

## THE USE OF WTO LEGAL INSTRUMENTS IN RUSSIA'S FOREIGN ECONOMIC RELATIONS

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*Experience shows that although certain notions like the norms and rules established by the World Trade Organization (WTO) are still being perceived as something abstract and metaphorical by many participants of foreign economic activity, these norms and rules have already been actively used in the traditional bi-lateral trade and economic relationships between the Russian Federation with the countries of near and far abroad. Although the WTO's legal instruments vary in their effectiveness, they make it possible for a country to safeguard its national economic interests. However, if these norms and rules are implemented incorrectly, they can only give rise to additional problems and troubles.*

Against the backdrop of the current situation characterized by an economic slump, low demand for Russia's exports of energy raw materials and the use of tit-for-tat sanctions, the WTO factor has acquired special importance for Russia's foreign economic sector.

At present, some of our trading partners are using every opportunity to increase pressure on Russia. Thus, many of the most developed countries of the world, including the USA, Germany, France, Italy etc., that have traditionally been prone to robust trade and investment expansion, always include in the agendas of any bi-lateral negotiations with Russia their objections to the measures that restrict their access to the Russian market.

These objections are primarily focused on Russia's current policy of production localization and import substitution. According to our trading partners, this policy contains elements of protectionism, which hamper investments in some sectors of the Russian economy, including commercial agriculture, machine-tool construction, production of medical equipment, etc. Russia's non-transparent sectoral rules for production localization also restrict opportunities for foreign investment and exports.

A number of objections are aimed at the lack of equitable access to state purchases, including in the field of computer software, medical equipment and medicines, where preference is given to manufacturers from the member-states of the Eurasian Economic Union (EEU).

Foreign businesses are traditionally displeased with the law-enforcement practices of the RF Federal Customs Service (FCS) in the field of customs clearance because of the excessive complexity of clearance procedures, as well as with the legislative norms prescribing that the servers of foreign companies be located in the territory of the Russian Federation.

Also, the agendas of bi-lateral intergovernmental negotiations usually include quite a few long-lasting unresolved issues, including the exaction of fees from foreign air carriers for the permission to fly along their trans-Siberian routes, and a number of issues dating back to the process of Russia's accession to the WTO<sup>1</sup>.

1 See, e.g., A.A. Pakhomov. Protsess prisedineniia Rossii k VTO [The process of Russia's accession to the WTO] / Vneshnaia torgovlia [Foreign Trade]. 1999. No 3. P. 2–9.

Some of the most contentious issues have already been filed as formal complaints at the Dispute Settlement Body of the WTO, including the introduction, by Russia, of a recycling duty; Russia's anti-dumping duty on imports of light commercial vehicles (LCV); Russia's ban on imports of pork products from the EU (Russia said that the measure was necessary due to cases of African swine fever found in some EU member states); Russia's customs tariff duties on certain agricultural and industrial products; and Russia's ban on railway equipment from Ukraine, etc.

Russia, in her turn, also filed a number of formal complaints at the WTO, including the formal complaint over the EU's Third Energy Package, claiming that it unjustifiably restricts imports of natural gas originating in Russia and discriminates against Russian natural gas pipeline transport services and service suppliers; the formal complaint over the EU's so-called energy adjustments (the 'cost-adjustment' administrative procedures, methodologies or practices used by the EU for the calculation of the dumping margin in the anti-dumping investigation in relation to imports of certain welded tubes and pipes of iron or non-alloy steel originating in Russia); and the formal complaint over Ukraine's anti-dumping duty on imports of ammonium nitrate originating in Russia<sup>1</sup>.

Thus, as practice shows, national markets are being actively protected by non-tariff measures introduced in addition to regular customs tariffs. Such non-tariff measures should be regulated by the norms approved by the WTO. The basic types of non-tariff measures are analyzed and classified by the United Nations Conference on Trade and Development (UNCTAD) (*Table 1*).

Table 1

#### BRIEF UNCTAD CLASSIFICATION OF NON-TARIFF MEASURES

Import-related measures	Technical measures	<ul style="list-style-type: none"> <li>• Sanitary and phytosanitary measures</li> <li>• Technical barriers to trade</li> <li>• Pre-shipment inspection and other formalities</li> </ul>
	Non-technical measures	<ul style="list-style-type: none"> <li>• Contingent trade-protective measures</li> <li>• Non-automatic licensing, quotas, prohibitions and quantity-control measures other than for SPS or TBT reasons</li> <li>• Price-control measures, including additional taxes and charges</li> <li>• Finance measures</li> <li>• Measures affecting competition</li> <li>• Trade-related investment measures</li> <li>• Distribution restrictions</li> <li>• Restrictions on post-sale services</li> <li>• Subsidies (excluding export subsidies)</li> <li>• Government procurement restrictions</li> <li>• Intellectual property</li> <li>• Rules of origin</li> </ul>
	Export-related measures	Export-related measures

Source: UNCTAD International classification of non-tariff measures, 2012 Version, United Nations, New York & Geneva, 2015, Table. Non-tariff measures classification by chapter, P.3.

Thus, according to the RF Ministry of Economic Development, as of 1 December 2015, 25 countries – Australia, Azerbaijan, Argentina, Belarus, Brazil,

1 Expertise Center for WTO Issues, Section 'Trade Disputes Involving the Russian Federation', <http://www.wto.ru>.

Vietnam, India, Indonesia, Iran, Kazakhstan, Canada, China, Laos, Malaysia, Mexico, Moldova, Morocco, Nigeria, the USA, Thailand, Turkmenistan, Turkey, Uzbekistan, Ukraine, the Philippines, and the EU had imposed protectionist measures against some imports from Russia<sup>1</sup>.

On the whole, according to the classification adopted by the RF Ministry of Economic Development (which differs from that introduced by UNCTAD), Russian products are subject to 110 measures, including anti-dumping duty (used in 39 instances); special protective duty (used in 15 instances); countervailing duty (used in 1 instance); other non-tariff measures (used in 55 instances (administrative measures, including additional charges and restrictions on commodities – 23 instances; technical barriers – 9 instances; tariff quotas – 3 instances; restrictions on quotas – 1 instance; discriminative excise taxes – 4 instances; import bans – 3 instances; sanitary and phytosanitary measures – 7 instances; threats to impose measures – 5 instances)<sup>2</sup>.

It should also be noted that Russia is subject to various trade sanctions imposed on her by more than 40 states, including the EU, the USA, Japan, Ukraine, Switzerland, Norway, Australia, New Zealand, Island, Liechtenstein, Montenegro, Albania, etc. These trade sanctions include such trade restrictive measures as bans on export of dual-purpose technologies and products; bans on conducting commercial transactions with designated legal entities; restrictions on access to financial instruments, etc.

On the whole, according to the Eurasian Economic Commission (EEC), the year 2015 saw a rise in the number of protectionist measures imposed on the key imports from Russia and other EUEA member states, including metallurgical products, fertilizers, and goods used for agricultural purposes. Market access opportunities for Russian metallurgy products have been hit the hardest. Thus, in 2015, several US steel makers (Nucor Corporation, US Steel Corporation and ArcelorMittal) initiated the United States' withdrawal from the bi-lateral Agreement on the Suspension of Antidumping Duty Investigation of Imports of Certain Hot-Rolled Steel Flat Products from the Russian Federation, signed in July 1999. Also in 2015, the US Department of Commerce initiated Antidumping Duty and Countervailing Duty Investigations of Imports of Certain Cold-Rolled Steel Flat Products from Russia.

In 2015, the EU imposed a definitive anti-dumping duty on imports of certain types of welded tubes and pipes of iron and non-alloy steel originating in Russia and Belarus (to be in effect until 2020); imposed an anti-dumping duty on imports of electrical steel from Russia; launched an antidumping duty investigation of imports of cold-rolled steel flat products from Russia; and imposed a preliminary duty on aluminum foil originating in Russia<sup>3</sup>.

1 On the whole, the largest number of restrictive measures against Russia have been introduced by the EU, India, the USA, Indonesia and Turkey. Ukraine and Uzbekistan account for most of the restrictive measures against Russia introduced by the post-Soviet countries. The External Foreign Economic Portal of the RF Ministry of Economic Development, the Reference Information on Restrictive Measures section, <http://www.ved.gov.ru>

2 Imports of products originating in Russia are also subject to yet another 18 investigations, including 8 anti-dumping duty investigations; 9 special protective duty investigations; and 1 countervailing investigation. At the same time, 12 anti-dumping measures and 2 agreements on the suspension of antidumping duty investigations are under way. <http://www.ved.gov.ru>

3 Doklad ob ogranichitel'nykh merakh, primeniaemykh k tovaram gosudarstv-chlenov EAES na rynkakh tret'ikh stran vo 2-m polugodii 2015 g. [Report on the restrictive measures applied to commodities from EUEA member states on the markets of third countries in the 2<sup>nd</sup> half-year of 2015]. The Official Website of the Eurasian Economic Commission, see <http://www.eurasiancommission.org>, p.14.

It should be said that most of the afore-said restrictive measures cannot be characterized as discriminatory, because in many instances the Russian side or some individual participants of foreign economic activity made mistakes and miscalculations in the conduct of international trade. Regretfully, these multiple facts indicate that Russia lacks a coherent foreign economic policy – an omission that inevitably results in negative consequences<sup>1</sup>.

At present, objects of intellectual property (IP) and their adequate and effective protection, including overseas, have become one of the most important components of development of the export-oriented branches of highly developed economies.

For example, apart from using the whole set of international legal instruments within the framework of the WTO (first of all, the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the USA additionally applies unilateral measures based on the key principles of the WTO in order to conduct a coherent and purposeful policy designed to protect the intellectual property rights (IPR) of US right-holders abroad.

Thus, one of the most important legal instruments used by the USA for IPR protection is the 'special' Section 301 of the Trade Act of 1974<sup>2</sup>. Under Section 301 of the 1974 Trade Act, the US President is authorized to introduce sanctions (including the revocation of tariff preferences) against countries that do not respect their obligations to protect the IPR of US right-holders<sup>3</sup>.

The US authorities annually analyze the losses suffered by US right-holders in the USA's trading partners, as well as the legislation and law-enforcement practices regarding IPR protection of host countries. If one or other trading partner has achieved no progress in IPR protection, or if a serious threat to the interests of US right-holders has emerged therein, the US President, in accordance with Article 502 of the 1974 Trade Act, is authorized to deprive that trading partner of its status as user of the US Generalized System of Preferences Provisions<sup>4</sup>.

Thus, on 30 April 2015, the Office of the United States Trade Representative published its traditional annual report under Section 182 of the US Trade Act of 1974 (better known as the Special 301 Report), which contains comprehensive conclusions regarding the protection of the IPR of US right-holders in foreign countries.

In accordance with the findings contained in the 2015 Special 301 Review, the USTR placed 37 trading partners on the Priority Watch List or Watch List. The 13 countries included in the Priority Watch List presented the most significant concerns regarding insufficient IPR protection. Automatically, those countries were to be the subject of economic sanctions. The 24 countries on the Watch List were those that had achieved some progress in improving their legislation and law-enforcement practices regarding IPR protection.

1 For more details, see A. Pakhomov, *Strategiia razvitiia vneshneekonomicheskogo kompleksa Rossiiskoi Federatsii* [The strategy of development of the foreign economic complex of the Russian Federation] / *Problemy teorii i praktiki upravleniia* [Issues in the theory and practice of management]. 2010. No 12. P. 18–29.

2 U.S. Smoot-Hawley Tariff Act of 1930, U.S. Trade Act of 1974, Cornell University Law School, Legal Information Institute, <http://www.law.cornell.edu>.

3 U.S. Trade and Tariff Act of 1984, Cornell University Law School, Legal Information Institute, <http://www.law.cornell.edu>.

4 Presidential Proclamation: To Modify Duty-Free Treatment, by the President of the United States of America, January 13, 2003, The White House, The Office of The Press Secretary, Washington DC, p.1, <http://www.whitehouse.gov>

In accordance with the conclusions contained in the 2015 Special 301 Report, Russia was retained on the Priority Watch List for the duration of the year 2015 (as it had been for the previous 15 years). Thus, Russia was designated as one of the Watch List Countries which do not provide 'adequate and effective' protection of IPR or 'fair and equitable market access to United States for persons that rely upon intellectual property rights', and therefore could become subject to restrictive trade measures<sup>1</sup>. Thus, for example, countries designated as users of the US Generalized System of Preferences Provisions, which envisages the duty-free access to the US market for a number of commodities, could be deprived of this status if they do not provide adequate and effective protection of intellectual property rights<sup>2</sup>. However, in 2015 this procedure was not applied<sup>3</sup>.

The US authorities are doing their best to compel the USA's trading partners to fully implement the requirements, consolidated in the 2015 Special 301 Report, for the adequate and effective protection of the IPR of US right-holders in the various formats of intergovernmental interaction, ranging from negotiations on one or other country's terms of WTO membership to bi-lateral working groups and specialized dialogues<sup>4</sup>.

It is very telling that similar claims have also been made by the EU and a number of other states, which can be explained not only by their experience of having common problems on Russia's intellectual property market, but also by the implementation, by them, of a coordinated policy of pressurizing Russia's authorities<sup>5</sup>. Thus, for example, the agenda of the dialogue between Russia and the EU in the field of intellectual property rights includes the issue of protecting the IPR of EU right-holders in Russia: improvement of legislation and law-enforcement practices; closure of 'pirate' websites; legal protection of places of origin of commodities, etc. More specific issues of IPR protection are discussed in the issue management groups of the corresponding bi-lateral Intergovernmental Commissions for Trade and Economic Cooperation and Intergovernmental Commissions for Cooperation in Science and Technology.

In her turn, the Russian Federation also resorts – both via the Eurasian Economic Commission and unilaterally – to restrictive trade measures against her trading partners.

During the current period of elevated tensions in the political and trade relations between Russia and the Western countries, both sides have been ac-

1 Office of the United States Trade Representative 2015 Special 301 Report, Washington D.C., April 30, 2008, 83 p. <http://www.ustr.gov>.

2 Presidential Proclamation: To Modify the List of Beneficiary Developing Countries Under the Trade Act of 1974, by the President of the United States of America, October 03, 2014, The White House, The Office of The Press Secretary, Washington DC, p.1, <http://www.whitehouse.gov>.

3 In the past few years, an investigation of whether or not Russia met these requirements was carried out. At the same time, on 3 October 2014 Russia was withdrawn from the US Generalized System of Preferences (GSP) program. US President Barack Obama terminated Russia's status as a GSP beneficiary on the grounds that Russia had sufficiently advanced in economic development and improved in trade competitiveness, and so it became appropriate to terminate the designation of Russia as a beneficiary developing country.

4 A.I. Makarov. 301-ya 'spetsial'naia' stat'ia Zakona o torgovle SShA 1974 g. kak torgovopoliticheskii instrumentarii v mezhdunarodno-pravovykh otnosheniakh SShA s zarubezhnyimi stranami [The 'special' Section 301 of the US Trade Act of 1974 as a political instrument in the system of international legal relations between the USA and foreign countries // *Mezhdunarodnoe pravo* [International law]. 2007. Vol. 32, No 4. P. 290.

5 A.A. Pakhomov. Okhrana prav intellektual'noi sobstvennosti v Rossiiskoi Federatsii [The protection of intellectual property rights in the Russian Federation] *Federal'nyi spravochnik* [The Federal Guidebook]. 2006. P. 83–84.

tively erecting technical trade barriers and introducing sanitary and phytosanitary measures against one another. One of the most vivid examples of this ongoing struggle is Russia's introduction of a ban on most food imports from the EU, the USA and some other countries, extended in late 2015 on food imports from Ukraine. Russia resorted to these restrictive measures in response to the punitive sanctions imposed on her by the aforesaid countries.

Equally noteworthy is the set of Russia's restrictions imposed against Turkey in November 2015, ranging from a ban on the imports of some types of agricultural products to restrictions on the commercial activities performed by Turkish economic operators on the territory of the Russian Federation.

Apart from the aforesaid measures, Russia has introduced individual phytosanitary measures designed to restrict the import of some types of commodities (as a rule, meat and dairy products) from a number of countries. For this purpose, Russia also implements a number of other protectionist policies.

It should be noted that anti-dumping duties have become the most common form of protective measures introduced by the EEU towards its trading partners within the scope of the EUEA's supranational competence. As of the end of 2015, such measures had been mostly introduced against goods from the PRC and Ukraine (*Table 2*).

Table 2

## EEU INTERNAL MARKET PROTECTIVE MEASURES

No	Commodity	CN of FEA EEU*	Exporter country	Type of measure
AD-1	Some types of steel pipes and tubes	7304, 7305, 7306	Ukraine	Anti-dumping
AD-3	Roll bearings	8482	PRC	Anti-dumping
AD-8	Rolled metal products with polymer coating	7210, 7212, 7225	PRC	Anti-dumping
AD-9	Graphitized electrodes	8545	India	Anti-dumping
AD-11	Cold-worked seamless stainless steel tubes	7304	PRC	Anti-dumping
AD-12	Enameled cast iron bathtubs	7324	PRC	Anti-dumping
AD-10	Light commercial vehicles	8704	Germany, Italy, Turkey	Anti-dumping
SG-8	Porcelain tableware and kitchenware	6911	All countries	Special protective
SG-7	Grain combine harvesters and modules	8433	All countries	Special protective
AD-7	Forged steel rolls for rolling mills	8455	Ukraine	Anti-dumping
AD-15	Citric acid	2918	PRC	Anti-dumping
AD-14	Stainless steel kitchen and table cutlery	8211, 8215	PRC	Anti-dumping
AD-16	Steel seamless drill tubes and casing pipes for oil and gas wells	7304	PRC	Anti-dumping
AD-17	Crawler bulldozers	8429	PRC	Anti-dumping

Table 2, cont'd

No	Commodity	CN of FEA EEU*	Exporter country	Type of measure
AD-18	Truck tyres	4011	PRC	Anti-dumping

Source: Website of the Eurasian Economic Commission; Section 'The Department of Internal Market Protection;», <http://www.eurasiancommission.org>

\* Translator's note: CN of FEAEEU – The Single Commodity Nomenclature of the Foreign Economic Activity of the EEU.

Thus, during the current period of elevated tensions in the political and trade relations between Russia and a number of other countries, Russia has begun to more actively (but not necessarily efficiently) impose protectionist measures in her bilateral ties with the corresponding countries. At the same time, the norms and regulations adopted by the WTO remain an international legal base for the imposition of such measures, as well as for proper regulation of the existing problems. ●