measure's design and structure have not changed, but only the numerical value of "x" as it figures in the applied and bound duty rates. Consequently, a finding based on that design and structure would indicate whether the measure as it existed at the time of the Panel's establishment was consistent with Article II:1(b), even though the value of "x" was different.

7.170. We turn, finally, to the European Union's second request (i.e. that the Panel make findings concerning the ninth measure as it existed between 1 and 20 September 2015). According to the European Union, until 31 August 2015, the relevant bound duty rate was 16.7%. On 1 September 2015, in accordance with Russia's Schedule, the bound duty rate was lowered to 15%. However, until 20 September 2015, Russia was required to subject goods imported under this tariff line to an applied duty rate of "16.7%, but not less than 0.13 EUR/l". The European Union thus argues that between 1 and 20 September 2015, Russia's alleged breach of Article II:1(b), first sentence, was aggravated because, although the bound duty rate with which Russia had to comply had dropped (from 16.7% to 15%), the duty rate required to be applied by Russia remained the same. Therefore, in the European Union's view, from 1 to 20 September 2015, even the *ad valorem* element of the combined applied duty rate (16.7%) exceeded the bound duty rate (15%).[241]

7.171. It appears to us that the European Union's descriptions of both the change in the bound duty rate and the absence of a change in the duty rate required to be applied by Russia from 1 to 20 September 2015 are correct. Russia has not argued otherwise. Nevertheless, in our view additional findings on the measure as it existed during the period 1 to 20 September 2015 may not be necessary to resolve this dispute. If we were to find that the ninth measure as amended, the *ad valorem* element of which is currently equal to Russia's bound *ad valorem* duty rate, is inconsistent with Article II:1(b), first sentence, then it would follow *a fortiori* that the ninth measure would have been WTO-inconsistent during the period 1 to 20 September 2015, when even the *ad valorem* element of the ninth measure (16.7%) was higher than the relevant bound duty rate (15%). In such circumstances, we do not believe that additional findings would be necessary to secure a positive solution of this dispute. In contrast, if we were to find that the ninth measure as amended is not inconsistent with Article II:1(b), first sentence, it may be necessary to consider the measure as it existed from 1 to 20 September 2015 in order to ensure that we do not leave gaps in our analysis. Accordingly, we will return to the ninth measure as it existed from 1 to 20 September 2015 only if we conclude that the ninth measure as amended is not inconsistent with Article II:1(b), first sentence.

7.172. In sum, in these findings we will consider the seventh and eighth measures as they existed at the time of the Panel's establishment. In contrast, in the light of the European Union's request,

[240] That is, the applied duty rate ("x% but not less than y per unit") has changed from "16.7% but not less than 0.13 EUR/l" to "15% but not less than 0.13 EUR/l", and the bound rate (x%) has changed from 16.7% to 15%. Put another way, the value of x, as it figures in both the applied and bound duty rate, has dropped from 16.7% to 15%.

[241] European Union's second written submission, para. 84.

we will consider the ninth measure as amended from 20 September 2015. However, if we conclude that the ninth measure as amended is not inconsistent with Russia's obligations under Article II:1(b), first sentence, we will return to that measure as it existed during the period 1 to 20 September 2015.

7.4.1.2 Consistency with Article II:1(b), first sentence, of the GATT 1994

7.173. Turning now to assess the consistency of the seventh, eighth, and ninth measures with Article II:1 of the GATT 1994, the Panel finds it appropriate, for the reasons given above[242], to first address the European Union's claims under Article II:1(b), first sentence, before turning to the European Union's consequential claim under Article II:1(a).

7.174. According to the European Union, the seventh, eighth, and ninth measures at issue are inconsistent with Article II:1(b), first sentence. This is so, in the European Union's view, because in respect of tariff lines 1511 90 190 2, 1511 90 990 2, and 8418 10 200 1, Russia is required to apply a combined duty (pursuant to which the customs authority, in respect of every import of the affected goods, calculates and chooses the higher of either an *ad valorem* duty or a specific duty), whereas its Schedule provides for a straightforward *ad valorem* bound duty rate. It does so, in the European Union's view, in a way that necessarily results in the application of duties in excess of bound duty rates for some categories of transactions.[243]

7.175. The European Union notes that although the application of a type of duty other than that provided for in a Member's schedule is not, in itself, inconsistent with Article II:1, such variation will give rise to an inconsistency to the extent that it results in ordinary customs duties being levied in excess of those provided in the schedule. In the European Union's view, "simple arithmetic"[244] shows that, in respect of the seventh, eighth, and ninth measures, there is a break-even price or customs value – expressed in relation to the weight or volume of the affected imported goods – below which the *ad valorem* equivalent of the specific element of the applied combined duty will inevitably exceed Russia's bound *ad valorem* duty.[245] Additionally, and as noted above, the European Union argues, in respect of the ninth measure, that from 1 to 20 September 2015 (after Russia's bound duty rate fell, but before the applied duty rate was reduced), even the *ad valorem* element of the applied duty rate (16.7%) exceeded the bound rate (15%). Because, during this period, the combined duty required the customs authority to select the higher of two values, the minimum duty required to be levied in all cases was 16.7%. This meant that, in respect of the ninth measure, the applied duty rate exceeded the bound rate with regard to all rather than just some customs values.[246] According to the European Union, Russia did not, either at the time of the Panel's establishment or subsequently, apply any kind of cap or ceiling mechanism that would have prevented it from levying duties in excess of bound rates.[247]

7.176. The European Union adds that, as a matter of law, the fact that a duty is designed in a way that makes individual violations merely *possible*, in a given price range, suffices to show a violation of Article II:1. The European Union emphasizes, however, that its arguments are not "purely hypothetical".[248] To demonstrate this, the European Union submitted a series of customs declarations that in its view make it "abundantly clear"[249] that the application of the specific

[242] See paragraph 7.48 above.
[243] European Union's first written submission, para. 79.
[244] European Union's first written submission, para. 85.
[245] European Union's first written submission, para. 85. In its second written submission, the European Union provides the following mathematical formula in support of its argument:

> An 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%", as long as there is no additional mechanism like a ceiling that would prevent that from happening with respect to an individual import transaction".

European Union's second written submission, para. 58.
[246] European Union's second written submission, para. 84.
[247] European Union's first written submission, para. 103; opening statement at the first meeting of the Panel, para. 69; second written submission, para. 58.
[248] European Union's first written submission, para. 88.
[249] European Union's first written submission, para. 98.

elements of the combined duties results in duties being levied in excess of bound rates, sometimes "dramatically"[250] so.[251]

7.177. Russia argues that the European Union's claims in respect of the seventh to ninth measures are essentially about the structure and design of the applied duties, rather than the duties themselves. In Russia's view, the mere fact that a Member applies a type of duty other than that provided for in its schedule is not inconsistent with Article II:1. Rather, to successfully challenge a customs duty under Article II:1, a complaining Member has additionally to prove that the customs duty collected is in excess of the bound rate.[252] Moreover, in Russia's view, the European Union's claims are legally flawed because nothing in the covered agreements requires a Member to use a legislative ceiling or cap when they apply customs duties.[253] Additionally, Russia argues that the European Union's claims must fail because they do not take account of paragraph 313 of Russia's Working Party Report, which, in its view, contains a methodology that must be used when assessing the consistency of an applied combined duty with Article II:1.[254]

7.178. The Panel will, first of all, consider Russia's characterization of the European Union's claims in respect of the seventh to ninth measures.

7.4.1.2.1 Duty type/structure variation

7.179. As noted above, Russia argues that the European Union's claims in respect of the seventh to ninth measures are essentially about the structure and design of the applied duties, rather than the duties themselves, and that Article II:1 does not prohibit it from applying a type or structure of duty other than that provided for in its Schedule.

7.180. The Panel notes that, according to the Appellate Body, "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*".[255] Therefore, we agree with the parties that the mere use by a Member of a duty type or structure that differs from the duty type or structure used in that Member's Schedule is not, in itself, inconsistent with Article II:1. What matters is whether the particular duty that is applied exceeds that set forth in a Member's Schedule.

7.181. In our view, however, the European Union's claims do not arise from the mere fact that Russia is required to apply combined duties in respect of tariff lines with a bound rate expressed in *ad valorem* terms. Rather, the European Union's concern is that certain duties applied by Russia lead, in some circumstances, to the levying of ordinary customs duties in excess of those provided for in Russia's Schedule. As we understand it, the European Union uses the terms "structure and design" in the context of explaining how and why the combined duties at issue result, in its view, in the imposition of customs duties in excess of Russia's bound duty rates. The European Union's claim is that the seventh to ninth measures are inconsistent with Article II:1(b), first sentence, not simply because their structure or design *differs* from the type, structure or design of the corresponding bound rates in Russia's Schedule, but rather because their type, structure and design *result* in the imposition of customs duties in excess of those set forth in Russia's Schedule.

7.4.1.2.2 Methodology for comparison of applied and bound duty rates

7.182. Having addressed the nature of the European Union's claims, we now turn to consider the European Union's claim that the seventh to ninth measures lead (or led, at the time of the Panel's

[250] European Union's first written submission, para. 88.
[251] European Union's first written submission, paras. 85, 88 and 98; opening statement at the first meeting of the Panel, para. 67; second written submission, para. 53; and opening statement at the second meeting of the Panel, para. 16.
[252] Russia's first written submission, paras. 104, 115, 118, and 122; second written submission, para. 31; opening statement at the second meeting of the Panel, paras. 25-26.
[253] Russia's first written submission, paras. 129 and 132-133; opening statement at the first meeting of the Panel, para. 74; second written submission, para. 29.
[254] The parties' arguments on this issue are summarized in more detail below in section 7.4.1.2.2.
[255] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 55 (emphasis added).

establishment) to the imposition of customs duties in excess of those provided in Russia's Schedule.

7.183. We begin this part of our analysis by observing that Russia contests the methodology used by the European Union to compare the applied and bound rates. According to Russia, the European Union's approach is flawed because it does not take account of the methodology in paragraph 313 of Russia's Working Party Report. According to Russia, this methodology is to be used when calculating the *ad valorem* equivalent of the specific element of a combined applied duty. In Russia's view, the European Union cannot, as a legal matter, establish that Russia applies specific duties in excess of bound *ad valorem* duties contrary to Article II:1(b), first sentence, unless it submits evidence conforming to the methodological specifications of paragraph 313.[256]

7.184. The European Union disagrees with Russia, arguing that paragraph 313 is not relevant to an analysis under Article II:1(b), first sentence.[257]

7.185. The Panel notes that Russia's arguments concerning paragraph 313 raise the question of how we should compare the relevant applied and bound duty rates for the purposes of assessing the consistency of the seventh, eighth, and ninth measures with Article II:1(b), first sentence. This issue is logically prior to the issue of whether the European Union has shown that the measures are in fact inconsistent. Accordingly, we will initially consider whether paragraph 313 is relevant to our assessment of the European Union's claims, and in particular whether it provides for a methodology that must be used in calculating the *ad valorem* equivalent of the specific element of a combined duty.

7.4.1.2.2.1 Relevance of Paragraph 313 of Russia's Working Party Report

7.186. Paragraph 313 of Russia's Working Party Report provides:

> As a result of these negotiations, the representative of the Russian Federation confirmed that for goods subject to a combined duty (for example, in the form of 5 per cent, but not less than 2 €/kg), it would be ensured, whether by the Russian Federation or the competent bodies of the CU [customs union], that the *ad valorem* equivalent of the specific duty rate for each tariff line, calculated based on the average customs value, would be no higher than the alternative *ad valorem* duty rate for that tariff line in the Schedule of the Russian Federation in accordance with the following provisions:
>
> - On an annual basis, it would be determined, whether by the Russian Federation or by the competent bodies of the CU, whether it was necessary to reduce the applied specific duty rate to ensure that it was no higher than the applied *ad valorem* duty rate;
>
> - This calculation would be done two months before the end of each calendar year, beginning in the first calendar year after the date of the accession of the Russian Federation;
>
> - Data for the calculations would be 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;
>
> - 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; and

[256] Russia's first written submission, paras. 138-143 and 153-158; second written submission, paras. 24-46; response to Panel question No. 99.
[257] European Union's second written submission, paras. 64-79.

- Data would be drawn from the Official Customs Statistics of the Russian Federation notified to the WTO Integrated Database (IDB) unless such data was unavailable. In such case, IDB and COMTRADE data would be used.

The Russian Federation would inform Members of the results of these calculations on a tariff line basis and, if the results showed that it was necessary to reduce the specific duty rate alternative, this reduction would be made and would go into effect automatically, beginning on 1 January of the year following the calculation. 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. If, after reductions based on the annual re-calculation and changed circumstances, the specific duty rate alternative became significantly lower than *ad valorem* alternative rate of duty, the Russian Federation reserved the right to modify permanently the form of the duty to a purely *ad valorem* duty, at a level that complied with the binding for the relevant tariff line. The Working Party took note of these commitments.

7.187. In Russia's view, paragraph 313 "informs the content of Russia's obligations under Article II:1", and in particular is a "necessary mechanism"[258] for the calculation of the *ad valorem* equivalent of the specific element of a combined duty. According to Russia, as a result of paragraph 313, individual customs declarations cannot serve as evidence that the *ad valorem* equivalent of an applied specific duty rate is in excess of the corresponding *ad valorem* bound duty rate. Rather, to establish that the specific element of a combined duty has been applied in excess of an *ad valorem* bound rate, a complaining party would, in Russia's view, need to "submit evidence based on data from a three-year period and average customs value".[259] According to Russia, as the European Union's evidence does not meet these requirements, it cannot be considered to have established a *prima facie* case that the seventh to ninth measures are WTO-inconsistent.[260]

7.188. The European Union counters that paragraph 313 only concerns goods subject to a combined duty in Russia's Schedule. In the European Union's view, paragraph 313 does not concern goods for which the Schedule provides an *ad valorem* rate and to which Russia nevertheless applies a combined duty. Thus, according to the European Union, paragraph 313 is not relevant to the seventh to ninth measures.[261]

7.189. The European Union further argues that, in any event, paragraph 313 concerns the relationship between the specific element and the *ad valorem* element of a single combined duty. According to the European Union, the purpose of the paragraph is to ensure that the specific element of such a combined duty does not exceed the *ad valorem* element of that same duty for the average customs value. If, after performing the calculation in paragraph 313, it appears that the specific element leads to a higher duty *on average*, then paragraph 313 would require Russia to further reduce the applied specific element below its bound level. In this sense, paragraph 313 imposes obligations on Russia that are distinct from, and additional to, those contained in Article II:1 and Russia's Schedule. Paragraph 313 does not set out a way of interpreting, changing, or limiting Russia's obligations under Article II:1. In the European Union's view, accepting Russia's interpretation of paragraph 313 would make Article II:1(b), first sentence, practically meaningless as far as Russia is concerned, because it would allow Russia to freely exceed its tariff bindings as long as it did so only some of the time, compensating the duties it levies in excess by imposing others below bound rates.[262]

[258] Russia's first written submission, para. 162; second written submission, para. 33.
[259] Russia's first written submission, para. 155.
[260] Russia's first written submission, paras. 136, 142-143 and 155-157; opening statement at the first meeting of the Panel, paras. 78 and 80; second written submission, paras. 28-30, 33-34 and 39; opening statement at the second meeting of the Panel, paras. 29, 31, and 34-39; responses to Panel question Nos. 20, 25, 30, 70-71, 96 and 97(c).
[261] European Union's opening statement at the first meeting of the Panel, para. 73; second written submission, para. 65; response to Panel question No. 75.
[262] European Union's opening statement at the first meeting of the Panel, paras. 74-75 and 80; second written submission, paras. 64-65, 68-69 and 74; opening statement at the second meeting of the Panel, paras. 17-21 and 23; responses to Panel question Nos. 23, 25, 30, 70, 73, 96-98 and 112-113.

7.190. The question before the Panel is whether paragraph 313 sets forth a methodology through which the *ad valorem* equivalent of the specific element of a combined duty rate must be calculated. If that were the case, the European Union's claims concerning the seventh to ninth measures would need to be supported by evidence that takes this methodology into account.

7.191. Before examining the text of paragraph 313, it is useful to further explain the significance of this issue for the current proceedings. In respect of the seventh, eighth, and ninth measures at issue, the corresponding bound rates are expressed in straightforward *ad valorem* terms. The CCT, however, requires the application of combined duties. To recall, the term "combined duty", as it has been used in these proceedings, refers to a duty that consists of at least one *ad valorem* alternative rate combined with a minimum specific alternative rate.[263] Where, in a given import transaction, the *ad valorem* alternative rate, if it were applied, would yield an amount of duty per unit of measurement that is less than the amount that the specific alternative rate would yield, the CCT requires application of the specific alternative duty rate.[264]

7.192. In cases where a bound duty rate is expressed in *ad valorem* terms but the corresponding applied duty is expressed in specific terms, the question arises how to compare the former with the latter for the purpose of determining compliance with Article II:1(b), first sentence. The Appellate Body has explained in this respect that "for any specific duty, there is an *ad valorem* equivalent deduced from the ratio of the absolute amount collected to the price of the imported product".[265] In other words, the comparison can be facilitated by converting the specific duty into a percentage of the customs value of the imported product, and comparing that percentage with the *ad valorem* bound duty rate.[266]

7.193. In Russia's view, paragraph 313 sets out a methodology that must be followed for a legally valid comparison between a bound *ad valorem* duty rate and the specific element of an applied combined duty rate to be calculated. As explained above, according to Russia the conversion and comparison must be conducted as envisaged in paragraph 313, that is to say, in respect of the "average customs value" of a particular product, and on the basis of 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".[267]

7.194. We begin our assessment by looking closely at the content of paragraph 313. We note that, pursuant to paragraph 2 of Russia's Accession Protocol and paragraph 1450 of its Working Party Report, paragraph 313 is an integral part of the WTO Agreement. However, we observe that paragraph 313 is silent on the nature of its relationship, if any, with Article II:1(b), first sentence. Paragraph 313 therefore neither expressly precludes nor expressly endorses Russia's interpretation.

7.195. We next observe that both Article II:1(b), first sentence, and paragraph 313 are concerned with, or may involve, comparisons of duties or duty rates. In particular, both provisions may, as in the case of combined applied duties of the kind at issue here, require calculation of the *ad valorem* equivalent of a specific duty or rate, and the comparison of that *ad valorem* equivalent with another duty or rate. However, the two provisions are significantly different when it comes to the issues of what precisely is to be compared, and for what purpose.

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[263] In the present case, the relevant combined duties take the form "x%, but not less than y per unit" (the seventh to ninth measures) or "x%; or y%, but not less than z per unit" (the tenth and eleventh measures).

[264] For instance, at the time of the Panel's establishment, the tariff line concerning the seventh measure was subject to an *ad valorem* bound duty rate of 3%. In the CCT, however, that tariff line was subject to a combined duty rate of "3%, but not less than 0.09 EUR/kg". Thus, where levying a duty of 3% of the customs value would work out to be less than 0.09 EUR/kg, the customs authority is required to levy the duty at the rate of 0.09 EUR/kg. The duty levied on a product imported under the seventh measure can therefore never be less than the equivalent of 0.09 EUR/kg, whether expressed in *ad valorem* or specific terms.

[265] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 50.

[266] We note that the opposite conversion could also be used for comparative purposes, as it is possible to estimate the specific duty equivalent that would result from the application of an *ad valorem* duty rate. Although the calculation of one or the other may be easier depending on the information available in a case, both comparative approaches are mathematically equivalent and should, therefore, lead to the same finding.

[267] Russia's Working Party Report, para. 313.

7.196. As its terms make clear, Article II:1(b), first sentence, calls for a comparison between the "customs duties … set forth and provided" for in a Member's Schedule, on the one hand, and the customs duties levied on goods "on their importation into the territory to which the Schedule relates", on the other hand.[268] The relevant comparison under Article II:1(b), first sentence, is thus between a *bound* duty or duty rate and an *applied* duty or duty rate. The purpose of this comparison is, as the text makes clear, to determine whether imports have been "exempt[ed] from ordinary customs duties in excess of those" provided for in the Schedule.

7.197. Paragraph 313 calls for a different comparison. The first sub-paragraph indicates the overall concern of the provision, which is to ensure that "the *ad valorem* equivalent of the specific duty rate for each tariff line, calculated based on the average customs value, would be no higher than the alternative *ad valorem* duty rate for that tariff line in the Schedule of the Russian Federation". The way in which this is to be ensured is elaborated in the tirets of that sub-paragraph. In particular, the first tiret of the sub-paragraph translates the overall concern into a specific obligation: on an annual basis, Russia or the competent bodies of the Customs Union (and now the EAEU) must determine "whether it [is] necessary to reduce the applied specific duty rate to ensure that it [i]s no higher than the applied *ad valorem* duty rate".

7.198. This tiret makes clear that the relevant comparison under paragraph 313 is between the two alternative elements – *ad valorem* and specific – of a single combined *applied* duty. Thus, paragraph 313 is not concerned with the relationship between Russia's applied and bound duties; rather, its purpose is to ensure that if Russia's customs authority applies the specific element of a combined applied duty, the *ad valorem* equivalent of the specific duty rate, determined on the basis of the average customs value, does not exceed the corresponding alternative *ad valorem* duty rate.

7.199. Turning to relevant context, the immediately preceding paragraph 312 in our view further elucidates the different purpose of the mechanism in paragraph 313. It provides, in relevant part:

> In response to comments of some Members that, combined (mixed) and specific rates should be replaced by *ad valorem* duties upon the accession of the Russian Federation, in order to increase transparency and reduce distortions in trade, the representative of the Russian Federation noted that the CCT ensured a similar effective rate for the *ad valorem* and specific alternatives of combined rates.

7.200. It is instructive that this paragraph contains, *in fine*, the phrase "the *ad valorem* and specific *alternatives* of combined rates". (second emphasis added) To us, this provides additional confirmation that paragraph 313 calls for a comparison between two elements of a single combined applied duty, and not a comparison between a combined applied duty and a corresponding bound duty.[269]

7.201. In our view, not only the what and the why of the comparisons called for under Article II:1(b), first sentence, and paragraph 313 are different, but also the how. As we have mentioned above, for goods subject to a combined applied duty, paragraph 313 instructs that the *ad valorem* equivalent of a specific duty rate be calculated on the basis of the average customs value of a particular product. This calculation is to be done using data from a three-year period, which in turn is to be 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. So calculated, the *ad valorem* equivalent must then be compared to the alternative *ad valorem* element of the applied combined duty rate.

7.202. In contrast, Article II:1(b), first sentence, calls for a simple comparison between the bound duty rate and the actually applied or applicable duty rate. In the case of combined applied duties, it may be necessary to calculate the *ad valorem* equivalent of a specific element in order to

[268] Panel Report, *Colombia – Textiles*, para. 7.145.

[269] While it is true that paragraph 312 talks about the CCT prior to Russia's accession, paragraph 313 opens with the words "[a]s a result of these negotiations", and then goes on to say that "it *would* be ensured" (emphasis added) by Russia that "the *ad valorem* equivalent of the specific duty rate for each tariff line would be no higher than the alternative *ad valorem* duty rate for that tariff line". Russia's Working Party Report, paras. 312-313.

compare it with a bound *ad valorem* rate.[270] But nothing in the text of Article II:1(b), first sentence, suggests that this calculation must or even can be based on the average customs value of imports of the good concerned, or on data from a three-year period. The text of Article II:1(b) states, broadly, that "products … shall, on their importation … be exempt from ordinary customs duties in excess of those set forth and provided" in a Member's Schedule. This unqualified language, together with the considerations we set out above[271], suggests to us that the obligation in Article II:1(b), first sentence, applies to each and every import transaction. Thus, the duties applied or applicable in respect of each and every import transaction must comply with the upper limit imposed by Article II:1(b), and not only some average duty calculated on the basis of a series of import transactions.

7.203. In sum, while both paragraph 313 and Article II:1(b), first sentence, require comparisons, there are significant differences between the two provisions in terms of what is to be compared, how the comparison is to be undertaken, and the purpose for which the comparison is made. These significant differences indicate to us that paragraph 313 does not, as Russia suggests, prescribe or authorize a methodology to be applied when calculating *ad valorem* equivalents as part of an analysis under Article II:1(b), first sentence. We find no support for this view in paragraph 313. Moreover, the text of Article II:1(b), first sentence, and other considerations suggest to us that the calculation of an *ad valorem* equivalent under that provision is to be based on the specific duty applied or applicable to a good *vis-à-vis* its customs value.[272]

7.204. As an additional consideration, we have difficulty accepting Russia's interpretation of paragraph 313 because of its implications. Accepting Russia's interpretation would mean that Russia could subject some imports to duties in excess of bound rates, provided that, at the end of the relevant three-year period, the duty applied in respect of the average customs value was in conformity with the relevant bound rate. In other words, Russia could exceed its tariff bindings in some transactions, provided that, over time, it levied duties below bound rates in others. We have found above, however, that Article II:1(b), first sentence, does not permit such balancing.[273] In our view, it would not be appropriate to endorse an interpretation of paragraph 313 that would result in such a major departure from the requirements of Article II:1(b), first sentence, as we understand it, without a very clear indication that this was indeed what the negotiators intended. We have been unable to find any such indication.

7.205. Additionally, accepting Russia's interpretation of paragraph 313 would effectively make it impossible for a Member to promptly challenge individual instances of application of a combined duty in excess of the bound duty set forth in Russia's Schedule. This is because compliance with Article II:1(b), first sentence, would need to be ensured only in respect of an average customs value calculated on the basis of data from a three-year period. Here again, in the absence of a clear indication to the contrary, it is highly doubtful, in our view, that the negotiators of paragraph 313 intended to limit the ability of Members exporting goods to Russia to promptly challenge individual instances of application of a combined duty.

7.206. In sum, we consider that paragraph 313 is not relevant to the analysis of an applied combined duty that allegedly results in the imposition of duties in excess of those provided for in Russia's Schedule. More particularly, we consider that no recourse needs to, or can, be had to paragraph 313 when calculating the *ad valorem* equivalent of the specific element of an applied combined duty rate to determine whether that applied combined duty is in excess of the corresponding *ad valorem* duty set forth in Russia's Schedule. As this is precisely the analysis that must be performed in assessing the consistency of the seventh to ninth measures with Article II:1(b), first sentence, paragraph 313 will not be considered further in our analysis of these measures. Having found that paragraph 313 is not relevant to our assessment of the claims concerning the seventh to ninth measures, we do not find it necessary to determine in addition whether, as the European Union argues, paragraph 313 establishes an additional obligation on

[270] As explained above, in some cases it may also be possible to compare by calculating the specific duty equivalent of an *ad valorem* rate.

[271] On this point, see in paragraphs 7.15 to 7.17 and 7.21 to 7.33.

[272] We note that the customs value of that good would need to be determined in accordance with the provisions of the Customs Valuation Agreement.

[273] See paragraph 7.33.

Russia only in situations where both the applied and the bound duties are expressed in combined terms.

7.4.1.2.3 Comparison of applied and bound duty rates

7.207. We have already set out our understanding of the relevant applied duty rates in respect of the seventh to ninth measures. We can therefore turn to consider whether those applied rates lead to the imposition of duties in excess of those set forth in Russia's Schedule. To undertake this analysis, we once again need to compare the duty rates required to be applied by Russia, on the one hand, and the bound duty rates provided for in Russia's Schedule, on the other. We recall that, for the reasons given above[274], we will examine the seventh and eighth measures as they existed at the time of the Panel's establishment. Conversely, in respect of the ninth measure, we will focus on the measure as it currently exists following an amendment that entered into force on 20 September 2015. We will consider the ninth measure as it existed during the period 1 to 20 September 2015 only if we conclude that the measure as amended is not WTO-inconsistent.

7.208. In respect of the seventh and eighth measures, we find, based on the evidence presented, that the applied and bound duty rates at the time of the Panel's establishment were as follows:

Tariff line	Russia's applied duty rate provided for at date of Panel's establishment	Russia's bound duty rate[275]
1511 90 190 2	3%, but not less than 0.09 EUR/kg[276]	3%
1511 90 990 2	3%, but not less than 0.09 EUR/kg[277]	3%

7.209. In respect of the ninth measure, we understand, based on the evidence presented, that the applied and bound rates, as of 20 September 2015, are as follows:

Tariff line	Russia's current applied duty rate	Russia's bound duty rate[278]
8418 10 200 1	15%, but not less than 0.13 EUR/l[279]	15%

7.210. In respect of the seventh, eighth, and ninth measures, we cannot simply compare the applied and bound duty rates, as we did for the first to sixth measures. Rather, we need to consider how the applied combined duty rates operate before we can determine whether they lead to the imposition of duties in excess of Russia's bound rates.

7.211. In this connection, the Appellate Body has observed that "for any specific duty, there is an *ad valorem* equivalent deduced from the ratio of the absolute amount collected to the price of the imported product".[280] When the duty in question consists of a specific duty and the level bound in the Member's Schedule is expressed in *ad valorem* terms, it is possible to calculate a "break-even" price for which the *ad valorem* equivalent of the specific duty at issue is equal to the bound *ad valorem* level. Any import price below that break-even price will cause the *ad valorem* equivalent of the specific duty to exceed the bound *ad valorem* level, whereas any import price above the break-even price will result in the *ad valorem* equivalent of the specific duty being lower than the bound *ad valorem* level.[281]

7.212. This holds true also in the case of the seventh to ninth measures, where (i) the relevant applied rate is expressed in combined terms, consisting of two alternative elements, a specific one and an *ad valorem* one, and (ii) the bound rate is expressed in *ad valorem* terms.[282] In these cases, the duty structure itself indicates in which transactions the specific element is to be applied. Where the specific element is applied, it is possible to calculate a break-even price. Imports priced

[274] See section 7.4.1.1.1.1 above.
[275] Russia's Schedule, (Exhibit EU-9).
[276] Decision No. 52, (Exhibit EU-6).
[277] Decision No. 52, (Exhibit EU-6).
[278] Russia's Schedule, (Exhibit EU-9). This bound rate came into effect on 1 September 2015.
[279] Russia's Schedule, (Exhibit EU-9).
[280] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 50.
[281] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 53; Panel Report, *Colombia – Textiles*, para. 7.146.
[282] Panel Report, *Colombia – Textiles*, para. 7.146.

below that break-even price will be subject to a specific duty whose *ad valorem* equivalent exceeds the corresponding bound *ad valorem* rate.

7.213. The European Union explained its understanding of the structure, design, and architecture of the seventh, eighth, and ninth measures. It also presented arithmetical calculations in an attempt to show how the application of the relevant combined duties results, for import transactions at or below a specified customs value (that is, the break-even price discussed above), in the imposition of customs duties in excess of those provided for in Russia's Schedule. Additionally, it submitted actual customs declarations that, in its view, confirm that customs duties have, in fact, been levied in excess of bound rates in respect of the tariff lines affected by the seventh, eighth, and ninth measures.[283]

7.214. Russia has not challenged the accuracy of the European Union's mathematical explanations; it only challenged the methodology underlying the European Union's calculations as failing to take account of paragraph 313 of Russia's Working Party Report. Nevertheless, it is, as noted by the panel in *Colombia – Textiles*, the responsibility of a panel to "review" the submitted "arithmetical calculations and verify whether they are of value in resolving this dispute".[284] Accordingly, we now turn to consider the European Union's arithmetical arguments in more detail.

7.215. We begin with the seventh and eighth measures. The European Union argues that these measures, as they existed at the time the Panel was established, required Russia to apply the specific element of the combined duty whenever the customs value (expressed as a unit price[285]) of an import was less than 3 EUR/kg. According to the European Union, this resulted in an applied duty above the bound level. In support of this contention, the European Union presents a calculation using a hypothetical good with a customs value equal to 2.90 EUR/kg. In reviewing this calculation, we recall that, at the time the Panel was established, the bound duty rate in respect of the seventh and eight measures was 3%, while the applied duty rate in respect of both measures was "3%, but not less than 0.09 EUR/kg".[286] Thus, assuming that 1 kilogram of palm oil were imported under either tariff line 1511 90 190 2 or 1511 90 990 2, at a customs value of EUR 2.90, under the *ad valorem* element (namely 3%) of the applied combined rate, the duty levied would be 0.087 EUR/kg.[287] Since 0.087 EUR/kg is *less* than the alternative minimum specific duty rate of "0.09 EUR/kg", Russia's customs authority would need to apply the alternative specific element, namely "not less than 0.09 EUR/kg". Therefore, the applied specific duty rate would be 0.09 EUR/kg. In the present example, for a hypothetical good weighing 1 kilogram, the resulting applied duty would therefore be exactly EUR 0.09. As we have explained above, the *ad valorem* equivalent of an applied specific duty rate is calculated by dividing the amount of duty levied by the total customs value of the good at issue (thereby yielding the percentage of the customs value that the duty levied represents).[288] In this example, EUR 0.09 (the duty levied) divided by EUR 2.90 (the customs value of 1 kilogram of palm oil) yields an *ad valorem* equivalent of 3.1%. As indicated, Russia's Schedule requires that it not impose a duty at a rate higher than 3%. Evidently, an applied *ad valorem* equivalent duty rate of 3.1% would be higher than the bound rate of 3%.[289] It is clear from this example that any time the customs value of the good is equal to or less than 2.90 EUR/kg[290], the specific element of the applied combined duty rate would necessarily be applied.

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[283] European Union's first written submission, paras. 85-87 and 91-92; second written submission, para. 97.

[284] Panel Report, *Colombia – Textiles*, para. 7.148.

[285] We use the term unit price to express the value of a good in terms of one "unit of measurement" of that good. For example, a good with a price of EUR 10 and weighing 10 kilograms, would be expressed in terms of a unit price as 1 EUR/kg.

[286] See paragraph 7.208 above.

[287] 3% of EUR 2.90 is EUR 0.087.

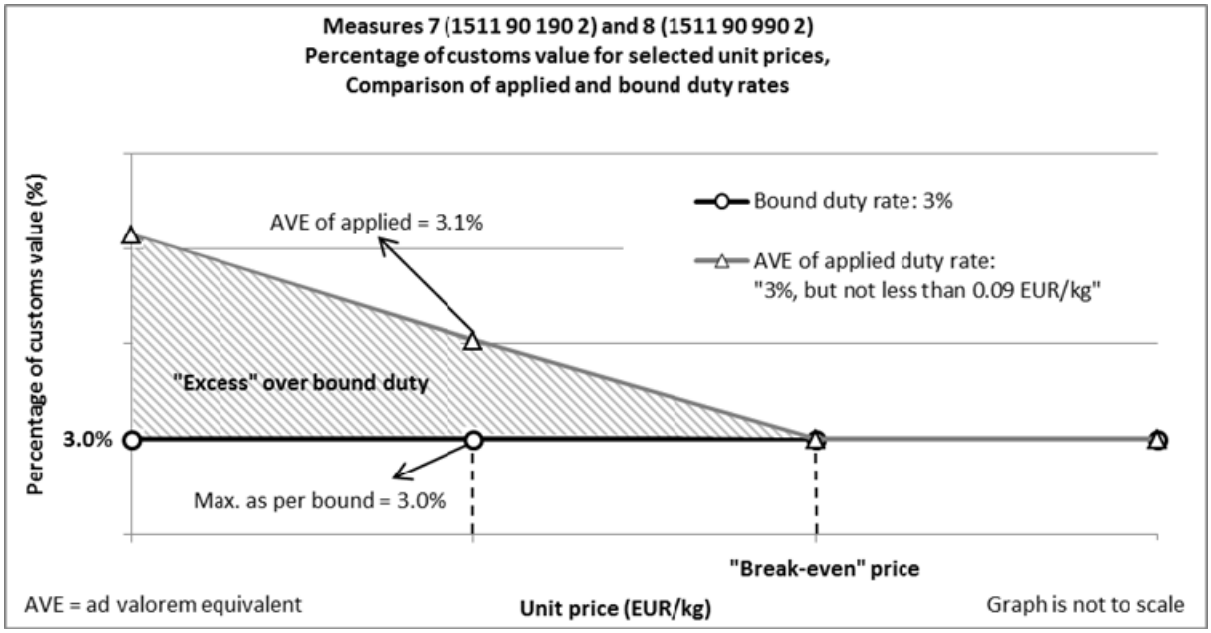
[288] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 50. See also Panel Report, *Colombia – Textiles,* para. 7.146.

[289] Put slightly differently, had the bound duty rate been applied, the amount of duty levied would have been 3% of EUR 2.90, namely EUR 0.087. Therefore, for a good with a customs value of 2.90 EUR/kg, any amount of duty above EUR 0.087 would be higher than the bound duty.

[290] For a customs value below 2.90 EUR/kg, the *ad valorem* duty resulting from the specific element (i.e. 0.09 EUR/kg) will inevitably be higher than the duty resulting from the alternative *ad valorem* element (i.e. 3% of the customs value), which means that "0.09 EUR/kg" would be levied by Russia's customs authority in all such cases. The lower the customs value is with respect to 2.90 EUR/kg, the higher the percentage that

7.216. The European Union asserts that the lowest customs value for which the applied duty rate would equal the bound duty rate (the "break-even price") is 3 EUR/kg, not 2.90 EUR/kg. According to the European Union, for goods with customs values below that alleged break-even price Russia was required to apply duties in excess of those provided in its Schedule. We agree with the European Union that a specific break-even price could be mathematically determined. However, the European Union did not provide Russia and the Panel with the worked mathematical reasoning supporting its determination of the break-even price. In these circumstances, and bearing in mind the proper allocation of the burden of proof in WTO dispute settlement[291], we do not find it appropriate to determine the break-even price ourselves. Because the European Union has not provided its calculations in support of the specific break-even price that it has identified, we are not in a position to review these calculations with a view to confirming whether a good valued at 3 EUR/kg would or would not be subject to duties higher than those provided for in Russia's Schedule. We are satisfied, however, that the European Union has demonstrated that for goods valued at or less than 2.90 EUR/kg, the application of the minimum specific duty rate of 0.09 EUR/kg would necessarily result in an *ad valorem* equivalent duty rate of more than 3%, i.e. a duty rate higher than the bound rate. Accordingly, we find, in respect of the seventh and eighth measures, that so long as the customs value of a good falling within the relevant tariff lines was equal to or less than a certain customs value – and the customs value for which we have been able to confirm this is 2.90 EUR/kg – the *ad valorem* equivalent of the specific element of the applied combined duty rate would inevitably have been higher than the bound *ad valorem* duty rate, resulting in applied duties higher than the bound duty. This finding is represented graphically in Figure 1 below.

Figure 1



7.217. We turn, next, to the ninth measure as amended. The European Union initially provided a mathematical example for the ninth measure as it existed at the time of the Panel's establishment. As discussed in paragraph 7.166 above, following amendment of the measure, the European Union requested findings on the measure as it existed at the time of the Panel's establishment, as it existed from 1 to 20 September 2015, and as amended after 20 September 2015.[292] As noted in paragraph 7.172 above, the Panel decided to make findings on the measure as amended after 20 September 2015.

0.09 EUR/kg will represent of that customs value. Therefore, it is mathematically correct to say that the lower the customs value is below 2.90 EUR/kg, the more the *ad valorem* equivalent of the combined applied duty rate will exceed the bound rate of 3%.

[291] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at 335.

[292] European Union's second written submission, para. 85.

7.218. We note that the European Union has not presented mathematical explanations for the measure as amended. We recall in this regard that the amendment occurred during these proceedings. The European Union states, however, that "[t]he inconsistency with Article II:1(b) … remains, for the very same reasons as with the duties that were in force when the Panel was established. The 'break-even' customs value below which duties would be imposed in excess is now different, but can still be clearly established".[293] In considering this argument, we note that the structure and design of the measure as amended is identical to that of the measure as it existed at the time of the Panel's establishment. In both instances the bound duty rate is in *ad valorem* form, while the applied combined duty rate comprises both an *ad valorem* element and a specific element. Moreover, in both instances the bound duty rate is numerically equal to the *ad valorem* element of the applied combined duty rate.[294] Given this, and lacking specific calculations for the ninth measure as amended, we will first review the European Union's calculations in respect of the measure as it existed at the time of the Panel's establishment. If these calculations concerning the ninth measure as it existed at that time confirm the European Union's argument that below a customs value identified by the European Union the *ad valorem* equivalent of the applied combined duty rate would inevitably have been higher than the bound *ad valorem* duty rate, we will examine whether the same can be said of the measure as amended in respect of that same customs value.

7.219. The European Union argued in respect of the measure as it existed at the time of the Panel's establishment, that below a break-even customs value of 0.77 EUR/l, the specific element of the combined duty would be applied, resulting in a duty levied above the bound level. As with the seventh and eight measures, the European Union did not provide to Russia and the Panel its worked mathematical reasoning in respect of this break-even price, but did provide calculations in respect of a hypothetical good, in this instance a good with a customs value of 0.76 EUR/l. Although we agree with the European Union that a specific break-even price could be mathematically determined for the ninth measure as amended, we do not find it appropriate, in the absence of specific calculations by the European Union, to determine the break-even price ourselves. We have, however, reviewed the calculations that the European Union did provide using the same analysis that we undertook in respect of the seventh and eighth measures. We are satisfied that under the ninth measure as it existed at the time of the Panel's establishment, the European Union has demonstrated that so long as the customs value of a good falling within the relevant tariff line was equal to or less than 0.76 EUR/l, the *ad valorem* equivalent of the specific element of the applied combined duty rate would inevitably have been higher than the bound *ad valorem* duty rate, resulting in applied duties higher than the bound duty.[295]

7.220. Turning to the measure as amended, we have applied the European Union's calculations and reasoning for the ninth measure as it existed at the time of the Panel's establishment to the ninth measure as amended, again using a hypothetical good with a customs value equivalent to 0.76 EUR/l (the customs value that was identified by the European Union). This calculation confirms, and we therefore find, in respect of the ninth measure as amended, that so long as the customs value of a good falling within the relevant tariff line is equal to or less than 0.76 EUR/l, the *ad valorem* equivalent of the specific element of the applied combined duty rate will inevitably be higher than the bound *ad valorem* duty rate, resulting in applied duties higher than the bound duty.[296] This finding is represented graphically in Figure 2 below.

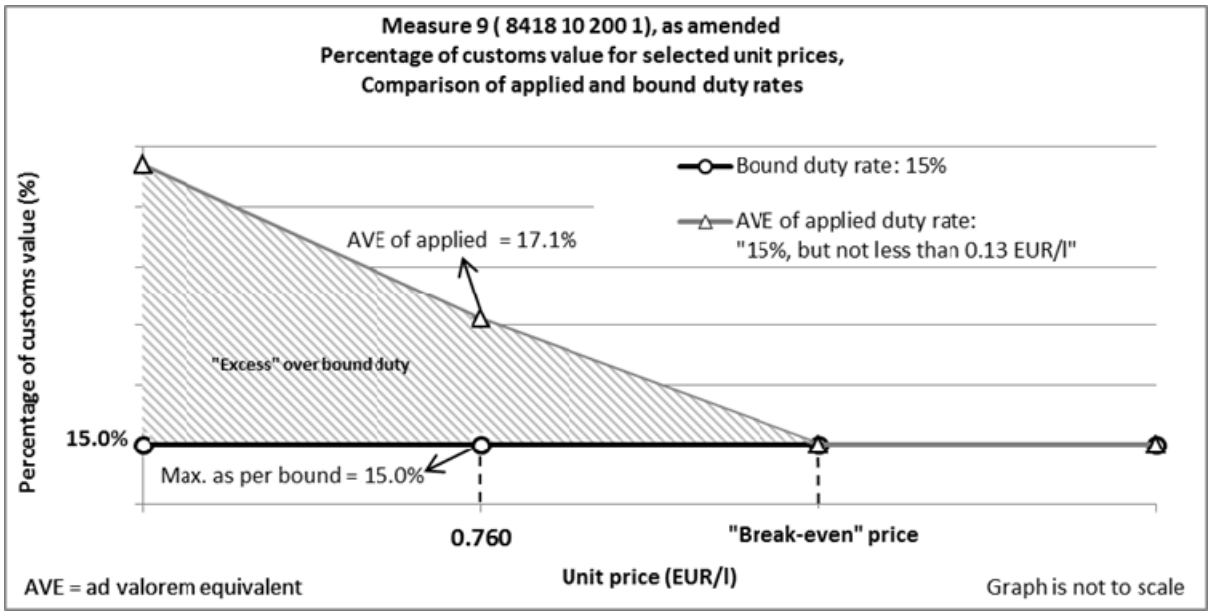
[293] European Union's second written submission, para. 83.

[294] See paragraphs 7.208 to 7.209 above.

[295] The applied duty rate was "16.7%, but not less than 0.13 EUR/l", while the bound duty rate was 16.7%. For any good with a customs value equal to or less than 0.76 EUR/l, applying the *ad valorem* element of 16.7% would have resulted in a specific duty rate equivalent of 0.127 EUR/l, which is less than 0.13 EUR/l, therefore requiring Russia's customs authority to impose the specific element of the combined duty, namely 0.13 EUR/l. This inevitably would have resulted in an *ad valorem* equivalent duty rate higher than the bound rate of 16.7%, whenever the customs value was 0.76 EUR/l or less. For a customs value of 0.76 EUR/l, the *ad valorem* equivalent of the combined applied duty rate would be 17.1%.

[296] The applied rate required is "15%, but not less than 0.13 EUR/l", while the bound rate is 15%. For any good with a customs value equal to or less than 0.76 EUR/l, applying the *ad valorem* element of 15% will result in a duty rate of 0.114 EUR/l, which is less than 0.13 EUR/l, therefore requiring Russia's customs authority to impose the specific element of the combined duty, namely 0.13 EUR/l. This inevitably will result in an *ad valorem* equivalent higher than the bound rate of 15%, whenever the customs value is 0.76 EUR/l or less. In the case of a customs value of 0.76 EUR/l, the *ad valorem* equivalent of the combined applied duty rate would be 17.1%. For all customs values below 0.76 EUR/l, the duty resulting from the specific element

Figure 2



7.221. In sum, in respect of the seventh and eighth measures as they existed at the time of the Panel's establishment, and for the ninth measure as amended from 20 September 2015, the European Union has identified specific customs values at or below which imports were or will be subject to the specific duty rate alternative of a combined duty, whose *ad valorem* equivalent was or is higher than the corresponding *ad valorem* duty rate in Russia's Schedule.

7.222. As we have explained above, the consistency of a measure with Article II:1(b), first sentence, can be determined on the basis of the "structure and design" of that measure.[297] For the reasons already given in respect of the first to fifth measures, there is no need for a complaining party to show that a particular measure has, in any given instance, actually led to the imposition of customs duties in excess of bound levels. Accordingly, we do not consider it necessary to base our findings on the Declarations of Goods and Supplementary Lists to those Declarations of Goods submitted by the European Union in Exhibits EU-12, EU-13, EU-14, EU-16, EU-17, and EU-18.

7.223. Additionally, we note that the application of a duty may be inconsistent with Article II:1(b), first sentence, even where it does not lead to duties being levied above bound levels in every transaction, but only "with respect to a certain range of import prices".[298] Therefore, the fact that, in respect of the seventh, eighth, and ninth measures, the European Union has demonstrated that Russia's duties would have been higher than bound levels whenever the customs value was at or fell below a certain level is sufficient to make a *prima facie* case of inconsistency with Article II:1(b), first sentence.

7.4.1.3 Ceiling mechanism

7.224. Before concluding our analysis of the seventh, eighth, and ninth measures, we need to address Russia's argument concerning the alleged lack of a ceiling mechanism.

(i.e. 0.13 EUR/l) will inevitably be higher than the duty resulting from the alternative *ad valorem* element (i.e. 15% of the customs value), which means that "0.13 EUR/l " would be levied by Russia's customs authority in all such cases. The lower the customs value is with respect to 0.76 EUR/l, the higher the percentage that 0.13 EUR/l will represent of that customs value. Therefore, it is mathematically correct to say that the lower the customs value is below 0.76 EUR/l, the more the *ad valorem* equivalent of the combined applied duty rate will exceed the bound rate of 15%.

[297] Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 53, 55 and 62; Panel Report, *Colombia – Textiles*, para. 7.122.

[298] Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 55 and 62.

7.225. According to the European Union, Russia provides for no mechanism that would prevent the *ad valorem* equivalents of the applied combined duties at issue from exceeding the level of Russia's bound duties.[299] In the European Union's view, in the absence of a ceiling mechanism, goods imported under the relevant tariff lines will be subject to duties exceeding those provided for in Russia's Schedule.[300]

7.226. Russia submits that the European Union's claims are unfounded because nothing in the WTO Agreement requires Members to apply a mechanism such as a ceiling or cap, nor has such an obligation been adopted by the WTO General Council or Ministerial Conference. In Russia's view, the Appellate Body has stated that the use of a mechanism such as a ceiling or cap is a possibility, but not an obligation.[301]

7.227. The European Union responds by asserting that it is not challenging the absence of a ceiling mechanism as being in itself WTO-inconsistent. According to the European Union, the absence of any mechanism that would ensure that the *ad valorem* equivalents of the specific element of the applied combined duty rates do not surpass the bound *ad valorem* rates is a part of the design and structure of the measures. In the European Union's view, it is precisely because there is no ceiling mechanism that the seventh, eighth, and ninth measures inevitably lead to the levying of duties in excess of bound levels whenever the customs value falls below a certain threshold.[302]

7.228. The Panel begins by considering the European Union's argument concerning the absence of a duty ceiling or cap that would prevent Russia from levying duties higher than those provided for in its Schedule. The European Union has indicated that, to its knowledge, Russia applies no such ceiling mechanism. The European Union has also argued that it cannot be expected to positively demonstrate the absence of something.[303] We note that Russia has introduced no evidence suggesting that such a ceiling or cap exists. Thus, there is no evidence on record that Russia has put in place a ceiling or cap that would prevent such duties from being applied.

7.229. With respect to Russia's argument that nothing in the WTO Agreement requires Members to apply a mechanism such as a ceiling or cap, we recall that we have already found, in our preliminary ruling, that the European Union is not challenging the absence of a ceiling mechanism in itself. As we explained there, we understand the European Union's references to the absence of a ceiling mechanism as an element of the European Union's description of the overall design and structure of the seventh, eighth, and ninth measures, or as a part of the European Union's explanation of how and why these measures lead, in respect of some transactions, to the imposition of customs duties in excess of those provided for in Russia's Schedule.[304] In our view, the European Union's point is simply to acknowledge that Russia could, in principle, have ensured that the seventh, eighth, and ninth measures at issue never result in the imposition of duties above the levels provided for in Russia's Schedule, by developing and implementing a kind of

[299] We note that the European Union has not argued that the first to sixth measures at issue could be subject to a duty ceiling or cap that would prevent these measures from leading to the imposition of customs duties in excess of those provided in Russia's Schedule. As we understand it, this is because a ceiling or cap could only be relevant where an applied duty is expressed in a form different from that in which the corresponding bound duty is expressed. A ceiling or cap could be particularly relevant where a Member applies a specific or a combined duty in respect of a tariff line bound in *ad valorem* terms. Thus, in *Argentina – Textiles and Apparel*, the Appellate Body discussed the possibility of using a ceiling or cap mechanism which would "ensure that, even if the type of duty applied differs from the type of duty provided in that Member's Schedule, the *ad valorem* equivalent of the duties actually applied would not exceed the *ad valorem* duties provided for in the Member's Schedule". Appellate Body Report, *Argentina – Textiles and Apparel*, para. 54.

[300] European Union's first written submission, para. 103; opening statement at the first meeting of the Panel, para. 69; second written submission, para. 58.

[301] Russia's first written submission, paras. 129 and 132-133; opening statement at the first meeting of the Panel, para. 74; second written submission, para. 29.

[302] European Union's first written submission, paras. 100 and 103; opening statement at the first meeting of the Panel, paras. 67 and 69; second written submission, paras. 58, 67 and 69; opening statement at the second meeting of the Panel, para. 16.

[303] European Union's second written submission, para. 93; opening statement at the first meeting of the Panel, para. 43.

[304] Annex A-1, para. 2.32.

ceiling or cap.[305] Therefore, as the European Union has claimed no breach by Russia of some asserted requirement to put in place a ceiling mechanism, we reject Russia's argument that the European Union's claims are unfounded because there is no requirement under Article II:1(b), first sentence, to use a ceiling mechanism.

7.4.1.4 Conclusion

7.230. We have found above that, in relation to the seventh and eighth measures as they existed at the time the Panel was established, the duties required to be applied by Russia were higher than bound levels for imports at or below specified break-even prices (customs values). We have also noted that there is no evidence that Russia applied a ceiling or cap that would prevent such duties from being applied. Therefore, we conclude that, in respect of the seventh and eighth measures as they existed at the time of the Panel's establishment, Russia was required in in some instances to apply duties in excess of those set forth in its Schedule, contrary to Article II:1(b), first sentence.

7.231. We have also found that, in relation to the ninth measure as amended from 20 September 2015, the duties required to be applied by Russia are higher than bound levels for imports at or below a specified break-even price. We have also noted the absence of evidence that Russia applies a ceiling or cap that would prevent these duties from being applied. Therefore, we conclude that, in respect of the ninth measure at issue as amended from 20 September 2015, Russia is required in some instances to apply duties in excess of those set forth in its Schedule, contrary to Article II:1(b), first sentence. In the light of this conclusion, we do not need to make a finding concerning the WTO-consistency of the ninth measure either at the time the Panel was established or during the period of 1 to 20 September 2015, during which the relevant bound duty rate was reduced but the applied duty rate remained as it was on the date of the Panel's establishment.[306]

7.4.1.5 Consistency with Article II:1(a) of the GATT 1994

7.232. We have concluded in section 7.4.1.4 above that Russia has acted inconsistently with Article II:1(b), first sentence. In the light of this conclusion, we see no need, for the purpose of resolving this dispute, to make additional findings regarding whether, as a consequence of that conclusion, Russia has also acted inconsistently with Article II:1(a). We therefore exercise judicial economy and decline to make findings with respect to this claim.

7.4.2 Claims concerning the tenth and eleventh measures

7.233. We now turn to the European Union's claims in respect of the duty rates required to be applied by Russia in respect of tariff lines 8418 10 800 1 (the tenth measure) and 8418 21 100 0 (the eleventh measure). The European Union claims that Russia is required to apply duties on goods falling within these tariff lines that are inconsistent with Article II:1(b), first sentence, of the GATT 1994, and consequently Article II:1(a) of the GATT 1994.

7.4.2.1 Measures and applied rates at issue

7.234. The European Union argues that, in respect of goods falling under the tenth and eleventh measures, the structure and design of the duty rates applied by Russia result in duties being levied in excess of bound duty rates with respect to a certain range of import prices.[307]

7.235. The European Union argues that, at the time of the Panel's establishment, the CCT, as amended by Decision No. 47 of the Council of the Eurasian Economic Commission[308] (Decision No. 47), imposed a combined duty rate of "16%, but not less than 0.156 EUR/l" for goods imported under tariff line 8418 10 800 1 (the tenth measure). Nevertheless, as also noted by the

[305] Such a ceiling would eliminate, as it were, the arithmetical inevitability of the inconsistency as described above by ensuring that in no instance would duties be levied in excess of the rates bound in Russia's Schedule.

[306] See paragraph 7.172 above.

[307] European Union's first written submission, para. 104; second written submission, paras. 87 and 89.

[308] Decision No. 47 of the Council of the Eurasian Economic Union, (Decision No. 47), (Exhibit EU-7).

European Union, Decision No. 54 of the Council of the Eurasian Economic Commission[309], which entered into force on 20 September 2015[310], imposed a new duty rate of "15%; or 14%, but not less than 0.114 EUR/l; whichever is the lower".

7.236. The European Union also argues that, at the time of the Panel's establishment, the CCT, as amended by Decision No. 47[311], imposed a combined duty rate of "13.3%, but not less than 0.12 EUR/l" for goods imported under tariff line 8418 21 100 0 (the eleventh measure). Nevertheless, as also noted by the European Union, Decision No. 54 of the Council of the Eurasian Economic Commission[312], which entered into force on 20 September 2015, imposed a new *ad valorem* duty of 10%.

7.237. Russia does not contest the European Union's description of the measures at issue.

7.238. The Panel notes that there is no dispute between the parties as to the rates applied by Russia in respect of the tenth and eleventh measures, either at the time of the Panel's establishment or subsequently.[313] Based on the evidence presented, we find that the applied duty rates for the tenth and eleventh measures, on the date of the Panel's establishment and currently, are as follows:

Measure	Tariff line	Russia's applied duty rate provided for at date of Panel's establishment	Russia's current applied rate
The tenth measure	8418 10 800 1	16%, but not less than 0.156 EUR/l[314]	15%; or 14%, but not less than 0.114 EUR/l; whichever is the lower[315]
The eleventh measure	8418 21 100 0	13.3%, but not less than 0.12 EUR/l[316]	10%[317]

7.4.2.1.1 Amended measures

7.239. As with the European Union's claims concerning the seventh to ninth measures, Russia argues that in the light of amendments made to the tenth and eleventh measures that entered into force on 20 September 2015, the tenth and eleventh measures as in force at the time of the Panel's establishment have "expired". According to Russia, the current applied duty rates are exactly the same as those set out in Russia's Schedule. Russia therefore asks the Panel to find that these measures are consistent with Russia's obligations under Articles II:1(b), first sentence, and consequently Article II:1(a).[318]

7.240. The European Union responds that the duties currently applied in respect of the tenth and eleventh measures appear to correspond to the bound duty rates. Nevertheless, according to the European Union, the Panel should adopt findings on the WTO-consistency of those measures as they existed at the time of the Panel's establishment.[319]

7.241. As the Panel explained above in the context of addressing the sixth and seventh to ninth measures[320], a measure that is modified subsequent to a panel's establishment does not, by virtue of that amendment, cease to be a measure for the purposes of WTO dispute settlement. Even if an

[309] Decision No. 54 of the Council, (Exhibit RUS-9).
[310] European Union's second written submission, para. 81; Russia's responses to Panel question Nos. 94-95.
[311] Decision No. 47, (Exhibit EU-7).
[312] Decision No. 54 of the Council, (Exhibit RUS-9).
[313] We also note that there is no dispute between the parties, and we accept, that the CCT requirements establishing the duty rates applicable to the tariff lines at issue are attributable to Russia. See paragraphs 7.42 to 7.47 above.
[314] Section XVI, Chapter 84 of the CCT, as amended by Decision No. 47, (Exhibit EU-7).
[315] Section XVI, Chapter 84 of the CCT, as amended by Decision No. 54 of the Council, (Exhibit RUS-9).
[316] Section XVI, Chapter 84 of the CCT, as amended by Decision No. 47, (Exhibit EU-7).
[317] Section XVI, Chapter 84 of the CCT, as amended by Decision No. 54 of the Council, (Exhibit RUS-9).
[318] Russia's second written submission, para. 9; opening statement at the second meeting of the Panel, paras. 40-42; response to Panel question No. 115.
[319] European Union's second written submission, para. 93; opening statement at the second meeting of the Panel, para. 29; responses to Panel question Nos. 91, 92 and 124.
[320] See section 7.3.2.1.1 and paragraphs 7.162 to 7.163 above.

allegedly WTO-inconsistent measure is brought into conformity during the course of the proceedings, a panel may still be required, pursuant to its terms of reference and Article 11 of the DSU, to make findings in respect of the measure as it existed at the time of the panel's establishment[321], at least where the complaining party has not requested the panel to consider the measure as amended.

7.242. In the present case, the European Union has requested findings only on the tenth and eleventh measures as they existed at the time of the Panel's establishment.[322] Accordingly, both our terms of reference and Article 11 of the DSU, which requires us to make an "objective assessment of the matter", compel us to examine the WTO-consistency of those measures as they existed at the time of the Panel's establishment. It would not be appropriate, in the absence of a specific request from the European Union, for us to examine the tenth and eleventh measures in their current form rather than as they existed at the time of the Panel's establishment. However, as we have already noted, we will take appropriate account of any relevant changes made to the measures at issue when making our recommendations (if any).

7.243. In this connection, we note the European Union's request that the Panel make additional findings concerning the tenth and eleventh measures as they existed during the period of 1 to 20 September 2015. According to the European Union, on 1 September 2015, in accordance with Russia's Schedule, the bound rate for tariff line 8418 10 800 1 (tenth measure) fell from "16.7%; or 16%, but not less than 0.156 EUR/l; whichever is the lower" to "15%; or 14%, but not less than 0.114 EUR/l; whichever is the lower". However, until 20 September 2015, Russia continued to subject goods imported under this tariff line to an applied duty rate of "16%, but not less than 0.156 EUR/l". Similarly, according to the European Union, the bound rate for tariff line 8418 21 100 0 (eleventh measure) fell on 1 September 2015 from "14.7%; or 13.3%, but not less than 0.12 EUR/l; whichever is the lower" to 10%. However, until 20 September 2015, Russia continued to apply a duty rate of "13.3%, but not less than 0.12 EUR/l". The European Union argues that from 1 to 20 September 2015 Russia's breach of Article II:1(b), first sentence, was aggravated because, although the bound duty rate had dropped, the applied duty rate remained the same. Thus, in the European Union's view, from 1 to 20 September 2015, even the *ad valorem* element of the applied duty rates (16% for tariff line 8418 10 800 1 and 13.3% for tariff line 8418 21 100 0) exceeded the corresponding bound rates (15% for tariff line 8418 10 800 1 and 10% for tariff line 8418 21 100 0). The European Union submits that, as a result, during this period the tenth and eleventh measures led to the imposition of duties in excess of bound duty rates regardless of customs value.[323]

7.244. It appears to us that the European Union's descriptions of both the changes in the bound duty rates and the absence of corresponding changes in the applied duty rates from 1 to 20 September 2015 are correct. Russia has not argued otherwise. Nevertheless, in our view additional findings on the measure as it existed during the period 1 to 20 September 2015 may not be necessary to resolve this dispute. If we were to find that the tenth and eleventh measures at the time of the Panel's establishment, the *ad valorem* elements of which were equal to the lower *ad valorem* elements of the bound duty rates, were inconsistent with Article II:1(b), first sentence, it would follow *a fortiori* that those measures would have been WTO-inconsistent during the period 1 to 20 September 2015, when even the *ad valorem* elements of the measures were higher than the *ad valorem* elements of the relevant bound duty rates. In such circumstances, we do not believe that additional findings would be necessary to securing a positive solution to this dispute. In contrast, if we were to find that the tenth and eleventh measures were not inconsistent with Article II:1(b), first sentence, at the time of the Panel's establishment, it may be necessary to consider the period 1 to 20 September 2015 in order to ensure that we do not leave gaps in our assessment of the challenged measures. Accordingly, we will return to the tenth and eleventh measures as they existed during the period 1 to 20 September 2015 only if, at the end of our initial analysis, we conclude that those measures were not inconsistent with Article II:1(b), first sentence, at the time of the Panel's establishment.

[321] Panel Report, *Chile – Price Band System*, para. 7.7.
[322] European Union's second written submission, para. 93.
[323] European Union's second written submission, paras. 92-93.

7.4.2.2 Consistency with Article II:1(b), first sentence of the GATT 1994

7.245. Turning now to assess the consistency of the tenth and eleventh measures with Article II:1 of the GATT 1994, the Panel finds it appropriate, for the reasons given above[324], to first address the European Union's claims under Article II:1(b), first sentence, before turning to the European Union's consequential claims under Article II:1(a).

7.246. According to the European Union, the tenth and eleventh measures at issue are inconsistent with Article II:1(b), first sentence. This is so, in the European Union's view, because the duties required to be applied by Russia in respect of both relevant tariff lines, at the time of the Panel's establishment, were in excess of those provided in Russia's Schedule whenever the customs value fell below a certain break-even price. The European Union argues that below a certain break-even price per litre (which can be determined arithmetically), the specific element of the combined applied duty was applied (i.e. 0.156 EUR/l or 0.12 EUR/l). In a subset of cases within that price range, the *ad valorem* equivalent of that applied specific duty rate was higher than 16.7% or 14.7% respectively, even though Russia's Schedule (because of the formulation "whichever is the lower") required that Russia not exceed those *ad valorem* duty rates. For that subset of cases, the applied duties were in excess of those provided in the Schedule, and accordingly were inconsistent with Article II:1(b), first sentence. In the European Union's view, both the possibility of exceeding the bound duty rates and the precise range of cases in which the bound duty rates would have been exceeded can be deduced directly from the design and structure of the duties. The European Union also submitted customs declarations that, it alleges, show that duties in excess of the bound levels have actually been levied. The European Union adds that Russia provided for no mechanism, such as a ceiling on the level of the applied duty, which would have prevented the applied duties from exceeding the level of the bound duties.[325]

7.247. Russia argues that the European Union's claims in respect of the tenth and eleventh measures are essentially about the structure and design of the applied duties, rather than the duties themselves. However, in Russia's view, the mere fact of application of a type of duty other than that provided for in a Member's Schedule is not, without more, inconsistent with Article II:1. Russia submits that, to succeed under Article II:1, a complaining party has additionally to prove that the duty collected actually exceeded the bound level.[326] Moreover, in Russia's view, the European Union's claims are legally flawed because nothing in the covered agreements requires a Member to use a legislative ceiling or cap when they apply customs duties.[327] Additionally, Russia argues that the European Union's claims must fail because they do not take account of the "mechanism" contained in paragraph 313 of Russia's Working Party Report.[328] As we have explained in the context of the seventh to ninth measures, Russia argues that that paragraph contains a methodology that must be used when assessing the consistency of an applied combined duty with Article II:1.[329]

7.4.2.2.1 Duty type/structure variation

7.248. The Panel first deals with Russia's argument that the European Union's claims in respect of the tenth and eleventh measures are about the structure and design of the applied duties, rather than about the applied duties themselves. It is not entirely clear from Russia's submissions whether this argument applies to the tenth and eleventh measures as well as to the seventh to ninth measures. To the extent that it does, we think it sufficient to recall our reasoning and findings concerning this argument in the context of the seventh to ninth measures.[330] What we said there applies with equal force here.

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[324] See paragraph 7.48 above.

[325] European Union's first written submission, paras. 111-112, 114, 117-118 and 121; opening statement at the first meeting of the Panel, para. 27; second written submission, para. 87; opening statement at the second meeting of the Panel, para. 27.

[326] Russia's first written submission, para. 122.

[327] Russia's first written submission, paras. 129 and 132-133; opening statement at the first meeting of the Panel, para. 74; second written submission, para. 29.

[328] Russia's first written submission, paras. 162 and 167; second written submission, para. 46; opening statement at the second meeting of the Panel, paras. 31 and 39; response to Panel question No. 99.

[329] The parties' arguments on this issue are summarized in more detail below, section 7.4.2.2.2.

[330] See section 7.4.1.2.1.

7.4.2.2.2 Methodology for comparison of applied and bound duty rates

7.249. We next turn to consider the issue of the correct methodology to be used for comparing whether the duty rates required to be applied by Russia in respect of the tenth and eleventh measures were higher than those provided in Russia's Schedule whenever the customs value fell below a certain break-even price.

7.250. Russia contests the methodology used by the European Union to compare the applied and bound rates, and on the basis of which the European Union concludes that the tenth and eleventh measures resulted in the application of duties in excess of those provided in Russia's Schedule. According to Russia, the European Union's case is flawed because it does not take account of paragraph 313 of Russia's Working Party Report. In Russia's view, the European Union cannot, as a legal matter, establish that Russia applies specific duties in excess of bound *ad valorem* duties unless it submits evidence conforming to the methodological specification of paragraph 313.

7.251. The European Union argues that the methodology in paragraph 313 does not set out a way of interpreting, changing, or limiting Russia's obligations under Article II:1.[331] Additionally, the European Union contends that the tenth and eleventh measures do not fall within the scope of paragraph 313 because the relevant bound duties are of a more complex form, consisting of an additional *ad valorem* element.[332]

7.252. The Panel already explained why, in its view, paragraph 313 does not, as Russia suggests, prescribe or authorize a methodology to be applied when calculating *ad valorem* equivalents as part of an analysis under Article II:1(b), first sentence. Analysing the texts of both paragraph 313 and Article II:1(b), first sentence, we found no support for the proposition that the methodology in paragraph 313 must or even could be used in the context of a claim that a Member subjects imports to duties in excess of those provided in its Schedule.

7.253. In our view, our reasoning and findings on this issue in the context of the seventh, eighth, and ninth measures apply *mutatis mutandis* in the present context.[333] In the light of this finding, we do not consider it necessary to determine in addition whether, as the European Union argues, the tenth and eleventh measures fall outside the scope of paragraph 313 because the relevant bound duties are of a more complex form, consisting of an additional *ad valorem* element.

7.254. Accordingly, in considering whether the tenth and eleventh measures led to the imposition of duties in excess of Russia's bound rates, we will not have regard to the methodology in paragraph 313.

7.4.2.2.3 Comparison of applied and bound rates

7.255. We have already set out our understanding of the relevant applied rates in respect of the tenth and eleventh measures. We can therefore turn to consider whether those applied rates lead to the imposition of duties in excess of those set forth in Russia's Schedule. To undertake this analysis, we once again need to compare Russia's applied duty rates, on the one hand, and the duty rates provided for in Russia's Schedule, on the other. We recall that, for the reasons given above[334], we will examine the tenth and eleventh measures as they existed at the time of the Panel's establishment.

7.256. We find, based on the evidence presented, that the applied and bound duty rates at the time of the Panel's establishment were as follows:

[331] See the fuller discussion of the European Union's arguments at paragraphs 7.188 to 7.189 above.
[332] European Union's opening statement at the second meeting of the Panel, para. 28.
[333] See paragraphs 7.190 to 7.206 above.
[334] See paragraph 7.244 above.

Tariff line	Russia's applied duty rate provided for at date of Panel's establishment[335]	Russia's bound duty rate[336]
8418 10 800 1	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
8418 21 100 0	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

7.257. The European Union explained its understanding of the structure, design, and architecture of the tenth and eleventh measures. It also presented arithmetical calculations in an attempt to show how these measures result, in some transactions, in the imposition of customs duties in excess of those provided for in Russia's Schedule. Additionally, it submitted actual customs declarations that, in its view, confirm that customs duties have, in fact, been levied in excess of bound rates in respect of the tariff lines affected by the tenth and eleventh measures.[337]

7.258. Russia has not challenged the accuracy of the European Union's mathematical explanations. As noted above, Russia only challenged the methodology underlying the European Union's calculations, because those calculations fail to take account of paragraph 313 of Russia's Working Party Report.

7.259. As the Panel has explained, the European Union argues that the tenth and eleventh measures, as they existed at the time of the Panel's establishment, required Russia to apply duties in excess of those provided in its Schedule whenever the customs value of a good falling within a relevant tariff line was less than a certain value. The European Union has provided calculations in support of this argument. As with the calculations provided in respect of the seventh to ninth measures, we will review the European Union's calculations for the tenth and eleventh measures.

7.260. In respect of the tenth measure as it existed at the time of the Panel's establishment, the bound rate in Russia's Schedule was "16.7%; or 16%, but not less than 0.156 EUR/l; whichever is lower". In order to determine the amount of duty that should be levied according to the Schedule, three separate steps are required. In a first step it is necessary to calculate 16.7% of the customs value, to obtain a first possible amount of duty to be levied. For the purposes of subsequent steps in the analysis, however, the amount of that duty to be levied must be converted into a corresponding unit price[338], to obtain a specific duty rate equivalent of the *ad valorem* duty rate. The second step involves calculating 16% of the customs value and converting the result into the corresponding specific duty rate equivalent, expressed as EUR/l. If this yields an amount of duty to be levied (expressed as a unit price) less than 0.156 EUR/l, then the relevant specific duty rate equivalent for purposes of the second step is 0.156 EUR/l, because it cannot be "less than" that rate. The third and final step requires a comparison of the specific equivalent duty rates resulting from the first and second steps. Whichever duty rate is lower is the one that must be levied.

7.261. The European Union has provided a hypothetical example of a good with a customs value of 0.92 EUR/l. We first consider the situation from the perspective of Russia's Schedule at the time of the Panel's establishment. Following the first step, we note that the *ad valorem* only element of 16.7% results in a specific duty rate equivalent of 0.154 EUR/l.[339] Under the second step, for the calculation of the alternative duty element, we note that the *ad valorem* duty rate of 16% would yield a specific duty rate equivalent of 0.147 EUR/l[340], which is less than the specific duty rate of 0.156 EUR/l. Because this element of the duty rate requires "no less than 0.156 EUR/l", the relevant alternative duty rate is 0.156 EUR/l. For the third and final step, it is necessary to compare the two alternative specific duty rate equivalents calculated in the first step (i.e. 0.154 EUR/l) and the second step (i.e. 0.156 EUR/l). That comparison shows that the first alternative duty rate is lower. Thus, for a good with a customs value of 0.92 EUR/l, Russia's Schedule would require that its customs authority levy no more than 0.154 EUR/l (corresponding to an *ad valorem* equivalent of 16.7%).

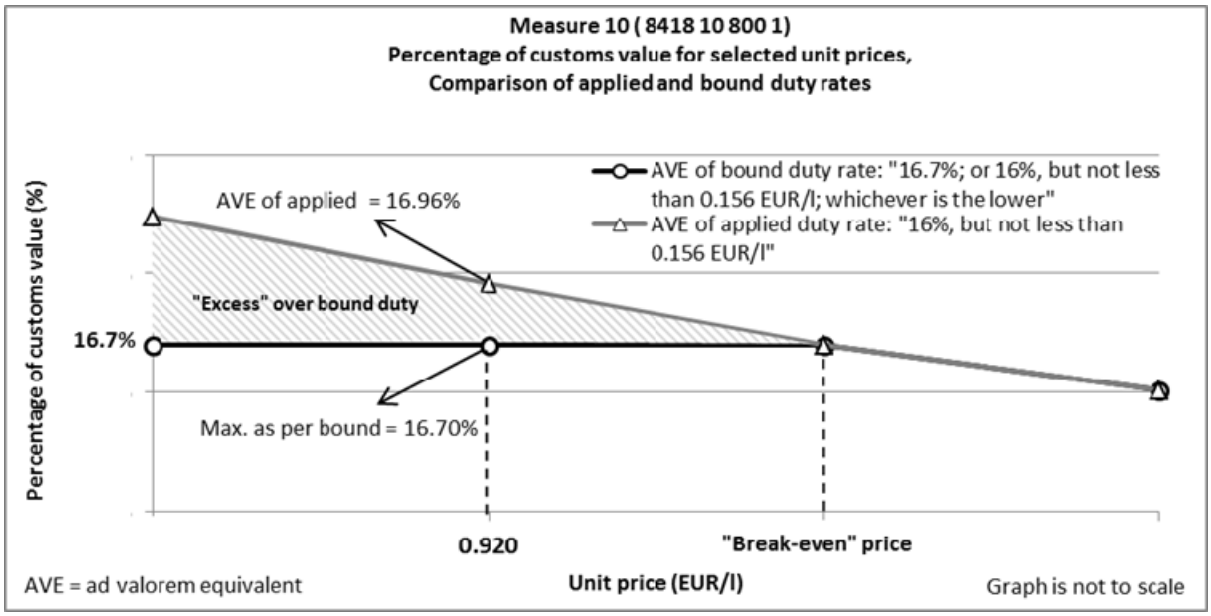
[335] Decision No. 47, (Exhibit EU-7).
[336] Russia's Schedule, (Exhibit EU-9).
[337] Declarations of Goods and Supplementary Lists to Declarations of Goods, (Exhibits EU-15, EU-16, and EU-17).
[338] The term "unit price" is discussed in footnote 285 above.
[339] 16.7% of 0.92 EUR/l is 0.1536 EUR/l.
[340] 16% of 0.92 EUR/l is 0.1472 EUR/l.

7.262. Next, we consider Russia's applied duty rate at the time of the Panel's establishment, which was "16%, but not less than 0.156 EUR/l". Considering a good imported at the same hypothetical customs value of 0.92 EUR/l, the *ad valorem* element of 16% would have resulted in a specific duty rate equivalent of 0.147 EUR/l.[341] Since this is less than the rate for the specific duty element, and the duty requires a rate of "no less than 0.156 EUR/l", Russia's customs authority would have been required to impose the alternative specific duty rate. The duty rate to be levied would therefore have been 0.156 EUR/l (corresponding to an *ad valorem* equivalent of 16.96%).

7.263. Comparing the applied and bound duty rates, it is clear that the applied specific duty rate equivalent would have been higher than the bound level (0.156 EUR/l compared to 0.154 EUR/l). In *ad valorem* terms, a specific duty rate of 0.156 EUR/l levied on a good with a customs value of 0.92 EUR/l or less yields an *ad valorem* equivalent duty rate of at least 16.96%.[342] This is higher than the bound duty rate, which provided for an absolute maximum rate of 16.7%.

7.264. The European Union asserts that the break-even customs value for the tenth measure was approximately 0.93 EUR/l, but has not provided its calculations in support of this break-even customs value. Although we agree with the European Union that a specific break-even price could be mathematically determined for the tenth measure, we do not find it appropriate, in the absence of specific calculations by the European Union, to determine the break-even price ourselves. However, based on the preceding considerations, we are satisfied that the European Union has demonstrated in respect of the tenth measure that so long as the customs value of a good falling within the relevant tariff line was equal to or less than 0.92 EUR/l, the *ad valorem* equivalent of the specific element of the applied combined duty rate would inevitably have been higher than the bound duty rate, resulting in applied duties higher than the bound duty.[343] This finding is represented graphically in Figure 3 below.

Figure 3



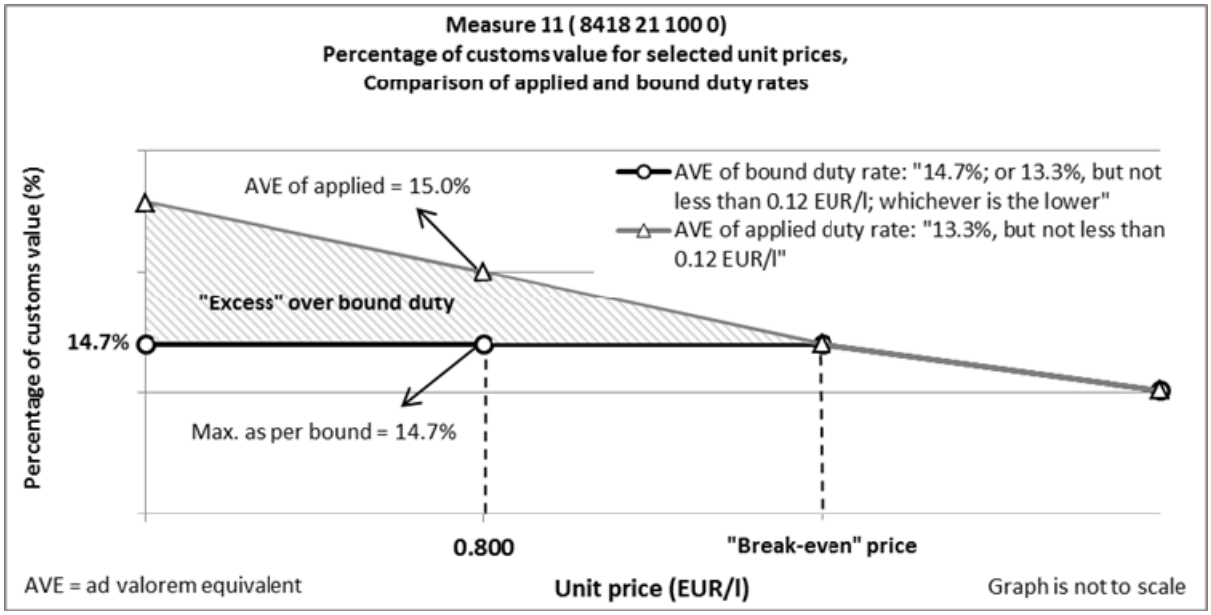
[341] 16% of 0.92 EUR/l is 0.1472 EUR/l.

[342] 0.156 EUR/l divided by 0.8 EUR/l is 0.195 (i.e. 19.5%).

[343] For all customs values below 0.92 EUR/l, the duty resulting from the specific element (i.e. 0.156 EUR/l) will inevitably be higher than the duty resulting from the alternative *ad valorem* element (i.e. 16% of the customs value), which means that "0.156 EUR/l" would need to be applied by Russia's customs authority in all such cases. The more the customs value falls below 0.92 EUR/l, the higher the percentage that 0.156 EUR/l will represent of that customs value. Therefore, it is mathematically correct to say that the lower the customs value is below 0.92 EUR/l, the more the *ad valorem* equivalent of the specific element of the combined applied duty rate will exceed the bound ad valorem rate of 16.7%. We note that the *ad valorem* equivalent of the *bound* duty rate would remain 16.7% for all customs values below 0.92 EUR/l.

7.265. The European Union asserts that the break-even customs value for the tenth measure was approximately 0.93 EUR/l, but has not provided its worked mathematical reasoning in support of this break-even customs value. Although we agree with the European Union that a specific break-even price could be mathematically determined for the tenth measure, we do not find it appropriate, in the absence of specific calculations by the European Union, to determine the break-even price ourselves. However, based on the preceding considerations, we are satisfied that the European Union has demonstrated in respect of the tenth measure that so long as the customs value of a good falling within the relevant tariff line was equal to or less than 0.92 EUR/l, the *ad valorem* equivalent of the specific element of the applied combined duty rate would inevitably have been higher than the bound duty rate, resulting in applied duties higher than the bound duty.[344] This finding is represented graphically in Figure 4 below.

Figure 4



7.266. In sum, in respect of the tenth and eleventh measures as they existed at the time the Panel was established, the European Union has identified specific customs values at or below which imports would have been subject to the specific duty rate alternatives of a combined duty, whose *ad valorem* equivalents were higher than the corresponding rate in Russia's Schedule, resulting in applied duties higher than the bound duties.

7.267. As we explained above, there is no need for a complaining party to show that a particular measure has, in respect of a particular transaction, actually led to the imposition of duties in excess of bound levels. Accordingly, and because we agree with the European Union that our assessment can be conducted on the basis of the structure and design of the tenth and eleventh measures at issue, considered in the light of Russia's Schedule, we do not consider it necessary to base our findings on the customs declarations submitted by the European Union in Exhibits EU-15, EU-16 and EU-17.

7.268. Additionally, as we have already noted, the application of a duty may be inconsistent with Article II:1(b), first sentence, even where it does not lead to duties being levied above bound

[344] For all customs values below 0.92 EUR/l, the duty resulting from the specific element (i.e. 0.156 EUR/l) will inevitably be higher than the duty resulting from the alternative *ad valorem* element (i.e. 16% of the customs value), which means that "0.156 EUR/l" would need to be applied by Russia's customs authority in all such cases. The more the customs value falls below 0.92 EUR/l, the higher the percentage that 0.156 EUR/l will represent of that customs value. Therefore, it is mathematically correct to say that the lower the customs value is below 0.92 EUR/l, the more the *ad valorem* equivalent of the specific element of the combined applied duty rate will exceed the bound ad valorem rate of 16.7%. We note that the *ad valorem* equivalent of the *bound* duty rate would remain 16.7% for all customs values below 0.92 EUR/l.

levels in respect of every transaction, but only "with respect to a certain range of import prices".[345] Therefore, the fact that, in respect of the tenth and eleventh measures, the European Union has demonstrated that Russia's duties would have been higher than bound levels whenever the customs value was at or fell below a certain level is sufficient to make a *prima facie* case of inconsistency with Article II:1(b), first sentence.

7.4.2.2.4 Ceiling mechanism

7.269. Before concluding our analysis of the tenth and eleventh measures, we note the European Union's argument that Russia does not apply a ceiling mechanism that would prevent the tenth and eleventh measures from operating in the way described above.[346]

7.270. Russia responds that nothing in WTO law requires the use of such a ceiling mechanism, and therefore the European Union's argument is legally flawed.[347]

7.271. The Panel dealt with this issue above in connection with its analysis of other challenged measures. The findings and analysis set out there apply equally here.[348] In particular, we note once again that there is no evidence on the record that Russia has put in place a ceiling or cap that would prevent such duties from being applied. Moreover, we reaffirm our rejection of Russia's argument that the European Union's claims are unfounded because there is no requirement to use a ceiling mechanism. As we have explained, our view is that the European Union is not challenging the absence of a ceiling mechanism in itself.

7.4.2.2.5 Conclusion

7.272. We have found above that, in relation to the tenth and eleventh measures as they existed at the time the Panel was established, the duties required to be applied by Russia were higher than bound levels in Russia's Schedule for imports at or below specified break-even prices (customs values). We have also noted that there is no evidence that Russia applies a ceiling or cap that would prevent such duties from being applied. Therefore, we conclude that, in respect of the tenth and eleventh measures as they existed at the time of the Panel's establishment, Russia was required in some instances to apply duties in excess of those set forth in its Schedule, contrary to Article II:1(b), first sentence, of the GATT 1994. In the light of this conclusion, we do not need to make findings concerning the WTO-consistency of the tenth and eleventh measures as they existed during the period 1 to 20 September 2015.

7.4.2.3 Consistency with Article II:1(a) of the GATT 1994

7.273. We concluded in section 7.4.2.2.5 above that Russia has acted inconsistently with Article II:1(b), first sentence. In the light of this conclusion, we see no need, for the purpose of resolving this dispute, to make additional findings regarding whether, as a consequence of that conclusion, Russia has also acted inconsistently with Article II:1(a). We therefore exercise judicial economy and decline to make findings with respect to this claim.

7.5 Claims concerning the twelfth measure ("Systematic Duty Variation")

7.274. The Panel now turns to the European Union's claims concerning the twelfth measure at issue, the "Systematic Duty Variation" or "SDV".

7.275. The European Union argues that the CCT systematically provides, in relation to a significant number of tariff lines, for a type or structure of duty that varies from the type or structure of duty recorded in Russia's Schedule, in a way that results in the application of duties in excess of those provided for in the Schedule. The European Union alleges that these systematic duty variations take place in one of the two ways explained in paragraphs 7.210 to 7.221 and 7.259 to 7.266 above, in respect of the seventh to ninth measures and the tenth and eleventh

[345] Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 55 and 62.
[346] See paragraph 7.246 above.
[347] See paragraph 7.247 above.
[348] See paragraphs 7.228 to 7.229 above.

measures respectively. According to the European Union, the SDV is therefore inconsistent as such with Article II:1(b), first sentence, of the GATT 1994 because, like the seventh to eleventh measures, it results in the imposition on imports from the European Union of duties in excess of those set forth and provided in Russia's Schedule, and consequently is also inconsistent as such with Article II:1(a) of the GATT 1994.[349]

7.276. The European Union argues that the twelfth measure, rather than calling for a finding that is limited to a number of specific tariff lines, requires a more general finding. According to the European Union, instances of inconsistency resulting from the SDV are neither rare nor sporadic, but appear systematically throughout the CCT.[350]

7.277. The European Union further argues that challenging the SDV as a distinct measure at issue is consistent with the DSU and relevant jurisprudence. The European Union asserts that it has adequately described the precise content of the SDV. Specifically, the European Union argues that the SDV consists of a large number of individual instances of inconsistency that are all contained in a legally binding instrument, the CCT. Additionally, the European Union notes that both Russia's applied and bound duties are subject to frequent changes, meaning that individual tariff lines are a "moving target".[351] The European Union submits that requiring a complaining party to "zero in" on the specific situation of a given tariff line at a specific point in time would make it impossible to address numerous similar violations in any practical way.[352]

7.278. Russia responds that the European Union has failed to establish the existence and the precise content of the SDV, thereby failing to meet the threshold legal test established by the Appellate Body in *US – Zeroing (EC)* for challenging an unwritten measure as such. Russia asserts that the European Union has not specified the norms and laws establishing the SDV, and claims that, as a consequence, it is unclear what particular kind of tariff treatment Russia should eliminate or on what precisely the Panel should rule.[353]

7.279. Russia further argues that a higher standard of review is required in instances of as such claims, and argues that the European Union has not met that high standard. According to Russia, the European Union has not provided evidence that WTO-inconsistent duty rates exist that constitute a systematic practice. In particular, in Russia's view the European Union has not provided any evidence to show that the duties allegedly covered by the SDV are repeated actions that are linked together. Russia states that the only common characteristic that they all possess is that they are set out in a single document, namely the CCT. In the light of these considerations, Russia argues that the European Union has failed to provide the "substantiated criteria" that would enable the Panel to determine the systematic "character" of the measure at issue.[354]

7.280. Russia suggests, finally, that the European Union has not provided sufficient evidence for the Panel to make a finding of inconsistency. For such a finding to be made, Russia argues that evidence should be provided in respect of each particular tariff line that allegedly deviates from the Schedule, including evidence that a particular duty is levied in excess of the bound duty, and evidence that there is no mechanism to prevent duties from being levied in such a manner. Furthermore, Russia argues that linking a particular applied duty to the particular provision of Russia's Schedule is crucial for determining whether there is any inconsistency between the applied and bound duties.[355]

7.281. The Panel notes that the parties disagree on three key issues: (i) whether the SDV is the type of measure that may be subject to WTO dispute settlement, (ii) whether the SDV has been shown to exist, and (iii) whether the SDV is inconsistent with Article II:1(b), first sentence, and consequently Article II:1(a). To uphold the European Union's claims, we would need to reach an

[349] European Union's first written submission, paras. 127-129.
[350] European Union's first written submission, para. 133.
[351] European Union's first written submission, para. 134.
[352] European Union's first written submission, para. 134.
[353] Russia's second written submission, paras. 85-107 (referring to Appellate Body Report, *US – Zeroing (EC)*, paras. 196 and 198); opening statement at the second meeting of the Panel, paras. 51-55.
[354] Russia's second written submission, paras. 2 and 102-103; opening statement at the second meeting of the Panel, paras. 57-58.
[355] Russia's second written submission, paras. 57-82; opening statement at the second meeting of the Panel, para. 56.

affirmative conclusion on all three issues. In the circumstances of the case before us, we find it appropriate to examine first whether the existence of the measure has been proven, before analysing whether, if it exists, it is a measure of the type that can be subject to dispute settlement.

7.5.1 Measure at issue

7.282. Unlike the first to eleventh measures, the twelfth measure at issue does not consist in the tariff treatment applied by Russia in respect of a particular tariff line. It is alleged to consist, rather, in something broader, affecting a "significant number or tariff lines". Importantly, it is unwritten, in the sense that it is, in the European Union's own words, "not described in a separate written measure".[356] Consistent with this, the European Union in its panel request has also described the SDV as a "general practice".[357]

7.283. We recall that the first issue arising in respect of the twelfth measure is whether the European Union has demonstrated its existence. In this respect, we are mindful of the Appellate Body's statement that the "evidence and arguments [necessary] in order to prove the existence of a measure challenged will be informed by how such measure is described or characterized by the complainant."[358] In the light of this, and taking into account the fact that the alleged SDV is an unwritten measure, we will review in some detail the ways in which the European Union has described the measure during the course of the proceedings. This will enable us to identify the characteristics of the measure at issue and subsequently assess whether the European Union has demonstrated its existence.

7.284. We begin by recalling the description of the twelfth measure contained in the European Union's panel request. That document defines and limits our jurisdiction, and sets out the "nature"[359] of both the measures at issue and the claims against them. The twelfth measure is identified in paragraph 11 of the Panel request, which provides the following description of the SDV:

> [T]he legal instruments referred to below systematically provide, in relation to a significant number of tariff lines, for a type/structure of duty that varies from the type/structure of duty recorded in the Schedule in a way that leads to the application of duties in excess of those provided for in the Schedule for those goods whenever the customs value is below a certain level, 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.[360]

7.285. In its first written submission, the European Union states that the twelfth measure is:

> [A] more general measure consisting in systematic duty variations … In this respect, 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 Russia's Schedule].[361]

7.286. The European Union further states that:

> [V]iolations resulting from the SDV are not rare and sporadic occurrences, they appear systematically throughout the CCT. In view of the large number of such

[356] European Union's opening statement at the second meeting of the Panel, para. 51.
[357] European Union's request for the establishment of a panel, para. 11.
[358] Appellate Body Report, *Argentina – Import Measures*, para. 5.108.
[359] Appellate Body Report, *US – Continued Zeroing*, para. 169.
[360] European Union's request for the establishment of a panel, para. 11.
[361] European Union's first written submission, para. 127.

> violations … they are best described as individual instances of a more general phenomenon.[362]

7.287. Additionally, the European Union explains that "[t]he SDV … is embedded directly into the numerous individual tariff lines throughout the CCT", and contends that, therefore, "[t]he violations stemming from the SDV … can be identified by the Panel as a 'group'".[363]

7.288. At our first substantive meeting with the parties, the European Union once again stated that the "content [of the SDV] is the particular kind of tariff treatment that is systematically accorded by Russia to a significant number of tariff lines".[364] Following this meeting, we asked the European Union a number of questions in order to clarify our understanding of the SDV. In one response, the European Union explained that it "is challenging the SDV as a single measure", and stated that "[e]ach individual tariff line to which the SDV applies … is an individual instance of" that measure.[365] In another response, the European Union stated that the SDV is "characterized notably by the particular kind of tariff treatment that Russia imposes on a significant and changing number of tariff lines".[366]

7.289. Finally, in its second written submission, the European Union explains that it is challenging the WTO-consistency of "systematically applying certain clearly described types of tariff treatment that lead, in each individual instance of such tariff treatment, to duties being levied in excess of bound rates".[367]

7.290. Russia argues that the European Union has "failed to define the precise content" of the twelfth measure at issue.[368] According to Russia, the European Union's challenge is effectively against an open-ended list of tariff lines.[369] In Russia's view, the European Union's description of the SDV leaves open the scope and content of the measure, and requires either the Panel or Russia to identify the particular tariff lines that are allegedly inconsistent with Article II:1(b), first sentence.[370] In Russia's view, the ambiguity of the European Union's descriptions of the SDV prevents the Panel from finding that that measure is inconsistent with Russia's WTO obligations.[371]

7.291. The Panel agrees with Russia that some aspects of the European Union's descriptions are not entirely clear. Notably, the European Union has sometimes used different words to describe the relationship between the SDV, the CCT, and individual tariff lines.[372] Nevertheless, in our view, the excerpts reproduced above show that the European Union has consistently defined the SDV as consisting in the systematic application of particular types of tariff treatment accorded to, or in respect of, a significant number of individual tariff lines in the CCT.[373] Thus defined, the SDV consists of three key elements, which are:

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[362] European Union's first written submission, para. 133.
[363] European Union's first written submission, para. 142.
[364] European Union's opening statement at the second meeting of the Panel, para. 89.
[365] European Union's response to Panel question No. 31.
[366] European Union's response to Panel question No. 76.
[367] European Union's second written submission, para. 95.
[368] Russia's first written submission, para. 173; second written submission, paras. 85, 102 and 103; request for a preliminary ruling, para. 51; opening statement at the second meeting of the Panel, para. 51.
[369] Russia's first written submission, para. 174.
[370] Russia's request for a preliminary ruling, para. 11; first written submission, para. 179.
[371] Russia's second written submission, para. 59.
[372] For example, the European Union's panel request states that it is "the legal instruments referred to below" (i.e. the CCT itself) that "systematically provide" for the challenged kinds of tariff treatment. In its first written submission, the European Union again states that "the CCT systematically provides" for the relevant tariff treatment (para. 127), but later states that the alleged violations "result[] from the SDV" and "appear systematically throughout the CCT" (para. 133). The European Union further states that "[t]he SDV consists of a large number of individual violations that are all contained in a legally-binding, overarching public instrument: the CCT" (para. 139). The European Union then states that "[t]he SDV … is embedded directly into the numerous individual tariff lines throughout the CCT" (para. 142). In its response to questions from the Panel, the European Union used the expression "[e]ach individual tariff line to which the SDV applies (in other words, each individual tariff line to which the sort of tariff treatment described by the EU when defining the SDV is accorded)" (response to Panel question No. 31).
[373] The European Union has also suggested that the SDV applies to a changing number of tariff lines. We observe, however, that this attribute was not described or otherwise adverted to in the European Union's panel

a. The systematic application

b. Of certain types of tariff treatment ("duty variation")

c. To, or in respect of, a significant number of individual tariff lines in the CCT.

7.292. As the European Union has insisted on these three elements in its panel request and throughout its submissions, in our view they constitute definitional characteristics of the SDV. Each of them is constitutive of the SDV, in the sense that without any one of the three the SDV would no longer be the SDV, but a different measure.

7.293. We note, in addition, that the European Union's panel request characterizes the SDV as a "general practice". As indicated above, in statements before us, the European Union also referred to the SDV as a "general phenomenon", and indicated that the relevant types of duty variation occur "throughout the CCT".[374] This additional characteristic, which goes to the scope of the SDV, can and should likewise be considered as a definitional and constitutive element of the SDV.[375] As we elaborate further below, the European Union's characterization of the SDV as a "general" measure clarifies the scope of the SDV in a way that the other definitional elements do not.[376]

7.294. Having identified the definitional characteristics of the SDV as we understand them, we now turn to consider them in more detail. As they are not fully self-explanatory, it is appropriate to clarify what the terms "systematic", "types of tariff treatment", and "significant" and "general" mean, after which we will assess whether the SDV has been shown to exist.

7.5.1.1 Systematic application

7.295. The Panel begins by considering the first of the three elements enumerated above, the "systematic application" of particular tariff treatment.

7.296. We note at the outset the European Union's argument, in response to a question from the Panel, that "[t]here is no general requirement to prove that a measure at issue is of a 'systematic character'".[377] We agree. In the present dispute, however, it is the European Union itself that has defined the measure at issue as consisting of the "systematic" application of particular types of tariff treatment, and insisted, throughout its submissions, on the systematic nature of the SDV. Indeed, the very name chosen by the European Union for the twelfth measure – "Systematic Duty Variation" – highlights the importance of this nature. Thus, in inquiring into the meaning of the term "systematic", and in proceeding to assess whether the European Union has submitted proof in support of its assertion that the measure is "systematic", we are not imposing any general requirement, but rather analysing the measure at issue according to "the way in which the complainant has characterized" it.[378]

7.297. The term "systematic" first appears in the European Union's panel request, where it is not defined. Nevertheless, some indication of the term's meaning can be gleaned from the context provided by the paragraph in which it is used. First, the panel request indicates that the SDV "systematically provides [the particular kinds of tariff treatment], in relation to a significant number of tariff lines …" This sentence, and in particular the preposition "in relation to", indicates that the expression "systematically provides" means something other than "a significant number of tariff lines". In other words, the sentence implies that the systematic nature of the measure's application consists in something other than the mere fact that it applies to or affects a significant number of tariff lines. This reading of the sentence ensures that each of its elements is given independent meaning and effect.

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request. Moreover, the European Union has confirmed that it is not claiming that the allegedly frequent modifications of the CCT are inconsistent with any provision of the covered agreements. At any rate, the evidence submitted by the European Union suggests that any changes to the scope of the SDV have been changes that eliminated the kind of duty variation that the European Union alleges is characteristic of the SDV.

[374] European Union's opening statement at the first meeting of the Panel, para. 17.

[375] Annex A-1, paras. 4.39 and 4.41.

[376] See section 7.5.1.4 below.

[377] European Union's response to Panel question No. 109.

[378] European Union's response to Panel question No. 109.

7.298. Neither the European Union's written submissions nor its responses to the Panel's questions provide an explicit definition of the term "systematic". Indeed, the European Union's statements suggest at least three possible meanings of, or approaches to, the term "systematic": first, some of the European Union's statements suggest that systematic means nothing more than "applied in respect of, or affecting, a significant number of tariff lines"; second, other statements suggest the opposite, that is, that the "systematic" nature of the measure is conceptually distinct from the fact that it allegedly affects numerous tariff lines; and third, there are statements suggesting that the term "systematic" implies the existence of some kind of pattern of behaviour in according particular types of tariff treatment.

7.299. With respect to the first approach, the submissions contain a number of statements that appear to conflate the terms "systematic" and "significant number of tariff lines". For example, the European Union argues that "violations resulting from the SDV are not rare and sporadic occurrences. They appear systematically *throughout the CCT*."[379] This statement could be read as suggesting that the SDV is "systematic" because it applies to a "significant number" of tariff lines. Similarly, in response to a question from the Panel, the European Union explained that "[t]he terms systematic and general refer … to the fact that such variations … are widespread and appear at numerous points throughout the CCT, so that they can be described as individual instances of a more general measure".[380]

7.300. With respect to the second approach, and despite the statements quoted above, the European Union has also repeatedly distinguished between the "systematic" nature of the measure and the fact that it applies in respect of a significant number of tariff lines. This is in keeping with the European Union's description of the measure in its panel request. Thus, the European Union referred to "the systematic duty variation that affects a significant number of tariff lines"[381], suggesting that the systematic character of the measure and the fact that it affects a significant number of tariff lines are conceptually distinct. To similar effect is the European Union's statement that "[t]he finding [they] seek is addressed at the particular kind of tariff treatment systematically accorded to a large and changing number of tariff lines throughout the CCT".[382]

7.301. Finally, in respect of the third approach, a number of statements suggest that the "systematic" nature of the SDV lies in the fact that the relevant types of tariff treatment are applied according to some plan, method, or pattern. Thus, the European Union refers to the SDV as a "pattern of violations".[383] Similarly, the European Union argues that "[b]y examining the Illustrative List, a pattern emerges: Russia did not make an error by imposing a combined duty instead of an *ad valorem* duty in a few isolated instances, but has done so repeatedly, systematically and in the same way".[384]

7.302. In considering the European Union's use of these variant approaches to the term "systematic", we note that, on the one hand, we need to pay attention to the ways in which the European Union has used the term so that we consider the measure as described by the European Union itself. On the other hand, it is important, particularly when dealing with a term that is a definitional characteristic of a measure, that we are able to identify a clear and unchanging meaning. Otherwise, neither the responding party nor the Panel itself would be able to pin down, as it were, the measure whose consistency with the covered agreements is contested. This could raise issues of due process, in that a responding party should not have to adjust its pleadings during the panel proceedings to respond to shifting descriptions of the measure.[385] It could also effectively permit a complaining party, over the course of its submissions, to redefine a measure in such a manner that it would no longer be within a panel's terms of reference.

7.303. In the light of this, it is necessary for us to proceed to determine the meaning of the term "systematic" that will form the basis of our review of the evidence submitted in support of the existence of the SDV. As we noted above, the European Union's panel request includes the term

[379] European Union's first written submission, para. 133. (emphasis added)
[380] European Union's opening statement at the first meeting of the panel, para. 17.
[381] European Union's opening statement at the first meeting of the Panel, para. 11.
[382] European Union's response to Panel question No. 32.
[383] European Union's first written submission, paras. 7 and 32.
[384] European Union's response to Panel question No. 82. (emphasis omitted)
[385] We note that the Appellate Body made a very similar point in respect of the due process rights of complaining parties. Appellate Body Report, *Chile – Price Band System*, para. 144.

"systematically", but does not explicitly define it. In the absence of a definition provided by the European Union, we look initially to the term's ordinary meaning, as expressed in dictionaries.[386]

7.304. The Shorter Oxford English Dictionary defines "systematic" as follows:

> (Of a text, exposition, activity, etc.) arranged or conducted according to a system, plan, or organized method; (of a person) acting according to a system, regular and methodical, thorough; habitual, deliberate, pre-meditated…[387]

7.305. The Oxford English Dictionary Online provides similar relevant definitions:

> Arranged or conducted according to a system, plan, or organized method; involving or observing a system; (of a person) acting according to a system, regular and methodical.
>
> Acting, carried out, or expressed with deliberate (and frequently malicious) intent; carried out as a regular and reprehensible practice; habitual, deliberate, premeditated.[388]

7.306. Similarly, the Collins English Dictionary defines "systematic" as something that is "characterized by the use of order and planning; methodical".[389]

7.307. These definitions indicate that the word "systematic", when combined with an activity such as "application" of particular tariff treatment, denotes something that is done according to a system, plan, or organized method. Thus, when the European Union refers to "systematic" application of particular types of tariff treatment, it is in our view denoting the existence of an alleged "system" for applying these types of tariff treatment. We also note in this connection the European Union's use of the term "pattern of violations".[390] In our view, that term can be properly used to describe a situation of "systematic" violations only if it refers to violations that are the consequence of a system, plan, or organized method.

7.308. It is instructive to note, in addition, the following statement by the Appellate Body in *Argentina – Import Measures*:

> It seems to us that … the Panel's findings show that the TRRs [the trade-related requirements at issue] measure has systematic application as opposed to sporadic, unrelated applications of individual TRRs. The systematic nature of the unwritten TRRs measure is evidenced by and manifested in the fact that TRRs are applied to economic operators in a broad variety of different sectors as part of an organized effort, coordinated and implemented at the highest levels of government, and aimed at achieving import substitution and reduction of trade deficit within the framework of the "managed trade" policy.[391]

7.309. This passage interprets the phrase "systematic application" as referring to a situation where individual applications in a broad variety of different economic sectors are connected ("related") to one another inasmuch as they are all the result of an "organized effort" undertaken

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[386] We note that other panels have also had recourse to dictionaries in order to clarify the ordinary meaning of terms used in a panel request: see, e.g. Panel Reports, *China – Electronic Payment Services*, para. 7.42 and fn 91; *China – Publications and Audiovisual Products*, para. 7.50; *EC – Approval and Marketing of Biotech Products*, para. 19.

[387] Shorter Oxford English Dictionary, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, pp. 3154-3155.

[388] Oxford English Dictionary online, definition of "systematic", <http://www.oed.com/view/Entry/196668?redirectedFrom=systematic#eid>, accessed on 12 February 2016. The Dictionary gives a number of examples of this usage, including the following: "Resistance groups in Belgium have … been engaged in the systematic destruction of railways, road bridges, telecommunications [etc.]".

[389] Collins English Dictionary online, definition of "systematic", <http://www.collinsdictionary.com/dictionary/english/systematic>, accessed on 12 February 2016.

[390] European Union's first written submission, paras. 7 and 32.

[391] Appellate Body Report, *Argentina – Import Measures*, para. 5.142.

in support of a particular "aim". This understanding accords closely with that which we have derived from dictionaries above.[392]

7.310. Furthermore, and as we explained, the text of the European Union's panel request indicates, and some of the European Union's own statements suggest, that the term "systematic", in the context of the twelfth measure, must mean something other than "occurring in respect of a significant number of tariff lines", because the panel request by its terms distinguishes between these two concepts. We also note that the European Union has used the word "widespread" in its submissions when discussing the systematic application of relevant tariff treatment.[393] We do not agree that this word can be used interchangeably with "systematic". Indeed, the dictionary definitions provided above do not support such an interpretation. To be sure, a systematic activity can, and often will be, one that is also widespread. But an activity can, in our view, be systematic without at the same time being widespread.[394]

7.311. More generally, we consider that frequent repetition of an activity, or repetition on a regular basis, is not, in and of itself, "systematic" activity, as it does not necessarily imply an activity that is undertaken according to a system, plan, or organized method or effort. Observed repetition may be accidental, random or so diffuse or unrelated as to belie any suggestion of systematicity. Nevertheless, depending on the circumstances of each case, repetition may constitute relevant evidence in support of an asserted systematic activity. In some cases it may even be possible to infer the existence of systematic activity from observed repetition, where the repetition is so substantial (for example, so frequent) as to render it more likely than not that an underlying system exists.[395] Based on the above considerations, we find that the term "systematic" in the European Union's expressions "systematic application" and "systematic duty variation" cannot properly be interpreted to mean "widespread" or "in a large number of cases". Rather, we think it means "done according to a system, plan, or organized method or effort". It refers, in the aforementioned expressions, to a situation where individual instances of application of certain types of tariff treatment, or individual instances of duty variation, are connected by a system, plan, or organized method or effort.[396] Accordingly, we will base our review of the evidence submitted to us on this interpretation of the term "systematic".

7.5.1.2 Certain types of tariff treatment

7.312. We now turn our attention to what we have identified as the second definitional characteristic of the SDV, the particular types of tariff treatment at issue. The European Union has consistently argued that the SDV concerns goods subject to applied combined duty rates and either bound combined duty rates or bound *ad valorem* duty rates. More particularly, the SDV consists in two distinct types of tariff treatment. The first (which we will refer to as the "first type") occurs where the CCT requires the imposition of a specific duty rate whenever it is higher than the alternative *ad valorem* duty rate, where the bound rate is *ad valorem* only. Put another way, this type of tariff treatment occurs where the relevant bound duty rate is expressed as "x%", and the applied duty rate is expressed as "x%, but not less than y per unit".[397] The second (which we will

[392] In response to a question from the Panel, the European Union stated that "in *Argentina – Import Measures*, the panel found that the measure at issue had systematic application primarily because it applied to economic operators in a broad variety of sectors." European Union's responses to Panel question Nos. 106-107 and 119. In our view, however, and as the passage cited above shows, the Appellate Body in that case considered a range of factors in concluding that the measure at issue had "systematic" application. We do not read paragraph 5.146 of the same Appellate Body report, which refers to the panel's finding on "systematic application", as limiting the Appellate Body's own reasoning in its report, including at paragraph 5.142. At any rate, for the reasons explained below, interpreting "systematic" to mean nothing more than, or to necessarily include "occurring in a significant number of cases" would in our view be incorrect and would, in the present dispute, also render parts of the text of the European Union's panel request redundant, as we have said.

[393] See, e.g. European Union's opening statement at the first meeting of the Panel, para. 17.

[394] For instance, an attack on a targeted group can be systematic, but it need not at the same time be widespread.

[395] This standard of proof has also been applied in the Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.374 (referring to Appellate Body Reports, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 301, 321; and *US – Continued Zeroing*, para 335).

[396] In our view, the terms "system", "plan" and "organized method or effort" imply the idea of pursuing a particular aim. We therefore do not identify the existence of a particular aim as a separate element in our interpretation of the term "systematic".

[397] European Union's first written submission, para. 129; second written submission, para. 97.

refer to as the "second type") occurs where the CCT requires the imposition of a combined duty rate in the form of "x%, but not less than y per unit", where the bound rate, though also combined, is expressed in the form "z%; or x%, but not less than y per unit; whichever is the lower", where the value of "z" is higher than "x".[398] The seventh to ninth measures at issue in this dispute are examples of the first type of tariff treatment; the tenth and eleventh measures at issue are examples of the second type.

7.313. At the Panel's second meeting with the parties, Russia argued that the European Union had introduced a new, third type of tariff treatment into its description of the SDV. According to Russia, this additional type falls outside the Panel's terms of reference because it was not included in the European Union's panel request.[399]

7.314. The European Union denies that it has introduced a new type of tariff treatment into the description of the SDV. The European Union argues that "paragraph 11 of the European Union's panel request, as well as the paragraphs referred to therein, covers all three types of tariff treatment by referring to 'two ways' described in relation to measures 7 – 11. The first 'way' covers two types of tariff treatment under the SDV, and the second way covers the third".[400]

7.315. In order to address this issue, it is necessary to look closely at the passages to which Russia has pointed in support of its allegation. The first paragraph is from the European Union's second written submission. It reads as follows:

> The EU has, first, clearly described the particular type of tariff treatment required by the SDV in abstract, even mathematical terms. To recap, that type of tariff treatment 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%".[401]

7.316. This paragraph is supplemented by a footnote, which provides:

> In addition, the European Union's description of the SDV outlines two further possible types of tariff treatment. The second type is exactly 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 Z%". The third type is analogous to the tariff lines described in Section D of the European Union's first written submission. 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%".[402]

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[398] European Union's first written submission, para. 129; second written submission, fn 82.

[399] Russia's closing statement at the second meeting of the Panel, para. 17. Russia's complaint in this respect focuses on paragraph 97 of the European Union's second written submission and paragraph 47 of its opening statement at the second meeting of the Panel.

[400] European Union's response to Panel question No. 105.

[401] European Union's second written submission, para. 97. (footnote omitted)

[402] European Union's second written submission, fn 82. To similar effect are two further paragraphs of the European Union's opening statement at the second meeting of the Panel, which provide:

> [T]he Illustrative List only provides evidence of the first type: combined duties with an ad valorem element equal to the bound rate. The second type is closely connected, the only difference being that the ad valorem element is lower than the bound rate. Nevertheless, given the existence of the specific duty, the same mathematical formula can be relied upon to see exactly why and when the second type leads to the levying of duties in excess.

7.317. Russia's contention is that the "second type" of tariff treatment referred to in this footnote is in fact a new type of tariff treatment that was not raised in the European Union's panel request.

7.318. The Panel recalls the definition of the SDV as set out in the European Union's panel request.[403] Importantly, that definition refers to alleged duty variations "in one of the two ways described above (in relation to the seventh, eighth, ninth, tenth, and eleventh measure at issue)". This sentence refers the reader back to the paragraphs 8 and 9 of the panel request, which define the types of tariff treatment allegedly accorded to the seventh to ninth and tenth and eleventh measures at issue. With respect to the seventh to ninth measures, paragraph 8 defines the relevant type of tariff treatment as follows: "Russia applies combined duty rates (combining an *ad valorem* and a specific element; for instance '3% but not less than 0.09 EUR/kg') in relation to goods for which the Schedule provides for *ad valorem* rates (for instance '3%')'. In respect of the tenth and eleventh measures at issue, the relevant type of tariff treatment is defined in paragraph 9 as: "Russia applies combined duty rates (combining an *ad valorem* and a specific element; for instance '16%, but not less than 0.156 EUR/l') in relation to goods for which the Schedule provides for a formula that requires Russia to impose the lower of the amounts of duty: either the amount based on the application of an *ad valorem* rate or of the amount based on the application of a combined rate (for instance '16.7%; or 16%, but not less than 0.156 EUR/l; whichever is the lower')".

7.319. The question for us is whether what the European Union refers to in its second written submission as the "second type" of tariff treatment is included within the descriptions in the panel request, or whether it is a new type of tariff treatment that falls outside the Panel's terms of reference. To avoid confusion, we refer to this type as the "third type" of tariff treatment.

7.320. We begin by observing that there does appear to be a lack of consistency between the descriptions of the SDV provided in the European Union's panel request and first written submission, on the one hand, and in its second written submission and second opening statement, on the other hand. The notion that the SDV consists of two types of tariff treatment (or of tariff treatment that results in the imposition of excess duties in one of two ways) is supported by the description provided in the European Union's first written submission, which distinguishes between two broad types of tariff treatment (the first introduced by the words "In a number of instances" at the beginning of the paragraph, and the second introduced by the words "A different way in which the SDV could lead to violations" five lines from the end of the paragraph).[404] In the latter submissions (i.e. in the European Union's second written submission and its second opening oral statement), however, the European Union refers to three types of tariff treatment. Although the European Union refers in its earlier submissions to two "ways", rather than to two "types", we do not think that the expression "two ways" clearly or obviously denotes "three" (or more) types.

7.321. A closer examination, however, reveals that this difference in wording is stylistic rather than substantive. The "third" type of tariff treatment is merely one more version of the type of tariff treatment that we have described above as the "first type", and which the European Union described as the "first way". To recall, this particular "way" exists where the CCT requires the imposition of a specific duty rate whenever it is higher than the alternative *ad valorem* duty rate, and the bound rate is *ad valorem* only. Indeed, the "third type" of tariff treatment is in fact discussed in the European Union's first written submission, although in that document the European Union did not refer to it as a separate type of tariff treatment, but merely as a possible manifestation of the first way identified in the panel request. Thus, in its first written submission, the European Union explained the first way as follows:

> In a number of instances, the CCT requires the imposition of a specific duty whenever it is higher than a given ad valorem duty, with the bound rate being *ad valorem* only. Such duties will inevitably be levied in excess of bound rates below a certain break-

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The third type of tariff treatment is somewhat different from the first two. However, it also shares an important feature with them: 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. European Union's opening statement at the second meeting of the Panel, paras. 47-48.

[403] See paragraph 7.284 above.

[404] European Union's first written submission, para. 129.

> even price, including when expressed in connection to some other characteristic of the product such as weight or volume. 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. 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 violations of Article II:1 will occur.[405]

7.322. As this passage makes clear, the only difference between the two variations of the first way concerns the value of the *ad valorem* element of the applied combined duty rate *vis-à-vis* the bound *ad valorem* duty rate. The fundamental structure of the two variations is, however, exactly the same, and both are, in our view, covered by the European Union's panel request.[406] It would therefore be accurate to describe both variations with the expression used by the European Union in paragraph 8 of its panel request.[407] Although the illustrative example given in that paragraph is of a situation where the specific element of the combined applied duty rate is equal to the bound *ad valorem* bound rate, that example is designated as being "for instance", and does not limit the ordinary meaning of the abstract description that it illustrates.

7.323. In our view, the European Union could have been clearer in explaining that the "two ways" it identified in its panel request referred to or incorporated "three types" of tariff treatment. Nevertheless, for the reasons given above, we do not agree with Russia that the European Union has expanded the scope of the twelfth measure at issue by including a type of tariff treatment that was not specified in the European Union's panel request.

7.324. In sum, we understand the second definitional element of the SDV (i.e. "certain types of tariff treatment") as referring to two types of tariff treatment. The first occurs where Russia applies a combined duty rate in respect of a tariff line with abound *ad valorem* rate (regardless of whether the value of the *ad valorem* element of the applied combined duty is equal to or less than the value of the *ad valorem* bound duty rate). The second occurs where Russia applies a combined duty rate in the form of "x% but not less than y per unit" in respect of a tariff line subject to a bound combined duty rate in the form of "z%; or x% but no less than y per unit; whichever is the lower", where the value of "z" is higher than "x".

7.5.1.3 Significant number of individual tariff lines

7.325. We now turn to address the next definitional characteristic that we have identified above, namely the "significant number of tariff lines" allegedly affected by the SDV.

7.326. The European Union has not specifically defined, either in its panel request or subsequently, what it means by the term "significant" in the phrase "a significant number of tariff lines". Accordingly, as above when addressing the meaning of "systematic", we begin by considering the European Union's statements before the Panel. In its first written submission, the European Union argues that "…violations resulting from the SDV are not rare and sporadic", and indicates that "[i]n view of the large number of such violations, the European Union submits that they are best described as individual instances of a more general phenomenon".[408] Later in the same submission, the European Union argues that the SDV "is embedded directly into the

[405] European Union's first written submission, para. 129.

[406] An example may make this point more concrete. Take, for example, the seventh measure at issue, which is an example of the "first type" of tariff treatment. As we have explained, that measure consists in the application of a combined duty rate ("3% but not less than 0.09 EUR/kg") where the corresponding bound duty rate is *ad valorem* only ("3%"). In this example, the value of the *ad valorem* element of the applied combined duty rate and the bound *ad valorem* duty rate are equal (3%). It is possible, however, to imagine a situation where, instead of being equal, the value of the *ad valorem* element of the applied combined duty rate is not equal to the value of the bound *ad valorem* duty rate. It is possible, for example, to imagine an applied combined duty rate of "2% but not less than 0.09 EUR/kg" where the corresponding bound rate is simply 3%. That variation – the lowering of the *ad valorem* element of the combined duty so that it is less than the *ad valorem* bound duty rate – does not change the fundamental structure of the measure.

[407] Paragraph 8 is quoted in paragraph 7.318 above.

[408] European Union's first written submission, paras. 133 and 138-139.

numerous individual tariff lines throughout the CCT".[409] In its opening statement at the Panel's first substantive meeting with the parties, the European Union explained that the kinds of tariff treatment at issue are "repeatedly" accorded through the SDV[410], and argued that its Illustrative List reflects the "frequency" with which the SDV accords the particular kinds of tariff treatment.[411] Similarly, in response to a question from the Panel, the European Union states that the SDV affects a "large and changing number of tariff lines"[412], and also that it is "widespread".[413] Taken together, these statements indicate to us that the European Union uses the phrase "a significant number of tariff lines" to refer to a large number of tariff lines, or numerous tariff lines.

7.327. The term "significant" is defined as meaning "[s]ufficiently great or important to be worthy of attention" or "noticeable, substantial, considerable, large".[414] Whereas the first of these meanings essentially concerns a qualitative attribute of someone or something, the second indicates that the term "significant" can also be interpreted in a quantitative sense. As explained above, the European Union appears to have used the term in the latter sense. We note in this respect that in the phrase at issue the adjective "significant" qualifies the word "number", which suggests a concern with quantity. Given this context, and the European Union's own statements before us, we are satisfied that in the case of the twelfth measure the term "significant" has been used to underscore that the number of affected tariff lines is quantitatively important.

7.328. For these reasons, and in accordance with the relevant dictionary definition, we consider that "a significant number" of tariff lines is a "large", "substantial", or "considerable" number of tariff lines. Therefore, to be "significant", a number need not necessarily be very large, substantial, or considerable.

7.329. In interpreting the phrase "a significant number of tariff lines", we also need to look at the relevant context of that phrase in the panel request, which includes a reference to the SDV as a "general" practice.[415] The word "general" is defined, *inter alia*, as follows:

> Including, participated in by, involving or affecting, all, or nearly all, the parts of a specified whole …; completely or approximately universal within implied limits; opposed to partial or particular … Relating or belonging in common to various persons or things … Of a rule, law, principle, formula, or description: applicable to a variety of cases; true or purporting to be true for all or most of the cases which come under its terms; (virtually) universal. In later use freq.: true in most instances, but not without exceptions …[416]

7.330. This definition raises the issue of whether the word "general" in the panel request should be taken to indicate that the SDV is a measure that affects "all, or nearly all", tariff lines. In our view, such an interpretation of "general" would be questionable, however, precisely because the panel request also contains the phrase "a significant number of tariff lines". As we have explained, the word "significant" as it appears in that phrase implies a large number of tariff lines, but not necessarily all, or nearly all, of Russia's tariff lines.[417] Moreover, if the European Union had meant to suggest that the SDV covers all, or nearly all, tariff lines, it would in our view have said so specifically, rather than using the looser term "significant number".

7.331. For these reasons, we consider that "a significant number of tariff lines" does not mean all, or nearly all, tariff lines, but merely a large, substantial, or considerable number of tariff lines.

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[409] European Union's first written submission, para. 142.
[410] European Union's opening statement at the first meeting of the Panel, para. 88.
[411] European Union's opening statement at the first meeting of the Panel, para. 89.
[412] European Union's response to Panel question No. 32.
[413] European Union's response to Panel question No. 85.
[414] Oxford English Dictionary Online, definition of "significant", <http://www.oed.com/view/Entry/179569?redirectedFrom=significant#eid>, accessed on 12 February 2016.
[415] European Union's request for the establishment of a panel, para. 11.
[416] Oxford English Dictionary Online, definition of "general", <http://www.oed.com/view/Entry/77489?rskey=htbn3p&result=1&isAdvanced=false#eid>, accessed on 12 February 2016.
[417] Annex A-1, para. 4.38.

7.5.1.4 General practice

7.332. We turn, finally, to the European Union's characterization of the SDV as a "general" practice. The European Union observes in this respect that violations resulting from the SDV are "best described as individual instances of a more general phenomenon".[418] The European Union also states that "[t]he terms systematic and general refer … to the fact that such variations … are widespread and appear at numerous points throughout the CCT, so that they can be described as individual instances of a more general measure."[419]

7.333. The latter statement is instructive because it elucidates how the concepts of "general" and "significant number" can be read harmoniously. It indicates that the relevant types of tariff treatment have been allegedly accorded to a large number of tariff lines ("numerous points"), and that affected tariff lines can be found "throughout the CCT". The SDV is alleged to be general in view of the latter aspect. That is, we understand the European Union to contend that unlike the first to eleventh measures, the twelfth measure is general, in the sense that it does not target any specific tariff line or any particular part of the CCT.

7.334. We note that this understanding of the word "general" accords with one of the dictionary definitions provided above[420], namely "opposed to partial or particular". In addition, interpreting the word "general" in this way sheds additional light notably on the scope of the SDV. It makes clear that the "phenomenon"[421] called "SDV" that allegedly exists in the CCT is not limited to only specific parts of the CCT.[422] It therefore gives the term "general" independent meaning.

7.335. In the light of the foregoing, we consider that the word "general" addresses the scope of the SDV and clarifies that scope in a way that the other three definitional characteristics do not. It notably indicates that the SDV is not confined to particular parts of the CCT.

7.5.1.5 Conclusion on the definition of the measure at issue

7.336. After careful examination of each of the "definitional characteristics" of the SDV, and bearing in mind the limitations imposed by the text of the panel request as well as the European Union's subsequent descriptions and explanations before us, we consider that the alleged twelfth measure can be described essentially as follows: the CCT applies two specified types of tariff treatment to a large number of tariff lines. This phenomenon, which reflects a system or organized method or effort, is general rather than being limited to only particular parts of the CCT. To use once again the terms of the panel request, the measure at issue consists in the *systematic* application of *particular types* of tariff treatment to a *significant* number of tariff lines, resulting in a *general* practice.

7.337. Having explained our understanding of the measure as defined by the European Union, we now turn to consider whether the European Union has proven that the measure exists as alleged by the European Union.

7.5.2 Existence of the measure

7.338. We turn to consider whether the European Union has demonstrated the existence of the twelfth measure. We recall in this regard that according to the Appellate Body, the complaining party must "present relevant arguments and evidence during the panel proceedings showing the existence of the measures, for example, in the case of challenges brought against unwritten measures".[423]

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[418] European Union's first written submission, paras. 133 and 138-139.
[419] European Union's opening statement at the first meeting of the Panel, para. 17.
[420] See paragraph 7.329 above.
[421] European Union's first written submission, para. 133.
[422] In contrast, it is arguable that the phrase "a significant number of tariff lines" provided an indicator that the SDV is not limited to specific tariff lines. But a significant number of tariff lines could be a significant number that represents only a specific part of the CCT.
[423] Appellate Body Report, *US – Continued Zeroing*, para. 169.

7.339. The European Union argues that the existence of the twelfth measure is demonstrated by (i) the mathematical explanations of the seventh to eleventh measures at issue; (ii) a non-exhaustive list ("Illustrative List") that provides the duty rates applied by Russia at the time of the Panel's establishment in respect of 39 tariff lines; and (iii) trade statistics for transactions under six of the tariff lines indicated in the Illustrative List, that allegedly demonstrate the "adverse trade impact" of the applied duty rates for those six tariff lines.[424]

7.340. Russia considers that the evidence provided by the European Union is insufficient to prove the existence of the twelfth measure.[425] Russia suggests that the European Union's Illustrative List demonstrates only "the fact that Russia does indeed apply duties".[426] Russia argues that the European Union has failed to provide any evidence to show that the duty rates allegedly illustrating the SDV are either repeated actions or linked together.[427]

7.341. The Panel recalls that the twelfth measure as described by the European Union is an alleged unwritten measure whose existence has been challenged. We note the Appellate Body's statement that "the constituent 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".[428]

7.342. Since we have already identified the key elements of the European Union's description above, we turn to consider the types of evidence submitted by the European Union in support of its description, before assessing whether this evidence demonstrates the existence of the characteristic elements of the measure, as described by the European Union.

7.5.2.1 Evidence submitted by the European Union

7.343. We now address the European Union's evidence in respect of the existence of the twelfth measure. We note that the European Union has submitted three types of evidence in support of its submission that the twelfth measure exists.

7.344. First, the European Union has presented the applied and bound duty rates in respect of the seventh to eleventh measures at issue, with accompanying mathematical explanations and descriptions. Three of these applied duty rates (related to the seventh, eighth and ninth measures at issue) are combined duty rates comprising a single *ad valorem* element and a minimum specific element.[429] We recall the European Union's claim that the alleged inconsistency arises in respect of tariff lines where the bound *ad valorem* rates are identical to the *ad valorem* alternative element of the applied combined duty rates. This corresponds to the "first type" of tariff treatment that, according to the European Union, characterizes the SDV. The remaining two applied duty rates (related to the tenth and eleventh measures at issue) are combined duty rates comprising multiple elements: first, a straightforward *ad valorem* element; second, a "combined" element constituting an alternative *ad valorem* element that may not be lower than a minimum specific element; and third, an element requiring that the duty levied be the lowest permissible under the various elements. In the case of these two applied duty rates, the European Union claims that the alleged inconsistency arises in respect of bound combined duty rates that are identical to the "combined" elements of the applied duty rates. This corresponds to evidence in respect of the "second type" of tariff treatment that, according to the European Union, characterizes the SDV.

7.345. Second, the European Union has presented an "Illustrative List of discrepancies" of tariff lines that indicates the applied duty rates contained in the CCT in respect of 39 distinct tariff lines, as they existed on the date of the Panel's establishment, as well as the bound duty rates for those same tariff lines.[430] The 39 tariff lines are from five different chapters of the CCT, namely: six tariff

[424] European Union's response to Panel question No. 87, para. 174; second written submission, paras. 97-98.
[425] Russia's opening statement at the second meeting of the Panel, paras. 51-58.
[426] Russia's opening statement at the second meeting of the Panel, para. 53.
[427] Russia's opening statement at the second meeting of the Panel, paras. 51-58.
[428] Appellate Body Report, *Argentina – Import Measures*, para. 5.108.
[429] See paragraphs 7.207 to 7.209 above.
[430] Illustrative List of discrepancies related to the European Union's claim on the Systematic Duty Variation, (Illustrative List), (Exhibit EU-19).

lines from chapter 15, two tariff lines from chapter 39, one tariff line from chapter 40, eight tariff lines from chapter 84, and twenty-two tariff lines from chapter 87. Each of these relates to the "first type" of tariff treatment challenged by the European Union, and corresponds to the type of tariff treatment described by the European Union in respect of the seventh to ninth measures.[431] We note that three of the 39 tariff lines included in the Illustrative List are 1511 90 190 2, 1511 90 990 2, and 8418 10 200 1. For these three tariff lines the relevant applied and bound duty rates have already been described by the European Union in the context of the seventh, eighth and ninth measures.[432] Therefore, the Illustrative List demonstrates the applied and bound duty rates in respect of 36 tariff lines additional to the five tariff lines already provided in the European Union's description of the seventh to eleventh measures at issue. Furthermore, we observe that the European Union did not submit into evidence all relevant Decisions of the EAEU establishing the applied duty rates indicated in the Illustrative List.[433]

7.346. Finally, the European Union has presented trade statistics and accompanying calculations concerning six of the tariff lines included in the Illustrative List.[434] Two of these tariff lines relate to the seventh and eighth measures at issue. The statistics indicate the total value and net weight of goods imported under each of the six tariff lines, to certain districts in Russia, from certain points of origin in the European Union. The European Union's accompanying calculations allegedly demonstrate that the average customs duty levied on products falling under each of those six tariff lines is in excess of the relevant bound duties. We recall that similar evidence was used as supplementary evidence by the panel and the Appellate Body in *Argentina – Textiles and Apparel*, in making a finding of inconsistency under Article II:1(b), first sentence.[435]

7.347. The European Union has submitted no other evidence, whether direct or indirect, to support its assertion regarding the existence of the SDV.

7.5.2.2 Assessment of evidence

7.348. As we have already noted, the European Union recognizes that the SDV, as distinct from its alleged individual instances, is an unwritten measure. We cannot, therefore, lightly accept the European Union's assertion that it exists. Accordingly, we now turn to consider whether the evidence submitted by the European Union demonstrates that the SDV, as defined by the European Union, actually exists. As we have explained above, the SDV, as described by the European Union, has the following definitional characteristics: "certain types of tariff treatment" that, in respect of a "significant number of tariff lines", are "systematically" applied or accorded in such a way as to result in a "general" practice. As we have explained, each of these is constitutive of the SDV as defined by the European Union. Thus, each element must be demonstrated before the Panel could find that the SDV, as a single overarching and unwritten measure, exists.

7.349. In reviewing the evidence before us, we will begin by considering whether the evidence submitted by the European Union establishes the existence of the relevant types of tariff treatment. If it does, we will proceed to consider whether this tariff treatment is accorded to a significant number of tariff lines, whether it is accorded in a systematic way, and whether it has resulted in a general practice.

7.5.2.2.1 Types of tariff treatment

7.350. We have already explained our understanding of the two types of tariff treatment implicated in the European Union's description of the SDV. We now turn to examine whether the evidence submitted by the European Union shows that the types of tariff treatment described by the European Union exist in the CCT. In carrying out this analysis, we are not concerned with

[431] See paragraph 7.312 above.
[432] The applied and bound duty rates indicated in the Illustrative List for tariff line 8418 10 200 1 are the same as those indicated by the European Union for the ninth measure as it existed at the time of the Panel's establishment, and not as amended.
[433] In contrast, in respect of its claims concerning the first to eleventh measures at issue, the European Union presented as evidence the relevant Decisions of the Eurasian Economic Union, amending the CCT.
[434] Specific cases of discrepancies, customs statistics of foreign trade of Russian Federation, (Customs Statistics), (Exhibit EU-20).
[435] Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 61-62.

either the frequency with which, or the systematic way in which, the treatment is allegedly accorded. Rather, our inquiry focuses on whether the types of tariff treatment alleged to exist have been identified in the CCT.

7.351. The European Union argues that the seventh to ninth measures manifest the first type of tariff treatment at issue (which exists where Russia applies a duty rate in the form "x% but not less than y per unit", where the corresponding bound rate is expressed in *ad valorem* terms only). Similarly, the European Union argues that the tenth and eleventh measures manifest the second type of tariff treatment at issue (which exists where Russia applies a duty rate in the form "x% but not less than y per unit", where the corresponding bound rate is "z%; or x% but not less than y per unit; whichever is the lower").[436] Additionally, the European Union argues that the Illustrative List contains further examples of the first type of tariff treatment.[437]

7.352. The Panel begins by noting that the European Union does not claim to have provided any evidence of the type of tariff treatment described as the "second type" in its second written submission (referred to in our findings as the "third" type).[438] As we have explained above, this type of tariff treatment, which is really just another version or sub-type of the first type, allegedly exists where Russia applies a combined duty rate in the form "x% but not less than y per unit ", and where the corresponding bound rate is expressed in *ad valorem* terms only and is higher than the *ad valorem* element of the applied combined rate.[439] Because the European Union has not provided us with any instances of this type of tariff treatment in the form of relevant excerpts from the CCT, we find that it has failed to establish the third type of tariff treatment exists in the CCT.

7.353. Conversely, we find that the seventh to ninth measures at issue in this dispute are instances of the first type of tariff treatment described by the European Union.[440] Similarly, we find that the tenth and eleventh measures at issue are instances of the second type of tariff treatment. As we have explained in detail above, the European Union has provided evidence establishing the existence of all these measures. It has, in particular, submitted relevant extracts from the CCT and Russia's Schedule.

7.354. Accordingly, we find that, by submitting evidence in respect of the seventh to eleventh measures, the European Union has established the existence of the two types of tariff treatment implicated in the SDV and described by the European Union in its Panel request: the first existing where Russia applies a duty rate in the form "x% but not less than y per unit", where the corresponding bound rate is expressed in *ad valorem* terms (the seventh to ninth measures); and the second existing where Russia applies a duty rate in the form "x% but not less than y per unit", where the corresponding bound rate is "z%; or x% but not less than y per unit; whichever is the lower" (the tenth and eleventh measures). Although, in respect of the first type, we have seen evidence of only one of the sub-types described by the European Union, this is sufficient to establish that the first type of tariff treatment, as described by the European Union, actually exists in the CCT.

7.5.2.2.2 Significant number of tariff lines

7.355. We now turn to assess whether the European Union has demonstrated that the types of tariff treatment identified above are accorded to "a significant number of tariff lines".[441]

7.356. According to the European Union, the Illustrative List clearly shows that Russia accords the relevant types of tariff treatment to a "significant" number of tariff lines in the CCT.[442]

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[436] European Union's first written submission, paras. 127 and 129.

[437] European Union's opening statement at the second meeting of the Panel, para. 47; response to Panel question No. 107.

[438] European Union's second written submission, para. 97, fn 82.

[439] As we have explained, this contrasts with the seventh, eighth, and ninth measures at issue, in respect of which the bound *ad valorem* rate and the *ad valorem* element of the applied combined duty are equal.

[440] They are not, however, instances of the sub-type that we have referred to as the "third type" of tariff treatment, and of whose existence the European Union has provided no evidence. Rather, the value of the bound *ad valorem* duty rate and the *ad valorem* element of the combined duty rate are equal.

[441] See paragraphs 7.325 to 7.331 above.

7.357. Russia responds that the Illustrative List cannot be considered evidence of anything, except the fact that Russia does apply duties.[443]

7.358. The Panel notes that the European Union has identified a number of applied and bound duty rates. According to the European Union, they demonstrate that the relevant types of tariff treatment are accorded to a "significant number" of tariff lines. As noted above, the European Union has submitted an Illustrative List, consisting of the applied and bound duty rates in respect of 39 tariff lines, and the evidence provided by the European Union in respect of the seventh to eleventh measures. As we have explained, the rates corresponding to the seventh, eighth, and ninth measures, as they existed at the time of the Panel's establishment, are included in the Illustrative List, whereas those corresponding to the tenth and eleventh measures are not. In total, therefore, the European Union has identified the applied and bound duty rates for 41 different tariff lines that allegedly demonstrate the SDV.

7.359. The Illustrative List suggests that Russia's applied duty rates were, at the time of the Panel's establishment, at a certain level, and of a certain type and structure. However, as stated in paragraph 7.345 above, the European Union has not provided the relevant excerpts from the CCT that would demonstrate that the applied duty rates alleged in the Illustrative List do in fact exist.

7.360. Nonetheless, the European Union has submitted into evidence Decision No. 52 (Exhibit EU-6) and Decision No. 103 (Exhibit EU-8), which relate to its claims concerning the seventh to ninth measures at issue. Decision No. 52 establishes certain duty rates required to be applied by Russia as of 1 September 2014. It shows the same applied duty rates as are specified in the Illustrative List for 20 tariff lines contained in the Illustrative List. Similarly, Decision No. 103 establishes duty rates required to be applied by Russia as of 1 September 2014, and shows the same applied duty rate as specified in the Illustrative List for one additional tariff line not contained in Decision No. 52. In addition to these Decisions that relate to tariff lines included in the Illustrative List, the European Union has provided the relevant Decisions establishing the duty rates in respect of the tenth and eleventh measures. Therefore, in total the European Union has provided legal instruments establishing the applied duty rates in respect of 23 tariff lines allegedly affected by the SDV. It follows that for the remaining 18 tariff lines included in the Illustrative List the European Union has provided no documentary evidence of their existence. We will therefore proceed on the basis that the European Union's evidence demonstrates that the relevant tariff treatment has been accorded to 23 tariff lines.

7.361. We now consider whether the evidence before us supports the European Union's assertion that the SDV affects a "significant" number of tariff lines. As we have explained in paragraph 7.331 above, the phrase "a significant number of tariff lines" in our view refers to a large, substantial, or considerable number of tariff lines. We recall at the outset that the phrase "a significant number" is intended to capture all tariff lines affected by the SDV, and not simply those contained in the Illustrative List. However, it would be improper to infer from the mere existence of some tariff lines with the relevant type of tariff treatment that there necessarily are others. The evidence before us establishes the existence of 23 relevant tariff lines. In the absence of other evidence that would support the conclusion that additional relevant tariff lines in fact exist, the only inquiry we can undertake is whether 23 tariff lines is in itself a "significant number" of tariff lines.

7.362. We note at the outset that the phrase "a significant number" does not refer to a particular number. We further observe that 23 tariff lines could be a large, substantial, or considerable number, and hence a "significant" number, of tariff lines, in some contexts, but not in others. Therefore, it appears to us at a minimum appropriate, in assessing whether 23 tariff lines are a large, substantial, or considerable number, to have regard to some comparator or reference point. Otherwise, it is possible that a number will be accepted as "significant" even though the context suggests that it is not large enough to constitute a "significant" number.

7.363. In the specific context in which the phrase "in relation to a significant number of tariff lines" has been used in the European Union's panel request and in the European Union's arguments before us, only two alternative approaches appear to us to warrant closer consideration. On the one hand, the European Union's description of the measure as affecting a

[442] European Union's second written submission, para. 98; response to question No. 87.
[443] Russia's opening statement at the second meeting of the Panel, para. 53.

"significant" number of tariff lines could be understood as highlighting a fundamental distinction between the SDV and the other eleven measures challenged by the European Union, each of which concerns one single tariff line.[444] On the other hand, the number of tariff lines affected by the SDV could be compared to the total number of tariff lines in the CCT.

7.364. We begin with the first approach. It is easy to see that the European Union's reference in the panel request to a "significant number of tariff lines" is useful in identifying the specific measure at issue, insofar as it sharply contrasts the twelfth measure with the preceding eleven measures, which concern single and identified tariff lines. Under this approach, the proper comparison is therefore between the number of tariff lines affected by the SDV and the number of tariff lines associated with each of the eleven other measures. As noted, each of these measures concerns one single tariff line. This should not be taken to mean, however, that any number greater than one is a significant number. To be "significant" under this approach, a number must be greater than one and at the same time be a large, substantial, or considerable number. The number one simply serves as a reference point for determining whether a number can be accepted as "significant".

7.365. Under the alternative approach, we would compare the number of tariff lines affected by the SDV to the totality of tariff lines in the CCT, which, according to the parties, is approximately 11,000.[445] Under this approach, the reference point is not the number one, but a number roughly equal to 11,000. Thus, whether a number can be accepted as "significant" under this approach must be determined bearing in mind the number 11,000. As a consequence, it may be the case that under this approach a particular number could not be accepted as "significant" even though under the first approach where the reference point is one that same number could be accepted as "significant".

7.366. As we understand the European Union's description of the SDV, the European Union alleges that the total number of tariff lines, which we have said is approximately 11,000, is greater than the number of tariff lines affected by the SDV. This view is supported by the European Union's contention that the SDV affects a "significant" number of tariff lines contained in the CCT, not "all" tariff lines. Viewed in this light, and considering the very large number of tariff lines in the CCT, it seems to us that if the intended comparison was with the total number of tariff lines in the CCT, it would have been more natural to refer in the panel request to a significant "proportion", "percentage", or "share", of tariff lines that are affected by the SDV rather than to a significant "number".

7.367. Thus, we find that the first approach fits better with the words actually used to describe the twelfth measure in the panel request, and with their context, which notably includes the preceding identification of the first eleven measures, each of which differs from the twelfth measure by virtue of the fact that it concerns only one specific tariff line. As we cannot accept both approaches at the same time, we will base our analysis on the first approach.

7.368. Accordingly, we now proceed to determine whether the 23 tariff lines at issue are a large, substantial, or considerable number of tariff lines that is at the same time greater than one. Plainly, 23 is a number greater than one. Moreover, 23 tariff lines can in our view be characterized as a large, substantial, or considerable number of tariff lines in the context of the present dispute. Indeed, had the European Union challenged the duties applicable to each of the 23 tariff lines at issue individually (which it could have done, but elected not to), we would have had to make findings on 23 additional measures at issue. If we had to address an additional 23 measures at issue, we would have no hesitation in saying that this would constitute a large, substantial, or considerable number of additional measures). Thus, we are satisfied that in the specific context of

[444] We note that the seventh to eleventh measures in particular concern the same types and structures of duty that are covered by the SDV.

[445] We note that in Russia's Working Party Report, a Russian representative indicated that before Russia's accession what is now called the CCT "consisted of 11,170 tariff lines". Russia's Working Party Report, para. 310.

the twelfth measure as described in the panel request, 23 tariff lines can be considered a large number.[446]

7.369. For these reasons, we find that the 23 tariff lines whose existence the European Union has established can be properly considered a "significant" number of tariff lines. We consequently also find that the European Union has demonstrated that the relevant types of tariff treatment are accorded "in relation to a significant number of tariff lines".[447]

7.5.2.2.3 Systematic application

7.370. We now turn to the European Union's assertion that the relevant types of tariff treatment are systematically applied or accorded. We have determined above that the word "systematic" as used in the context of the twelfth measure refers to a situation where individual instances of application of particular types of tariff treatment are connected by a system, plan, or organized method or effort. Bearing this in mind, we now turn to consider the evidence submitted by the European Union in order to determine whether it supports the conclusion that the types of tariff treatment discussed above are indeed being applied systematically.[448]

7.371. The key evidence relied upon by the European Union consists of tariff lines included in the Illustrative List, as well as the tenth and eleventh measures as they existed at the time the Panel was established. In its first written submission, the European Union explains that this "Illustrative List detailing a number of tariff lines with regard to which the SDV leads to violations … is proof of the systematic application of the SDV".[449] Similarly, in response to a question from the Panel, the European Union reaffirmed that "[t]he significant number of tariff lines that is affected is also indicative of the systematic nature of the measure".[450] In response to a question from the Panel concerning the relationship between the Illustrative List and the alleged "systematic" nature of the SDV, the European Union also stated that, in *Argentina – Import Measures*, the panel found that the measure at issue had systematic application primarily because it applied to economic operators in a broad variety of different sectors.[451]

7.372. Russia argues that the European Union has "failed to provide evidence that [violations] exist and … constitute a systematic practice".[452] In Russia's view, the European Union has failed "to establish the systematic character of the measure at issue".[453] According to Russia,"[t]he Illustrative List merely shows that certain duties are of [a] type, structure and design different from those provided for in Russia's Schedule"; it does not "provide any evidence of inconsistency

[446] We recall that we have said at paragraph 7.328 above that a "significant" number need not necessarily be a very large, substantial, or considerable number.

[447] See paragraphs 7.325 to 7.331 above.

[448] The European Union has commented on Russia's argument that the European Union has not provided "substantiated criteria that would allow … establishing [the] systematic character of the measure at issue". Russia's second written submission, para. 58(c); response to Panel question No. 109. According to the European Union, Russia's argument is "quite vague". The European Union then stated that "[i]t also departs from the legal standard set by the Appellate Body. There is no general requirement to prove that a measure at issue is of a systematic character". European Union's response to Panel question No. 109. The basis for the European Union's statement is unclear to us because, as we have explained above, it is the European Union that has insisted on the systematic nature of the SDV. While there may not be any "general" requirement to establish the systematic nature of a challenged measure, here the European Union in its own description of the measure at issue has consistently referred to it as being systematic in nature. Thus, in saying that our task is to determine whether the European Union has established the systematic nature of the measure at issue, we are not imposing a new test or additional requirement. Rather, we are simply inquiring whether the European Union has "adduce[d] evidence sufficient to raise a presumption" that the challenged measure is of a systematic nature. Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 323 at 335. Doing so is fully consistent with the Appellate Body's statement that 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". Appellate Body Report, *Argentina – Import Measures*, para. 5.108.

[449] European Union's first written submission, para. 139.

[450] European Union's response to Panel question No. 84; opening statement at the second meeting of the Panel, para. 46 ("The Illustrative List is also evidence of the systematic nature of that measure").

[451] European Union's responses to Panel question Nos. 106-107.

[452] Russia's second written submission, para. 102.

[453] Russia's second written submission, paras. 58-59.

of applied duties provided therein with Article II:1(a) and (b) of the GATT 1994".[454] Russia also argues that the European Union has failed to clarify how it could be assessed whether the three types of tariff treatment, taken together, are accorded systematically. According to Russia, the European Union suggests that the Panel should rule on the SDV on the basis of the Illustrative List, which contains examples of only the first type of tariff treatment as evidence of the WTO-inconsistency of the single measure, the SDV.[455] Additionally, in response to a question from the Panel, Russia explained that although there may be some "logic in saying that duties are systematic measures, because they are written measures of general and prospective application", nevertheless "the SDV does not amount to a simple combination of these duties", and accordingly there is no reason "to transfer the characteristics of a duty … to the SDV".[456]

7.373. The Panel begins by considering whether the "systematic" nature of the twelfth measure must be demonstrated in relation to each of the two types of tariff treatment, or whether we can consider those types of treatment together. The European Union argues that "[t]he reference to 'systematic' … should be understood as covering all … type[s] of tariff treatment considered together."[457] We see no reason not to accept the European Union's argument. The European Union's panel request states in relevant part that "the legal instruments … 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)."[458] The quoted sentence does not say that the relevant legal instruments systematically provide for duty type/structure variation in respect of each of the two ways identified in the panel request. This suggests to us that the word "systematically" in the panel request is intended to describe the SDV as a single phenomenon, rather than describing two parallel SDVs. We therefore consider that the two relevant ways of duty variation that characterize the SDV must be considered together when determining whether they are provided for systematically. Accordingly, we will determine whether the European Union has established that the relevant types of tariff treatment, considered together, are applied "systematically".

7.374. We have already explained that the term "systematic" as it appears in the panel request has a meaning distinct from the phrase "a significant number of tariff lines". Therefore, the mere fact that a certain type of tariff treatment is repeatedly accorded does not necessarily indicate the existence of a system underlying that repetition. Indeed, observed repetition may be coincidental or so diffuse or unstructured as to belie any suggestion of an underlying system, plan, organized method or effort. However, it may in some cases be possible to infer the existence of a system where the observed repetition is so substantial as to render it more likely than not that an underlying system, plan, organized method or effort exists. It is important to be clear, however, that in such cases the repetition is evidence from which the existence of an underlying system may be inferred; it is not in itself the system.

7.375. The European Union's assertion that the Illustrative List of tariff lines is itself "proof" of the measure's systematic nature suggests to us that we should begin our analysis by considering whether the tariff lines submitted as evidence are so numerous as to make it more likely than not that an underlying system exists. In this connection, we recall our determination above that the European Union has demonstrated the existence of 23 relevant tariff lines.[459] As we have noted, 21 of these tariff lines are examples of the first type of tariff treatment at issue (i.e. where Russia applies a combined duty in respect of a tariff line bound in its Schedule in *ad valorem* terms). The two remaining tariff lines – which are the tariff lines submitted by the European Union in the context of its claims concerning the tenth and eleventh measures at issue – are examples of the second type of tariff treatment.

[454] Russia's second written submission, para. 78.
[455] Russia's comments on the European Union's responses to Panel question Nos. 106-107.
[456] Russia's response to Panel question No. 109.
[457] European Union's response to Panel question No. 107.
[458] European Union's request for the establishment of a panel, para. 11. (emphasis added)
[459] We recall that the European Union has submitted the Illustrative List only to illustrate, rather than to comprehensively encapsulate, the SDV. However, our analysis can take into account only tariff lines allegedly affected by the SDV of whose existence we have evidence.

7.376. In our view, an assessment of whether 23 tariff lines justify the inference that the relevant types of tariff treatment are being accorded "systematically" cannot be meaningfully undertaken by considering these 23 tariff lines in absolute terms. Rather, to determine whether observed repetition is more or less common or frequent, we think it would be appropriate, as a conceptual matter, to compare the frequency with which the relevant types of tariff treatment have been accorded in the present dispute with the total number of tariff lines in respect of which the relevant type of tariff treatment could potentially have been applied (that is, the universe of all possibly affected tariff lines). If the difference were small, then it might be justified to infer that the relevant types of tariff treatment have been applied systematically.[460]

7.377. The European Union has not provided arguments or evidence regarding the universe of all possibly affected tariff lines. We note that it is possible to conceive of more than one potentially relevant universe. One possible approach would be to compare the 23 tariff lines allegedly affected by the SDV against the number of all tariff lines contained in the CCT. However, that approach does not accord well with the European Union's description of the SDV as affecting only tariff lines with duty rates that are bound in either *ad valorem* form (x%) or a particular type of combined form ("z%; or x% but not less than y per unit; whichever is the lower"). It would therefore be questionable to take account of any tariff lines in the CCT with duty rates bound in specific form.[461] Accordingly, we do not find the entire CCT to be an appropriate comparator.

7.378. An alternative approach would be to compare the 23 tariff lines to the total number of tariff lines contained in the CCT for which the bound duty rate is expressed in either *ad valorem* or the relevant combined duty form, that number being a sub-group of all the tariff lines contained in the CCT in respect of which duty variation from relevant bound duty rates could have occurred. Ultimately, however, we need not decide whether this alternative approach, or any other approach, would be an appropriate comparator. This is because the European Union has not provided the relevant information. Without evidence as to the universe of all potentially relevant tariff lines in the CCT, we are unable to assess whether the 23 tariff lines at issue establish that the CCT accords the relevant types of tariff treatment so commonly or frequently as to justify our inferring the existence of an underlying system, plan, or organized method or effort.

7.379. It is appropriate in this context to address the European Union's reliance on the Appellate Body's decision in *Argentina – Textiles and Apparel*. According to the European Union, the Appellate Body in that case found an inconsistency with Article II:1 with respect to all relevant tariff categories to which the measure at issue applied, even though the complaining party had only submitted evidence relating to 118, or at most 124, out of approximately 940 relevant tariff lines.[462] According to the European Union, the Appellate Body's findings in that case were based on evidence relating to a minority of the affected tariff lines.[463] In the European Union's view, we should follow the same approach in respect of our examination of the SDV.[464]

7.380. We do not disagree with the European Union's summary of the findings of the Appellate Body in *Argentina – Textiles and Apparel*. However, the passages relied on by the European Union relate to the Appellate Body's findings on the consistency of the measure at issue with the covered agreements, and do not concern the existence of the measure at issue. Indeed, as the European Union acknowledges, in *Argentina – Textiles and Apparel* both the measure itself and its scope of application were "described in a set of distinct documents"[465], and accordingly there was no uncertainty as to the measure's existence. In contrast, we are dealing with an unwritten measure

[460] If the difference is large, it would not normally be justified to infer solely on the basis of the number of instances of relevant tariff treatment that that tariff treatment has been applied systematically. However, it may be possible to demonstrate systematic application in other ways, for example by showing that the individual instances form part of a system, plan, or organized method or effort.

[461] We focus on the bound duty rates because it is to these rates that Russia is required under Article II:1 to conform. We also recall that the panel request indicates in relevant part that the SDV involves "a type/structure of duty that *varies from the type/structure of duty recorded in the Schedule*". European Union's request for establishment of a panel, para. 11. (emphasis added) Thus, it is the type or structure of the duty rates in the CCT that departs from the type or structure of the bound duty rates.

[462] European Union's first written submission, para. 141; second written submission, para. 100.

[463] European Union's second written submission, para. 100.

[464] European Union's first written submission, para. 142.

[465] European Union's first written submission, para. 142; European Union's opening statement at the second meeting of the Panel, para. 51.

that is alleged to be of a systematic nature. As we have said, we cannot lightly accept assertions concerning the existence of an unwritten measure of a particular nature. Moreover, we consider that the inferences that can be drawn from given numbers of tariff lines will of necessity depend on the particular circumstances of each case.

7.381. In the present dispute, what is to be demonstrated is the systematic nature of the SDV. By definition, the systematic nature is an attribute of the measure as a whole, not of each individual instance of relevant duty variation that is said to be connected to other such instances by a system. As we have said, if inferences are to be drawn solely based on numbers of tariff lines, it is only if the demonstrated number is sufficiently substantial that it can be inferred that an underlying system exists. This situation contrasts with that facing the Appellate Body in *Argentina – Textiles and Apparel,* where the Appellate Body found that the measure at issue, on account of its "structure and design"[466], resulted in an inconsistency with Article II:1(b), first sentence, in respect of numerous specific tariff categories and then proceeded to extend the scope of its finding of inconsistency to all other relevant tariff categories. It appears to us that in that dispute, considering additional tariff categories would merely have provided further confirmation of something that the Appellate Body already considered to have been established, namely that the measure at issue by virtue of its design and structure would result in inconsistencies with Article II:1(b), first sentence. We therefore consider that the Appellate Body report in *Argentina - Textiles and Apparel* does not support the proposition that a minority of tariff lines affected by the SDV is necessarily sufficient to demonstrate the systematic nature of the SDV. In our view, whether or not a minority of tariff lines is sufficient must be assessed on a case-by-case basis.

7.382. In the case at hand, we are unable to infer from the 23 demonstrated instances of relevant tariff treatment that other tariff lines exist that have also been subjected to the particular types of tariff treatment at issue. The European Union has not therefore established that the 23 tariff lines are a minority of tariff lines affected by the SDV. Moreover, although we have found that 23 tariff lines is a large and hence "significant" number of tariff lines in the circumstances of this dispute, we lack evidence and explanation concerning the universe of potentially relevant tariff lines in the CCT against which to compare the 23 tariff lines. In the light of this, the European Union in our view has also not established that 23 instances of relevant tariff treatment are sufficiently numerous to render it more likely than not that they are connected by a system, plan, or organized method or effort.

7.383. As the 23 demonstrated instances of relevant tariff treatment in our view do not establish, by themselves, that that tariff treatment is systematically applied, we now turn to consider whether there is any other evidence before us to show that these and possibly other relevant instances are connected or related such that they can be described as evidencing an underlying system, plan or organized method or effort. In undertaking this analysis, we are not looking to see whether the European Union has established the subjective intentions of the persons (if any) who designed and put in place the alleged SDV. Rather, we inquire into whether the European Union has demonstrated that there exists some objective connection or relationship between the identified instances of relevant tariff treatment that supports the inference that they form part of an underlying system, plan or organized method or effort.

7.384. The European Union did not, in its first written submission, provide an explanation of what, in its view, renders the application of the types of tariff treatment at issue "systematic". In order to explore this issue, we addressed a number of questions to the European Union. The European Union stated in this context that "[b]y examining the Illustrative List, a clear pattern emerges: Russia did not make an error by imposing a combined duty instead of an *ad valorem* duty in a few isolated instances, but has done so repeatedly, systematically, and *in the same way*".[467] The European Union subsequently elaborated on this point in the following terms:

> The connection between the individual instances of the SDV is clear: they all consist in a particular kind of tariff treatment, and they are all embodied in individual tariff lines in the CCT. Both those individual tariff lines and the CCT as a whole are written legal instruments of general and prospective application. The tariff treatment, or its precise content, is described distinctly from the individual instances of the SDV, and the

[466] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 62.
[467] European Union's response to Panel question No. 82. (emphasis original)

> Illustrative List shows that it is actually applied in a significant number of instances. That tariff treatment is widespread and ongoing, and has been accorded repeatedly to a significant number of tariff lines. It is likely to continue, if for no other reason, because it is provided by the CCT which is a measure of general and *prospective* application, i.e. stretching into the future.[468]

7.385. The European Union responded to another question in similar terms:

> [T]he individual instances of the SDV – the tariff lines in the CCT – could all, in themselves, be described as measures of general and prospective application. They mandate customs authorities to levy duties in a particular way. They are all contained in a single legally binding document of general and prospective application: the CCT. No discretion is involved.[469]

7.386. The Panel notes that these passages identify four elements as constituting the "connection" between the alleged individual instances: first, each instance is an example of a particular kind of tariff treatment; second, each instance is embodied (i.e. is written down) in the CCT; third, each individual instance, and the CCT itself, is legally binding and has general and prospective application; and fourth, the relevant types of tariff treatment have been accorded repeatedly.

7.387. We begin with the third element, which concerns the fact that the individual tariff lines in the CCT that are allegedly affected by the SDV, and the CCT itself, are written and legally binding measures of general and prospective application. Those characteristics may be important when considering the nature of each individual instance in itself. However, they do not, in our view, shed any light on the relationship or connection between the individual instances or demonstrate how they unite into an "overriding measure".[470] Indeed, even tariff lines in the CCT that are not alleged to be affected by the SDV exhibit those characteristics.

7.388. The first and second elements focus on the fact that all of the alleged individual instances of the SDV are of a particular form or type, and are contained in the same legal instrument, the CCT. The fourth element relates to the repeated application of the particular types of tariff treatment to a number of the tariff lines contained in the CCT. These elements in our view are indeed evidence of repetition of the same phenomenon, that is to say, the repeated appearance in the CCT of the relevant types of tariff treatment. However, these elements fail to distinguish between the identity of the SDV, as a distinct "overarching" measure, and its individual instances. The SDV must have content other than, or additional to, the individual instances of repetition. Mere repetition of certain types of tariff treatment does not, without more, show that the relevant tariff lines are connected to each other by a system. [471]

7.389. We are mindful of the fact that we are dealing with particular types of tariff treatment contained in the CCT. These types of tariff treatment did not, of course, appear spontaneously in the CCT and they are therefore not purely accidental. However, this fact alone is in our view insufficient to infer that the individual instances of relevant tariff treatment are connected to one another in such a way as to show the existence of an underlying system, plan, method, or effort. We note in this regard the European Union's statement that individual instances of the SDV can be found in "at least Chapters 15, 39, 40, 84 and 87 of the CCT".[472] These chapters cover very different agricultural and manufacturing products, including animal and vegetable oils, plastics, rubbers, refrigerators, and motor vehicles. The European Union did not explain why the SDV

[468] European Union's response to Panel question No. 85. The European Union stated along similar lines that "[w]hat brings together all these instances of the SDV, which could all individually be characterized as rules or norms of general and prospective application, is the type of tariff treatment that is accorded … In practical terms, they are also all bound together by the simple fact that they are all contained in a single, overarching written legal instrument – the CCT." European Union's response to Panel question No. 117.

[469] European Union's response to Panel question No. 87.

[470] European Union's response to Panel question No. 87.

[471] As we have explained, repetition may be enough to demonstrate the existence of an underlying system only where it is very extensive. We have already determined above that we are unable to agree, without additional information, that 23 demonstrated instances constitute a sufficiently extensive repetition to indicate the existence of an underlying system.

[472] European Union's response to Panel question No. 81.

affects those chapters rather than others, and what, in its view, is the connection between the sectors covered by those chapters beyond the fact that they cover tariff lines in respect of which the CCT applies the relevant types of tariff treatment. Since a system, plan, or organized method or effort is something more than merely the sum of all its parts, it is in our view important to articulate that system, plan, organized method or effort other than by merely describing the individual instances of which it consists. Therefore, even accepting that the 23 instances of duty type/structure variation identified by the European Union are the result of decisions establishing the relevant duty rates, this element by itself does not demonstrate that it is more likely than not that the resulting instances of duty variation are inter-connected and form part of a common system, plan or organized method or effort.

7.390. Finally, we recall that the European Union has asserted that other individual instances of the SDV exist, without, however, explaining where in the CCT those additional instances could be found.[473] In response to a question from the Panel on this issue, the European Union stated that the "instances [of the SDV] would be identifiable on the basis of the type of tariff treatment that is accorded".[474] This statement, however, rather than shedding light on the connection, if any, among the tariff lines allegedly affected by the SDV appears to assume the connection to be demonstrated.

7.391. In sum, the European Union has not provided us with evidence or explanation sufficient to establish that it is more likely than not that the demonstrated instances of relevant tariff treatment are connected by a system, plan, or organized method or effort. Consequently, we conclude that the European Union has failed to demonstrate that the types of tariff treatment at issue have been "systematically" applied.

7.5.2.2.4 The SDV as a "general" practice

7.392. We now turn to consider the last of what we have identified as the definitional characteristics of the SDV. This is the "general" character of the SDV.[475]

7.393. As we have observed above, the European Union's panel request refers to the SDV as a "general practice".[476] In its first written submission, the European Union again referred to the SDV as a "more general measure"[477], and also characterized it as a "general phenomenon".[478] In its opening oral statement at the Panel's first substantive meeting with the parties, the European Union reaffirmed that it was challenging the SDV in "more general terms"[479], and explained that the term "general", together with the term "systematic", refers:

> [F]irst, to the fact that such variations, which lead to duties exceeding bindings, are widespread and appear at numerous points throughout the CCT, so that they can be described as individual instances of a more general measure. Second, those terms refer to the nature of the European Union's claim – we ask for a general finding, and not a finding on a list of individual tariff lines.[480]

7.394. In its opening oral statement at the Panel's second substantive meeting with the parties, the European Union once again stated that the SDV is a "more general measure".[481] And in response to a question from the Panel, the European Union explained that "[t]he SDV could be

[473] Leaving aside whether it would be appropriate for us embark, on our own, on a search for additional relevant instances, we note that the European Union has not submitted the CCT as evidence.
[474] European Union's response to Panel question No. 81.
[475] We note that, at this stage of our analysis, we are not inquiring whether the alleged SDV is the type of measure that is or may be susceptible to challenge in WTO dispute settlement.
[476] European Union's request for establishment of a panel, para. 11.
[477] European Union's first written submission, para. 127.
[478] European Union's first written submission, para. 133.
[479] European Union's opening statement at the first meeting of the Panel, para. 90.
[480] European Union's opening statement at the first meeting of the Panel, para. 17; response to Panel question No. 9.
[481] European Union's opening statement at the second meeting of the Panel, para. 50.

described as a single general measure that is reflected in a number of more specific rules or norms of general and prospective application".[482]

7.395. Russia argues that while the European Union's challenge is aimed at the SDV as a single general measure, all evidence provided by the European Union relates to instances of the SDV. Russia also argues that the European Union failed to produce any justification as to why certain duties set out in the CCT constitute a separate administrative practice or more general policy separate from other duties.[483]

7.396. The Panel observes that the European Union has used the term "general" to describe a number of aspects of its claim. Thus, it has referred to the SDV as a "general" practice reflected in the CCT; it has indicated that it is seeking a "general" finding[484]; and it has also stated that both the SDV itself and its individual instances are measures of "general and prospective application".[485] Although we recognize that these different aspects may be interrelated[486], we are concerned in this part of our analysis with the first aspect – that is, whether, on the basis of evidence submitted to us, we can conclude that the SDV, as described by the European Union, constitutes a "general" practice.

7.397. As we have found above[487], the definitional term "general" indicates that the SDV is not confined to particular parts of the CCT or specific tariff lines. With this interpretation in mind, we now turn to assess whether this aspect of the SDV is borne out in the evidence before us. We have already identified the evidence on which the European Union relies. In the present context, we find the Illustrative List especially instructive, as it provides an indication of the scope of the alleged SDV. The tenth and eleventh measures at issue are also relevant to the analysis, because they are alleged instances of the SDV.

7.398. The Illustrative List includes tariff lines allegedly affected by the SDV from five chapters of the CCT, i.e. chapters 15, 39, 40, 84, and 87. These numbers indicate, however, that the CCT consists of at least eighty-seven chapters. We have seen no evidence that the relevant types of tariff treatment appear in any of the additional chapters from which examples have not been provided to us. In our view, it cannot properly be inferred from identified instances relating to only five chapters of the CCT that the SDV is a "general" measure whose effects are manifest "throughout the CCT", rather than being limited to particular parts, or chapters, of that instrument.

7.399. Similarly, although the Illustrative List identifies, as we have said, a number of tariff lines whose existence the European Union has established, this does not, in our view, justify an inference concerning the existence of affected tariff lines beyond those particular tariff lines. The relevant tariff lines listed in the Illustrative List and those concerning the tenth and eleventh measures may be examples of a broader phenomenon, but they are not proof that other such tariff lines exist in the CCT. We recall our finding above that the relevant types of tariff treatment have been accorded to a "significant" number of tariff lines. This finding, however, provides no basis on which to assume that the relevant types of tariff treatment go beyond these specific tariff lines. Therefore, the evidence before us in our view does not demonstrate that the relevant types of tariff treatment have been accorded to tariff lines in the CCT "generally", rather than being confined to specific tariff lines.

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[482] European Union's response to Panel question No. 117.

[483] Russia's comments on the European Union's response to Panel question No. 117; Russia's opening statement at the second meeting of the Panel, para. 58.

[484] See, e.g. European Union's first written submission, para. 131; second written submission, para. 99.

[485] See, e.g. European Union's first written submission, para. 139; second written submission, para. 101. In its opening oral statement at the Panel's second meeting with the parties, the European Union stated that "...each of the tariff lines which the SDV covers would in itself be a measure of general and prospective application. Logically, the SDV, *as a more general measure*, can be no less." European Union's opening statement at the second meeting of the Panel, para. 50. (emphasis added) In our view, this argument does not concern the issue of the scope and coverage of the SDV, i.e. whether the SDV constitutes a general practice.

[486] For example, it may very well be that a "general" measure covering a large number of tariff lines would call for a "general finding", rather than a series of findings on discrete tariff lines.

[487] See paragraph 7.335 above.

7.400. We do not overlook the fact that the Illustrative List was submitted by the European Union to "illustrate" the existence of the SDV, rather than to comprehensively delimit its scope. However, the European Union has not provided other evidence or explanation that would enable either the Panel or Russia to identify which additional chapters or tariff lines are affected. Therefore, while the Illustrative List, considered together with the tenth and eleventh measures, may be indicative of a more widespread phenomenon, we have no evidentiary basis on which to make a finding to that effect.

7.401. In the light of the foregoing considerations, we find that the European Union has failed to establish that the SDV is a "general" practice reflected in the CCT.

7.5.2.2.5 Overall assessment of the evidence

7.402. As we have explained, each of the definitional characteristics we have considered above is constitutive of the SDV, and we have therefore initially examined them separately. Since the European Union has defined the SDV as a single measure, it is clear that the existence or non-existence of any one of the definitional characteristics is legally meaningful only insofar as it points towards the existence or non-existence of the SDV.

7.403. In the preceding paragraphs, we found that the evidence submitted by the European Union establishes the existence of two of the SDV's definitional characteristics: namely, that "certain types of tariff treatment" are accorded in the CCT in respect of a "significant number of tariff lines". We also found, however, that the evidence fails to establish that the relevant tariff treatment is accorded in a "systematic" fashion and that it has been accorded in such a way as to constitute a "general" practice reflected in the CCT. We have already explained that the non-existence of one or more of the SDV's definitional characteristics would indicate that the SDV, as a single, overarching measure, does not exist. Therefore, because these two definitional characteristics of the SDV have not been established, we can only conclude that the European Union has failed to establish the existence of the SDV as a single, overarching measure.

7.5.3 Conclusion on the SDV

7.404. As we have explained above, the European Union has argued that the SDV is a measure of a type that can be challenged in WTO dispute settlement. The European Union has further argued that the SDV, as such, is inconsistent with Article II:1(b), first sentence, of the GATT 1994, and consequently with Article II:1(a) of the same Agreement.

7.405. Russia has contested both of these positions.

7.406. In the light of the Panel's conclusion above that the evidence submitted by the European Union fails to establish the existence of the SDV, the Panel need not, and does not, proceed to consider these arguments. Because we have found that the European Union has not established the existence of the SDV, there is no measure on which we could make any additional findings.

7.407. Accordingly, we conclude that, in respect of the twelfth measure at issue, the European Union has failed to establish an inconsistency with Article II:1(b), first sentence. It necessarily follows that the European Union has also failed to establish a consequential inconsistency with Article II:1(a).

7.408. Finally, we observe that the European Union has not requested us to make findings on the consistency with Article II:1 of each individual applied duty rate identified in the Illustrative List, except for those that relate to the seventh to ninth measures.[488] We therefore do not separately address the consistency of every applied duty rate identified in the Illustrative List, except for those that relate to the seventh to ninth measures.

[488] The European Union stated that "the individual 'violations' or, rather, individual instances of the SDV need not be specifically and exhaustively identified. The only finding the Panel should adopt in respect of the twelfth measure at issue is a single, general finding on the SDV." European Union's response to Panel question No. 79.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

a. In respect of Russia's preliminary ruling request:

i. the Panel finds that Russia failed to establish that the European Union's panel request is inconsistent with Article 6.2 of the DSU and that the European Union's claims covered by Russia's preliminary ruling request are outside the Panel's terms of reference.

b. In respect of the European Union's claims regarding the first to fifth measures at issue, which concern tariff lines 4810 22 900 0; 4810 29 300 0; 4810 92 300 0; 4810 13 800 9; and 4810 19 900 0:

i. the Panel finds that Russia is required to apply ordinary customs duties in excess of those set forth and provided in its Schedule of Concessions ("Schedule"), contrary to Article II:1(b), first sentence; and

ii. the Panel exercises judicial economy in respect of the European Union's consequential claim of inconsistency with Article II:1(a) of the GATT 1994.

c. In respect of the European Union's claims regarding the sixth measure at issue, which concerns tariff line 4810 92 100 0:

i. the Panel finds that, on the date of the Panel's establishment, Russia was required to apply, as from 1 January 2016, ordinary customs duties in excess of those set forth and provided in its Schedule, contrary to Article II:1(b), first sentence;

ii. the Panel exercises judicial economy in respect of the European Union's consequential claim of inconsistency with Article II:1(a) of the GATT 1994; and

iii. the Panel finds that the European Union has failed to establish that the sixth measure at issue was, on the date of the Panel's establishment, independently inconsistent with Article II:1(a) of the GATT 1994 because it imposed a temporary duty reduction and at the same time provided for a future duty rate that, from 1 January 2016, would have exceeded the bound duty rate.

d. In respect of the European Union's claims regarding the seventh and eighth measures at issue, which concern tariff lines 1511 90 190 2 and 1511 90 900 2:

i. the Panel finds that, on the date of the Panel's establishment, Russia was required in some instances to apply ordinary customs duties in excess of those set forth and provided in its Schedule, contrary to Article II:1(b), first sentence; and

ii. the Panel exercises judicial economy in respect of the European Union's consequential claim of inconsistency with Article II:1(a) of the GATT 1994.

e. In respect of the European Union's claims regarding the ninth measure at issue, which concerns tariff line 8418 10 200 1:

i. the Panel finds that Russia is required in some instances to apply ordinary customs duties in excess of those set forth and provided in its Schedule, contrary to Article II:1(b), first sentence; and

ii. the Panel exercises judicial economy in respect of the European Union's consequential claim of inconsistency with Article II:1(a) of the GATT 1994.

f. In respect of the European Union's claims regarding the tenth and eleventh measures at issue, which concern tariff lines 8418 10 800 1 and 8418 21 800 0:

i. the Panel finds that, on the date of the Panel's establishment, Russia was required in some instances to apply ordinary customs duties in excess of those set forth and provided in its Schedule, contrary to Article II:1(b), first sentence; and

ii. the Panel exercises judicial economy in respect of the European Union's consequential claim of inconsistency with Article II:1(a) of the GATT 1994.

g. In respect of the European Union's claims regarding the twelfth measure at issue (the alleged "Systematic Duty Variation"):

i. the Panel finds that the European Union failed to establish its claims of inconsistency with Article II:1(a) and (b), first sentence, because it did not demonstrate the existence of the "Systematic Duty Variation", that is, a measure constituting a general practice and consisting in the systematic application, in relation to a significant number of tariff lines, of a type or structure of duty that varies from the type or structure of duty recorded in the Schedule in a way that leads to the application of duties in excess of those set forth and provided in Russia's Schedule.

8.2. Pursuant to Article 3.8 of the DSU, in cases of failure to comply with obligations assumed under a covered agreement, that failure is considered *prima facie* to constitute a case of nullification or impairment of benefits accruing under that agreement. Consequently, the Panel finds that, to the extent that Russia has failed to comply with certain provisions of the GATT 1994, that failure constitutes a case of nullification or impairment of benefits accruing to the European Union under that agreement.

8.3. Pursuant to Article 19.1 of the DSU, to the extent that the first to eleventh measures continue to be inconsistent with Article II:1(b), first sentence, of the GATT 1994, the Panel recommends that Russia bring them into conformity with its obligations under the GATT 1994.[489]

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[489] As noted in paragraphs 7.85, 7.157 and 7.238 of the Panel's findings above, subsequent to the establishment of the Panel, the sixth, seventh, eighth, ninth, tenth, and eleventh measures at issue were amended, replaced, or otherwise changed.