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RUSSIA – MEASURES AFFECTING THE IMPORTATION OF RAILWAY  
EQUIPMENT AND PARTS THEREOF

AB-2018-7

*Report of the Appellate Body*

## Table of Contents

1	INTRODUCTION .....	10
2	ARGUMENTS OF THE PARTICIPANTS .....	13
3	ARGUMENTS OF THE THIRD PARTICIPANTS .....	14
4	ISSUES RAISED .....	14
5	ANALYSIS OF THE APPELLATE BODY .....	14
5.1	Russia's claims relating to the Panel's preliminary ruling .....	14
5.1.1	The Panel's findings .....	15
5.1.2	Claims and arguments on appeal .....	17
5.1.3	Whether the Panel erred in finding in its preliminary ruling that Russia had failed to establish that Ukraine's panel request was inconsistent with Article 6.2 of the DSU .....	19
5.1.3.1	Linkages between measures and legal basis of the complaint .....	21
5.1.3.2	Identification of the third measure .....	22
5.1.4	Conclusion .....	25
5.2	Russia's claims concerning the Panel's findings relating to the third measure .....	25
5.2.1	The Panel's findings .....	25
5.2.2	Russia's claim that the Panel erred in finding the existence of the third measure .....	28
5.2.2.1	Arguments on appeal .....	28
5.2.2.2	Analysis .....	29
5.2.2.3	Conclusion .....	32
5.2.3	Russia's claim that the Panel erred by relieving Ukraine from the necessity of establishing a <i>prima facie</i> case that the third measure exists as a single measure .....	32
5.2.3.1	Arguments on appeal .....	32
5.2.3.2	Analysis .....	33
5.2.3.3	Conclusion .....	34
5.2.4	Russia's claim that the Panel erred in finding that the third measure was within its terms of reference .....	34
5.2.4.1	Arguments on appeal .....	34
5.2.4.2	Analysis .....	36
5.2.4.3	Conclusion .....	37
5.2.5	Russia's claim that the Panel erred by making findings with respect to the alleged registration condition .....	37
5.2.5.1	Arguments on appeal .....	37
5.2.5.2	Analysis .....	37
5.2.5.3	Conclusion .....	41
5.3	Ukraine's claim under Article 5.1.1 of the TBT Agreement .....	41
5.3.1	The Panel's findings .....	41
5.3.2	Claims and arguments on appeal .....	43
5.3.3	The Panel's interpretation of Article 5.1.1 of the TBT Agreement .....	44
5.3.4	The Panel's application of Article 5.1.1 of the TBT Agreement .....	50
5.3.5	Completion of the legal analysis .....	54

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5.3.6 Whether the Panel failed to make an objective assessment of the matter under Article 11 of the DSU.....	54
5.3.7 Conclusion.....	54
5.4 Ukraine's claim under Article 5.1.2 of the TBT Agreement.....	55
5.4.1 The Panel's findings.....	55
5.4.2 Claims and arguments on appeal.....	58
5.4.3 Whether the Panel failed to make an objective assessment of the matter under Article 11 of the DSU with respect to the fourth alternative measure.....	61
5.4.4 Completion of the legal analysis.....	68
5.4.5 Whether the Panel failed to make an objective assessment of the matter under Article 11 of the DSU with respect to the other alternative measures.....	69
5.4.6 Conclusion.....	70
5.5 Ukraine's claim concerning the existence of systematic import prevention.....	71
5.5.1 The Panel's findings.....	71
5.5.2 Claims and arguments on appeal.....	73
5.5.3 Whether the Panel failed to make an objective assessment of the matter under Article 11 of the DSU.....	76
5.5.4 Conclusion.....	83
6 FINDINGS AND CONCLUSIONS.....	83
6.1 The Panel's preliminary ruling.....	83
6.2 The third measure as a "general" non-recognition requirement.....	83
6.3 The third measure as a single measure.....	84
6.4 The third measure and the Panel's terms of reference.....	84
6.5 The third measure and the local registration condition.....	84
6.6 Article 5.1.1 of the TBT Agreement.....	84
6.7 Article 5.1.2 of the TBT Agreement.....	85
6.8 Systematic prevention of imports.....	85
6.9 Recommendation.....	85

## ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
ART	Russian Federal Agency for Railway Transport
Association Agreement	Association Agreement by Ukraine with the European Union
BCI	business confidential information
CU	Eurasian Economic Union as established in accordance with the Treaty on Eurasian Economic Union of 29 May 2014 (former Customs Union of the Republic of Belarus, the Republic of Kazakhstan, and the Russian Federation)
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EAEU Treaty	Treaty on the Eurasian Economic Union
FBO	Federal Budgetary Organization
FIRA	final import risk analysis report for apples from New Zealand of November 2006
GATS	General Agreement on Trade in Services
GATT 1994	General Agreement on Tariffs and Trade 1994
MOT	Ministry of Transport of the Russian Federation
OHCHR	Office of the United Nations High Commissioner for Human Rights
Panel Report	Panel Report, <i>Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof</i>
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TRRs	trade-related requirements
Ukraine's panel request	Request for the Establishment of a Panel by Ukraine, WT/DS499/2
Working Procedures	Working Procedures for Appellate Review
WTO	World Trade Organization

## PANEL EXHIBITS CITED IN THIS REPORT\*

Exhibit Number	Description
RUS-23	<b>Organization Standard CTO PC-FZT 08-2013</b> "Procedure of organization and implementation of inspection control of certified products"
RUS-62 (BCI)	Documents of the FBO providing for the inconsistencies of the certified products of PJSC [BCI]
RUS-63 (BCI)	Documents of the FBO providing for the inconsistencies of the certified products of PJSC [BCI]
RUS-64 (BCI)	Documents of the FBO providing for the inconsistencies of the certified products of PJSC [BCI]

\* BCI redacted, as indicated [BCI]. See also para. 1.13.

Exhibit Number	Description
RUS-65 (BCI)	Documents of the FBO providing for the inconsistencies of the certified products of PJSC [BCI]
RUS-66 (BCI)	Documents of the FBO providing for the inconsistencies of the certified products of PJSC [BCI]
RUS-67 (BCI)	Letter dated 23 May 2016 from [BCI] to the FBO
RUS-68 (BCI)	Letter dated 13 June 2013 from [BCI] to the Deputy Minister of the MOT
RUS-69 (BCI)	Letter dated 3 December 2015 from [BCI] to the FBO
RUS-70 (BCI)	Letter dated 17 February 2013 from [BCI] to the FBO
UKR-3 (Corr.)	Rules of the Certification System for Federal Railway Transport. Procedure for organizing and conducting an inspection control. (CS FRT 12-2003)
UKR-18 (BCI) (Corr.)	Letter [BCI] from PJSC [BCI] to FBO
UKR-48 (BCI)	Letter from the Federal Agency for Railway Transport of the MOT to JSC [BCI] accompanied to Protocol No. A 4-3 of 20 January 2015 of the MOT regarding issuance by the certification authority of the CU of the certificates of conformity for products manufactured by third countries
UKR-49 (BCI) (Corr.)	Letter dated 4 February 2016 from the Federal Agency for Railway Transport to [BCI] on validity of certificates
UKR-141 (BCI)	Letter dated 10 August 2016 from the Federal Agency for Railway Transport to JSC [BCI] on validity of certificates
UKR-151 (BCI)	Act of inspection dated 23 January 2014 of certified products produced by PJSC [BCI]
UKR-152 (BCI)	Act of inspection dated 24 January 2014 of certified products produced by PJSC [BCI]

## CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
<i>Argentina – Import Measures</i>	Appellate Body Reports, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015, DSR 2015:II, p. 579
<i>Argentina – Import Measures</i>	Panel Reports, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS438/R and Add.1 / WT/DS444/R and Add.1 / WT/DS445/R and Add.1, adopted 26 January 2015, as modified (WT/DS438/R) and upheld (WT/DS444/R / WT/DS445/R) by Appellate Body Reports WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, DSR 2015:II, p. 783
<i>Australia – Apples</i>	Appellate Body Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , WT/DS367/AB/R, adopted 17 December 2010, DSR 2010:V, p. 2175
<i>Australia – Apples</i>	Panel Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , WT/DS367/R, adopted 17 December 2010, as modified by Appellate Body Report WT/DS367/AB/R, DSR 2010:VI, p. 2371
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
<i>Brazil – Desiccated Coconut</i>	Appellate Body Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, p. 167

Short Title	Full Case Title and Citation
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
<i>Canada – Dairy (Article 21.5 – New Zealand and US II)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States</i> , WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003, DSR 2003:I, p. 213
<i>Canada – Periodicals</i>	Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, p. 449
<i>Canada – Wheat Exports and Grain Imports</i>	Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
<i>Chile – Price Band System (Article 21.5 – Argentina)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS207/AB/RW, adopted 22 May 2007, DSR 2007:II, p. 513
<i>China – Auto Parts</i>	Appellate Body Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, p. 3
<i>China – HP-SSST (Japan) / China – HP-SSST (EU)</i>	Appellate Body Reports, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (“HP-SSST”) from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (“HP-SSST”) from the European Union</i> , WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015, DSR 2015:IX, p. 4573
<i>China – Publications and Audiovisual Products</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, p. 3
<i>China – Rare Earths</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014, DSR 2014:III, p. 805
<i>China – Raw Materials</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
<i>Colombia – Textiles</i>	Appellate Body Report, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear</i> , WT/DS461/AB/R and Add.1, adopted 22 June 2016, DSR 2016:III, p. 1131
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, p. 7367
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
<i>EC – Chicken Cuts</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
<i>EC – Hormones</i>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
<i>EC – Sardines</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3359
<i>EC – Seal Products</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I, p. 7

Short Title	Full Case Title and Citation
<i>EC – Selected Customs Matters</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
<i>EC and certain member States – Large Civil Aircraft (Article 21.5 – US)</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS316/AB/RW and Add.1, adopted 28 May 2018
<i>EU – Biodiesel (Argentina)</i>	Appellate Body Report, <i>European Union – Anti-Dumping Measures on Biodiesel from Argentina</i> , WT/DS473/AB/R and Add.1, adopted 26 October 2016, DSR 2016:VI, p. 2871
<i>Guatemala – Cement I</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
<i>Indonesia – Chicken</i>	Panel Report, <i>Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products</i> , WT/DS484/R and Add.1, adopted 22 November 2017, DSR 2017:VIII, p. 3769
<i>Indonesia – Iron or Steel Products</i>	Appellate Body Report, <i>Indonesia – Safeguard on Certain Iron or Steel Products</i> , WT/DS490/AB/R, WT/DS496/AB/R, and Add.1, adopted 27 August 2018
<i>Japan – Agricultural Products II</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, p. 277
<i>Japan – DRAMS (Korea)</i>	Appellate Body Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/AB/R and Corr.1, adopted 17 December 2007, DSR 2007:VII, p. 2703
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
<i>Korea – Pneumatic Valves (Japan)</i>	Appellate Body Report, <i>Korea – Anti-Dumping Duties on Pneumatic Valves from Japan</i> , WT/DS504/AB/R and Add.1, adopted 30 September 2019
<i>Korea – Radionuclides</i>	Appellate Body Report, <i>Korea – Import Bans, and Testing and Certification Requirements for Radionuclides</i> , WT/DS495/AB/R and Add.1, adopted 26 April 2019
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5
<i>Russia – Commercial Vehicles</i>	Appellate Body Report, <i>Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy</i> , WT/DS479/AB/R and Add.1, adopted 9 April 2018
<i>Russia – Pigs (EU)</i>	Appellate Body Report, <i>Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union</i> , WT/DS475/AB/R and Add.1, adopted 21 March 2017, DSR 2017:I, p. 207
<i>Russia – Railway Equipment</i>	Panel Report, <i>Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof</i> , WT/DS499/R and Add.1, circulated to WTO Members 30 July 2018
<i>Russia – Tariff Treatment</i>	Panel Report, <i>Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products</i> , WT/DS485/R, Add.1, Corr.1, and Corr.2, adopted 26 September 2016, DSR 2016:IV, p. 1547
<i>Thailand – H-Beams</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 2701
<i>US – Anti-Dumping and Countervailing Duties (China)</i>	Appellate Body Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869

Short Title	Full Case Title and Citation
<i>US – Anti-Dumping Methodologies (China)</i>	Appellate Body Report, <i>United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China</i> , WT/DS471/AB/R and Add.1, adopted 22 May 2017, DSR 2017:III, p. 1423
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
<i>US – Clove Cigarettes</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/AB/R, adopted 24 April 2012, DSR 2012:XI, p. 5751
<i>US – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
<i>US – COOL</i>	Panel Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , 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
<i>US – COOL (Article 21.5 – Canada and Mexico)</i>	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico</i> , WT/DS384/AB/RW / WT/DS386/AB/RW, adopted 29 May 2015, DSR 2015:IV, p. 1725
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3
<i>US – Countervailing and Anti-Dumping Measures (China)</i>	Appellate Body Report, <i>United States – Countervailing and Anti-Dumping Measures on Certain Products from China</i> , WT/DS449/AB/R and Corr.1, adopted 22 July 2014, DSR 2014:VIII, p. 3027
<i>US – Countervailing Measures (China)</i>	Appellate Body Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , WT/DS437/AB/R, adopted 16 January 2015, DSR 2015:I, p. 7
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
<i>US – Large Civil Aircraft (2<sup>nd</sup> complaint)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
<i>US – Section 211 Appropriations Act</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, p. 589
<i>US – Tuna II (Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837
<i>US – Tuna II (Mexico) (Article 21.5 – Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico</i> , WT/DS381/AB/RW and Add.1, adopted 3 December 2015, DSR 2015:X, p. 5133
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
<i>US – Upland Cotton (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, p. 809



Short Title	Full Case Title and Citation
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
<i>US – Zeroing (EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)</i> , WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417
<i>US – Zeroing (Japan) (Article 21.5 – Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441

WORLD TRADE ORGANIZATION  
APPELLATE BODY

Russia – Measures Affecting the  
Importation of Railway Equipment  
and Parts Thereof

Ukraine, *Appellant/Appellee*  
Russian Federation, *Other Appellant/Appellee*

Canada, *Third Participant*  
China, *Third Participant*  
European Union, *Third Participant*  
India, *Third Participant*  
Indonesia, *Third Participant*  
Japan, *Third Participant*  
Singapore, *Third Participant*  
United States, *Third Participant*

AB-2018-7

Appellate Body Division:

Graham, Presiding Member  
Servansing, Member  
Zhao, Member

## 1 INTRODUCTION

1.1. Ukraine and the Russian Federation (Russia) each appeal certain issues of law and legal interpretations developed in the Panel Report, *Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof*<sup>1</sup> (Panel Report).

1.2. Before the Panel, Ukraine challenged certain measures allegedly taken by Russia concerning conformity assessment procedures for railway products as they relate to suppliers from Ukraine. Specifically, Ukraine's challenge concerned the following three categories of measures:

- a. systematic prevention of Ukrainian railway products from being imported into Russia by suspending valid certificates issued for railway products, refusing to issue new certificates for railway products, and not recognizing certificates issued by the competent authorities of the member countries of the Eurasian Economic Union as established in accordance with the Treaty on Eurasian Economic Union of 29 May 2014 (former Customs Union of the Republic of Belarus, the Republic of Kazakhstan, and the Russian Federation) (CU) other than Russia, which Ukraine submitted are evidenced by the instructions and decisions listed in Annexes I, II, and III to its request for the establishment of a panel<sup>2</sup> (systematic import prevention);
- b. the suspensions of certificates and the rejections of applications for new certificates with regard to Ukrainian producers of railway products, as listed in Annexes I and II to the panel request (suspensions and rejections); and
- c. Russia's non-recognition of certificates issued under CU Technical Regulation 001/2011 to Ukrainian suppliers of railway products in other CU countries found in the documents listed in Annex III to the panel request (non-recognition of certificates).<sup>3</sup>

1.3. In the Panel Report, circulated to Members of the World Trade Organization (WTO) on 30 July 2018, the Panel made the following findings that are relevant to this appeal:

- a. with respect to Russia's request for the Panel's preliminary ruling, Russia had failed to establish that Ukraine's panel request is inconsistent with Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)<sup>4</sup>;

<sup>1</sup> WT/DS499/R, 30 July 2018.

<sup>2</sup> Request for the Establishment of a Panel by Ukraine, WT/DS499/2 (Ukraine's panel request).

<sup>3</sup> Panel Report, para. 7.225.

<sup>4</sup> Panel Report, paras. 7.43, 7.104, and 8.1.a.i.

- b. with respect to the instructions suspending certificates:
- i. Ukraine had failed to establish, with respect to each of the 14 instructions at issue, that Russia had acted inconsistently with its obligations under Article 5.1.1 of the Agreement on Technical Barriers to Trade (TBT Agreement)<sup>5</sup>; and
  - ii. Ukraine had failed to establish, with respect to each of the 14 instructions at issue, that Russia had acted inconsistently with its obligations under Article 5.1.2, first and second sentences, of the TBT Agreement<sup>6</sup>;
- c. with respect to the decisions rejecting applications for certificates:
- i. Ukraine had failed to establish, with respect to the two decisions through which the Federal Budgetary Organization (FBO) Register of Certification on the Federal Railway Transport "returned without consideration" applications for certificates submitted by Ukrainian producers under CU Technical Regulation 001/2011, and with respect to the decision through which the FBO "annulled" applications for certificates submitted by a Ukrainian producer under CU Technical Regulation 003/2011, that Russia had acted inconsistently with its obligations under Article 5.1.1 of the TBT Agreement<sup>7</sup>; and
  - ii. Ukraine had failed to establish, with respect to both decisions through which the FBO "returned without consideration" applications for certificates submitted by a Ukrainian producer under CU Technical Regulation 001/2011 (decision 1 insofar as it relates to one of the products covered by application A3 and application A4, and decision 2), and with respect to the decision through which the FBO "annulled" applications for certificates submitted by a Ukrainian producer under CU Technical Regulation 003/2011, that Russia had acted inconsistently with its obligations under Article 5.1.2, first and second sentences, of the TBT Agreement<sup>8</sup>;
- d. with respect to the non-recognition of certificates issued in CU countries other than Russia:
- i. the non-recognition requirement was properly before the Panel<sup>9</sup>;
  - ii. Ukraine had established that Russia had acted inconsistently with Article I:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994)<sup>10</sup>; and
  - iii. Ukraine had established that Russia had acted inconsistently with Article III:4 of the GATT 1994<sup>11</sup>; and
- e. with respect to the systematic import prevention, Ukraine had failed to establish its claims of inconsistency with Articles I:1, XI:1, and XIII:1 of the GATT 1994, because it had not demonstrated the existence of the systematic import prevention.<sup>12</sup>

1.4. In addition, the Panel made a number of findings that have not been appealed. In particular: (i) with respect to 13 out of 14 instructions suspending certificates, the Panel found that Ukraine had established that Russia had acted inconsistently with Article 5.2.2, third obligation, of the TBT Agreement<sup>13</sup>; (ii) with respect to one out of three decisions rejecting applications for certificates (decision 1 insofar as it relates to applications A1 and A2 and one of the products covered by application A3), the Panel found that Ukraine had established that Russia had acted inconsistently

<sup>5</sup> Panel Report, paras. 7.394 and 8.1.b.i.

<sup>6</sup> Panel Report, paras. 7.544 and 8.1.b.ii.

<sup>7</sup> Panel Report, paras. 7.638 and 8.1.c.i.

<sup>8</sup> Panel Report, paras. 7.728, 7.764, and 8.1.c.iii.

<sup>9</sup> Panel Report, paras. 7.823, 7.829, and 8.1.d.i.

<sup>10</sup> Panel Report, paras. 7.907 and 8.1.d.iv.

<sup>11</sup> Panel Report, paras. 7.928 and 8.1.d.v.

<sup>12</sup> Panel Report, paras. 7.995 and 8.1.e.i.

<sup>13</sup> Panel Report, paras. 7.591 and 8.1.b.iii. For the remaining single instruction suspending certificates, the Panel found that Ukraine had failed to establish that Russia had acted inconsistently with Article 5.2.2 of the TBT Agreement. (Ibid., paras. 7.591 and 8.1.b.iv)

with Article 5.1.2, first and second sentences, of the TBT Agreement<sup>14</sup>; (iii) with respect to all three decisions rejecting applications for certificates at issue, the Panel found that Ukraine had failed to establish that Russia had acted inconsistently with Article 5.2.2, second obligation, of the TBT Agreement<sup>15</sup>; (iv) with respect to two out of three decisions rejecting applications for certificates at issue, the Panel found that Ukraine had established that Russia had acted inconsistently with Article 5.2.2, third obligation, of the TBT Agreement<sup>16</sup>; (v) the Panel found that Ukraine had failed to establish that the non-recognition requirement falls within the scope of application of Article 2.1 of the TBT Agreement<sup>17</sup>; and (vi) with respect to the non-recognition of certificates issued in CU countries other than Russia, the Panel made no findings regarding Ukraine's claims under Articles 5.1.1 and 5.1.2 of the TBT Agreement and Article X:3(a) of the GATT 1994.<sup>18</sup>

1.5. In sum, the Panel found that Russia had acted inconsistently with its obligations under Articles 5.1.2 and 5.2.2 of the TBT Agreement, and Articles I:1 and III:4 of the GATT 1994, and that it had as a result nullified or impaired benefits accruing to Ukraine under these provisions. Pursuant to Article 19.1 of the DSU, the Panel thus recommended that the Dispute Settlement Body (DSB) request that Russia bring its measures at issue into conformity with its obligations under the TBT Agreement and the GATT 1994.<sup>19</sup>

1.6. On 27 August 2018, Ukraine notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel and filed a Notice of Appeal<sup>20</sup> and an appellant's submission pursuant to Rules 20 and 21, respectively, of the Working Procedures for Appellate Review<sup>21</sup> (Working Procedures). On 3 September 2018, Russia notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel and filed a Notice of Other Appeal<sup>22</sup> and an other appellant's submission pursuant to Rule 23 of the Working Procedures. On 14 September 2018, Ukraine and Russia each filed an appellee's submission.<sup>23</sup> On 17 September 2018, Canada, the European Union (EU), and Japan each filed a third participant's submission.<sup>24</sup> China, Singapore, and the United States each notified its intention to appear at the oral hearing as a third participant.<sup>25</sup>

1.7. On 28 September 2018, the participants and third participants were informed that, in accordance with Rule 15 of the Working Procedures, the Chair of the Appellate Body had notified the Chair of the DSB of the Appellate Body's decision to authorize Appellate Body Member Mr Shree Baboo Chekitan Servansing to complete the disposition of this appeal, to which he had been assigned before the completion of his term of office. On 9 December 2019, the participants and third participants were informed that, in accordance with Rule 15 of the Working Procedures, the Chair of the Appellate Body had informed the Chair of the DSB that Thomas R. Graham would complete the disposition of this appeal, to which he had been assigned before the completion of his term of office and for which the oral hearing had been held before that date.<sup>26</sup>

1.8. On 24 October 2018, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report in this appeal within the 60-day period pursuant to Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision.<sup>27</sup>

<sup>14</sup> Panel Report, paras. 7.727 and 8.1.c.ii.

<sup>15</sup> Panel Report, paras. 7.806 and 8.1.c.iv.

<sup>16</sup> Panel Report, paras. 7.785 and 8.1.c.v. For the remaining single decision rejecting applications for certificates at issue, the Panel found that Ukraine had failed to establish that Russia had acted inconsistently with Article 5.2.2, third obligation, of the TBT Agreement. (Ibid., paras. 7.785 and 8.1.c.vi)

<sup>17</sup> Panel Report, paras. 7.885 and 8.1.d.ii.

<sup>18</sup> Panel Report, paras. 7.826, 7.940, 8.1.d.iii, and 8.1.d.vi.

<sup>19</sup> Panel Report, para. 8.2.

<sup>20</sup> WT/DS499/6.

<sup>21</sup> WT/AB/WP/6, 16 August 2010.

<sup>22</sup> WT/DS499/7.

<sup>23</sup> Pursuant to Rules 22 and 23(4) of the Working Procedures.

<sup>24</sup> Pursuant to Rule 24(1) of the Working Procedures.

<sup>25</sup> Pursuant to Rule 24(2) of the Working Procedures.

<sup>26</sup> WT/DSB/79.

<sup>27</sup> The Chair of the Appellate Body referred to the size of the Panel record and the complex issues appealed and further noted that, in view of the backlog of appeals pending and the overlap in the composition of all divisions resulting in part from the reduced number of Appellate Body Members, it would not be possible for the Division to focus on the consideration of this appeal and for it to be fully staffed for some time. (WT/DS499/8)

For the reasons explained in the letter, work on this appeal could gather pace only in June 2019. On 9 December 2019, the Chair of the Appellate Body informed the Chair of the DSB that the Report in these proceedings would be circulated no later than 4 February 2020.<sup>28</sup>

1.9. On 13 September 2019, the Appellate Body received a communication from Ukraine requesting that the Division extend the time-limits for opening statements at the oral hearing. On the same day, the Division hearing the appeal invited Russia and the third participants to provide any comments on Ukraine's request by 16 September 2019. Russia expressed support and requested that equal opportunity be provided to both Russia and Ukraine in the event that the Division decided to grant Ukraine's request. No comments were received from the third participants. Having considered Ukraine's request and comments by Russia, the Division informed participants and third participants by letter of 16 September of extended time-limits for the participants' opening statements.

1.10. The oral hearing in this appeal was held on 17 and 18 September 2019. The participants and several third participants made oral statements and responded to questions posed by the Members of the Appellate Body Division hearing the appeal.

1.11. At the oral hearing, the participants jointly requested the Division hearing the appeal to continue treating the information designated as business confidential information (BCI) by the Panel under its additional working procedures for the protection of BCI as confidential also on appeal. In particular, Ukraine referred to the protection of the identity of individual producers, information regarding the certificates, and the specific number of decisions at issue.<sup>29</sup> No third participant raised objections in connection with this request.

1.12. We recall that any additional procedures adopted by the Appellate Body to protect sensitive information must conform to the requirement in Rule 16(1) of the Working Procedures that such procedures not be inconsistent with the DSU, the other covered agreements, and the Working Procedures themselves.<sup>30</sup> Moreover, in adopting such procedures, the Appellate Body must ensure that an appropriate balance is struck between the need to guard against the risk of harm that could result from the disclosure of particularly sensitive information, on the one hand, and the integrity of the adjudication process, the participation rights of third participants, and the rights and systemic interests of the WTO membership at large, on the other.<sup>31</sup> This means, among other considerations, that the Appellate Body should bear in mind the need for transparency and "the rights of third parties and other WTO Members under various provisions of the DSU", and should ensure that the public version of its report circulated to all Members of the WTO is understandable.<sup>32</sup>

1.13. In the circumstances of the present appeal, we consider that treating the relevant information as confidential does not unduly affect our ability to adjudicate this dispute, the participation rights of the third participants, or the rights and interests of the WTO membership at large. We note in this respect the absence of comments by third participants regarding the participant's joint request, as well as the rather limited information designated as BCI. Based on the foregoing, we grant the participants' joint request to treat the information designated as BCI by the Panel as confidential on appeal pursuant to Rule 16(1) of the Working Procedures. Accordingly, this Appellate Body Report does not contain information designated as BCI by the Panel.

## 2 ARGUMENTS OF THE PARTICIPANTS

2.1. The claims and arguments of the participants are reflected in the executive summaries of their written submissions provided to the Appellate Body.<sup>33</sup> The Notices of Appeal and Other Appeal, and

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<sup>28</sup> WT/DS499/9.

<sup>29</sup> Ukraine's response to questioning at the oral hearing (referring to Panel Report, para. 7.222).

<sup>30</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, Annex D-1, Procedural Ruling of 25 October 2016, para. 10.

<sup>31</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.3 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15).

<sup>32</sup> Appellate Body Report, *Japan – DRAMS (Korea)*, para. 279.

<sup>33</sup> Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

the executive summaries of the participants' claims and arguments, are contained in Annexes A and B of the Addendum to this Report, WT/DS499/AB/R/Add.1.

### 3 ARGUMENTS OF THE THIRD PARTICIPANTS

3.1. The arguments of the third participants that filed a written submission (Canada, the European Union, and Japan) are reflected in the executive summaries of their written submissions provided to the Appellate Body<sup>34</sup>, and are contained in Annex C of the Addendum to this Report, WT/DS499/AB/R/Add.1.

### 4 ISSUES RAISED

4.1. The following issues are raised in this appeal:

- a. in relation to the Panel's preliminary ruling (raised by Russia):
  - i. whether the Panel erred in finding that Russia had failed to establish that Ukraine's panel request is inconsistent with Article 6.2 of the DSU;
- b. in relation to the Panel's findings with respect to the non-recognition of certificates issued in CU countries other than Russia, which the Panel referred to as the third measure (raised by Russia):
  - i. whether the Panel acted inconsistently with Article 11 of the DSU in finding the existence of the third measure as a general non-recognition requirement flowing from CU Technical Regulation 001/2011;
  - ii. whether the Panel acted inconsistently with Article 11 of the DSU in finding the third measure capable of being challenged under the DSU as a single measure;
  - iii. whether the Panel acted inconsistently with Articles 6.2, 7.1, and 11 of the DSU in finding that the third measure was within the Panel's terms of reference; and
  - iv. whether the Panel acted inconsistently with Article 11 of the DSU in making findings with respect to an aspect related to the third measure that it had previously found to be outside its terms of reference;
- c. whether the Panel erred in its interpretation and application, and acted inconsistently with Article 11 of the DSU, in its analysis relating to the existence of a "comparable situation" under Article 5.1.1 of the TBT Agreement and in finding that Ukraine failed to establish that Russia acted inconsistently with its obligations under Article 5.1.1 (raised by Ukraine);
- d. whether the Panel acted inconsistently with Article 11 of the DSU in finding that Ukraine failed to establish that the proposed less trade-restrictive alternatives were reasonably available, and that Russia acted inconsistently with its obligations under Article 5.1.2 of the TBT Agreement (raised by Ukraine); and
- e. whether the Panel acted inconsistently with Article 11 of the DSU in its assessment of the existence of systematic import prevention with respect to Ukraine's claims under Articles I:1, XI:1, and XIII:1 of the GATT 1994 (raised by Ukraine).

### 5 ANALYSIS OF THE APPELLATE BODY

#### 5.1 Russia's claims relating to the Panel's preliminary ruling

5.1.1. Russia requests us to reverse the conclusion made by the Panel in its preliminary ruling, that Russia had failed to establish that Ukraine's panel request is inconsistent with Article 6.2 of the

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<sup>34</sup> Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

DSU.<sup>35</sup> Russia alleges that, in coming to this conclusion, the Panel erred in two respects: first, in finding that Ukraine's panel request properly linked the measures at issue with the legal basis of its complaint<sup>36</sup>; and, second, in finding that Ukraine's panel request properly identified the third measure at issue.<sup>37</sup>

5.2. Ukraine, for its part, requests us to uphold the conclusions made by the Panel in its preliminary ruling.<sup>38</sup> For Ukraine, first, the panel request links the measures at issue with the legal basis of the complaint in a manner sufficient to present the problem clearly<sup>39</sup>, and, second, it identified with sufficient clarity the third measure at issue in this dispute.<sup>40</sup>

### 5.1.1 The Panel's findings

5.3. Russia requested a preliminary ruling from the Panel, alleging that Ukraine's panel request failed to provide the legal basis of Ukraine's complaint, and that the panel request was thus not sufficient to present the problem clearly, as required pursuant to Article 6.2 of the DSU. Russia alleged, *inter alia*, that Ukraine's panel request failed to identify a link between, on the one hand, the measures challenged by Ukraine, and the WTO obligations allegedly violated, on the other, and that the request failed to properly identify the third measure at issue.<sup>41</sup> Ukraine requested the Panel to reject Russia's request. In Ukraine's view, its panel request plainly connected the measures at issue and the relevant WTO obligations and clearly identified the third measure as required under Article 6.2.<sup>42</sup>

5.4. The Panel issued its conclusions on Russia's request to the parties on 17 July 2017.<sup>43</sup> The Panel concluded that Ukraine's panel request was *not* inconsistent with Article 6.2, and therefore it rejected Russia's claims in this respect. The Panel indicated that it would provide detailed reasons in support of its conclusions at a later date, and at the latest in the Interim Report. The Panel Report contains the Panel's detailed reasons for its conclusions on Russia's request, and the conclusions circulated to the parties (and the third parties for information) on 17 July 2017 are also an integral part of the Panel Report.<sup>44</sup>

5.5. First, with regard to Russia's claim that Ukraine's panel request failed to identify a link between the measures challenged by Ukraine, on the one hand, and the WTO obligations allegedly violated, on the other, the Panel noted that it concerned all measures and all claims identified in the panel request.<sup>45</sup> The Panel recalled that the Appellate Body had held that Article 6.2 of the DSU calls for sufficient clarity with respect to the legal basis of the complaint, because a defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defence.<sup>46</sup> The Panel also referred to the Appellate Body's finding that "in order to 'present the problem clearly', within the meaning of Article 6.2, a panel request must 'plainly

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<sup>35</sup> Russia's other appellant's submission, para. 162(d) (referring to Panel Report, para. 8.1.a.i). In addition, Russia requests that, as a consequence, we also reverse the Panel's conclusions relating to the measures not properly identified in Ukraine's panel request. (Panel Report, paras. 8.1.d.iv and 8.1.d.v)

<sup>36</sup> Russia's other appellant's submission, paras. 3-11 (referring, *inter alia*, to the Panel's finding in para. 7.43).

<sup>37</sup> Russia's other appellant's submission, paras. 12-43 (referring, *inter alia*, to the Panel's finding in para. 7.104).

<sup>38</sup> Ukraine's appellee's submission, paras. 16, 37, 39, 69-70, and 188.

<sup>39</sup> Ukraine's appellee's submission, paras. 16 and 19.

<sup>40</sup> Ukraine's appellee's submission, paras. 45-47.

<sup>41</sup> Panel Report, paras. 7.2, 7.11-7.12, and 7.87. In its request for a preliminary ruling, Russia raised four additional issues with regard to Ukraine's panel request and the obligation under Article 6.2 of the DSU to "present the problem clearly". Russia's appeal of the Panel's preliminary ruling does not extend to the Panel's findings concerning those additional allegations of error.

<sup>42</sup> Ukraine's appellee's submission, paras. 28 and 47.

<sup>43</sup> Panel Report, para. 7.6. On the same day, the Panel's conclusions were also circulated to third parties for their information.

<sup>44</sup> Panel Report, paras. 7.6-7.7.

<sup>45</sup> Panel Report, para. 7.11.

<sup>46</sup> Panel Report, para. 7.22 (quoting Appellate Body Report, *Thailand – H-Beams*, para. 88; referring to Appellate Body Report, *EC – Selected Customs Matters*, para. 168).

connect' the challenged measure(s) with the provision(s) claimed to have been infringed so that a respondent can 'know what case it has to answer, and ... begin preparing its defence'.<sup>47</sup>

5.6. The Panel then turned to examine in detail Ukraine's panel request. The Panel noted that the panel request is structured in four sections. Section I provides an overview of the background of the dispute. Section II describes the measures at issue. Section III describes Russia's relevant legal framework. Section IV provides the legal basis of the complaint.<sup>48</sup>

5.7. Regarding section II of the request, the Panel observed that it contains three narrative paragraphs describing the measures at issue, followed by a numbered list of the measures that includes references to Annexes I, II, and III to the panel request. The Panel further noted that this section ends with a concluding paragraph describing the trade effects of the challenged measures.<sup>49</sup> The Panel then briefly outlined its understanding of each of the challenged measures.<sup>50</sup>

5.8. Turning to section IV of Ukraine's panel request, the Panel noted that it begins with an introductory paragraph that reads: "the measures described in section II are inconsistent with [Russia's] obligations under the following provisions of the GATT 1994 and the TBT Agreement" and that this paragraph is followed by a list of 10 provisions, five of the TBT Agreement and five of the GATT 1994, each of which contains a brief description of how that provision is allegedly breached.<sup>51</sup>

5.9. The Panel then examined each point of section IV of Ukraine's panel request, bearing in mind the description of the three measures at issue in section II of the panel request, in order to determine whether the panel request properly links the challenged measures with the 10 WTO provisions allegedly infringed.<sup>52</sup> The Panel Report contains a table setting out the linkages between the claims raised by Ukraine and the measures at issue.<sup>53</sup>

5.10. Second, regarding Russia's allegation that Ukraine's panel request failed to comply with Article 6.2 of the DSU because it lacked a proper identification of the third measure at issue<sup>54</sup>, the Panel began by noting that the text of Article 6.2 makes clear that a panel request must, *inter alia*, identify the specific measure or measures at issue, and that measures not properly identified fall outside a panel's terms of reference, and cannot be the subject of panel findings or recommendations.<sup>55</sup>

5.11. The Panel recalled that with respect to the requirement to identify the specific measures at issue, the Appellate Body had said that "the measures at issue must be identified with sufficient precision so that what is referred to adjudication may be discerned from the panel request"<sup>56</sup>, and that a panel request will satisfy this requirement where it identifies the measure(s) at issue "with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue".<sup>57</sup> Furthermore, the Panel noted that "there may be circumstances in which a party describes a measure in a more generic way, which nonetheless allows the measure to be discerned"<sup>58</sup>, and that "[a]n assessment of whether a complaining party has identified the specific measures at issue may depend on the particular context in which those measures exist and operate."<sup>59</sup> To the Panel, this suggested that there is no single way that a challenged measure must be identified.<sup>60</sup>

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<sup>47</sup> Panel Report, para. 7.22 (quoting Appellate Body Reports, *Argentina – Import Measures*, para. 5.39, in turn quoting Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8, in turn quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162).

<sup>48</sup> Panel Report, para. 7.24 (referring to Ukraine's panel request).

<sup>49</sup> Panel Report, para. 7.25 (referring to Ukraine's panel request, p. 2).

<sup>50</sup> Panel Report, paras. 7.27-7.29.

<sup>51</sup> Panel Report, para. 7.30 (referring to Ukraine's panel request, p. 3).

<sup>52</sup> Panel Report, paras. 7.31-7.38.

<sup>53</sup> Panel Report, para. 7.39, table 1.

<sup>54</sup> Panel Report, paras. 7.2 and 7.87.

<sup>55</sup> Panel Report, para. 7.90 (referring to Appellate Body Reports, *Dominican Republic – Import and Sale of Cigarettes*, para. 120; *EC and certain member States – Large Civil Aircraft*, para. 790).

<sup>56</sup> Panel Report, para. 7.91 (quoting Appellate Body Report, *US – Continued Zeroing*, para. 168).

<sup>57</sup> Panel Report, para. 7.91 (quoting Appellate Body Report, *US – Continued Zeroing*, para. 169).

<sup>58</sup> Panel Report, para. 7.92 (quoting Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 116).

<sup>59</sup> Panel Report, para. 7.92 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 641).

<sup>60</sup> Panel Report, para. 7.92.



5.12. More specifically regarding the question whether the third measure had been properly identified in Ukraine's panel request, the Panel noted that this measure was addressed in the third narrative paragraph, the three numbered points, and Annex III and that these various references must be read together.<sup>61</sup> Ultimately, the Panel concluded that Ukraine's panel request identified the challenged measure in a manner that satisfies the requirements of Article 6.2 of the DSU and thus rejected Russia's request to find otherwise.<sup>62</sup>

### 5.1.2 Claims and arguments on appeal

5.13. On appeal, Russia submits that the Panel erred in two respects: first, in finding that Ukraine's panel request properly linked the measures at issue with the legal basis of its complaint<sup>63</sup>; and second, in finding that Ukraine's panel request properly identified the third measure at issue.<sup>64</sup>

5.14. Regarding the first point, Russia submits that the Panel misread the Appellate Body Reports in *China – Raw Materials*. In particular, Russia takes issue with the Panel's finding that "section IV of Ukraine's panel request contains a list of the ten WTO provisions allegedly infringed, together with an explanation of why Ukraine deems each provision inconsistent with the measures at issue."<sup>65</sup> Russia alleges that section IV of the panel request at issue fails to properly connect specific WTO obligations with the measures corresponding to them.

5.15. Furthermore, Russia draws attention to the Panel's statements that certain items in section III of Ukraine's panel request "*could* relate" to or "*could* concern" a corresponding measure contained in section II of the panel request.<sup>66</sup> For Russia, the Panel's use of "weak auxiliary verbs" reveals that, in fact, the linkages between the measures and the legal obligations were not as clear as the Panel found.<sup>67</sup> Had Ukraine plainly connected the challenged measures with the provisions of the covered agreements claimed to have been infringed, the Panel would not have needed to have recourse to language "inappropriately leaving the room for hesitations and speculations".<sup>68</sup>

5.16. Russia further alleges that the Panel misunderstood its argument pertaining to the fact that Ukraine eventually dropped certain claims. Russia did not seek to curtail Ukraine's right to decide which claims to pursue in the course of the dispute. However, coupled with a lack of clarity in linking the measures at issue with the legal obligations concerned, Ukraine's decision not to pursue certain claims rendered unclear to Russia what the dispute was in fact about, until the time of the first written submission to the Panel. While Ukraine's panel request "arguably outlines the possible contours of the dispute, the matter brought and *meant* by Ukraine had not been clear [because] the final scope largely differed from what the panel request hinted".<sup>69</sup>

5.17. Regarding the second point, namely, whether the panel request properly identified the third measure at issue, Russia alleges on appeal that the Panel failed to review the description of the third measure in Ukraine's panel request on its face and instead undertook a "contextual interpretation" of it.<sup>70</sup> Russia asserts that the Panel failed to consider in its analysis the meaning of the third numbered point in the panel request, read on its face, and when compared with the other two numbered points of section II of the panel request.<sup>71</sup> Russia notes that the text of the first two numbered points of the panel request refers to "certain alleged actions" by Russia, while the third numbered point of the panel request lists certain documents, and submits that therefore the third measure at issue covers specific documents, rather than certain alleged actions.<sup>72</sup>

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<sup>61</sup> Panel Report, para. 7.93.

<sup>62</sup> Panel Report, para. 7.104.

<sup>63</sup> Russia's other appellant's submission, paras. 3-11 (referring, *inter alia*, to the Panel's finding in para. 7.43).

<sup>64</sup> Russia's other appellant's submission, paras. 12-43 (referring, *inter alia*, to the Panel's finding in para. 7.104).

<sup>65</sup> Russia's other appellant's submission, para. 8 (quoting Panel Report, para. 7.42).

<sup>66</sup> Russia's other appellant's submission, para. 9 (quoting Panel Report, para. 7.32). (emphasis original)

<sup>67</sup> Russia's other appellant's submission, para. 9.

<sup>68</sup> Russia's other appellant's submission, para. 9.

<sup>69</sup> Russia's other appellant's submission, para. 6. (emphasis original)

<sup>70</sup> Russia's other appellant's submission, para. 14.

<sup>71</sup> Russia's other appellant's submission, para. 15.

<sup>72</sup> Russia's other appellant's submission, paras. 18-19.

5.18. Russia also disagrees with the Panel's statement that there is no single way in which a challenged measure must invariably be identified. Instead, the Panel should have relied on the plain meaning of the text of Ukraine's panel request and found that the third measure is Technical Regulation 001/2011 as such, read together with the Protocol of the Ministry of Transport of the Russian Federation (MOT) and the instructions mentioned in Annex III.<sup>73</sup>

5.19. Russia asserts that, in order to confirm the meaning of the words used in a panel request, and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted.<sup>74</sup> Russia notes that Ukraine described the third measure in three different manners in its first written submission to the Panel and argues that the discrepancy in the way Ukraine referred to this measure demonstrates that Ukraine's first written submission does not confirm the words used in its panel request, and that the panel request is not sufficiently specific to identify the precise measure at issue.<sup>75</sup> In addition, Russia alleges that the Panel failed to properly consider the fact that CU Technical Regulation 001/2011, identified by Ukraine as an element of the third measure, is a complex legal instrument. Referring to the Panel Report in *Australia – Apples*, Russia contends that whenever a complex and lengthy document is challenged, a panel request shall duly contain a reference to particular parts, sections, or issues and that Ukraine was therefore required to be more specific in identifying what it wished to challenge before the Panel.<sup>76</sup>

5.20. Ukraine, for its part, requests us to uphold the Panel findings challenged by Russia.<sup>77</sup> First, Ukraine submits that, contrary to Russia's arguments, its panel request links the measures at issue with the legal basis of the complaint sufficiently to present the problem clearly.<sup>78</sup> In particular, section II of the panel request describes the "acts or omissions" attributable to Russia and identifies their "sources and evidence", while section **IV explains what "acts or omissions ... violate what [WTO] provisions and on what basis"**.<sup>79</sup> According to Ukraine, Russia's claim that the panel request does not plainly connect the challenged measures to the relevant provisions is based on an incorrect reading of section IV in isolation from the rest of the panel request.<sup>80</sup> Had Russia read the panel request as a whole, it would have readily understood how the claims made relate to the relevant WTO obligations.<sup>81</sup>

5.21. In response to Russia taking issue with the Panel's use of "weak auxiliary verbs", Ukraine submits that the Panel's "choice of words" or use of "auxiliary verbs" is irrelevant to a determination of whether or not the Panel committed an error of law in the interpretation and application of Article 6.2 of the DSU.<sup>82</sup> Ukraine also disagrees with Russia that the scope of the claims as formulated in the panel request changed throughout the proceedings, and particularly in Ukraine's first written submission.<sup>83</sup> For Ukraine, the fact that a complainant abandons certain claims during the course of panel proceedings is immaterial to the question whether that complainant's panel request properly identifies the challenged measures and clearly connects them to the relevant WTO obligations.<sup>84</sup>

5.22. Second, Ukraine disagrees with Russia's allegation that the panel request does not clearly identify the third measure at issue in this dispute. Section II of the panel request, titled "The measures at issue", lists not only the three measures, but also provides an explanation for each.<sup>85</sup> In particular, the "plain text" of the third recital clearly indicates that the third measure consists of "the decision" of Russian authorities not to recognize the validity of conformity certificates issued to

<sup>73</sup> Russia's other appellant's submission, para. 21 (quoting Panel Report, para. 7.92).

<sup>74</sup> Russia's other appellant's submission, para. 23 (quoting Appellate Body Report, *US – Carbon Steel*, para. 127; referring to Appellate Body Reports, *Korea – Dairy*, para. 127; *Thailand – H-Beams*, para. 95).

<sup>75</sup> Russia's other appellant's submission, para. 27.

<sup>76</sup> Russia's other appellant's submission, para. 33 (referring to Panel Report, *Australia – Apples*, para. 7.1449).

<sup>77</sup> Ukraine's appellee's submission, paras. 16, 37, 39, 69-70, and 188.

<sup>78</sup> Ukraine's appellee's submission, paras. 16 and 19.

<sup>79</sup> Ukraine's appellee's submission, para. 20. See also *ibid.*, paras. 21-22 and 27-28.

<sup>80</sup> Ukraine's appellee's submission, para. 27.

<sup>81</sup> Ukraine's appellee's submission, para. 28.

<sup>82</sup> Ukraine's appellee's submission, para. 36.

<sup>83</sup> Ukraine's appellee's submission, para. 29.

<sup>84</sup> Ukraine's appellee's submission, para. 30.

<sup>85</sup> Ukraine's appellee's submission, para. 45.

Ukrainian producers in other CU countries, as well as "the explanation and information on decisions taken in that regard".<sup>86</sup> While defects in a panel request cannot be "cured" by a complainant's subsequent submissions and statements, those submissions and statements can nonetheless be considered in order to "confirm the meaning of the words" used in the panel request.<sup>87</sup> In Ukraine's view, its first written submission confirmed rather than altered the identification of the third measure as it appeared in the panel request.<sup>88</sup>

5.23. Ukraine argues that contrary to what Russia alleges, the Panel properly assessed the panel request on its face.<sup>89</sup> For Ukraine, Russia misunderstands the third measure as being limited to CU Technical Regulation 001/2011<sup>90</sup>, whereas in fact the measure consists of that Regulation "read together with" Protocol No. A 4-3 and three letters mentioned in Annex III to the panel request.<sup>91</sup> Had Ukraine intended to challenge CU Technical Regulation 001/2011 alone, it would not have included, in the description of the specific measure at issue, a protocol and individual decisions adopted by the MOT.

5.24. Finally, contrary to what Russia argues, for Ukraine the situation in the present case is not similar or comparable to that in *Australia – Apples*. In that case, due to the complexity and length of the legal instrument and in the absence of references to specific parts of the challenged document, the respondent was unable to understand which specific elements of the legal instrument were at issue; in the present case, the instruments providing the legal basis for the third measure were clearly identified in the panel request and could therefore be discerned.<sup>92</sup> Ukraine further submits that, in any event, the Appellate Body has said that the consultation process provides an opportunity for parties to define and delimit the scope of the dispute.<sup>93</sup> Since, in the present case, all relevant documents had been introduced at that stage of the proceedings, Russia could not claim on appeal that Ukraine failed to identify particular parts of documents that were supposed to be examined and that it was thus unclear what Ukraine was challenging.

### 5.1.3 Whether the Panel erred in finding in its preliminary ruling that Russia had failed to establish that Ukraine's panel request was inconsistent with Article 6.2 of the DSU

5.25. In addressing Russia's claim that the Panel erred in making the preliminary ruling that Russia has failed to establish that Ukraine's panel request is inconsistent with Article 6.2 of the DSU<sup>94</sup>, we note that Article 6.2 provides:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

5.26. Article 6.2 of the DSU sets out two principal requirements, namely, the identification of the specific measures at issue and the provision of a brief summary of the legal basis of the complaint sufficient to present the problem clearly.<sup>95</sup> Russia's appeal concerns both requirements. In particular, Russia's claim that the Panel erred in finding that Ukraine's panel request linked the measures at issue with the legal basis of the complaint relates to the obligation to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In turn, Russia's claim that

<sup>86</sup> Ukraine's appellee's submission, para. 46. (emphasis omitted)

<sup>87</sup> Ukraine's appellee's submission, para. 48 (quoting Appellate Body Report, *US – Carbon Steel*, para. 127, in turn referring to Appellate Body Reports, *Korea – Dairy*, para. 127; *Thailand – H-Beams*, para. 95).

<sup>88</sup> Ukraine's appellee's submission, para. 49.

<sup>89</sup> Ukraine's appellee's submission, para. 51.

<sup>90</sup> Ukraine's appellee's submission, para. 54.

<sup>91</sup> Ukraine's appellee's submission, para. 55. (emphasis original)

<sup>92</sup> Ukraine's appellee's submission, paras. 65-66.

<sup>93</sup> Ukraine's appellee's submission, para. 68 (referring to Appellate Body Reports, *Argentina – Import Measures*, para. 5.10).

<sup>94</sup> Panel Report, para. 8.1.a.i.

<sup>95</sup> Furthermore, Article 6.2 contains the additional requirements that the request must be made in writing and that it must indicate whether consultations were held. See also Appellate Body Report, *Korea – Dairy*, para. 120.

the Panel erred in finding that the third measure had been properly identified in Ukraine's panel request relates to the obligation to properly identify the specific measures at issue.

5.27. The Appellate Body has said that the requirements specified in Article 6.2 are significant because, pursuant to Article 7 of the DSU, a panel's terms of reference are governed by the request for establishment of a panel<sup>96</sup>, and that a panel request thus delimits the scope of a panel's jurisdiction and serves the due process objective of notifying the respondent and third parties of the nature of the complainant's case.<sup>97</sup> In order to "present the problem clearly", a panel request must plainly connect the challenged measures with the provisions of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged inconsistency of the measures at issue with the covered agreements.<sup>98</sup> Only by such connection between the measures and the relevant provisions can a respondent "know what case it has to answer, and ... begin preparing its defence".<sup>99</sup> In this vein, for instance, the panel requests in *China – Raw Materials* did not present the problem clearly, because they failed to connect the different measures with the various obligations listed therein.<sup>100</sup>

5.28. At the same time, the requirement to present the problem clearly does not entail an obligation for the complainant to provide arguments in support of its claim.<sup>101</sup> Rather, the "brief summary" of the legal basis of the complaint required by Article 6.2 of the DSU aims to explain succinctly how or why the measure at issue is considered by the complaining Member to be violating the WTO obligation in question.<sup>102</sup> While the identification of the treaty provision claimed to have been violated by the respondent is "always necessary" and a "minimum prerequisite", such identification may not be sufficient to meet the requirement of Article 6.2 depending on the particular circumstances of a case, including the nature of the measure at issue and the manner in which it is described in the panel request, as well as the nature of the provisions of the covered agreements alleged to have been breached.<sup>103</sup>

5.29. The Appellate Body has further said that in order to determine whether a panel request complies with Article 6.2, a panel must carefully scrutinize the request, read as a whole, and on the basis of the language used therein.<sup>104</sup> Moreover, a panel must determine compliance with Article 6.2 on the face of the panel request as it existed at the time of filing.<sup>105</sup> Parties' subsequent submissions and statements during the panel proceedings cannot "cure" defects in a panel request<sup>106</sup>, but they

<sup>96</sup> Appellate Body Report, *US – Carbon Steel*, para. 124.

<sup>97</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 639-640 (referring to Appellate Body Report, *US – Carbon Steel*, para. 126, in turn referring to Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:1, p. 186). See also Appellate Body Reports, *EC – Chicken Cuts*, para. 155; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108.

<sup>98</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.

<sup>99</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162 (quoting Appellate Body Report, *Thailand – H-Beams*, para. 88).

<sup>100</sup> Those panel requests listed 37 legal instruments as the measures at issue, alleging that they were inconsistent with 13 provisions of the covered agreements. However, it was unclear which allegations of error pertained to which particular measure identified in the panel requests. (Appellate Body Reports, *China – Raw Materials*, para. 227. See also *ibid.*, para. 229)

<sup>101</sup> Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.31 (quoting Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.14, in turn quoting Appellate Body Report, *Korea – Dairy*, para. 139). See also *ibid.*, para. 5.125; Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.9.

<sup>102</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 130.

<sup>103</sup> Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.9 (quoting Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.14, in turn quoting Appellate Body Report, *Korea – Dairy*, para. 124).

<sup>104</sup> Appellate Body Reports, *EC – Bananas III*, para. 142; *EC and certain member States – Large Civil Aircraft*, para. 641; *US – Carbon Steel*, para. 127; *US – Continued Zeroing*, para. 161; *US – Countervailing Measures (China)*, para. 4.7; *EC – Fasteners (China)*, para. 562; *US – Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108.

<sup>105</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.79 (referring to Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 787; *US – Continued Zeroing*, para. 161; *US – Carbon Steel*, para. 127; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.13).

<sup>106</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.79 (referring to Appellate Body Reports, *China – Raw Materials*, para. 220; *EC – Bananas III*, para. 143; *EC and certain member States – Large Civil Aircraft*, para. 787; *US – Carbon Steel*, para. 127; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9).

can be consulted to the extent that they may confirm or clarify the meaning of the words used in the panel request.<sup>107</sup>

### 5.1.3.1 Linkages between measures and legal basis of the complaint

5.30. We now turn to review the Panel's analysis in its preliminary ruling regarding Article 6.2 of the DSU. At the outset we note the Panel's observation that Ukraine's panel request was structured in four sections: section I providing an overview of the background of the dispute; section II describing the measures at issue; section III describing Russia's relevant legal framework; and section IV providing the legal basis of the complaint.<sup>108</sup> The Panel focused on sections II and IV of Ukraine's panel request and examined, for each point of section IV of the panel request, and bearing in mind the description of the three measures at issue in section II of the panel request, whether the panel request links the challenged measures with the 10 WTO provisions allegedly infringed.<sup>109</sup>

5.31. The Panel analysed the linkages between the measures challenged by Ukraine and the WTO provisions allegedly infringed, based on the text of the panel request, including by drawing inferences, for instance, with respect to Ukraine's claims under Article X:3(a) of the GATT 1994. In that respect, the Panel reasoned:

Point eight of section IV of the panel request contains Ukraine's claims under Article X:3(a) of the GATT 1994. These claims concern the uniform, impartial, and reasonable administration of laws, regulations, and decisions of a general application. Measure one and measure three are measures of general application which could fall under the purview of Article X:3(a). This, however, is not the case for the three components of measure two, all of which refer to individual instances of application. We thus consider that there is a link between Ukraine's claims under Article X:3(a) and measures one and three. We also consider that there is no link between Ukraine's claims under Article X:3(a) and measure two.<sup>110</sup>

Thus, the Panel explained what it considered to be the linkages made in the panel request, and ultimately summarized<sup>111</sup> its findings in a table that set out for each measure the provision under which Ukraine had raised a claim.

5.32. Russia takes issue with what it refers to as the Panel's use of "weak auxiliary verbs", such as "*could* relate" or "*could* concern", and asserts that this language reveals that the linkages between the measures and the legal obligations were not as clear as the Panel found.<sup>112</sup> As we see it, the use of this language is owed to the analytical approach employed by the Panel, defining, *first*, the potential scope of a particular claim, and *second*, identifying limitations on the scope of the claim based on the language used in the Panel request. The Panel statements identified by Russia in connection with this argument represent intermediate steps in the Panel's reasoning that, in connection with other elements of the Panel's analysis, provide the basis for the Panel's conclusion concerning linkages between the measures challenged by Ukraine and the WTO provisions allegedly infringed. The statements identified by Russia do not describe conclusively the quality of the linkages between the measures and the provisions at issue and thus, taken in isolation, these statements cannot be regarded as describing the quality of these linkages.

5.33. In addition, Russia asserts that the Panel erred in failing to recognize similarities in the deficiencies of the panel requests in the present case and in *China – Raw Materials*, the latter of which had been found to be insufficient by the Appellate Body.<sup>113</sup> We note that the Panel indeed addressed the parallels drawn by Russia between the panel request at issue and the panel requests in *China – Raw Materials* in some detail in its report.<sup>114</sup> However, the Panel observed significant differences between the panel requests in the present case and in *China – Raw Materials*. The Panel

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<sup>107</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.79 (referring to Appellate Body Reports, *China – Raw Materials*, para. 220; *EC and certain member States – Large Civil Aircraft*, para. 642; *US – Carbon Steel*, para. 127; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9).

<sup>108</sup> Panel Report, paras. 7.23-7.39.

<sup>109</sup> Panel Report, paras. 7.30-7.39.

<sup>110</sup> Panel Report, para. 7.37.

<sup>111</sup> Panel Report, para. 7.39, table 1.

<sup>112</sup> Russia's other appellant's submission, para. 9.

<sup>113</sup> Russia's other appellant's submission, paras. 7-8.

<sup>114</sup> Panel Report, para. 7.40.

noted that, first, the narrative paragraphs of section II of the panel requests in *China – Raw Materials* referred to several distinct types of measures and included allegations of violation of 13 different provisions of the covered agreements. Following the narrative paragraphs, the panel requests included a list of at least 37 legal instruments that ranged from entire codes or charters to specific administrative measures, without referring to specific sections or provisions of any of the listed instruments. The Panel observed that the narrative paragraphs in those panel requests included a brief description of different allegations of violation relating to different types of restraints, but they did not link them to the myriad of legal instruments listed in the subsequent section. The Panel contrasted this with Ukraine's panel request at issue and noted that the narrative paragraphs in section II identify three measures at issue and provide a description that allows the nature of each to be discerned. The Panel further explained that, in particular, the third narrative paragraph of section II, where the non-recognition of other CU certificates is described, provides a clear indication of the legal instruments concerned by that measure (e.g. CU Technical Regulation 001/2011). Furthermore, the Panel noted that the legal instruments described in section III of the panel request at issue were limited to nine instruments, the first five of which clearly relate to the challenged measures described in section II, and the other four refer to the background on the legal framework applicable to Russia's Conformity Assessment Procedures.<sup>115</sup> In addition, the Panel noted that the final paragraph of section III of the panel requests in *China – Raw Materials* provided a list of 13 WTO provisions allegedly infringed, without indicating how any of the measures at issue caused any of the alleged violations. The Panel noted that the narrative paragraphs of the panel request in the present case, however, provided such explanations.<sup>116</sup> In particular, the Panel explained that section IV of Ukraine's panel request contained a list of the 10 WTO provisions allegedly infringed, together with an explanation of why Ukraine considers that the measures identified are inconsistent with Russia's obligations.<sup>117</sup>

5.34. Accordingly, the Panel in fact engaged with Russia's argument concerning parallels between the panel request at issue and the panel requests in *China – Raw Materials*. The Panel, however, provided a detailed explanation of why it did not see sufficient similarities between the panel request in the present case and the panel requests in *China – Raw Materials*. On appeal, Russia advances essentially the same argument as before the Panel based on what it considers to be parallels between these panel requests. Thus, rather than demonstrating an error in the Panel's application of Article 6.2 of the DSU, Russia simply disagrees with the reasons given by the Panel for rejecting Russia's argument of certain parallels between the panel request at issue and the panel requests in *China – Raw Materials*.

5.35. In light of the above considerations, we find that the Panel did not err in its assessment of whether Ukraine's panel request provided sufficient clarity so as to plainly connect the WTO provisions allegedly infringed to the measures at issue.

#### 5.1.3.2 Identification of the third measure

5.36. Next, we turn to address Russia's allegation that the Panel erred in finding that Ukraine's panel request identified Ukraine's third measure in a manner that satisfies the requirements of Article 6.2 of the DSU.<sup>118</sup> Russia alleges that the Panel erred because it failed to review the description of the third measure in the panel request "on its face" and instead undertook a "contextual interpretation" of it.<sup>119</sup>

5.37. This allegation of error relates to the Panel's analysis in paragraphs 7.87 to 7.104 of the Panel Report, in which the Panel found that the measure at issue identified in the panel request as the third measure is the alleged requirement that Russia's authorities must not recognize certificates issued in other CU countries if the certified railway products were not produced in a CU country.<sup>120</sup> In particular, the Panel reasoned that "the third measure at issue is addressed in the third narrative paragraph, the three numbered points and Annex III", and that these references must be read

<sup>115</sup> Panel Report, para. 7.41 (referring to Ukraine's panel request, pp. 2-3).

<sup>116</sup> Panel Report, para. 7.42 (referring to WT/DS394/7, pp. 6-9; WT/DS395/7, pp. 6-9; WT/DS398/6, pp. 6-9).

<sup>117</sup> Panel Report, para. 7.42 (referring to Ukraine's panel request, pp. 3-4).

<sup>118</sup> Panel Report, para. 7.104.

<sup>119</sup> Russia's other appellant's submission, para. 14.

<sup>120</sup> Panel Report, para. 7.103.

together.<sup>121</sup> The Panel then addressed each of these elements and concluded that the third measure challenged by Ukraine was the alleged requirement that Russia's authorities considered to flow from CU Technical Regulation 001/2011, pursuant to which Russia's authorities must not recognize certificates issued to Ukrainian producers in other CU countries, if the certified products were not produced in a CU country.<sup>122</sup>

5.38. We have set out above that, in order to determine whether a panel request complies with Article 6.2, a panel must carefully scrutinize the request, read as a whole, and on the basis of the language used therein.<sup>123</sup> Moreover, a panel must determine compliance with Article 6.2 on the face of the panel request as it existed at the time of filing.<sup>124</sup>

5.39. We observe that in the present case, the Panel began its analysis by noting which elements of the panel request related to the third measure.<sup>125</sup> One by one, the Panel addressed these elements and explained its understanding of them.<sup>126</sup> Next, the Panel addressed the various elements "in context". We understand the Panel thus to have assessed the panel request "as a whole", in keeping with the approach set out above.

5.40. Russia argues that the text of the first two numbered points of the panel request refers to "certain alleged actions" by Russia, while the third numbered point of the panel request lists certain documents.<sup>127</sup> For Russia, such intentional difference in the description of the measures at issue must be given meaning, such that the third measure at issue covers specific documents, rather than certain alleged actions.<sup>128</sup> Russia contends that the Panel erred in disregarding this difference in the description of the measures at issue, and instead engaged in guessing what the complainant could have meant. Ukraine responds that Russia is essentially requesting the Appellate Body to read the numbered list in section IV of the panel request in isolation from the remaining part of that section, the other sections of the request, and the text of the covered agreements. For Ukraine, the numbered list and the explanations given in section IV, read together with the introductory paragraph to that list, support the Panel's findings in the preliminary ruling.<sup>129</sup>

5.41. We do not see that the Panel disregarded differences in the description of the measures at issue as alleged by Russia. A review of paragraphs 7.65 to 7.99 of the Panel Report reveals that, with regard to each of the three measures at issue, the Panel employed a different analytical approach in its assessment of the relevant parts of the panel request. The first measure had been identified by Ukraine as the "non-recognition" of certificates, and the Panel considered that to be the first measure without further analysis. With respect to the second measure, the Panel noted that Ukraine had referred to refusals to recognize certificates, suspension of certificates, and rejections. The Panel then "inferred that Ukraine [had sought] to identify these individual instructions as separate components of measure two".<sup>130</sup> Concerning the third measure, the Panel noted that the third numbered point identified CU Technical Regulation 001/2011, read together with the Protocol of the MOT and instructions mentioned in Annex III. The Panel continued explaining that, in order to better understand the third measure, it was instructive to look at the third narrative paragraph in section II. The Panel observed that the relevant Russian authorities had concluded that certificates issued in other CU countries were not valid in Russia's territory and that the products concerned could not be imported or registered. In other words, according to Ukraine, Russia's authorities concluded that these certificates could not be recognized.

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<sup>121</sup> Panel Report, para. 7.93 (referring to the text of section II of Ukraine's panel request as reproduced by the Panel in para. 7.139, table 2).

<sup>122</sup> Panel Report, paras. 7.99 and 7.103.

<sup>123</sup> Appellate Body Reports, *EC – Bananas III*, para. 142; *EC and certain member States – Large Civil Aircraft*, para. 641; *US – Carbon Steel*, para. 127; *US – Continued Zeroing*, para. 161; *US – Countervailing Measures (China)*, para. 4.7; *EC – Fasteners (China)*, para. 562; *US – Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108.

<sup>124</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.79 (referring to Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 787; *US – Continued Zeroing*, para. 161; *US – Carbon Steel*, para. 127; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.13).

<sup>125</sup> Panel Report, para. 7.93.

<sup>126</sup> Panel Report, paras. 7.94-7.98.

<sup>127</sup> Russia's other appellant's submission, para. 18.

<sup>128</sup> Russia's other appellant's submission, para. 19.

<sup>129</sup> Ukraine's appellee's submission, paras. 27-28.

<sup>130</sup> Panel Report, para. 7.96.

5.42. This demonstrates that, contrary to what Russia alleges, the Panel did not disregard differences in the description of the measures at issue. On the contrary, while the Panel noted the content of the first measure as clear on the face of the measure, the Panel drew certain inferences in order to determine the content of the second measure, and considered contextual elements contained in other parts of the panel request in order to determine the content of the third measure.

5.43. Furthermore, Russia takes issue with the Panel's statement that there is no single way in which a challenged measure must be identified, and asserts that, instead, the Panel should have relied on the plain meaning of the text of Ukraine's panel request and found that the third measure is Technical Regulation 001/2011 as such, read together with the Protocol of the MOT and the instructions mentioned in Annex III.<sup>131</sup> Ukraine disagrees with Russia that the Panel failed to consider the language contained in the panel request on its face<sup>132</sup>, and submits that the Panel properly considered the panel request as a whole.

5.44. As we have set out above, it is well established that in an analysis under Article 6.2 of the DSU, panels must scrutinize the panel request read as a whole, and on the basis of the language used therein.<sup>133</sup> Russia's proposed reading of the panel request would not take account of the description of the measure in the third narrative paragraph of section II of the panel request and it would thus not constitute a reading "as a whole". Moreover, we agree with the Panel that the reference to "Technical Regulation No. 001/2011 'On safety of railway rolling stock', *read together with* the Protocol of the Ministry of Transport of the Russian Federation regarding issuance by certification authority of the Customs Union of the certificates of conformity for products manufactured by third-countries"<sup>134</sup> indicates that Ukraine was not challenging Technical Regulation 001/2011 "as such", but rather a particular measure expressed in that technical regulation when *read together with* the relevant Protocol of the MOT.<sup>135</sup>

5.45. Finally, Russia also alleges that the Panel failed to properly consider the fact that CU Technical Regulation 001/2011, identified by Ukraine as an element of the third measure, is a complex legal instrument, and that therefore Ukraine was required to specify particular parts that it wished to challenge before the Panel.<sup>136</sup> In support of this argument, Russia submits that the panel in *Australia – Apples* found that whenever a complex and lengthy document is challenged, a panel request shall duly contain a reference to particular parts, sections, or issues to enable a respondent to understand the problem clearly.

5.46. We note that the Panel assessed Ukraine's panel request, taking account of the findings by the panel in *Australia – Apples*. The Panel noted that New Zealand's panel request contained a broad reference to the measures as specified in the final import risk analysis report for apples from New Zealand of November 2006 (FIRA) and then a list of 17 specific measures listed in the FIRA.<sup>137</sup> The identification of the 17 items in the FIRA was found to be sufficiently precise in identifying the specific measures at issue, pursuant to Article 6.2 of the DSU.<sup>138</sup> However, the panel in *Australia – Apples* also found that, given the length and complexity of the FIRA, a broad reference to it was insufficient as identification of a measure at issue in the sense of Article 6.2 of the DSU.<sup>139</sup>

5.47. In its analysis, the Panel noted significant differences between Ukraine's panel request in the present dispute and New Zealand's panel request in *Australia – Apples*. The Panel noted that Ukraine's panel request identifies the measure at issue in different parts of section II, and that it does so with sufficient clarity to allow a reader to discern that the measure is the alleged requirement that Russia's authorities must not recognize certificates issued in other CU countries if the certified products were not produced in a CU country. The Panel further explained that Ukraine's references

<sup>131</sup> Russia's other appellant's submission, para. 21 (referring to Panel Report, para. 7.92).

<sup>132</sup> Ukraine's appellee's submission, para. 51.

<sup>133</sup> Appellate Body Reports, *EC – Bananas III*, para. 142; *EC and certain member States – Large Civil Aircraft*, para. 641; *US – Carbon Steel*, para. 127; *US – Continued Zeroing*, para. 161; *US – Countervailing Measures (China)*, para. 4.7; *EC – Fasteners (China)*, para. 562; *US – Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108.

<sup>134</sup> Ukraine's panel request, section II(3). (emphasis added)

<sup>135</sup> Panel Report, para. 7.93.

<sup>136</sup> Russia's other appellant's submission, para. 33 (referring to Panel Report, *Australia – Apples*, para. 7.1449).

<sup>137</sup> Panel Report, para. 7.101 (referring to Panel Report, *Australia – Apples*, para. 7.1446).

<sup>138</sup> Panel Report, para. 7.101 (referring to Panel Report, *Australia – Apples*, para. 7.1449).

<sup>139</sup> Panel Report, para. 7.101 (referring to Panel Report, *Australia – Apples*, para. 7.1449).



to CU Technical Regulation 001/2011 and the Protocol of the MOT in certain parts of the panel request seemed intended to signal the legal instruments from which the challenged measure flows. In contrast, in *Australia – Apples*, New Zealand attempted to describe the measure at issue as the FIRA, a complex and lengthy legal instrument.<sup>140</sup>

5.48. Accordingly, the Panel did engage with Russia's argument relying on the findings of the panel in *Australia – Apples*. Ultimately, the Panel concluded that the features of the present panel request of Ukraine were different from those of the panel request in *Australia – Apples*. Rather than demonstrating an error in the Panel's application of Article 6.2 of the DSU, Russia disagrees with the reasons given by the Panel for rejecting Russia's argument regarding certain parallels between the panel request at issue and the panel request in *Australia – Apples*.

#### 5.1.4 Conclusion

5.49. Russia has not established that the Panel erred in determining the scope of its terms of reference in this dispute. We therefore uphold the Panel's finding, in paragraphs 8.1.a.i, 8.1.d.iv, and 8.1.d.v of the Panel Report, that Russia has failed to establish that Ukraine's panel request is inconsistent with Article 6.2 of the DSU.

### 5.2 Russia's claims concerning the Panel's findings relating to the third measure

5.50. On appeal, Russia makes four claims regarding the Panel's findings relating to the third measure. First, Russia claims that the Panel erred under Articles 6.2, 7.1, and 11 of the DSU in finding that the third measure as described by the Panel was within its terms of reference.<sup>141</sup> Second, Russia claims that the Panel erred under Article 11 of the DSU by making findings regarding the alleged local registration condition after it had found that aspect as it relates to the third measure to be outside its terms of reference.<sup>142</sup> Third, Russia claims that the Panel erred under Article 11 of the DSU by relieving Ukraine from "the necessity of establishing a *prima facie* case" with respect to the existence of the third measure as a single measure capable of being challenged under the DSU.<sup>143</sup> Lastly, Russia claims that the Panel erred under Article 11 of the DSU in finding that the third measure is of a "general" character and "flows from" CU Technical Regulation 001/2011, and that the third measure had been demonstrated to exist.<sup>144</sup>

5.51. We begin with a summary of the relevant findings by the Panel, and Russia's and Ukraine's arguments on appeal. We then proceed to assess Russia's claims concerning the Panel's findings relating to the third measure.

#### 5.2.1 The Panel's findings

5.52. Before the Panel, Ukraine challenged the decision by the Russian authorities not to recognize in its territory the validity of certificates issued to producers of Ukrainian railway products in other CU countries as a measure that the Panel referred to as the third measure.<sup>145</sup> As evidence establishing the existence of this measure, Ukraine submitted to the Panel certain letters issued by the Russian Federal Agency for Railway Transport (ART) as follows<sup>146</sup>: (i) the January 2015 letter, to which Protocol No. A 4-3 of the MOT was attached (the January 2015 letter); (ii) the letter sent on 4 February 2016 (the February 2016 letter); and (iii) the letter of 10 August 2016 (the

<sup>140</sup> Panel Report, para. 7.102.

<sup>141</sup> Russia's other appellant's submission, section 3.

<sup>142</sup> Russia's other appellant's submission, section 4.

<sup>143</sup> Russia's other appellant's submission, section 5.

<sup>144</sup> Russia's other appellant's submission, section 6.

<sup>145</sup> Panel Report, para. 7.811 (referring to Ukraine's first written submission to the Panel, para. 373).

See also *ibid.*, para. 7.808.

<sup>146</sup> Panel Report, paras. 7.811 and 7.841. See also Letter from the Federal Agency for Railway Transport of the MOT to JSC [BCI] accompanied to Protocol No. A 4-3 of 20 January 2015 of the MOT regarding issuance by the certification authority of the CU of the certificates of conformity for products manufactured by third countries (Panel Exhibit UKR-48 (BCI)); Letter dated 4 February 2016 from the Federal Agency for Railway Transport to [BCI] on validity of certificates (Panel Exhibit UKR-49 (BCI)); Letter dated 10 August 2016 from the Federal Agency for Railway Transport to JSC [BCI] on validity of certificates (Panel Exhibit UKR-141 (BCI)). We refer to the translated English versions of the Panel exhibits.

August 2016 letter).<sup>147</sup> Based on these letters, Ukraine argued before the Panel that the decision not to recognize the validity of certificates issued to Ukrainian producers in other countries was based on the relevant Russian authorities' interpretation of CU Technical Regulation 001/2011.<sup>148</sup> Specifically, Ukraine argued that the relevant Russian authorities interpreted CU Technical Regulation 001/2011 as setting out the following two requirements: (i) the requirement that only products manufactured in the territory of the CU may be subject to certification under CU Technical Regulation 001/2011 (the local production condition); and (ii) the requirement that only entities registered in the same country as the relevant certification body can apply for certification (the local registration condition).<sup>149</sup>

5.53. In response, Russia submitted that what the panel request identified as the third measure was CU Technical Regulation 001/2011, rather than the decision not to recognize the validity of certificates issued to Ukrainian producers in other countries.<sup>150</sup> Thus, Russia argued before the Panel that the third measure challenged by Ukraine in its first written submission to the Panel was "different from the measure identified in [Ukraine's] panel request" and that it was therefore outside the Panel's terms of reference.<sup>151</sup> On this basis, Russia also contended that its due process right to know what case it has to defend had been prejudiced.<sup>152</sup>

5.54. The Panel considered that the issue before it was whether the third measure as described in Ukraine's written submissions was "different from the measure that is identified in the panel request".<sup>153</sup> The Panel recalled that, in its preliminary ruling, it had already rejected Russia's claim that Ukraine had failed to identify the third measure with sufficient clarity in its panel request. The Panel noted that the third measure as described in Ukraine's panel request concerned "an alleged requirement that Russia's authorities consider to flow from CU Technical Regulation 001/2011".<sup>154</sup> Under this requirement, the Russian authorities must not recognize certificates issued to Ukrainian producers in other CU countries, unless the local production condition and the local registration condition are met. Concerning the local production condition, the Panel observed that the third narrative paragraph of Ukraine's panel request specifically identifies it as a basis for Ukraine's claim.<sup>155</sup> Accordingly, **the Panel found it "clear ... from the analysis of the panel request ... that any challenge to the alleged requirement that Russia's authorities must not recognize certificates issued in other CU countries if the certified products were not produced in a CU country is within [the Panel's] terms of reference"**.<sup>156</sup> However, the Panel noted that the local registration condition was not expressly mentioned in Ukraine's panel request.<sup>157</sup> The Panel took the view that the panel request does not give adequate notice to Russia and third parties about Ukraine's claim with respect to the local registration condition. Hence, the Panel concluded that Ukraine's claim concerning non-recognition resulting from a failure to meet the alleged local registration condition was not within the Panel's terms of reference.<sup>158</sup>

5.55. The Panel then turned to the alleged difference between the descriptions of the third measure in Ukraine's panel request and in its written submissions in the context of defining the Panel's terms of reference. The Panel noted that the description of the third measure in Ukraine's written

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<sup>147</sup> Panel Report, para. 7.841, table 7. See also Letter from the Federal Agency for Railway Transport of the MOT to JSC [BCI] accompanied to Protocol No. A 4-3 of 20 January 2015 of the MOT regarding issuance by the certification authority of the CU of the certificates of conformity for products manufactured by third countries (Panel Exhibit UKR-48 (BCI)); Letter dated 4 February 2016 from the Federal Agency for Railway Transport to [BCI] on validity of certificates (Panel Exhibit UKR-49 (BCI)); Letter dated 10 August 2016 from the Federal Agency for Railway Transport to JSC [BCI] on validity of certificates (Panel Exhibit UKR-141 (BCI)). The January 2015 letter (along with Protocol No. A 4-3) and the February 2016 letter were listed in Annex III to the panel request (see Ukraine's panel request, Annex III), whereas the August 2016 letter was submitted by Ukraine with its second written submission (see Ukraine's second written submission to the Panel, para. 444 and fn 462 thereto).

<sup>148</sup> Panel Report, para. 7.812.

<sup>149</sup> Panel Report, para. 7.813 (referring to Ukraine's first written submission to the Panel, paras. 375-376; responses to Panel questions Nos. 23, 26, and 36).

<sup>150</sup> Panel Report, para. 7.818.

<sup>151</sup> Panel Report, paras. 7.809 and 7.818-7.819.

<sup>152</sup> Panel Report, para. 7.819.

<sup>153</sup> Panel Report, para. 7.822.

<sup>154</sup> Panel Report, para. 7.823.

<sup>155</sup> Panel Report, para. 7.823 (referring to Ukraine's panel request, p. 2).

<sup>156</sup> Panel Report, para. 7.823. See also *ibid.*, para. 8.1.d.i.

<sup>157</sup> Panel Report, para. 7.824.

<sup>158</sup> Panel Report, para. 7.825.

submissions to the Panel was "somewhat different" from the description in the panel request.<sup>159</sup> However, the Panel considered that "what matters for purposes of [its] assessment of ... the third measure is not so much what terms Ukraine has employed", but rather "whether Ukraine has demonstrated the existence of the measure that Ukraine has identified in the panel request".<sup>160</sup> In this regard, the Panel noted that the reference to Russia's decision regarding the meaning and scope of CU Technical Regulation 001/2011 in Ukraine's panel request indicates that the alleged non-recognition finds its basis in that regulation as interpreted by Russia. As such, the Panel understood the third measure in the panel request to mean "the alleged non-recognition requirement flowing from CU Technical Regulation 001/2011".<sup>161</sup>

5.56. Having clarified the scope of its terms of reference in relation to the third measure, the Panel proceeded to examine whether Ukraine had demonstrated the existence of the measure the Panel found to have been identified in the panel request.<sup>162</sup> Based on its analysis of the three letters submitted by Ukraine as evidence of the existence of the third measure, the Panel found that the Russian authorities "decided that the relevant certificates issued by Belarus' certification body were not valid in Russia's territory".<sup>163</sup> The Panel noted that each decision in the three letters "was based explicitly on the provisions of CU Technical Regulation 001/2001" as interpreted by the Russian authorities and applied to the certificates at issue, according to which a certificate cannot be validly issued under Articles 1(1) and 6(9) of that regulation unless, respectively, the local production condition and the local registration condition are satisfied.<sup>164</sup> The Panel's understanding was confirmed by two of the letters, which "explicitly state that the relevant certificates were issued by Belarus in 'violation' of CU Technical Regulation 001/2011 because Belarus had not enforced the two requirements".<sup>165</sup> In the Panel's view, the evidence submitted by Ukraine indicated that the Russian authorities did not independently "decide" to establish a new general non-recognition requirement. Instead, the requirements flowed from CU Technical Regulation 001/2011 as the Russian authorities interpreted it.<sup>166</sup> The Panel found this to be consistent with the third measure as described in the panel request.

5.57. The Panel rejected Russia's argument that Protocol No. A 4-3 is a non-binding document that merely records the opinions of representatives of various Russian railway-related bodies. The Panel considered that Protocol No. A 4-3 reveals that the competent authorities "reached a particular view on the scope of CU Technical Regulation 001/2011" and took "decisions" and specific actions on the certificates at issue based on that view.<sup>167</sup> Furthermore, the Panel saw no merit in Russia's argument that neither the MOT nor the Russian Federal ART was authorized to decide on the recognition of certificates issued in other CU countries or to interpret CU Technical Regulation 001/2011 under Russian law. For the Panel, the question whether the relevant authorities had acted within their remit under domestic law had no relevance for its analysis, which rather hinged on "what these authorities actually did or did not do".<sup>168</sup>

5.58. Moreover, the Panel saw no merit in Russia's argument that Protocol No. A 4-3 and the letters concerned products from only two Ukrainian producers and that therefore these documents were

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<sup>159</sup> Panel Report, para. 7.827.

<sup>160</sup> Panel Report, para. 7.828.

<sup>161</sup> Panel Report, para. 7.828. (emphasis added)

<sup>162</sup> Panel Report, para. 7.829.

<sup>163</sup> Panel Report, para. 7.846. The Russian authorities stated in the January 2015 letter and the attached Protocol No. A 4-3 that CU Technical Regulation 001/2011 applies to products manufactured in the territory of the CU. In the February 2016 letter and the August 2016 letter, the Russian authorities stated that Articles 1(1) and 6(9) of CU Technical Regulation 001/2011 provide for the local production condition and the local registration condition, respectively, and that certain certificates issued by the Belarusian authorities to Ukrainian imports were in violation of CU Technical Regulation 001/2011. For these reasons, the Russian authorities decided that the certificates at issue in all three letters were not valid within Russia's territory. (See Panel Report, para. 7.841 and table 7; Letter from the Federal Agency for Railway Transport of the MOT to JSC [BCI] accompanied to Protocol No. A 4-3 of 20 January 2015 of the MOT regarding issuance by the certification authority of the CU of the certificates of conformity for products manufactured by third countries (Panel Exhibit UKR-48 (BCI)); Letter dated 4 February 2016 from the Federal Agency for Railway Transport to [BCI] on validity of certificates (Panel Exhibit UKR-49 (BCI)); Letter dated 10 August 2016 from the Federal Agency for Railway Transport to JSC [BCI] on validity of certificates (Panel Exhibit UKR-141 (BCI)))

<sup>164</sup> Panel Report, paras. 7.846-7.847.

<sup>165</sup> Panel Report, para. 7.847.

<sup>166</sup> Panel Report, para. 7.854.

<sup>167</sup> Panel Report, para. 7.843.

<sup>168</sup> Panel Report, para. 7.851. See also *ibid.*, para. 7.845.

not of general application. The Panel recalled that CU Technical Regulation 001/2011 is a regulation of general application, and found that "[n]othing in the Protocol or the ... letters" suggested that the interpretation of CU Technical Regulation 001/2011 by the Russian authorities "would not be generally applicable and would apply only to Ukrainian products".<sup>169</sup> The Panel also recalled that Protocol No. A 4-3 "state[d] that the underlying meeting concerned 'certificates of conformity for products manufactured by third-countries', which countries include, but are not limited to Ukraine".<sup>170</sup> The Panel considered these findings to support its view that the relevant documents provided a "general interpretation"<sup>171</sup>, whereby the Russian authorities would not recognize a certificate issued under CU Technical Regulation 001/2011 in another CU country unless the local production and the local registration conditions are met.<sup>172</sup>

5.59. Russia also referred to Article 53 of the Treaty on the Eurasian Economic Union (EAEU Treaty) in support of its argument that it did not apply the local production condition. According to Russia, this provision provides that a product that conforms to CU technical regulations must be permitted to circulate freely across the territory of the CU. In the Panel's view, however, the letters it examined explicitly state that the certificates issued by Belarus were issued in violation of CU technical regulations. While the Panel acknowledged that there is indeed evidence that Russia had itself *issued* certificates under CU Technical Regulation 001/2011 to producers located in third countries, the Panel found that there is no evidence that Russia actually *recognized* a certificate issued under CU Technical Regulation 001/2011 by another CU country to producers outside the CU within the relevant time period. The Panel thus found that Russia did not rebut Ukraine's evidence concerning *non-recognition* that shows that a local production condition was enforced.<sup>173</sup>

5.60. In light of the foregoing considerations, the Panel concluded that "the third measure ha[d] been demonstrated to exist."<sup>174</sup> In particular, the Panel found that the relevant Russian authorities applied "a general non-recognition requirement, which these authorities considered to flow from CU Technical Regulation 001/2011 as they interpreted it", according to which the Russian authorities were not to recognize certificates issued under CU Technical Regulation 001/2011 in other CU countries unless the local production condition and the local registration condition were met.<sup>175</sup> However, the Panel also noted that "the non-recognition requirement falls within the Panel's terms of reference only to the extent that it requires non-recognition in situations where the certified products were not produced in a CU country."<sup>176</sup>

## 5.2.2 Russia's claim that the Panel erred in finding the existence of the third measure

### 5.2.2.1 Arguments on appeal

5.61. On appeal, Russia requests that we reverse the Panel's finding that the third measure has been demonstrated to exist and that the evidence on the record supports the conclusion that the relevant Russian authorities applied a general non-recognition requirement, which these authorities considered to flow from CU Technical Regulation 001/2011 as they interpreted it.<sup>177</sup> Russia submits that, in reaching that finding, the Panel failed to conduct an objective assessment under Article 11 of the DSU.

5.62. In support of its position, Russia submits that the application of CU Technical Regulation 001/2011 is not limited to products manufactured within the CU, but that it applies equally to products manufactured outside the CU. Furthermore, Russia contends that it had submitted evidence to the Panel demonstrating that CU Technical Regulation 001/2011 had in fact been applied to imports of railway products manufactured in third countries.<sup>178</sup> Russia submits that

<sup>169</sup> Panel Report, para. 7.850.

<sup>170</sup> Panel Report, para. 7.850.

<sup>171</sup> Panel Report, para. 7.850.

<sup>172</sup> Panel Report, para. 7.853.

<sup>173</sup> Panel Report, para. 7.856.

<sup>174</sup> Panel Report, para. 7.861.

<sup>175</sup> Panel Report, para. 7.861.

<sup>176</sup> Panel Report, para. 7.862.

<sup>177</sup> Russia's other appellant's submission, para. 159 (referring to Panel Report, para. 7.861).

<sup>178</sup> Russia's other appellant's submission, para. 149.

the alleged non-recognition requirement could not have flowed from CU Technical Regulation 001/2011 and could not be of a general character.<sup>179</sup>

5.63. Furthermore, Russia asserts that because Ukraine's panel request referred to CU Technical Regulation 001/2011 in the description of the third measure, the Panel was required to conduct a detailed examination of the regulation, starting with its text. In failing to engage sufficiently with the text of the regulation, the Panel failed to conduct an objective assessment of the matter.<sup>180</sup> Russia argues that the text of CU Technical Regulation 001/2011 is "origin neutral" and that it does not contain any provision requiring Russian authorities not to recognize the certificates issued by authorities of other CU countries for goods manufactured outside the CU.<sup>181</sup> According to Russia, this was also supported by Article 53 of the EAEU Treaty, which both the Panel and Ukraine acknowledged to require that products subject to technical regulations of the CU be put into circulation within the whole CU without additional requirements or conformity assessment procedures.<sup>182</sup> Finally, Russia alleges that the Panel failed to consider its argument that the Russian authorities that issued the letters the Panel relied on were not competent to interpret CU Technical Regulation 001/2011.<sup>183</sup>

5.64. Ukraine requests that we uphold the Panel's conclusion that the third measure, as described by the Panel as a general non-recognition requirement, which the Russian authorities considered to flow from CU Technical Regulation 001/2011 as they interpreted it, had been demonstrated to exist.<sup>184</sup> First, with respect to Russia's argument that the Panel erred by finding that the third measure "flows from" CU Technical Regulation 001/2011, Ukraine disagrees with Russia that the Panel of its own motion found that the third measure flows from CU Technical Regulation 001/2011. Ukraine submits that the relevant Russian authorities *themselves* interpreted the regulation to establish the non-recognition requirement.<sup>185</sup>

5.65. With respect to Russia's argument that the Panel erred by not examining CU Technical Regulation 001/2011, Ukraine argues that since the third measure was not CU Technical Regulation 001/2011 "*per se*"<sup>186</sup>, the Panel was under no obligation to examine that document separately from Protocol No. A 4-3 and the other instruments.<sup>187</sup> In any event, Ukraine submits that the Panel did examine CU Technical Regulation 001/2011, albeit not in its analysis of the third measure.<sup>188</sup>

5.66. In addition, Ukraine submits that the Panel was not required to examine whether Russia's authorities correctly understood or had the authority under Russian law to interpret CU Technical Regulation 001/2011.<sup>189</sup> For Ukraine, it was correct of the Panel not to engage with the question whether or not the MOT or the Russian Federal ART was competent to interpret CU Technical Regulation 001/2011. Rather, what mattered for the purpose of the Panel's analysis was that the non-recognition requirement "was actually made operative in practice with respect to Ukrainian producers as a result of the decision made by the Russian authorities".<sup>190</sup>

### 5.2.2.2 Analysis

5.67. As part of its objective assessment of the matter under Article 11 of the DSU, a panel must "thoroughly scrutinize the measure before it, both in its design and in its operation, and identify its

<sup>179</sup> Russia's other appellant's submission, paras. 154 and 157.

<sup>180</sup> Russia's other appellant's submission, para. 133.

<sup>181</sup> Russia's other appellant's submission, para. 148. (emphasis omitted)

<sup>182</sup> Russia's other appellant's submission, para. 151. Specifically, Russia argues that, according to Article 53 of the EAEU Treaty, products that are subject to technical regulations of the CU are put into circulation within the territory of the whole CU after completion of the necessary conformity assessment procedure and that CU countries must ensure the circulation of the products that conform to CU technical regulations within their respective territories without introducing any requirements additional to those set out in the CU technical regulations or any additional conformity assessment procedures. (Ibid.)

<sup>183</sup> Russia's other appellant's submission, para. 155 (referring to Panel Report, para. 7.851).

<sup>184</sup> Ukraine's appellee's submission, paras. 176-177 and 186-187.

<sup>185</sup> Ukraine's appellee's submission, paras. 167-168.

<sup>186</sup> Ukraine's appellee's submission, para. 171.

<sup>187</sup> Ukraine's appellee's submission, para. 172.

<sup>188</sup> Ukraine's appellee's submission, para. 170 (referring to Panel Report, paras. 7.592-7.595 and 7.619).

<sup>189</sup> Ukraine's appellee's submission, para. 180.

<sup>190</sup> Ukraine's appellee's submission, para. 181.

principal characteristics".<sup>191</sup> This entails identifying "all relevant characteristics of the measure", recognizing "which features are the most central to that measure itself", and "which are to be accorded the most significance for purposes of characterizing the relevant [measure]".<sup>192</sup> Exactly what is required for a panel to do so is bound to vary depending on the circumstances of each case, the evidence proffered by the parties, and the nature of the measure itself.<sup>193</sup> In this regard, panels enjoy a margin of discretion to structure their assessment as they see fit, provided they proceed "on the basis of a properly structured analysis"<sup>194</sup>, provide "reasoned and adequate explanations and coherent reasoning"<sup>195</sup>, base their findings on a "sufficient evidentiary basis"<sup>196</sup>, treat evidence with "even-handedness"<sup>197</sup>, and carry out a "holistic assessment" of all pertinent elements before reaching its conclusions.<sup>198</sup>

5.68. Furthermore, the Appellate Body cannot base a finding of inconsistency under Article 11 simply on the conclusion that it might have reached a different factual finding from the one the panel reached.<sup>199</sup> It is therefore not sufficient for a participant raising a claim under Article 11 simply to disagree with a panel.<sup>200</sup> In addition, the Appellate Body has stated that not every error in the appreciation of a particular piece of evidence will rise to the level of a failure by a panel to comply with its duties under Article 11 of the DSU. To find that a panel acted inconsistently with Article 11, the Appellate Body would have to be satisfied that the panel's errors, taken together or singly, undermine the objectivity of the panel's assessment of the matter before it.<sup>201</sup>

5.69. With these considerations in mind, we turn to address Russia's claim that the Panel erred under Article 11 of the DSU in finding the existence of the third measure as a "general" non-recognition requirement that "flows from" CU Technical Regulation 001/2011.

5.70. We first turn to Russia's argument that Ukraine's "[p]anel [r]equest specifies the matter as CU Technical Regulation 001/2011 and thus it is the *obligation* of the Panel to examine CU Technical Regulation 001/2011, including its content".<sup>202</sup> This contention appears to be based on the proposition that the third measure consists of CU Technical Regulation 001/2011 as such.<sup>203</sup> However, as we have found above, the third measure as identified by Ukraine was the alleged decision by the relevant Russian authorities that they will not recognize the validity of certificates issued for Ukrainian railway products by certification bodies in other CU countries unless the products were manufactured within the CU.<sup>204</sup> The Panel examined the three letters submitted by Ukraine as evidence of this measure and made a factual finding that these documents showed that the relevant Russian authorities *themselves* interpreted Article 1(1) of CU Technical Regulation 001/2011 as imposing the non-recognition requirement based on, *inter alia*, the local production condition, and applied it on Ukrainian railway imports to come to a decision not to recognize certificates issued to

<sup>191</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 586 (quoting Appellate Body Reports, *China – Auto Parts*, para. 171).

<sup>192</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 586 (quoting Appellate Body Reports, *China – Auto Parts*, para. 171). (emphasis original) See also e.g. Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.156.

<sup>193</sup> Appellate Body Report, *US – Carbon Steel*, para. 157. See also e.g. Appellate Body Reports, *Argentina – Import Measures*, para. 5.110.

<sup>194</sup> Appellate Body Report, *Colombia – Textiles*, para. 5.20 (quoting Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 127).

<sup>195</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 713 (quoting Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, fn 618 to para. 293). See also e.g. Appellate Body Report, *Russia – Commercial Vehicles*, paras. 5.76-5.77.

<sup>196</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 713. See also e.g. Appellate Body Report, *US – Carbon Steel*, para. 142.

<sup>197</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 713 (quoting Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 292).

<sup>198</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.156.

<sup>199</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1317 (referring to Appellate Body Reports, *US – Wheat Gluten*, para. 151; *EC – Sardines*, para. 299; *US – Carbon Steel*, para. 142; quoting Appellate Body Report, *US – Wheat Gluten*, para. 151).

<sup>200</sup> Appellate Body Reports, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 992; *China – Rare Earths*, paras. 5.178-5.179.

<sup>201</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1318.

<sup>202</sup> Russia's other appellant's submission, para. 134. (emphasis original)

<sup>203</sup> For example, in advancing this argument, Russia stresses that "the [p]anel [r]equest specifies the matter as CU Technical Regulation 001/2011." (Russia's other appellant's submission, para. 134)

<sup>204</sup> Panel Report, paras. 7.811-7.813.

these Ukrainian imports in other CU countries.<sup>205</sup> Thus, the Panel did not interpret of its own motion CU Technical Regulation 001/2011 to find that the third measure *in fact* "flows from" that regulation. Rather, the Panel found, as a factual matter based on its examination of the three letters, that the relevant Russian authorities themselves indicated CU Technical Regulation 001/2011 as the source of the third measure as Ukraine identified in its panel request.<sup>206</sup>

5.71. Next, we turn to Russia's reliance on Article 53 of the EAEU Treaty.<sup>207</sup> Russia contends that this provision requires that products subject to technical regulations of the CU be put into circulation within the whole CU without additional requirements or conformity assessment procedures. For Russia, this demonstrates that the non-recognition requirement challenged by Ukraine does not exist.<sup>208</sup> In this respect, we note that the Panel reviewed the three letters provided by Ukraine as evidence of the third measure and found that the relevant Russian authorities decided that the relevant certificates issued by the Belarusian certification body were not valid in Russia's territory. This decision was expressly based on the provisions of CU Technical Regulation 001/2011, which the Russian authorities interpreted as imposing the local production condition and the local registration condition.<sup>209</sup> In our view, the Panel thus found that the non-recognition requirement challenged by Ukraine did in fact exist, notwithstanding the argument by Russia that such a requirement would be in breach of Article 53 of the EAEU Treaty. Thus, for the Panel, evidence regarding whether or not the third measure is permitted under Article 53 of the EAEU Treaty was not probative in determining whether the third measure existed in reality.

5.72. We now turn to Russia's assertion that the Panel did not consider its argument that neither the MOT nor the Russian Federal ART had the authority to interpret CU Technical Regulation 001/2011.<sup>210</sup> We note that the Panel indeed addressed this argument.<sup>211</sup> In particular, the Panel explicitly noted Russia's argument that neither the MOT nor the Russian Federal ART had the authority to interpret CU Technical Regulation 001/2011.<sup>212</sup> The Panel then recalled Protocol No. A 4-3 and the letters, and found that it is clear from these documents that the Russian authorities reached a conclusion on the meaning and scope of certain provisions of CU Technical Regulation 001/2011 and based their decisions on it.<sup>213</sup> In the presence of evidence of what the Russian authorities actually did according to these letters, the Panel concluded that whether or not the relevant Russian authorities had the power to interpret CU Technical Regulation 001/2011 and whether they interpreted it correctly was not relevant to its analysis. Instead, the Panel found that what is relevant for its analysis was what the Russian authorities actually did or did not do<sup>214</sup>, which the Panel discerned from Protocol No. A 4-3 and the letters. From our review of the Panel's analysis, we do not see that the Panel "did not consider" or "disregarded" Russia's arguments that neither the MOT nor the Russian Federal ART had the authority to interpret CU Technical Regulation 001/2011. Rather, the Panel did consider these arguments in light of its finding of what the relevant Russian authorities actually did.

5.73. In addition, we do not consider that Russia has established that the Panel erred in finding that the competence of the MOT and the Russian Federal ART to interpret CU Technical Regulation 001/2011 is not relevant for the purpose of assessing the existence of the third measure. We recall that the third measure at issue did not include CU Technical Regulation 001/2011 *per se*, but consisted of the alleged non-recognition requirement that the relevant Russian authorities themselves considered to flow from CU Technical Regulation 001/2011 according to their interpretation. As such, we do not see the relevance of the competence of the relevant Russian authorities to interpret CU Technical Regulation 001/2011 in determining whether the third measure exists.

5.74. Finally, we turn to Russia's argument that a "general" non-recognition requirement that "flows from" CU Technical Regulation 001/2011 did not exist because it was CU Technical Regulation 001/2011 (as opposed to the alleged non-recognition requirement) that applied to all

<sup>205</sup> Panel Report, para. 7.847.

<sup>206</sup> Panel Report, paras. 7.828 and 7.846-7.847.

<sup>207</sup> See para. 5.60 above.

<sup>208</sup> Russia's other appellant's submission, para. 151.

<sup>209</sup> Panel Report, paras. 7.846-7.847.

<sup>210</sup> Russia's other appellant's submission, para. 155.

<sup>211</sup> Panel Report, para. 7.851.

<sup>212</sup> Panel Report, para. 7.851.

<sup>213</sup> Panel Report, para. 7.851.

<sup>214</sup> Panel Report, para. 7.851.

products regardless of their location of manufacture.<sup>215</sup> Russia's assertion is based on the evidence of Russia's issuance of certificates under CU Technical Regulation 001/2011 to producers outside the CU territory.<sup>216</sup> In this regard, we recall that the measure subject to the Panel's inquiry was the *non-recognition* by Russia of certificates already issued under CU Technical Regulation 001/2011 to products manufactured in other CU countries.<sup>217</sup> The Panel stated that the third measure at issue concerned "only the non-recognition by Russia of certificates already issued to Ukrainian producers under CU Technical Regulation 001/2011 in other CU countries" but "[i]t does not concern non-certification by Russia"<sup>218</sup>, i.e. issuance of certificates under CU Technical Regulation 001/2011 by the Russian authorities. The evidence submitted by Russia, however, relates to Russia's *issuance* of certificates under CU Technical Regulation 001/2011. Specifically, Russia submitted to the Panel that it had issued certificates under CU Technical Regulation 001/2011 and subsequent amendments to producers located in Austria, Czech Republic, Germany, Hungary, Italy, Japan, Spain, Switzerland, and the United Kingdom.<sup>219</sup> While the Panel acknowledged that "there is indeed evidence that Russia ha[d] itself issued certificates under CU Technical Regulation 001/2011 to producers located in third countries", it ultimately found that **"there is no evidence that ... Russia actually allowed registration and importation of products produced outside the CU and covered by a certificate issued under CU Technical Regulation 001/2011 by another CU country."**<sup>220</sup> We agree with the Panel that "Russia [had] therefore not rebutted Ukraine's evidence concerning non-recognition that shows that a production condition was enforced" on the basis of evidence relating to the Russian authorities' *issuance* of new certificates.<sup>221</sup>

### 5.2.2.3 Conclusion

5.75. Russia has not established that the Panel acted inconsistently with Article 11 of the DSU in finding that the third measure is of a "general" character and flows from CU Technical Regulation 001/2011. We therefore uphold the Panel's finding, in paragraph 7.861 of the Panel Report, that the third measure as a general non-recognition requirement, which the relevant Russian authorities considered to flow from CU Technical Regulation 001/2011, had been demonstrated to exist.

## 5.2.3 Russia's claim that the Panel erred by relieving Ukraine from the necessity of establishing a *prima facie* case that the third measure exists as a single measure

### 5.2.3.1 Arguments on appeal

5.76. Russia requests us to reverse the Panel's finding that the third measure had been demonstrated to exist. Russia asserts that the Panel failed to conduct an objective assessment under Article 11 of the DSU by impermissibly relieving Ukraine of the duty to make a *prima facie* case with respect to the existence of "a single measure composed of several different documents".<sup>222</sup> Relying on the Appellate Body Reports in *Argentina – Import Measures*, Russia submits that a complainant challenging such a measure will "normally need to provide evidence of how the different components operated together as part of a single measure and how a single measure exists as distinct from its components".<sup>223</sup> Thus, in Russia's view, Ukraine was required to make a *prima facie* case with respect to the existence of the third measure as a single measure.<sup>224</sup> Russia contends that Ukraine proceeded from "an unsubstantiated presumption of existence of a single measure capable of being challenged".<sup>225</sup> Russia also argues that the different documents identified in Ukraine's panel request, namely, CU Technical Regulation 001/2011 and the letters, have different legal force and scope of

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<sup>215</sup> Russia's other appellant's submission, para. 150.

<sup>216</sup> Russia's other appellant's submission, paras. 149-150.

<sup>217</sup> Panel Report, para. 7.829.

<sup>218</sup> Panel Report, para. 7.829.

<sup>219</sup> Russia's other appellant's submission, para. 149 (referring to Russia's response to Panel question No. 107).

<sup>220</sup> Panel Report, para. 7.856.

<sup>221</sup> Panel Report, para. 7.856.

<sup>222</sup> Russia's other appellant's submission, paras. 112-113. (emphasis omitted)

<sup>223</sup> Russia's other appellant's submission, para. 108 (quoting Appellate Body Reports, *Argentina – Import Measures*, para. 5.108).

<sup>224</sup> Russia's other appellant's submission, para. 112.

<sup>225</sup> Russia's other appellant's submission, para. 114.



application and that Ukraine was therefore required to explain how these different instruments operated together as a single measure.<sup>226</sup>

5.77. In response, Ukraine contends that it provided sufficient evidence and arguments to establish a *prima facie* case that the third measure existed as a single measure.<sup>227</sup> According to Ukraine, the decision not to recognize the validity of certificates issued to Ukrainian railway products by other CU countries is found in Protocol No. A 4-3 and the letters listed in Annex III to the panel request. Ukraine contends that these documents "clearly demonstrate that the Russian Federation imposed additional requirements", namely, the local production condition and the local registration condition, and that the Russian authorities themselves relied on the text of CU Technical Regulation 001/2011 as a source of these additional requirements.<sup>228</sup> Furthermore, Ukraine asserts that the instructions mentioned in Annex III to its panel request "illustrat[e] the practical realization of the single measure".<sup>229</sup> With respect to Russia's argument based on the alleged differences in the legal force and scope of the different documents, Ukraine contends that the decision not to accept in the territory of Russia the validity of the conformity assessment certificates issued in other CU countries was explicitly prescribed in the letters identified in Annex III to its panel request, irrespective of the nature of these documents.<sup>230</sup>

### 5.2.3.2 Analysis

5.78. We begin by recalling that "any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings."<sup>231</sup> In identifying a measure and its characteristics, we have referred above to the standard under Article 11 of the DSU, which requires a panel to "thoroughly scrutinize the measure before it, both in its design and in its operation, and identify its principal characteristics".<sup>232</sup> Exactly what is required for a panel to do so is bound to vary depending on the circumstances of each case.<sup>233</sup> Panels enjoy a margin of discretion to structure their assessment as they see fit, and they do not err under Article 11 of the DSU unless they exceed their authority as the trier of facts.<sup>234</sup> In terms of the question whether a complainant has met its *prima facie* case to show the relevant features of the measure, a complainant need not definitively persuade a panel of the soundness of its position. Instead, a complainant meets its *prima facie* burden by presenting sufficient arguments and evidence "to raise a presumption in favour of its claim".<sup>235</sup>

5.79. In the present case, the Panel found that Ukraine's challenge was directed at Russia's decision not to recognize the validity of certificates issued for Ukrainian railway products by certification bodies in other CU countries. The Panel considered Ukraine's submission that this decision can be found in Protocol No. A 4-3 and two individual decisions contained in the letters listed in Annex III to Ukraine's panel request. The Panel also understood Ukraine to argue that Russia based its alleged decisions contained in Protocol No. A 4-3 and the letters on its interpretation of CU Technical Regulation 001/2011.<sup>236</sup> The Panel then proceeded with its own examination of the evidence to assess the arguments and evidence put forward by Ukraine. Specifically, the Panel examined Protocol No. A 4-3 and the letters at issue, and noted that they indicate that the Russian authorities decided that the relevant certificates issued by the Belarusian certification body were not valid in

<sup>226</sup> Russia's other appellant's submission, paras. 115-116.

<sup>227</sup> Ukraine's appellee's submission, para. 154 (referring to Ukraine's first written submission to the Panel, paras. 351-378; second written submission to the Panel, paras. 320-381).

<sup>228</sup> Ukraine's appellee's submission, para. 155 (referring to Ukraine's first written submission to the Panel, para. 373).

<sup>229</sup> Ukraine's appellee's submission, para. 162.

<sup>230</sup> Ukraine's appellee's submission, para. 163.

<sup>231</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81. See also e.g. Appellate Body Report, *Australia – Apples*, para. 171.

<sup>232</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 586 (quoting Appellate Body Reports, *China – Auto Parts*, para. 171).

<sup>233</sup> Appellate Body Report, *US – Carbon Steel*, para. 157. See also e.g. Appellate Body Reports, *Argentina – Import Measures*, para. 5.110.

<sup>234</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 713. See also e.g. Appellate Body Report, *US – Wheat Gluten*, para. 151.

<sup>235</sup> Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 66. See also e.g. Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 134.

<sup>236</sup> Panel Report, paras. 7.811-7.812 (referring to Ukraine's first written submission to the Panel, paras. 4, 315, 373, 377, and 398; second written submission to the Panel, para. 339).

Russia's territory.<sup>237</sup> The documents at issue also indicated that these decisions were the result of the Russian authorities' interpretation of CU Technical Regulation 001/2011 that a certificate cannot be validly issued under the regulation unless, *inter alia*, the products were manufactured within the CU territory.<sup>238</sup> In the Panel's view, the decisions at issue were explicitly based on CU Technical Regulation 001/2011 as interpreted by the Russian authorities themselves.

5.80. Contrary to what Russia asserts on appeal, the Panel did not base its finding that the third measure existed on an unsubstantiated presumption of existence of a single measure capable of being challenged. Rather, the Panel assessed the relationships and interactions among the different instruments at issue and confirmed that: (i) the alleged decisions not to recognize certificates issued under CU Technical Regulation 001/2011 in other CU countries to products manufactured outside the CU territory were contained in Protocol No. A 4-3 and the letters submitted by Ukraine as evidence; and (ii) these decisions were based on the Russian authorities' interpretation of CU Technical Regulation 001/2011. Accordingly, the Panel assessed the arguments and evidence put forward by Ukraine in order to make a *prima facie* case that the third measure existed as a single measure.

5.81. In any event, we note that Russia's claim is based on its assertion that differences in the legal force and scope of application of the different documents proffered as evidence of a single measure *must* be taken into consideration, on the basis of the panel's finding in *US – COOL*.<sup>239</sup> However, we do not see that panel's statement to stand for the proposition Russia puts forward. In particular, the question before the panel in *US – COOL* was whether to treat several requirements or provisions as a single measure or multiple measures, which is different from the question of what arguments and evidence are required for establishing a *prima facie* case regarding the existence of a single measure as we face here.<sup>240</sup> In addition, with respect to the question whether to treat several requirements or provisions as a single measure or multiple measures, the panel in *US – COOL* did not set out any specific criteria, but stressed that the analysis requires case-specific considerations.<sup>241</sup>

### 5.2.3.3 Conclusion

5.82. Russia has not established that Ukraine failed to meet its *prima facie* burden to establish the existence of the third measure as a single measure. We therefore uphold the Panel's finding, in paragraph 7.861 of the Panel Report, that the third measure had been demonstrated to exist.

## 5.2.4 Russia's claim that the Panel erred in finding that the third measure was within its terms of reference

### 5.2.4.1 Arguments on appeal

5.83. Russia requests us to reverse the Panel's finding that the third measure, as described in the Panel Report, fell within the Panel's terms of reference. According to Russia, the Panel acted inconsistently with Articles 6.2 and 7.1 of the DSU by finding that the third measure, as framed by Ukraine in its first written submission to the Panel and as determined to exist by the Panel, was within the Panel's terms of reference.<sup>242</sup> Russia contends that, consequently, the measure assessed by the Panel was not the third measure that was within its terms of reference, and that the Panel erred under Article 11 of the DSU by improperly expanding its jurisdiction, and examining and ruling on that measure.

5.84. First, Russia argues that the descriptions of the third measure in Ukraine's written submissions to the Panel are "different, by description, nature, coverage, and content" from the third measure identified in its panel request.<sup>243</sup> In this regard, Russia alleges that the Panel improperly relied on the third narrative paragraph of section II of the panel request in its analysis of whether the third measure described by Ukraine in its first written submission to the Panel was within the Panel's

<sup>237</sup> Panel Report, para. 7.846.

<sup>238</sup> Panel Report, para. 7.847.

<sup>239</sup> Russia's other appellant's submission, para. 109 (referring to Panel Reports, *US – COOL*, para. 7.50); opening statement at the oral hearing.

<sup>240</sup> Panel Reports, *US – COOL*, para. 7.50.

<sup>241</sup> Panel Reports, *US – COOL*, para. 7.50.

<sup>242</sup> Russia's other appellant's submission, para. 44.

<sup>243</sup> Russia's other appellant's submission, para. 69.

terms of reference.<sup>244</sup> In Russia's view, "the plain meaning of the text of the third measure indicates that Ukraine challenged [CU] Technical Regulation No. 001/2011 as such, read together with [Protocol No. A 4-3] and the instructions mentioned in Annex III."<sup>245</sup> Russia notes that, in contrast, Ukraine described the third measure in its first written submission as: "the *decision* of the Russian Federation not to accept in its territory the validity of the conformity assessment certificates issued to Ukrainian producers in other CU countries"<sup>246</sup>; "additional *requirements*", i.e. the local production condition and the local registration condition<sup>247</sup>; "the *conformity assessment procedures*" set out in Article 6(9) of CU Technical Regulation 001/2011 read together with a certain letter in Annex III<sup>248</sup>; and "*administration*" of CU Technical Regulation 001/2011, read together with Protocol No. A 4-3 and the decisions in Annex III to the panel request.<sup>249</sup> To Russia, these different permutations of the description of the third measure in Ukraine's first written submissions to the Panel constitute *separate* measures.

5.85. Second, Russia argues that the Panel erred in referring to the third measure as "the alleged non-recognition requirement flowing from CU Technical Regulation 001/2011".<sup>250</sup> Moreover, Russia alleges that the Panel referred to this measure in ways different from how it had been presented to it by Ukraine's panel request. According to Russia, neither Ukraine's panel request nor its first written submission to the Panel identified the third measure found to exist by the Panel. Russia contends that the Panel's characterization of the third measure was erroneous because "[t]he Panel's description of the measure is *not* how Ukraine presented *its own understanding* of the third measure" in its panel request.<sup>251</sup> As such, "the Panel's finding that it was Ukraine who had identified the third measure [as the Panel described it] [was] clearly wrong"<sup>252</sup>, and rather "the Panel played a complaining party's role in 'identify[ing] the specific measure at issue' at the later stage in the process" by adopting a description of the measure that Ukraine did not present.<sup>253</sup>

5.86. In response, Ukraine requests us to uphold the Panel's finding that the third measure challenged in its written submissions was within the Panel's terms of reference.<sup>254</sup> Ukraine contends that the Panel correctly identified the third measure by reading the list of the instruments in section II of its panel request together with the narrative paragraphs.<sup>255</sup> Accordingly, Ukraine insists that its panel request "clearly and correctly identify[ed] the specific measure" at issue and met the requirements of Article 6.2 of the DSU.<sup>256</sup> In addition, Ukraine recalls that the Panel found that there is no single way in which a challenged measure must be identified.<sup>257</sup> According to Ukraine, this is because whether a panel request adequately identifies the specific measures at issue depends on the particular context in which those measures exist and operate.<sup>258</sup> In this case, Ukraine contends that the Panel correctly considered that Ukraine's panel request sufficiently identifies the measure at issue and met the requirements of Article 6.2 of the DSU.<sup>259</sup> With respect to Russia's claim under Article 11 of the DSU, Ukraine contends that the Panel conducted a detailed analysis of the arguments raised by Russia.<sup>260</sup> Noting that a finding of inconsistency under Article 11 cannot be based simply on the conclusion that the Appellate Body might have reached a different factual finding from the one that the panel reached<sup>261</sup>, Ukraine contends that Russia failed to establish that the Panel acted inconsistently with Article 11.<sup>262</sup>

<sup>244</sup> Russia's other appellant's submission, paras. 61 and 65.

<sup>245</sup> Russia's other appellant's submission, para. 77. See also *ibid.*, para. 70.

<sup>246</sup> Russia's other appellant's submission, para. 70. (emphasis added)

<sup>247</sup> Russia's other appellant's submission, para. 71.

<sup>248</sup> Russia's other appellant's submission, para. 72.

<sup>249</sup> Russia's other appellant's submission, para. 73.

<sup>250</sup> Russia's other appellant's submission, para. 85.

<sup>251</sup> Russia's other appellant's submission, para. 87. (emphasis original)

<sup>252</sup> Russia's other appellant's submission, para. 87.

<sup>253</sup> Russia's other appellant's submission, para. 92.

<sup>254</sup> Ukraine's appellee's submission, para. 121.

<sup>255</sup> Ukraine's appellee's submission, para. 74.

<sup>256</sup> Ukraine's appellee's submission, para. 74.

<sup>257</sup> Ukraine's appellee's submission, para. 81 (referring to Panel Report, para. 7.92).

<sup>258</sup> Ukraine's appellee's submission, paras. 80-81.

<sup>259</sup> Ukraine's appellee's submission, para. 82.

<sup>260</sup> Ukraine's appellee's submission, para. 84.

<sup>261</sup> Ukraine's appellee's submission, para. 83 (referring to Appellate Body Report, *US – Wheat Gluten*, para. 151).

<sup>262</sup> Ukraine's appellee's submission, para. 85.

5.87. According to Ukraine, based on a proper reading of its panel request, the third measure identified in the panel request is Russia's "*decision* not to accept in its territory the validity of the conformity assessment certificates issued to Ukrainian producers in other CU countries and not to register such producers for operation in its territory".<sup>263</sup> Viewed in this light, Ukraine considers that the third measure identified in its panel request had not been modified in its subsequent submissions<sup>264</sup>, and that the Panel's description of the third measure also comported with the third measure as identified in the panel request.<sup>265</sup> On the basis of the foregoing considerations, Ukraine also requests that we dismiss Russia's claim that its due process rights were prejudiced.<sup>266</sup>

5.88. With respect to Russia's claim that different permutations of the third measure in Ukraine's written submissions constitute different "measures", Ukraine first notes that the portions of the Panel Report Russia takes issue with are merely "explaining the context of the third measure ... and ... do not contain any additional meaning or definitions" of the third measure.<sup>267</sup> Ukraine contends that it has not claimed that the various permutations of the third measure are separate measures, but that they are "component parts" and "practical realization" of the third measure.<sup>268</sup> With respect to Russia's claim that the Panel modified the third measure from how it was presented by Ukraine, Ukraine recalled that the third measure, properly read from the panel request, is "the decision of the Russian Federation not to accept in its territory the validity of the conformity assessment certificates issued to Ukrainian producers in other CU countries".<sup>269</sup> That "decision" is contained in Protocol No. A 4-3 explicitly referred to in the panel request, and it establishes the local production condition based on the authorities' interpretation of CU Technical Regulation 001/2011.<sup>270</sup> Thus, Ukraine contends that the Panel's description of the third measure as "a general non-recognition requirement which [the relevant Russian authorities] considered to flow from CU Technical Regulation 001/2011 as they interpreted it" was correct.<sup>271</sup>

#### 5.2.4.2 Analysis

5.89. The participants disagree as to whether the third measure Ukraine challenged, and the Panel understood and assessed for conformity with the covered agreements, was the third measure that Ukraine had identified in its panel request. In particular, the Panel found that the third measure identified in the panel request is the alleged requirement that Russia's authorities must not recognize certificates issued in other CU countries if the certified railway products were not produced in a CU country.<sup>272</sup> The Panel then found that the relevant Russian authorities applied a "general non-recognition requirement, which these authorities considered to flow from CU Technical Regulation 001/2011 as they interpreted it", according to which the Russian authorities were not to recognize certificates issued under the regulation in other CU countries if the certified products were not produced in a CU country.<sup>273</sup> For its part, Russia contends that what Ukraine had identified as the third measure in the panel request is "[CU] Technical Regulation **001/2011 ... read together with** [Protocol No. A 4-3 and the letters listed in Annex III to the panel request]".<sup>274</sup> Thus, to Russia, neither the third measure the Panel found to exist nor the third measure challenged by Ukraine fell within the Panel's terms of reference.

5.90. With respect to Russia's separate claim that the Panel erred in its preliminary ruling, in section 5.1 above, we disagreed with Russia that the Panel erred in finding that the third measure identified in Ukraine's panel request is the alleged requirement that Russia's authorities must not recognize certificates issued in other CU countries if the certified railway products were not produced in a CU country.<sup>275</sup> In particular, we found that the Panel was correct in considering the panel request as a whole, including the third narrative paragraph of section II thereof. Here, Russia claims that the Panel acted inconsistently with Articles 6.2 and 7.1 of the DSU by finding that the third measure,

<sup>263</sup> Ukraine's appellee's submission, para. 95. (emphasis original)

<sup>264</sup> Ukraine's appellee's submission, para. 97.

<sup>265</sup> Ukraine's appellee's submission, paras. 106-107.

<sup>266</sup> Ukraine's appellee's submission, paras. 117-119.

<sup>267</sup> Ukraine's appellee's submission, para. 115.

<sup>268</sup> Ukraine's appellee's submission, para. 116.

<sup>269</sup> Ukraine's appellee's submission, para. 124.

<sup>270</sup> Ukraine's appellee's submission, paras. 124-125.

<sup>271</sup> Ukraine's appellee's submission, para. 127.

<sup>272</sup> Panel Report, para. 7.103.

<sup>273</sup> Panel Report, para. 7.861.

<sup>274</sup> Russia's other appellant's submission, para. 70 (quoting Ukraine's panel request, p. 2).

<sup>275</sup> Panel Report, para. 7.103.

as described by Ukraine in its first written submission to the Panel, and as determined by the Panel, was within the Panel's terms of reference. This claim is based on the very premise we rejected in our analysis of Russia's claims relating to the Panel's preliminary ruling, namely, that the Panel erred in finding the third measure to consist of a requirement that Russia's authorities must not recognize certificates issued in other CU countries if the certified railway products were not produced in a CU country. Having rejected that contention, we must for the same reason also reject the contention that the Panel erred in finding that the third measure, as framed by Ukraine in its first written submission to the Panel and as determined to exist by the Panel, was within the Panel's terms of reference.

#### 5.2.4.3 Conclusion

5.91. Russia's claim regarding the terms of reference concerning the third measure is based on the premise that the Panel erred in its preliminary ruling. We have rejected that allegation of error and upheld the Panel's preliminary ruling. Consequently, we uphold the Panel's finding, in paragraphs 7.823 and 8.1.d.i of the Panel Report, that the non-recognition requirement based on the local production condition is properly before the Panel.

### 5.2.5 Russia's claim that the Panel erred by making findings with respect to the alleged registration condition

#### 5.2.5.1 Arguments on appeal

5.92. Russia requests us to reverse the Panel's erroneous "findings" concerning the local registration condition.<sup>276</sup> Russia recalls that the Panel found that "[n]on-recognition resulting from a failure to **meet the alleged registration condition is ... not a measure within [its] terms of reference.**" Consequently, the Panel concluded that it will "not make findings with regard to those of Ukraine's claims about non-recognition that relate to the alleged registration condition".<sup>277</sup> Russia contends that, despite this finding, the Panel continued making findings with respect to the alleged registration condition and it took these findings into account. Russia alleges that this constitutes an error under Article 11 of the DSU.<sup>278</sup>

5.93. Ukraine, for its part, requests us to uphold the Panel findings challenged by Russia.<sup>279</sup> In Ukraine's view, the Panel did not exceed its mandate by referring to the local registration condition.<sup>280</sup>

#### 5.2.5.2 Analysis

5.94. Russia claims that the Panel failed to conduct an objective assessment of the matter before it because it "consider[ed] the alleged [local] registration condition as if this element of the third measure as described in Ukraine's [first written submission] had been within the Panel's terms of reference".<sup>281</sup> Thus, the question before us is whether the challenged paragraphs of the Panel Report regarding the local registration condition constitute an assessment of a matter that was not before the Panel.

5.95. Article 11 of the DSU provides that a panel should make an objective assessment of the "matter" before it. The term "matter" is referred to in Article 7 of the DSU. The Appellate Body has stated that "[t]he measures and the claims identified in the panel request constitute the 'matter referred to the DSB', which serves as a basis for the panel's terms of reference under Article 7.1 of the DSU."<sup>282</sup> Article 11 of the DSU also refers to the "matter" before the panel, and it requires a

<sup>276</sup> Russia's other appellant's submission, paras. 105-106. According to Russia, these "findings" are contained in paragraphs 7.847, 7.849-7.850 (third and fourth sentences), 7.853-7.854, 7.861, 7.897, 7.899, 7.917, and 7.926 of the Panel Report. (Ibid., para. 106)

<sup>277</sup> Russia's other appellant's submission, para. 102 (quoting Panel Report, para. 7.825).

<sup>278</sup> Russia's other appellant's submission, para. 101.

<sup>279</sup> Ukraine's appellee's submission, para. 150.

<sup>280</sup> Ukraine's appellee's submission, paras. 147 and 149.

<sup>281</sup> Russia's other appellant's submission, para. 105.

<sup>282</sup> Appellate Body Report, *Korea – Radionuclides*, para. 5.113 (referring to Appellate Body Reports, *Guatemala – Cement I*, paras. 72-73; *US – Carbon Steel*, para. 125; *Australia – Apples*, para. 416; *China – Raw Materials*, para. 219).

panel to make an objective assessment of that "matter".<sup>283</sup> More specifically, Article 11 requires panels to conduct an objective assessment, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements. Not every error in the appreciation of evidence will necessarily rise to the level of a failure by a panel to comply with its duties under Article 11 of the DSU. For example, some inconsequential inaccuracies may not necessarily constitute a violation of Article 11 of the DSU as long as they do not undermine the remainder of the panel's analysis.<sup>284</sup> Only those errors that are so material that, "taken together or singly", they undermine the objectivity of the panel's assessment of the matter lead to a violation of Article 11 of the DSU.<sup>285</sup> The Appellate Body has also found that panels have not exceeded their terms of reference when making certain purely descriptive comments that did not rise to the level of legal findings or conclusions.<sup>286</sup>

5.96. With that in mind, we turn to assess whether, in considering the local registration condition, the Panel exceeded its terms of reference and thereby acted inconsistently with Article 11 of the DSU. Russia takes issue with the following statements made by the Panel. First, paragraphs 7.847 and 7.849, in the section titled "Existence of the [third] measure at issue" of the Panel Report, contain the Panel's factual examination of the three letters from Russia's Federal ART to Ukrainian producers that Ukraine submitted as evidence. Second, paragraphs 7.850 (the third and the fourth sentences), 7.853, and 7.854 also appear in the same section, and the Panel indicated in these paragraphs its understanding of the "non-recognition requirement" and the Russian authorities' interpretation of CU Technical Regulation 001/2011. Third, paragraph 7.861 is the conclusion of the "Existence of the [third] measure at issue" section, where the Panel found that the third measure had been demonstrated to exist. Lastly, paragraphs 7.897, 7.899, 7.917, and 7.926 appear in the sections addressing Ukraine's claims under Articles I:1 and III:4 of the GATT 1994 with respect to the third measure. More specifically, these paragraphs appear in the context of the Panel's assessment of whether Ukrainian railway products and certain other goods are "like", and whether Russia treated Ukrainian railway products less favourably.

5.97. With respect to the first group of paragraphs in the Panel Report challenged by Russia under this claim, namely, paragraphs 7.847 and 7.849 of the Panel Report, the Panel described the content of Protocol No. A 4-3 and the letters submitted by Ukraine as evidence of the third measure. In paragraph 7.847, the Panel noted that the Russian authorities provided their interpretation of Articles 1(1) and 6(9) of CU Technical Regulation 001/2011 in Protocol No. A 4-3 and the letters. According to this interpretation, a certificate cannot be validly issued under CU Technical Regulation 001/2011 unless the local production condition and the local registration condition are met. In paragraph 7.849, the Panel continued to describe the content of Protocol No. A 4-3 and the letters, and clarified that the reference to the local registration condition is found in only two of the letters, but not in the Protocol.

5.98. In our view, these remarks by the Panel are descriptive comments regarding the evidence put forward by Ukraine concerning the third measure at issue. According to the Panel's examination of the evidence, particularly the 2016 letters, both the local production condition and the local registration condition were mentioned together in each letter. In this way, the local production condition and the local registration condition were part of the *same* evidence put before the Panel by Ukraine to prove the existence of the third measure. In this context, we do not consider that the Panel exceeded its terms of reference by merely describing the content of the evidence before it. As noted above, by making descriptive comments about a piece of evidence, a panel does not necessarily exceed its terms of reference, especially where such statements do not amount to legal findings or conclusions.

5.99. We now turn to the second group of paragraphs in the Panel Report challenged by Russia under this claim. In the third and the fourth sentences of paragraph 7.850, the Panel addressed Russia's argument that the letters concern products from only two Ukrainian producers and that the letters are not of general application. In response to that argument, the Panel observed in the third sentence that nothing in the Protocol or the letters suggests that the Russian authorities'

<sup>283</sup> Appellate Body Report, *Korea – Radionuclides*, para. 5.113.

<sup>284</sup> Appellate Body Report, *EC – Chicken Cuts*, paras. 185-186.

<sup>285</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 992 (quoting Appellate Body Reports, *EC – Fasteners (China)*, para. 499; *EC and certain member States – Large Civil Aircraft*, para. 1318). See also Appellate Body Reports, *China – Rare Earths*, paras. 5.178-5.179.

<sup>286</sup> Appellate Body Reports, *Australia – Salmon*, para. 110; *US – Wool Shirts and Blouses*, p. 17, DSR 1997:I, p. 338.

interpretation of Articles 1(1) and 6(9) of CU Technical Regulation 001/2011 would not be generally applicable and would apply only to Ukrainian products. In the fourth sentence, the Panel concluded that "the relevant documents provide a general interpretation" on the basis of its examination of Protocol No. A 4-3 and the letters. Turning next to paragraphs 7.853 and 7.854, we note that the Panel, in paragraph 7.853, considered that Protocol No. A 4-3 and the letters support its view that the Russian authorities applied a general non-recognition requirement, which they considered to flow from CU Technical Regulation 001/2011 as they interpreted it. In paragraph 7.854, the Panel stressed that the evidence indicates that the non-recognition requirement flows from CU Technical Regulation 001/2011 as "interpreted" by the Russian authorities. Accordingly, the Panel found that Ukraine's panel request correctly identified CU Technical Regulation 001/2011 as the source of the non-recognition requirement as interpreted and applied by Russia in the Protocol and the letters.

5.100. We do not see that the Panel made findings regarding the local registration condition *per se* in these paragraphs. Notably, there is no mention of the local registration condition. While paragraphs 7.853 and 7.854 refer to the "non-recognition requirement", which, based on the Panel's examination of the evidence in preceding paragraphs, encompasses the local registration condition, it also encompasses the local production condition, which the Panel found to be within its terms of reference. Similarly, in paragraph 7.850, the Panel concluded that "[t]he relevant documents provide a general interpretation." This interpretation includes not only the interpretation of Article 6(9) of CU Technical Regulation 001/2011 that concerns the local registration condition, but also the interpretation of Article 1(1) of CU Technical Regulation 001/2011 that concerns the local production condition. In our view, the Panel considered the "non-recognition requirement" and the interpretation of CU Technical Regulation 001/2011 provided in the documents at issue *as a whole*, and extrapolated relevant features to clarify its understanding of the third measure at issue. For example, in paragraph 7.853, the Panel considered that Protocol No. A 4-3 and the letters show that a general "non-recognition requirement" was applied, before concluding that "[t]he situations in which that requirement was applied included those where a certificate had been issued in another CU country in violation of the production condition." In paragraphs 7.850 and 7.854, the Panel concludes that the "non-recognition requirement" flows from CU Technical Regulation 001/2011 and that the documents provide a "general" interpretation, which underpin the Panel's understanding that the *third measure* is of a general character and flows from CU Technical Regulation 001/2011.<sup>287</sup> As we see it, in the challenged paragraphs of the Panel Report, the Panel considered evidence concerning the local production condition and the third measure at issue, but it did not make any findings regarding the local registration condition *per se*.

5.101. In paragraph 7.861, the Panel concluded that the third measure had been demonstrated to exist. In so doing, the Panel found that the third measure consists of the non-recognition requirement, which the Russian authorities considered to flow from CU Technical Regulation 001/2011 as they interpreted it, for products not meeting the local production condition or the local registration condition. In this context, the Panel made reference to the local registration condition when describing the content of the "non-recognition requirement". However, in our view, this reference to the local registration condition is part of the Panel's *reasoning* for its finding regarding the existence of the third measure. In this regard, we recall that the Panel found that the evidence, i.e. Protocol No. A 4-3 and the letters, contained both the local production condition and the local registration condition. As such, these documents supported the Panel's conclusion that Russia applied the "non-recognition requirement" encompassing both conditions, which in turn, formed the basis of the Panel's finding that the third measure had been demonstrated to exist. Thus, we do not find that the Panel made any "finding" regarding the local registration condition *per se*, but rather that the Panel based its conclusion regarding the existence of the third measure on its examination of the evidence before it.

5.102. Moreover, the Panel's reference to the local registration condition in the "Existence of the [third] measure" section should be viewed in light of the Panel's conclusion in that section contained in paragraph 7.862 that "the non-recognition requirement falls within the Panel's terms of reference only to the extent that it requires non-recognition in situations where the certified products were not

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<sup>287</sup> The Panel found that the "third measure ha[d] been demonstrated to exist" on the basis that the evidence supported the conclusion that the relevant Russian authorities "applied a general non-recognition requirement, which these authorities considered to flow from CU Technical Regulation 001/2011 as they interpreted it". Subsequently, the Panel clarified that the third measure within its terms of reference concerns only the local production condition. (Panel Report, paras. 7.861-7.862)

produced in a CU country."<sup>288</sup> The Panel's conclusion demonstrates that it was mindful of the limitation of its terms of reference, and in particular of the fact that its terms of reference did not include the local registration condition. As we see it, paragraph 7.862 thus qualifies the Panel's findings regarding the existence of the third measure in the sense that the Panel's findings concern that measure only as far as the local production condition is concerned.

5.103. We now turn to the third group of paragraphs of the Panel Report challenged by Russia under the claim that the Panel acted inconsistently with Article 11 of the DSU by making "findings" regarding the local registration condition, consisting of paragraphs 7.897, 7.899, 7.917, and 7.926 of the Panel Report. Paragraphs 7.897 and 7.899 are in the Panel's analysis of like imported products in the context of Ukraine's claim under Article I:1 of the GATT 1994 with respect to the third measure. In paragraph 7.897, the Panel examined Ukraine's argument<sup>289</sup> that the third measure distinguishes between products based solely on the origin of the product. The Panel began its analysis by recalling that, under the "non-recognition requirement", the Russian authorities would not recognize a certificate issued under CU Technical Regulation 001/2011 by other CU countries for a product manufactured in Ukraine. The Panel compared a Ukrainian product, on the one hand, and a Belarusian and Kazakh product, on the other. In making this comparison, the Panel assumed that the applicants in each case were registered in the country of the relevant conformity authorities, i.e. that they satisfied the local registration condition. Based on this analysis, the Panel concluded that the only basis for the difference in treatment between the products is where they were produced. Consequently, the Panel found that the non-recognition requirement in some situations draws a distinction based on the origin of the products. In paragraph 7.899, the Panel, based on its analysis, concluded that "the non-recognition requirement in certain situations results in an origin-based distinction between imported railway products, [and] the likeness of the products can be presumed."<sup>290</sup>

5.104. Paragraphs 7.917 and 7.926 of the Panel Report are found in the section containing the Panel's analysis of the third measure with respect to Ukraine's claim under Article III:4 of the GATT 1994. In paragraph 7.917, the Panel examined whether imported and domestic products are "like". Similarly to its analysis under Article I:1, the Panel began by recalling that under the non-recognition requirement, the Russian authorities would not recognize a certificate issued under CU Technical Regulation 001/2011 by other CU countries for a product manufactured in Ukraine. The Panel then compared a Ukrainian product to a Russian product. In making this comparison, the Panel assumed that the applicants in each case were registered in the country of the relevant conformity authorities, i.e. that they had satisfied the local registration condition. Based on this analysis, the Panel concluded that, in certain situations, the Ukrainian products and the domestic (Russian) products were treated differently based solely on where they were produced. In paragraph 7.926, the Panel examined whether there is "less favourable" treatment within the meaning of Article III:4. The Panel recalled that under the non-recognition requirement, a product produced in Ukraine and a product produced domestically (in Russia) will be treated differently in certain situations, namely, when both products satisfy the local registration condition. Accordingly, the Panel concluded that "the non-recognition requirement in certain situations (when the applicant for certification is registered at the place where the certification body is also located) distorts the conditions of competition to the detriment of that sub-category of imported products which comprises products not produced in a CU country." Moreover, the Panel determined that the non-recognition requirement accords "less favourable" treatment to these imported products as compared to the like domestic products.<sup>291</sup>

5.105. In our view, these findings by the Panel concerned the third measure as it relates to the local production condition. Specifically, as summarized above, in these paragraphs the Panel found that the Ukrainian products were treated differently based on where they were *produced*. The Panel made no findings about the treatment based on whether an applicant company is registered in the country of the conformity assessment authority. It is true that the Panel made remarks regarding the local registration condition, but these were only made in order to isolate the impact of the local

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<sup>288</sup> Panel Report, para. 7.862.

<sup>289</sup> Panel Report, para. 7.896.

<sup>290</sup> The Panel recalled that such situations would arise where:

[T]wo imported railway products have been certified in a CU country; one was produced in the CU, the other was produced outside the CU; and the applicant in each case was registered in the CU country where it applied for the certificate.

(Panel Report, para. 7.899)

<sup>291</sup> Panel Report, para. 7.926.



production condition. In other words, had the Panel not assumed that the products at issue were comparable in all aspects other than their place of manufacture, the Panel could not render a finding regarding the impact of the local production condition. Thus, we consider that these remarks do not constitute findings *per se*, but that the Panel was describing aspects of its comparative analysis. Therefore, we do not consider these remarks regarding the local registration condition to be an assessment or "finding" regarding the local registration condition *per se*.

### 5.2.5.3 Conclusion

5.106. The Panel's statements challenged by Russia as constituting "findings" concerning the local registration condition were either merely descriptive statements or concerned the third measure within the Panel's terms of reference. Consequently, we find that Russia has failed to establish that the Panel acted inconsistently with Article 11 of the DSU by continuing to make findings with respect to a matter that was not within its terms of reference.

## 5.3 Ukraine's claim under Article 5.1.1 of the TBT Agreement

5.107. We now turn to Ukraine's claim that the Panel erred in its interpretation and application of Article 5.1.1 of the TBT Agreement and failed to make an objective assessment of the matter before it pursuant to Article 11 of the DSU in finding that Ukraine failed to establish that Russia had acted inconsistently with Article 5.1.1 of the TBT Agreement. Ukraine requests us to reverse the Panel's conclusions in paragraphs 8.1.b.i and 8.1.c.i of the Panel Report.<sup>292</sup>

### 5.3.1 The Panel's findings

5.108. The Panel noted that Article 5.1.1 of the TBT Agreement establishes obligations to provide national treatment and most-favoured nation treatment with regard to access for suppliers from other Members to covered conformity assessment procedures of importing Members.<sup>293</sup> In the Panel's view, an importing Member acts inconsistently with Article 5.1.1 if three elements are established: (i) the suppliers of another Member that have been granted less favourable access are suppliers of products that are "like" the products of domestic suppliers or suppliers from any other country that have been granted more favourable access; (ii) the importing Member (through the preparation, adoption, or application of a covered conformity assessment procedure) "grants access" for suppliers of products from another Member "under conditions less favourable" than those accorded to suppliers of domestic products or products from any other country; and (iii) the importing Member grants access under conditions less favourable for suppliers of like products "in a comparable situation".<sup>294</sup>

5.109. Regarding the first element, the Panel considered that the same criteria that are applied for determining whether products are "like" in the context of Article 2.1 of the TBT Agreement are applicable in the context of Article 5.1.1.<sup>295</sup> With respect to the phrase "conditions no less favourable", the Panel observed that differential access conditions would be relevant under Article 5.1.1 if they modified the conditions of competition, or competitive opportunities, among relevant suppliers of like products to the detriment of suppliers of the complaining Member.<sup>296</sup> The Panel recalled that Ukraine challenged not the preparation or adoption of a conformity assessment procedure (i.e. not a conformity assessment procedure as such), but the application of a conformity assessment procedure to particular Ukrainian suppliers (i.e. individual instances of application of the procedure).<sup>297</sup> According to the Panel, in the case of such challenge, less favourable access conditions exist "where the importing Member denies or limits the right or possibility of a supplier of another Member to have conformity assessment activities undertaken under the rules of the applicable conformity assessment procedure, either in respect of the entire conformity assessment procedure or any of its relevant parts, but does not deny or limit the right or possibility of access of another supplier of a like product from the importing Member or any other country."<sup>298</sup>

<sup>292</sup> Ukraine's appellant's submission, paras. 175 and 258.

<sup>293</sup> Panel Report, para. 7.248.

<sup>294</sup> Panel Report, para. 7.251.

<sup>295</sup> Panel Report, para. 7.254.

<sup>296</sup> Panel Report, para. 7.260.

<sup>297</sup> Panel Report, para. 7.261.

<sup>298</sup> Panel Report, para. 7.261.

5.110. Furthermore, the Panel took account of the fact that, unlike in Article 2.1 of the TBT Agreement, the text of Article 5.1.1 qualifies the non-discrimination obligations by including the phrase "in a comparable situation".<sup>299</sup> In the Panel's view, this phrase "confirms that Article 5.1.1 permits differential access conditions where they concern situations that are not comparable", and "preserves a degree of flexibility for the importing Member to design and apply its conformity assessment procedures in a situation-appropriate manner".<sup>300</sup> The Panel was therefore not persuaded that there is a need to import into Article 5.1.1 the test developed by the Appellate Body for determining the existence of less favourable treatment under Article 2.1 of the TBT Agreement.<sup>301</sup>

5.111. With regard to the interpretation of the term "in a comparable situation", the Panel noted that it "qualifies the preceding part of the first sentence of Article 5.1.1, that is, the requirement to grant access under no less favourable conditions".<sup>302</sup> The Panel considered that "this phrase warrants a comparison of differential conditions of access with a view to determining whether the less favourable conditions of access are being granted despite the situation being comparable."<sup>303</sup> For the Panel, the relevant context for assessing whether a situation is comparable, such that no less favourable access conditions must be granted, is that of assessing conformity under the rules of the procedure and conducting conformity assessment activities. Referring to the definition of conformity assessment procedures in Annex 1.3 to the TBT Agreement, the Panel concluded that "aspects of a situation that have a bearing on, for instance, the ability of the importing Member to undertake such activities under the rules of the procedure with adequate confidence would, in principle, seem to be relevant", and that "the relevant aspects of a situation would include aspects specific to the suppliers who are claimed to have been granted access under less favourable conditions or to the location of the suppliers' facilities."<sup>304</sup>

5.112. Turning to the application of Article 5.1.1 of the TBT Agreement to the 14 instructions through which the FBO suspended valid certificates of conformity held by Ukrainian producers of railway products, the Panel considered that Ukraine "has the burden of demonstrating that Russia applied its conformity assessment procedure for railway products so as to grant access for suppliers of like products originating in Ukraine under conditions less favourable than those accorded to suppliers of like Russian products or like products from other countries, in a comparable situation".<sup>305</sup> For the purpose of examining the elements necessary to demonstrate an inconsistency with Article 5.1.1, the Panel assumed that the relevant Ukrainian suppliers are suppliers of railway products "like" those of the Russian and other foreign suppliers that Ukraine alleges to enjoy better access conditions.<sup>306</sup>

5.113. With respect to the question whether Russia granted access for specific suppliers of products from another Member under conditions less favourable, the Panel considered that the inspection controls at issue fell within the definition of "conformity assessment procedures" in Annex 1.3 to the TBT Agreement.<sup>307</sup> The evidence before the Panel demonstrated that, through the 14 instructions, the FBO suspended valid certificates held by the five affected suppliers of Ukrainian railway products with the reason that the conditions for inspection control were not present at the time of issuance of the corresponding instruction, and therefore "did not grant the affected suppliers of Ukrainian railway products access to inspection control, which is part of Russia's conformity assessment procedure for railway products".<sup>308</sup> At the same time, the FBO granted suppliers of Russian and European railway products access to such inspection control.<sup>309</sup> For the Panel, this difference modified the conditions of competition for access to Russia's conformity assessment procedure for railway products to the detriment of each of the affected Ukrainian suppliers.<sup>310</sup> The Panel thus found that "Russia, by issuing the 14 challenged instructions, applied its conformity assessment procedure

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<sup>299</sup> Panel Report, para. 7.271.

<sup>300</sup> Panel Report, para. 7.272.

<sup>301</sup> Panel Report, para. 7.273.

<sup>302</sup> Panel Report, para. 7.282. (fn omitted)

<sup>303</sup> Panel Report, para. 7.282.

<sup>304</sup> Panel Report, para. 7.283.

<sup>305</sup> Panel Report, paras. 7.286-7.287.

<sup>306</sup> Panel Report, para. 7.292.

<sup>307</sup> Panel Report, para. 7.298.

<sup>308</sup> Panel Report, para. 7.301.

<sup>309</sup> Panel Report, para. 7.302.

<sup>310</sup> Panel Report, para. 7.305.

so as to grant access for the relevant suppliers of Ukrainian railway products under conditions less favourable than those accorded to suppliers of Russian and European railway products."<sup>311</sup>

5.114. Concerning the question whether Ukrainian suppliers and those from other Members are "in a comparable situation", the Panel took the view that "conducting an objective assessment of the matter entails reviewing the explanations provided both in the challenged instructions and by Russia in these proceedings" on the basis of the evidence on the record.<sup>312</sup> In its overall assessment of the evidence on the record, the Panel underscored that while importing Members should not lightly be allowed to invoke an inability to carry out parts of their conformity assessment procedure, as this could undermine market-access commitments, inspections are often carried out abroad by government officials of the importing Member and in some situations their life or health may be at risk.<sup>313</sup> For the Panel, in the specific circumstances of the dispute, "the importing Member in applying Article 5.1.1 may confront the need to weigh and balance the interests of suppliers of products originating in the territories of other Members in an assessment of conformity against its interest in safeguarding the life or health of its employees when undertaking conformity assessment activities, such as inspections, abroad."<sup>314</sup>

5.115. Based on the evidence before it, the Panel considered that the FBO could be justifiably concerned about the life or health of any employees that it sent to Ukraine to carry out inspections. Specifically, the Panel took the view that the situation "during the relevant time-period was marked by instability and unpredictability, and this was also reflected in the travel advice that Russia's Ministry of Foreign Affairs issued for the benefit of its own citizens".<sup>315</sup> In sum, the Panel found that, "during the relevant time-period, the FBO did not act outside its margin of discretion by balancing the interests of Ukrainian suppliers and FBO employees and then erring on the side of ensuring the safety of the latter and determining that the conditions for carrying out inspection control in Ukraine were not satisfied."<sup>316</sup> The Panel therefore stated that, "in this instance related to risks to life and health of FBO inspectors, over the time-frame examined above, the situation in Ukraine was not comparable to other countries."<sup>317</sup> On this basis, the Panel concluded that, "between April 2014 and December 2016, Ukrainian suppliers of railway products were denied no less favourable access in a situation that was not comparable to the situation in which Russia granted access to suppliers of Russian railway products and suppliers of railway products from other countries."<sup>318</sup>

### 5.3.2 Claims and arguments on appeal

5.116. On appeal, Ukraine requests us to reverse the Panel's conclusions that Ukraine failed to establish that Russia had acted inconsistently with Article 5.1.1 of the TBT Agreement.<sup>319</sup> In Ukraine's view, the Panel erred in its interpretation and application of the phrase "in a comparable situation" in Article 5.1.1 by failing to elaborate on what exactly has to be compared. Specifically, Ukraine considers that the Panel provided a very limited interpretation of the phrase "in a comparable situation" and did not clarify whether an assessment of the situation of a country as a whole or that of the relevant suppliers is required.<sup>320</sup> Ukraine also argues that, in applying this provision to the facts of the case, the Panel focused on the risk to life or health of Russian *inspectors*, rather than on aspects specific to the *suppliers* at issue or the location of the suppliers' facilities.<sup>321</sup> Furthermore, Ukraine takes issue with an analogy the Panel made between the objective of conformity assessment procedures under Article 5.1.1 of the TBT Agreement, on the one hand, and the legitimate objective of protecting human life or health under Article 2.2 of that agreement, on the other. According to Ukraine, the phrase "a comparable situation" may not be understood as a basis for an importing Member to act for the protection of the interests recognized in the sixth recital of the preamble of

<sup>311</sup> Panel Report, para. 7.306.

<sup>312</sup> Panel Report, para. 7.314.

<sup>313</sup> Panel Report, paras. 7.374-7.375.

<sup>314</sup> Panel Report, para. 7.376.

<sup>315</sup> Panel Report, para. 7.380.

<sup>316</sup> Panel Report, para. 7.384.

<sup>317</sup> Panel Report, para. 7.387.

<sup>318</sup> Panel Report, para. 7.387.

<sup>319</sup> Ukraine's appellant's submission, paras. 175 and 258 (referring to Panel Report, paras. 7.387, 7.393-7.394, 8.1.b.i, and 8.1.c.i).

<sup>320</sup> Ukraine's appellant's submission, paras. 236 and 257. See also Ukraine's opening statement at the oral hearing, para. 4.

<sup>321</sup> Ukraine's appellant's submission, paras. 247-248 and 255 (referring to Panel Report, paras. 7.283-7.284).

the TBT Agreement without the protection of those interests being directly linked to the situation of the suppliers subject to the measures at issue with respect to conditions of access to the conformity assessment procedure.<sup>322</sup>

5.117. Ukraine further submits that the Panel failed to make an objective assessment of the matter in its analysis of Article 5.1.1 of the TBT Agreement by failing to: (i) accurately determine adequate burden of proof; (ii) apply the correct standard of review; and (iii) conduct an objective assessment of Russia's evidence concerning the security situation in Ukraine in its examination of whether Russia granted to Ukrainian suppliers' access under less favourable conditions in a comparable situation.

5.118. In response, Russia requests us to uphold the Panel's conclusions under Article 5.1.1.<sup>323</sup> Russia submits that the Panel correctly interpreted and applied the term "in a comparable situation" under Article 5.1.1 of the TBT Agreement.<sup>324</sup> In particular, Russia argues that the "supplier-specific" assessment of comparability suggested by Ukraine is an excessively literal reading of Article 5.1.1. In Russia's view, the negotiating history of Article 5.1.1 strongly suggests that it is the situations in particular countries that should be compared and not those of particular suppliers.<sup>325</sup> Russia considers that, having stated that "whether a situation is comparable must be assessed on a case-by-case basis"<sup>326</sup> and having scrutinized the evidence on the record in its totality, the Panel arrived at the correct conclusion that "in this instance related to risks to life and health of FBO inspectors ... the situation in Ukraine was not comparable to [that in] other countries."<sup>327</sup> Regarding the allegation that the Panel erred in drawing an analogy of legitimate objective under Article 2.2 of the TBT Agreement, Russia points out that Ukraine did not refer to particular paragraphs of the Panel Report where the Panel based its decision on the similarity between Articles 2.2 and 5.1.1.<sup>328</sup> In addition, according to Russia, such an analogy is not inferable implicitly from the Panel's reasoning, insofar as the link between those two provisions in the analysis is too remote to consider that the Panel applied the legitimate objective under Article 2.2 to Article 5.1.1 by analogy.<sup>329</sup>

### 5.3.3 The Panel's interpretation of Article 5.1.1 of the TBT Agreement

5.119. Article 5.1 of the TBT Agreement provides, in relevant part:

#### *Article 5*

##### *Procedures for Assessment of Conformity by Central Government Bodies*

5.1 Members shall ensure that, in cases where a positive assurance of conformity with technical regulations or standards is required, their central government bodies apply the following provisions to products originating in the territories of other Members:

5.1.1 conformity assessment procedures are prepared, adopted and applied so as to grant access for suppliers of like products originating in the territories of other Members under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country, in a comparable situation; access entails suppliers' right to an assessment of conformity under the rules of the procedure, including, when foreseen by this procedure, the possibility to have conformity assessment activities undertaken at the site of facilities and to receive the mark of the system[.]

<sup>322</sup> Ukraine's appellant's submission, paras. 252-254. See also Ukraine's opening statement at the oral hearing, para. 20.

<sup>323</sup> Russia's appellee's submission, para. 218 (referring to Panel Report, paras. 7.387, 8.1.b.i, and 8.1.c.i).

<sup>324</sup> Russia's appellee's submission, para. 203.

<sup>325</sup> Russia's appellee's submission, para. 213 (referring to Ukraine's appellant's submission, paras. 240 and 242).

<sup>326</sup> Russia's appellee's submission, para. 215 (quoting Panel Report, para. 7.283).

<sup>327</sup> Russia's appellee's submission, para. 216 (quoting Panel Report, para. 7.387).

<sup>328</sup> Russia's appellee's submission, para. 210.

<sup>329</sup> Russia's appellee's submission, para. 211.

5.120. The title of Article 5 of the TBT Agreement indicates that the provision relates to procedures for the assessment of conformity. Obligations therein apply with respect to a Member's "central government bodies" where the Member requires "a positive assurance of conformity" with technical regulations or standards. Conformity assessment procedures are defined in Annex 1.3 to the TBT Agreement as "[a]ny procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled". Pursuant to the explanatory note to Annex 1.3, conformity assessment procedures "include, *inter alia*, procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval as well as their combinations".

5.121. Article 5.1.1 of the TBT Agreement consists of two clauses. Its first clause establishes a national treatment obligation and a most-favoured nation treatment obligation regarding the conditions of access to an assessment of conformity to suppliers of like products. In particular, the first clause of Article 5.1.1 specifies that conformity assessment procedures are to be prepared, adopted, and applied so as to grant access for suppliers of like products originating in the territories of other Members under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country, in a comparable situation. Article 5.1.1 covers the preparation, adoption, and application of conformity assessment procedures. In turn, the second clause defines "access" for purposes of the obligations in Article 5.1.1 as entailing "suppliers' right to an assessment of conformity under the rules of the procedure, including, when foreseen by this procedure, the possibility to have conformity assessment activities undertaken at the site of facilities and to receive the mark of the system".

5.122. In contrast to other non-discrimination obligations, such as Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement, the obligations under Article 5.1.1 of the TBT Agreement attach to the *suppliers* of products as opposed to the product itself. At the same time, Article 5.1 stipulates that all provisions contained in Article 5 shall apply "to products" originating in the territories of other Members. Thus, while it is the *suppliers* that should be granted access to conformity assessment under Article 5.1.1, it is the *products* that receive "a positive assurance of conformity with technical regulations or standards". Moreover, the fact that the adjective "like" attaches to the noun "products" and not to "suppliers" makes clear that the "likeness" requirement in Article 5.1.1 relates to the products. Indeed, the "likeness" of the products at issue is central in defining the scope of the non-discrimination obligations under Article 5.1.1, such that there is no obligation to grant access to conformity assessment under no less favourable conditions, if the products being supplied are not "like". In other words, the products at issue must be in a competitive relationship in the marketplace. Accordingly, the determination of likeness under Article 5.1.1 involves "a determination about the nature and extent of a competitive relationship between and among the products at issue".<sup>330</sup>

5.123. As the second clause of Article 5.1.1 of the TBT Agreement makes clear, the focus of the non-discrimination obligations under Article 5.1.1 is on the *conditions for access* to a conformity assessment granted to suppliers, i.e. on the factors or circumstances under which the opportunity to benefit from conformity assessment is accorded to those suppliers. Article 5.1.1 prohibits the granting of access to conformity assessment under less favourable conditions for suppliers of like products originating in the territories of other Members, as compared to suppliers of like products of national origin or originating in any other country.<sup>331</sup> It thus requires an assessment of whether the conditions for access to conformity assessment granted by the regulating Member to suppliers of domestic or third-country products modify the conditions of competition to the detriment of suppliers of like imported products.<sup>332</sup>

5.124. In addition, the national treatment and most-favoured nation treatment obligations in Article 5.1.1 are qualified by the phrase "in a comparable situation". The word "comparable" is defined as "[a]ble to be compared, capable of comparison".<sup>333</sup> Two things can be considered to be comparable "when there are sufficient similarities between the things that are compared as to make

<sup>330</sup> See, for Article 2.1 of the TBT Agreement, Appellate Body Report, *US – Clove Cigarettes*, para. 120.

<sup>331</sup> Similarly to Article I:1 of the GATT 1994, Article 5.1.1 extends the non-discrimination requirement to granting access under conditions no less favourable between suppliers from a WTO Member and suppliers of like products from "any other country".

<sup>332</sup> See, for Article III:4 of the GATT 1994, Appellate Body Report, *Korea – Various Measures on Beef*, para. 137.

<sup>333</sup> Oxford English Dictionary online, definition of "comparable", <https://www.oed.com/view/Entry/37424>.

that comparison worthy or meaningful".<sup>334</sup> Turning to the word "situation", we recall that the obligations under Article 5.1.1 of the TBT Agreement concern the conditions for granting access to conformity assessment for suppliers of like products. Thus, even though the word "situation" could potentially encompass a large number of factors on the basis of which a comparison could be made, the factors relevant for purposes of establishing the existence of a "comparable situation" under Article 5.1.1 would be those with a bearing on the conditions for granting access to conformity assessment in a particular case.<sup>335</sup> Moreover, the second clause of Article 5.1.1 describes access as "suppliers' right to an assessment of conformity *under the rules of the procedure*".<sup>336</sup> Since this procedure sets out the conditions for access to conformity assessment in a particular case, its rules will also be relevant for defining the universe of situations to be compared.

5.125. Being placed at the end of the first clause of Article 5.1.1 of the TBT Agreement and separated by a comma from the rest of the clause, the words "in a comparable situation" relate to **the entire phrase "so as to grant access for suppliers ... under conditions no less favourable",** and not only to the phrase "in any other country" or the "suppliers of like products". Thus, "in a comparable situation" is not limited to qualifying only the suppliers or countries from which the like products originate, rather it qualifies the entire requirement to grant access to suppliers of like products under no less favourable conditions. This indicates that whether a situation is "comparable" for purposes of Article 5.1.1 should be assessed in relation to the measure at issue granting access to conformity assessment to suppliers of like products and in light of the particular circumstances of each case. In addition, we consider that the function of conformity assessment procedures, which is to determine that relevant requirements in technical regulations or standards are fulfilled, as indicated in Annex 1.3 to the TBT Agreement, provides some guidance for the determination of a "comparable situation".<sup>337</sup> In light of this function, factors that impact the ability of Members to make a determination that relevant requirements in technical regulations or standards are fulfilled may be relevant in the inquiry of "a comparable situation".

5.126. We further note that the obligations under Article 5.1.1 concern "access for *suppliers* of like products"<sup>338</sup> to conformity assessment. Moreover, the second clause of Article 5.1.1 defines "access" as "*suppliers'* right to an assessment of conformity".<sup>339</sup> It is therefore the suppliers of like products that are entitled to an assessment of conformity under the rules of the procedure and under conditions no less favourable. The second clause of Article 5.1.1 further specifies that this includes, when foreseen by the conformity assessment procedure at issue, "the possibility to have conformity assessment activities undertaken at the site of facilities and to receive the mark of the system". This language in the second clause of Article 5.1.1 reaffirms the provision's focus on the suppliers and the modalities of their right of access to conformity assessment. The focus on the situation of suppliers in Article 5.1.1 is different from provisions containing similar language, for instance the reference to "countries where the same conditions prevail" in the *chapeau* of Article XX of the GATT 1994, and "Members where identical or similar conditions prevail" in Article 2.3 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), both of which qualify requirements that measures do not constitute a means of arbitrary or unjustifiable discrimination. Whereas the *chapeau* of Article XX of the GATT 1994 relates to "countries" and Article 2.3 of the SPS Agreement to "Members", Article 5.1.1 of the TBT Agreement specifically

<sup>334</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 476.

<sup>335</sup> In the context of the *chapeau* of Article XX of the GATT 1994, the Appellate Body similarly observed that while the term "conditions" could "potentially encompass a number of circumstances facing a country", in the specific context in which that term appears in the *chapeau* "only 'conditions' that are *relevant* for the purpose of establishing arbitrary or unjustifiable discrimination in the light of the specific character of the measure at issue and the circumstances of a particular case should be considered". (Appellate Body Reports, *EC – Seal Products*, para. 5.299 (italics original; bold omitted))

<sup>336</sup> Emphasis added.

<sup>337</sup> We note that, differently from technical regulations or standards, which may pursue various legitimate objectives, the function of conformity assessment procedures is to ensure that the underlying technical regulations or standards are complied with. That the function of conformity assessment procedures is limited to ensuring compliance is also confirmed by Article 5.1.2 of the TBT Agreement, which requires that conformity assessment procedures not be more strict or applied more strictly than is necessary "to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards".

<sup>338</sup> Emphasis added.

<sup>339</sup> Emphasis added.

refers to "suppliers".<sup>340</sup> The text of Article 5.1.1 therefore makes clear that comparability of the situations has to be assessed by reference to the "suppliers", and thus takes account of the fact that conditions of access to conformity assessment may vary within a country.

5.127. We note Russia's view that the negotiating history of Article 5.1.1 of the TBT Agreement suggests that it is the situations *in particular countries* that should be compared and *not the suppliers*.<sup>341</sup> Specifically, Russia points out that the initial drafts of Article 5.1.1 did not contain the qualifying phrase "in a comparable situation", which was introduced later in the negotiations and specifically after the words "in any other country".<sup>342</sup> This, according to Russia, "reveals the intention of the drafter[s] to qualify and narrow down the scope of application of the no less favourable treatment provisions" of Article 5.1.1<sup>343</sup>, and implies that "it is the situations in particular countries that should be compared and not the suppliers."<sup>344</sup> We agree with Russia that the phrase "in a comparable situation" in Article 5.1.1 qualifies the scope of the obligations in that provision to accord no less favourable conditions of access to conformity assessment. However, the introduction of this phrase as a qualification of the obligations under Article 5.1.1 does not suggest an analysis of comparability on a country-wide or supplier-specific basis. As observed above, we understand the phrase "in a comparable situation", inserted after the comma in the first clause of Article 5.1.1, to limit the scope of the non-discrimination obligations by requiring an assessment of factors relating to the *suppliers* of like products, for purposes of determining whether access has been granted under conditions no less favourable. Therefore, while factors relating to an entire country may be relevant in determining the existence of a "comparable situation", the text of Article 5.1.1 makes clear that such country-wide factors have to affect the specific suppliers at issue. In our view, had the intention of the drafters been to mandate an assessment of a "comparable situation" by reference only to the situation in a country, to the exclusion of the situation of suppliers, they would not have inserted the comma in the text of the first clause of Article 5.1.1. Therefore, while the "comparable situation" analysis may rely on country-wide factors, such factors would ultimately have to apply to the suppliers at issue, in order to be relevant to the question whether "access for *suppliers* of like products"<sup>345</sup> has been granted under conditions less favourable.

5.128. In light of the above, the assessment of whether access is granted under conditions no less favourable "in a comparable situation" within the meaning of Article 5.1.1 of the TBT Agreement should focus on factors with a bearing on the conditions for granting access to conformity assessment in that specific case and the ability of the regulating Member to ensure compliance with the requirements in the underlying technical regulation or standard. In a particular case, such an assessment may involve the analysis of various factors, including the rules of the conformity assessment procedure; whether its preparation, adoption, or application is challenged; the nature of the products at issue; and the situation in a particular country or supplier. Nevertheless, the relevant factors for determining the existence of a "comparable situation" should ultimately relate to the Member's ability to make a positive assurance of conformity with respect to the specific suppliers of like products at issue, such that if no comparable situation existed for these suppliers, the obligation to grant non-discriminatory access to conformity assessment would not apply to them. In all instances, this analysis has to be made on a case-by-case basis in light of the measure at issue and the particular circumstances of the case.

5.129. We now turn to review the Panel's analysis under Article 5.1.1 of the TBT Agreement. With respect to the Panel's interpretation, Ukraine argues that the Panel failed to elaborate on what exactly has to be compared for purposes of interpreting the phrase "in a comparable situation" in Article 5.1.1. Specifically, Ukraine considers that the Panel provided a very limited interpretation of the phrase and did not clarify whether an assessment of the situation of a country as a whole or that of the relevant suppliers is required.<sup>346</sup>

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<sup>340</sup> We further note that, while Article 5.1.1 of the TBT Agreement imposes affirmative obligations on Members with respect to conformity assessment procedures, Article XX of the GATT 1994 establishes exceptions to obligations under the GATT 1994.

<sup>341</sup> Russia's appellee's submission, para. 213 (referring to Ukraine's appellant's submission, paras. 240 and 242).

<sup>342</sup> Russia's appellee's submission, paras. 158-159. (fn omitted)

<sup>343</sup> Russia's appellee's submission, para. 159.

<sup>344</sup> Russia's appellee's submission, para. 160.

<sup>345</sup> Emphasis added.

<sup>346</sup> Ukraine's appellant's submission, paras. 236 and 257. See also Ukraine's opening statement at the oral hearing, para. 4.

5.130. The Panel began its analysis by noting that Article 5.1.1 of the TBT Agreement establishes obligations to provide national treatment and most-favoured nation treatment with regard to access for suppliers from other Members to covered conformity assessment procedures of importing Members.<sup>347</sup> Regarding the "like products" analysis, the Panel observed that the text of Article 5.1.1 defines the product scope of the non-discrimination obligations and considered that the same criteria that are applied for determining whether products are "like" in the context of Article 2.1 of the TBT Agreement are applicable in the context of Article 5.1.1.<sup>348</sup> With regard to whether the importing Member grants access for suppliers under conditions less favourable, the Panel noted that differential access conditions would be relevant under Article 5.1.1 if they modified the conditions of competition, or competitive opportunities, among relevant suppliers of like products to the detriment of suppliers of the complaining Member.<sup>349</sup> The Panel recalled that Ukraine challenged only the application of a conformity assessment procedure to particular Ukrainian suppliers, and not the procedure as such.<sup>350</sup> Thus, according to the Panel, less favourable access conditions would exist "where the importing Member denies or limits the right or possibility of a supplier of another Member to have conformity assessment activities undertaken under the rules of the applicable conformity assessment procedure, either in respect of the entire conformity assessment procedure or any of its relevant parts, but does not deny or limit the right or possibility of access of another supplier of a like product from the importing Member or any other country".<sup>351</sup>

5.131. Finally, the Panel noted that the phrase "in a comparable situation" qualifies the preceding part of the first clause of Article 5.1.1, and therefore "warrants a comparison of differential conditions of access with a view to determining whether the less favourable conditions of access are being granted despite the situation being comparable".<sup>352</sup> With respect to the relevant factors that render a situation comparable or not, the Panel observed the second clause of Article 5.1.1 makes clear that the relevant context of the phrase is that of assessing conformity under the rules of the procedure and conducting conformity assessment activities. The Panel also considered the context of Articles 5.1.2 and 5.2.7 of and Annex 1.3 to the TBT Agreement. Accordingly, for the Panel, "aspects of a situation that have a bearing on, for instance, the ability of the importing Member to undertake such activities under the rules of the procedure with adequate confidence would, in principle, seem to be relevant." In the Panel's view, "the relevant aspects of a situation would include aspects specific to the suppliers who are claimed to have been granted access under less favourable conditions or to the location of the suppliers' facilities." The Panel concluded that, "[i]n all events, whether a situation is comparable must be assessed on a case-by-case basis and in the light of the relevant rules of the conformity assessment procedure and other evidence on record."<sup>353</sup>

5.132. We begin by noting that the Panel's understanding of "like products" and "access ... under conditions no less favourable" is consonant with our interpretation above. Specifically, as observed, even though the obligation under Article 5.1.1 attaches to the *suppliers* of products as opposed to the product itself, the "likeness" of the products at issue is central in defining the scope of the non-discrimination obligations under Article 5.1.1. Accordingly, the determination of likeness under Article 5.1.1, similarly to that under Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement, involves a determination of the nature and extent of a competitive relationship between and among the products at issue. We also noted that Article 5.1.1 requires an assessment of whether the *conditions for access* to conformity assessment granted by the regulating Member to suppliers of domestic or third-country products modify the conditions of competition to the detriment of suppliers of like imported products.<sup>354</sup>

5.133. The Panel's finding that the phrase "in a comparable situation" contains a qualification of the obligation to grant access to conformity assessment procedures to suppliers under conditions no less favourable<sup>355</sup> is also in line with our interpretation of Article 5.1.1 of the TBT Agreement. The Panel correctly recognized that, in determining whether a situation is comparable, such that no less favourable access conditions must be granted, "it is necessary to identify relevant factors that render

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<sup>347</sup> Panel Report, para. 7.248.

<sup>348</sup> Panel Report, para. 7.254.

<sup>349</sup> Panel Report, para. 7.260.

<sup>350</sup> Panel Report, para. 7.261.

<sup>351</sup> Panel Report, para. 7.261.

<sup>352</sup> Panel Report, para. 7.282.

<sup>353</sup> Panel Report, para. 7.283.

<sup>354</sup> See, for Article III:4 of the GATT 1994, Appellate Body Report, *Korea – Various Measures on Beef*, para. 137.

<sup>355</sup> Panel Report, para. 7.282.



a situation comparable or not."<sup>356</sup> As the Panel observed, the relevant context for such an assessment is that of assessing conformity under the rules of the procedure and conducting conformity assessment activities.<sup>357</sup> Above we similarly found that, even though the word "situation" could potentially encompass a large number of factors on the basis of which a comparison could be made, the factors relevant for purposes of establishing the existence of a "comparable situation" would be those with a bearing on the conditions for granting access to conformity assessment in a particular case. The Panel further noted that relevant factors would include the ability of the importing Member to undertake conformity assessment activities under the rules of the procedure with adequate confidence. Indeed, in light of the function of conformity assessment procedures to ensure that the underlying technical regulation or standard is complied with, factors that may impact the ability of the importing Member to make such a determination would be relevant in the inquiry of "a comparable situation". We also agree with the Panel that the relevant aspects of a situation would include "aspects specific to the suppliers who are claimed to have been granted access under less favourable conditions or to the location of the suppliers' facilities".<sup>358</sup> In our analysis above, we similarly concluded that under Article 5.1.1 it is the suppliers of like products that are entitled to an assessment of conformity under the rules of the procedure and under conditions no less favourable.

5.134. Ukraine argues that "if the situation of suppliers in one country presents common elements and is not 'totally' different from the situation of suppliers in another country, they are to be regarded as 'comparable' under Article 5.1.1."<sup>359</sup> In this regard, Ukraine relies on the Appellate Body's statement made in the context of Article 5.5 of the SPS Agreement.<sup>360</sup> In our view, in stating that "[i]f the situations proposed to be examined are *totally* different from one another, they would not be rationally comparable"<sup>361</sup>, the Appellate Body was not addressing what constitutes a "comparable" situation, but rather explaining when it would not be possible to begin examining whether two different situations are comparable. It does not follow from this statement that situations that are not totally different are necessarily comparable. Moreover, the term "comparable situation" in Article 5.1.1 of the TBT Agreement is not the same as the term "different situations" in Article 5.5 of the SPS Agreement.<sup>362</sup>

5.135. In light of the above, it appears that, in its interpretation of Article 5.1.1 of the TBT Agreement, the Panel outlined a number of factors that may be relevant in determining the existence of a "comparable situation", and in particular recognized the relevance of factors specific to the suppliers at issue. Furthermore, the Panel correctly concluded that whether a situation is comparable must be assessed on a case-by-case basis and in light of the relevant rules of the conformity assessment procedure and other evidence on the record.<sup>363</sup> In our view, the Panel thus adequately set out the interpretative framework of Article 5.1.1, and we do not see that, in its interpretation of Article 5.1.1, the Panel "completely followed the lead" of the respondent's arguments<sup>364</sup> or "made [an] incomplete conclusion concerning 'in a comparable situation'".<sup>365</sup>

5.136. In sum, we do not consider that the Panel erred in its interpretation of the phrase "in a comparable situation" in Article 5.1.1 of the TBT Agreement by failing to elaborate on what has to be compared in establishing the existence of a comparable situation.

<sup>356</sup> Panel Report, para. 7.283. (fn omitted)

<sup>357</sup> Panel Report, para. 7.283.

<sup>358</sup> Panel Report, para. 7.283.

<sup>359</sup> Ukraine's appellant's submission, para. 242 (quoting Panel Report, para. 7.276).

<sup>360</sup> In *EC – Hormones*, the Appellate Body observed that "[t]he situations exhibiting differing levels of protection cannot ... be compared unless they are comparable, that is, unless they present some common element or elements sufficient to render them comparable", and that "[i]f the situations proposed to be examined are *totally* different from one another, they would not be rationally comparable and the differences in levels of protection cannot be examined for arbitrariness." (Appellate Body Report, *EC – Hormones*, para. 217 (emphasis original))

<sup>361</sup> Appellate Body Report, *EC – Hormones*, para. 217. (emphasis original)

<sup>362</sup> The first sentence of Article 5.5 of the SPS Agreement provides that "[w]ith the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade."

<sup>363</sup> Panel Report, para. 7.283.

<sup>364</sup> Ukraine's appellant's submission, para. 255.

<sup>365</sup> Ukraine's appellant's submission, para. 257.

#### 5.3.4 The Panel's application of Article 5.1.1 of the TBT Agreement

5.137. Ukraine argues that in its analysis the Panel relied on general considerations regarding the political or internal security situation in Ukraine that had no bearing on the situation of the relevant suppliers whose certificates were suspended or rejected.<sup>366</sup> Ukraine specifically takes issue with the focus of the Panel assessment on the risk to life or health of Russian *inspectors*, rather than on aspects specific to the *suppliers* at issue or the location of the suppliers' facilities.<sup>367</sup> In Ukraine's view, the Panel should have compared the situations of the specific suppliers whose certificates were suspended or applications rejected by the FBO with the situations of suppliers of like products originating in Russia and other countries, as opposed to accepting the relevance of general considerations regarding the security situation in Ukraine that had no bearing on the situation of the relevant suppliers.<sup>368</sup> Furthermore, Ukraine takes issue with an analogy the Panel made between the function of conformity assessment procedures under Article 5.1.1 of the TBT Agreement, on the one hand, and the legitimate objective of protecting human life and health under Article 2.2 of that agreement, on the other. According to Ukraine, the phrase "a comparable situation" may not be understood as a basis for an importing Member to act for the protection of the interests recognized in the sixth recital of the preamble of the TBT Agreement unless the protection of those interests is directly linked to the situation of the suppliers subject to the measures at issue.<sup>369</sup>

5.138. The Panel examined the reasons provided by Russia in support of its view that the situation of suppliers of Ukrainian railway products was not comparable to that of suppliers of Russian railway products and of suppliers of railway products from other countries.<sup>370</sup> In particular, the Panel reviewed the arguments and evidence submitted by the parties in support of their assertions regarding the existence of uncertainty with respect to the safety and security of FBO employees travelling to Ukraine to conduct inspections, namely: (i) incidents in several places in Ukraine and anti-Russian sentiment; (ii) Russian citizens visiting Ukraine between 2013 and 2016; (iii) report of the Office of the United Nations High Commissioner for Human Rights (OHCHR Report); (iv) visits to Ukraine by inspectors from other countries between 2014 and 2017; (v) Russia's Ministry of Foreign Affairs travel advice on Ukraine; (vi) declaration from FBO employees refusing to visit Ukraine; and (vii) communications from Ukrainian producers to the FBO offering enhanced security conditions.<sup>371</sup> Following its review of individual pieces of evidence, the Panel undertook an overall assessment of the evidence, and ultimately found that "in this instance related to risks to life and health of FBO inspectors, over the time-frame examined above, the situation in Ukraine was not comparable to other countries."<sup>372</sup>

5.139. Above, we found that the question under Article 5.1.1 of the TBT Agreement is whether "access for *suppliers* of like products" has been granted under conditions less favourable and that "access" is defined as "*suppliers'* right to an assessment of conformity".<sup>373</sup> Since it is the suppliers of like products that are entitled to access to an assessment of conformity under no less favourable conditions and even though factors that more generally apply to an entire country may be relevant to the inquiry of whether a "comparable situation" exists, such factors should ultimately pertain to or affect the specific suppliers of like products to which the conditions for access to conformity assessment granted by the importing Member relate. With these considerations in mind, we turn to the Panel's application of Article 5.1.1 to the facts of the present case.

5.140. We observe that, while in its interpretation of Article 5.1.1 the Panel clearly stated that the relevant aspects of a situation would include aspects specific to the suppliers who are claimed to have been granted access under less favourable conditions or to the location of the suppliers'

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<sup>366</sup> Ukraine's appellant's submission, paras. 247-248 and 255. See also Ukraine's opening statement at the oral hearing, para. 8.

<sup>367</sup> Ukraine's appellant's submission, paras. 247-248.

<sup>368</sup> Ukraine's opening statement at the oral hearing, para. 8.

<sup>369</sup> Ukraine's appellant's submission, paras. 252-254. See also Ukraine's opening statement at the oral hearing, para. 20.

<sup>370</sup> Panel Report, para. 7.314.

<sup>371</sup> Panel Report, section 7.3.2.2.4.2. The Panel further considered Russia's arguments regarding the existence of restrictions on Russian citizens entering Ukraine (i.e. automatic prosecution in Ukraine of Russian citizens who visited Crimea after April 2014 and restriction on the entry to Ukraine of Russian male citizens aged between 16 and 60). (Ibid., section 7.3.2.2.4.3) However, the Panel found that the evidence before it did not confirm the existence of such restrictions. (Ibid., paras. 7.361 and 7.369)

<sup>372</sup> Panel Report, para. 7.387.

<sup>373</sup> Emphasis added.

facilities<sup>374</sup>, in its assessment of the evidence on the record the Panel made only limited references to relevant factors relating to the specific suppliers at issue, such as the location of the suppliers' facilities. Importantly, while the Panel focused its analysis on the security situation in Ukraine in general, it did not assess the evidence on the record with a view to determining how the security situation related to the specific suppliers at issue. In fact, only in examining the set of press articles reflecting incidents in several places in Ukraine and anti-Russian sentiment did the Panel refer to the regions of the relevant suppliers.<sup>375</sup> However, even in that context, and in drawing conclusions from the evidence in the press articles, the Panel did not clearly distinguish between incidents in the regions where the relevant suppliers were located and incidents in other regions.<sup>376</sup> The rest of the Panel's analysis was based on the existence of security concerns and anti-Russian sentiment in Ukraine in general and not in the specific regions where the relevant suppliers were located.<sup>377</sup> Thus, in applying Article 5.1.1 to the facts of the case and in examining factors relevant for establishing the existence of a "comparable situation" in the particular circumstances at issue, the Panel did not in fact focus, as it stated in its interpretation, on "aspects specific to the suppliers who are claimed to have been granted access under less favourable conditions or to the location of the suppliers' facilities" and relied instead on information on the record concerning the general security situation in Ukraine.<sup>378</sup>

5.141. As we see it, evidence concerning an entire country may provide a basis for concluding that a conformity assessment procedure cannot be conducted in any part of the country, e.g. when its entire territory is affected by a natural disaster or an armed conflict that has an impact on the situation of specific suppliers. Evidence of risk for the security of governmental employees, as opposed to actual incidents relating to the security of those employees, may also be probative in this regard. However, as noted above, the language in Article 5.1.1 makes clear that comparability of the situations has to be assessed by reference to the "suppliers", thus taking account of the fact that conditions of access to conformity assessment may vary within a country. Therefore, the existence of a "comparable situation" must be established on the basis of evidence pertaining to the specific suppliers of like products to which the conditions for access to conformity assessment granted by the importing Member relate. In the present case, we do not see that, in making this assessment, the Panel sufficiently considered the situation of the specific suppliers at issue or the regions where the relevant suppliers were located or provided an explanation as to how the evidence on the record concerning the existence of security concerns and anti-Russian sentiment in Ukraine in general related to these regions and suppliers.

5.142. Furthermore, in its overall assessment of the evidence, the Panel referred to the importance of protecting human life and health and noted that "responsive and responsible governments can and may take such vital interests of their citizens into account when determining whether their government officials can carry out inspections abroad."<sup>379</sup> Notably, the Panel observed that:

[I]n the specific circumstances of a dispute such as ours, the importing Member in applying Article 5.1.1 may confront the need to weigh and balance the interests of suppliers of products originating in the territories of other Members in an assessment of conformity against its interest in *safeguarding the life or health of its employees* when undertaking conformity assessment activities, such as inspections, abroad. As noted, the protection of human life and health is a *vital interest*. However, there must be a rational relationship between the need to protect the life and health of inspectors travelling abroad and the situation prevailing in the country where inspections are to be carried out. In our view, the importing Member in principle benefits from a *margin of discretion* in carrying out such a weighing and balancing of interests, as appropriate to the circumstances, which include the importance of the interests at stake.<sup>380</sup>

5.143. We note that the Panel recognized the necessity of "a rational relationship between the need to protect the life and health of inspectors travelling abroad and the situation prevailing in the country where inspections are to be carried out".<sup>381</sup> As we understand it, the Panel therefore did not

<sup>374</sup> Panel Report, para. 7.283.

<sup>375</sup> See Panel Report, paras. 7.329-7.331 and 7.335.

<sup>376</sup> Panel Report, para. 7.336.

<sup>377</sup> See Panel Report, paras. 7.337-7.356.

<sup>378</sup> Panel Report, para. 7.283.

<sup>379</sup> Panel Report, para. 7.375.

<sup>380</sup> Panel Report, para. 7.376. (emphasis added)

<sup>381</sup> Panel Report, para. 7.376.

rely on the protection of human life and health as a legitimate objective relevant under Article 5.1.1 in general, but rather considered this objective to be a relevant factor to determine the existence of a "comparable situation" in the circumstances of the present case, to the extent that it had a bearing on this situation. As noted above, under Article 5.1.1, the relevant factors for purposes of establishing the existence of a "comparable situation" are those relating to the conditions for granting "access" to conformity assessment for specific suppliers of like products, i.e. suppliers' right to an assessment of conformity under the rules of the procedure. Furthermore, factors that impact the ability of Members to make a determination that relevant requirements in technical regulations or standards are fulfilled, thereby ensuring compliance with these requirements, would be of relevance in the inquiry. In the present dispute, Ukraine challenged only the application of Russia's conformity assessment procedure. Under these procedures annual on-site inspections were to be conducted, in order to ensure the continued compliance of imported railway products with the relevant Russian technical regulations. In these circumstances, the ability of Russian inspectors to make a determination that the requirements in the technical regulation are fulfilled by way of conducting an on-site inspection, and thus to ensure access for suppliers of Ukrainian railway products to this part of Russia's conformity assessment procedure, could be affected by the security situation in Ukraine.

5.144. At the same time, we have concerns with the Panel's approach to assessing the existence of a "comparable situation" in the circumstances of this case. The question before the Panel was whether a comparable situation existed in the present dispute. The existence of a "comparable situation" may depend on a number of factors specific to the measure at issue and the circumstances of the case. Notably, such factors should have a bearing on *the conditions for granting access* to conformity assessment in a particular case and should pertain to or affect *the specific suppliers* of like products to which these conditions relate. It follows that the interest of safeguarding the life and health of governmental employees can only constitute a pertinent consideration for purposes of establishing the existence of a "comparable situation" to the extent that it also relates to the situation applicable to the suppliers at issue.

5.145. Moreover, we disagree with the Panel's conclusion that there was a need to "weigh and balance" the market access interests of suppliers of products originating in the territories of other Members against the interest of safeguarding the life and health of governmental employees.<sup>382</sup> The Panel also took into account the restrictiveness of the measure by noting that "the FBO in this dispute opted for suspensions rather than the stricter withdrawals or cancellation of the relevant certificates of conformity."<sup>383</sup> While such a balancing test may be appropriate in assessing whether a measure is more trade-restrictive than necessary under Article 2.2 of the TBT Agreement, this is not the question under Article 5.1.1. Nor do we see a basis for the Panel's statement that the importing Member benefits from a "margin of discretion" in carrying out such a weighing and balancing of interests of suppliers and employees.<sup>384</sup> We do agree that a threat to the life and health of governmental employees in performing part of the conformity assessment procedure can be a relevant factor in comparing the situations for purposes of Article 5.1.1 in a particular case. We further accept that the impossibility for governmental employees to carry out a part of a conformity assessment procedure, such as on-site inspections abroad, due to a *risk* for the security of those employees may not require evidence of *actual incidents*. Nevertheless, the existence of a "comparable situation" should be established objectively and based on evidence pertaining to the suppliers at issue. Therefore, the question before the Panel was whether, in light of all evidence on the record, the security situation in Ukraine as it applied to the relevant suppliers of Ukrainian railway products affected the conditions of granting access to conformity assessment to those suppliers, such that the situations relating to those suppliers and to suppliers in other countries could no longer be considered comparable.

5.146. By focusing in its analysis on whether the FBO acted "outside its margin of discretion by balancing the interests of Ukrainian suppliers and FBO employees"<sup>385</sup>, the Panel failed to consider how the interest of safeguarding the life and health of FBO employees related to the suppliers of Ukrainian railway products at issue, and thus failed to address the question whether the security situation in Ukraine, as it related to the suppliers at issue, was comparable to the security situation in other countries and suppliers. For instance, while the Panel recognized that "[i]t is not clear that

<sup>382</sup> See Panel Report, paras. 7.376 and 7.383.

<sup>383</sup> Panel Report, para. 7.383.

<sup>384</sup> Panel Report, paras. 7.376 and 7.383-7.384.

<sup>385</sup> Panel Report, para. 7.384.

FBO employees were necessarily likely to go to places where protests or demonstrations were held or where civil unrest erupted", the Panel also considered that "the situation during the relevant time-period was marked by instability and unpredictability."<sup>386</sup> Notably, the Panel held that "[f]rom the FBO's vantage point, it was therefore *not readily apparent* whether a given area of the country was sufficiently safe, or would remain so, to proceed with an inspection visit."<sup>387</sup> Thus, in assessing the existence of a "comparable situation", the Panel apparently "balanced" the evidence on the record concerning the objective existence of security concerns and anti-Russian sentiment generally in Ukraine, on the one hand, and the perception of the importing Member as to the existence of such concerns and sentiment, on the other. As noted, however, such weighing and balancing has no basis in the language of Article 5.1.1 of the TBT Agreement.

5.147. In the same vein, in stating that it seemed "reasonable that FBO employees, and the FBO's management, could reach the same conclusion" as the Russian citizens deciding not to travel to Ukraine<sup>388</sup>, and that the FBO's decision to consider the possible risk of sending government officials to Ukraine did not appear "unreasonable in the specific circumstances and time-frame"<sup>389</sup>, the Panel examined the existence of a comparable situation not through the perspective of the suppliers of Ukrainian railway products concerned but through that of the Russian government. This is also how we understand the Panel's ultimate conclusion that "during the relevant time-period, the FBO did not act outside its margin of discretion by balancing the interests of Ukrainian suppliers and FBO employees and then erring on the side of ensuring the safety of the latter and determining that the conditions for carrying out inspection control in Ukraine were not satisfied."<sup>390</sup> By giving prominence to the FBO's discretion, rather than examining whether and how the evidence on the record was relevant to the specific suppliers' situation, the Panel failed in applying Article 5.1.1 to the facts of the case, and, specifically, it failed to examine the existence of a "comparable situation" on the basis of objective evidence that sufficiently pertained to the specific suppliers at issue, namely, the suppliers to which the conditions for access to conformity assessment granted by the importing Member relate. Rather, the Panel relied on general "uncertainty" about the security situation of Russian citizens in Ukraine to make the far-reaching conclusion that Ukraine's entire territory was unsafe for purposes of conducting on-site inspections regarding all suppliers at issue and over the entire relevant time period of April 2014 to December 2016.

5.148. Finally, we observe that the Panel's error in applying the correct legal framework for examining the existence of a "comparable situation" is also reflected in the Panel's reliance on evidence that was either of a general nature and did not relate to the existence of security concerns and anti-Russian sentiment in the specific regions where the relevant suppliers were located (such as statistics concerning the number of Russian citizens visiting Ukraine between 2013 and 2016<sup>391</sup>), or reflected the situation in regions other than those of the suppliers (such as Russia's Ministry of Foreign Affairs travel advice on Ukraine<sup>392</sup>). Moreover, some of the evidence relied on by the Panel (e.g. the OHCHR Report<sup>393</sup>) explicitly referred to the armed conflict as confined to the Donbass and Crimea regions of Ukraine, i.e. regions different from the ones where the relevant suppliers were located. The Panel nevertheless considered this evidence to be relevant for its analysis of comparable situation, without explaining how it related to the regions where the suppliers at issue were located. Rather, the Panel specifically observed that officials from Belarus, the European Union, India, Kazakhstan, and Pakistan travelled to Ukraine "despite the above-noted evidence of unrest, rallies and protests in various parts of Ukraine, and despite the armed conflict in eastern Ukraine".<sup>394</sup> The Panel thus recognized that the security situation in Ukraine posed danger for the life and health of only Russian governmental employees, to the extent that evidence on the record demonstrated the existence of anti-Russian sentiment. In these circumstances, it was of particular importance for the Panel to analyse the comparability of situations with respect to the specific suppliers of Ukrainian railway products at issue, in order to be in a position to answer the question whether the security situation in certain regions of Ukraine, coupled with the existence of anti-Russian sentiment in those same regions and over the period between 2014 and 2016, resulted in the absence of a "comparable

<sup>386</sup> Panel Report, para. 7.380.

<sup>387</sup> Panel Report, para. 7.380. (emphasis added)

<sup>388</sup> Panel Report, para. 7.381.

<sup>389</sup> Panel Report, para. 7.382.

<sup>390</sup> Panel Report, para. 7.384.

<sup>391</sup> Panel Report, paras. 7.337-7.339.

<sup>392</sup> Panel Report, paras. 7.346-7.350.

<sup>393</sup> Panel Report, paras. 7.340-7.342.

<sup>394</sup> Panel Report, para. 7.345.

situation" with respect to suppliers located in those regions and for purposes of conducting on-site inspections by Russian FBO employees over the relevant period.<sup>395</sup>

5.149. In light of the above, the Panel erred in its application of Article 5.1.1 of the TBT Agreement to the facts of the present case in finding that, between April 2014 and December 2016, Ukrainian suppliers of railway products were denied no less favourable access in a situation that was not comparable to the situation in which Russia granted access to suppliers of Russian railway products and suppliers of railway products from other countries.

### 5.3.5 Completion of the legal analysis

5.150. The Appellate Body has completed the legal analysis with a view to facilitating the prompt settlement and effective resolution of disputes where the factual findings by the panel<sup>396</sup> and/or undisputed facts on the panel record<sup>397</sup> provided a sufficient factual foundation for doing so.<sup>398</sup>

5.151. In the present case, Ukraine has not requested us to complete the legal analysis. Furthermore, as noted above, the focus of the Panel's assessment was on evidence concerning the existence of security concerns and anti-Russian sentiment in Ukraine in general, rather than on how this evidence related to the regions where the relevant suppliers were located. Therefore, the Panel did not conduct an assessment as to how the evidence on the record, taken individually or together, relates to the security situation in Ukraine as it applied to relevant suppliers of Ukrainian railway products. Consequently, there are no specific factual findings relating to these suppliers, which would be required for a completion of the legal analysis and thus we cannot rely on the factual findings made by the Panel, in order to complete the legal analysis. Specifically, we are not in a position to assess whether the security situation in Ukraine affected the conditions of granting access to conformity assessment for the specific suppliers at issue over the relevant period, such that it was no longer comparable to the situation applicable to other countries and suppliers of like products. Additionally, it appears that the relevance and weight to be given to certain pieces of evidence is contested between the participants. In these circumstances, we do not consider that we have before us sufficient factual findings by the Panel or undisputed facts on the Panel record on which we can rely in completing the legal analysis.

### 5.3.6 Whether the Panel failed to make an objective assessment of the matter under Article 11 of the DSU

5.152. Having found that the Panel erred in its application of Article 5.1.1 of the TBT Agreement to the facts of the present case in finding that the situation in Ukraine was not comparable to other countries, there is no need to further examine Ukraine's claim that the Panel failed to make an objective assessment of the matter under Article 11 of the DSU with respect to the same finding.

### 5.3.7 Conclusion

5.153. Under Article 5.1.1 of the TBT Agreement, the assessment of whether access is granted under conditions no less favourable "in a comparable situation" should focus on factors having a

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<sup>395</sup> We note that at the oral hearing Ukraine raised concerns with respect to the relevant time period the Panel chose for its assessment of evidence on the record. In Ukraine's view, since the dates of the 14 instructions suspending certificates were between April 2014 and August 2015, the Panel should not have extended this period until the date of the Panel's establishment on 16 December 2016. The Panel explained its decision with the fact that there was no evidence before it that up until the date of the Panel's establishment the FBO issued instructions determining that the conditions for suspending certificates were no longer present. (Panel Report, para. 7.377) In our view, independently of the precise time period, the Panel had to establish whether the situation concerning the relevant producers of Ukrainian railway products was or was not comparable to the situation concerning producers of other countries both: (i) at the time the suspensions were made; and (ii) in the period following the suspensions.

<sup>396</sup> Appellate Body Reports, *Canada – Periodicals*, p. 24, DSR 1997:I, p. 469; *Australia – Salmon*, paras. 117-119; *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1250.

<sup>397</sup> Appellate Body Reports, *US – Lamb*, paras. 150 and 172; *US – Section 211 Appropriations Act*, paras. 343-345; *EC and certain member States – Large Civil Aircraft*, para. 1178; *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 1250-1251.

<sup>398</sup> Appellate Body Reports, *Colombia – Textiles*, para. 5.30; *US – Anti-Dumping Methodologies (China)*, para. 5.146; *Russia – Pigs (EU)*, para. 5.141; *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.745.

bearing on the conditions for granting access to conformity assessment to suppliers of like products and the ability of the regulating Member to ensure compliance with the requirements in the underlying technical regulation or standard. Thus, factors relevant to the inquiry of whether a "comparable situation" exists have to affect the specific suppliers to which the conditions for access to conformity assessment granted by the importing Member relate.

5.154. We consider that the Panel did not err in its interpretation of the phrase "in a comparable situation" in Article 5.1.1 of the TBT Agreement. However, in examining factors relevant for establishing the existence of a "comparable situation" in the particular circumstances of this case, the Panel relied too much on information concerning the security situation in Ukraine generally, and did not focus sufficiently on aspects specific to the suppliers who are claimed to have been granted access under less favourable conditions or to the location of the suppliers' facilities. We therefore find that the Panel erred in its application of Article 5.1.1 of the TBT Agreement to the facts of the present case in finding that, between April 2014 and December 2016, Ukrainian suppliers of railway products were denied no less favourable access in a situation that was not comparable to the situation in which Russia granted access to suppliers of Russian railway products and suppliers of railway products from other countries. For the same reasons, we find that the Panel erred in its application of Article 5.1.1 of the TBT Agreement to the facts of the present case in finding that less favourable access conditions were granted to Ukrainian suppliers of railway products in a situation that was not comparable also in the context of the two decisions through which the FBO rejected applications submitted by Ukrainian suppliers under CU Technical Regulation 001/2011 (i.e. decisions 1 and 2).

5.155. Consequently, we reverse the Panel's finding, in paragraphs 7.394 and 8.1.b.i of the Panel Report, that Ukraine failed to establish, with respect to each of the 14 challenged instructions suspending certificates, that Russia acted inconsistently with its obligations under Article 5.1.1 of the TBT Agreement.

5.156. We also reverse the Panel's finding, in paragraphs 7.638 and 8.1.c.i of the Panel Report, that Ukraine failed to establish, with respect to the two decisions through which the FBO "returned without consideration" applications for certificates submitted by Ukrainian producers under CU Technical Regulation 001/2011, i.e. decisions 1 and 2, that Russia acted inconsistently with its obligations under Article 5.1.1 of the TBT Agreement.

#### 5.4 Ukraine's claim under Article 5.1.2 of the TBT Agreement

5.157. We now turn to Ukraine's claim that the Panel erred in making an objective assessment of the matter before it pursuant to Article 11 of the DSU in finding that Ukraine had failed to establish that the proposed less trade-restrictive alternatives were reasonably available, and that Russia acted inconsistently with its obligations under Article 5.1.2 of the TBT Agreement. Ukraine requests us to reverse the conclusions in paragraphs 8.1.b.ii and 8.1.c.iii of the Panel Report and find that the Panel failed to make an objective assessment of the matter before it under Article 11 of the DSU in finding that Ukraine had failed to establish, with respect to each of the 14 instructions, that Russia had acted inconsistently with its obligations under Article 5.1.2 of the TBT Agreement.<sup>399</sup> In Ukraine's view, the Panel's assessment of the facts in this respect "lack[s] objectivity, adequate reasoning and explanations, and [is] not impartial", and the Panel accepted Russia's "unsubstantiated assertions".<sup>400</sup>

##### 5.4.1 The Panel's findings

5.158. The Panel began by setting out its interpretation of Article 5.1.2 of the TBT Agreement. The Panel observed that Article 5.1.2 stipulates, in its first sentence, a general obligation not to prepare, adopt, or apply conformity assessment procedures with a view to or with the effect of creating unnecessary obstacles to international trade. In turn, an example of a situation where an inconsistency with that general obligation would arise is set out in the second sentence of Article 5.1.2.<sup>401</sup> With respect to the first sentence, the Panel concluded that the reference in Article 5.1.2 to "unnecessary obstacles to international trade" refers to the notion of "necessity"<sup>402</sup>

<sup>399</sup> Ukraine's appellant's submission, paras. 177 and 226.

<sup>400</sup> Ukraine's appellant's submission, para. 190.

<sup>401</sup> Panel Report, para. 7.402.

<sup>402</sup> Panel Report, para. 7.412.

and in that respect bears certain similarity with Article 2.2 of the TBT Agreement. At the same time, Article 5.1.2 and Article 2.2 of the TBT Agreement differ with respect to the relationship between the first and the second sentences of these two provisions. Specifically, in the Panel's view, unlike Article 2.2, the second sentence of Article 5.1.2 does not qualify the terms of the first sentence. The Panel thus concluded that a finding of inconsistency with the first sentence of Article 5.1.2 may rest entirely on findings made with respect to the second sentence of Article 5.1.2.<sup>403</sup>

5.159. With respect to the second sentence of Article 5.1.2, the Panel examined the similarities and differences between that provision and the second sentence of Article 2.2 of the TBT Agreement. The Panel considered that both provisions concern the notion of "necessity", and thus found it useful to consider the Appellate Body's findings relating to the second sentence of Article 2.2.<sup>404</sup> The Panel further noted that, while the second sentence of Article 2.2 uses the phrase "necessary to fulfil a legitimate objective", the second sentence of Article 5.1.2 uses the phrase "necessary to give the importing Member adequate confidence that the products conform with the applicable technical regulations or standards". In the Panel's view, this textual difference indicates that the second sentence of Article 5.1.2 is limited to the objective of giving the importing Member adequate confidence of conformity.<sup>405</sup>

5.160. Furthermore, the Panel noted that the second sentence of Article 2.2 refers to the concept of "trade restrictiveness", while Article 5.1.2 refers to the concepts of *strictness* or *strict application*.<sup>406</sup> As the Panel saw it, a conformity assessment procedure that is more trade-restrictive (or is applied in a more trade-restrictive manner) than necessary, would constitute a conformity assessment procedure that is more strict (or applied more strictly) than necessary. However, the Panel reasoned, there may be other ways (not involving the restriction of trade *per se*) in which a conformity assessment procedure could be more strict, or could be applied more strictly, than necessary and could thus fail to comply with the second sentence of Article 5.1.2.<sup>407</sup>

5.161. The Panel explained that, based on these considerations, it would undertake a holistic weighing and balancing of the following factors to determine whether Russia applies its conformity assessment procedure consistently with the second sentence of Article 5.1.2: (i) the contribution of Russia's application of its conformity assessment procedure to the objective of giving Russia adequate confidence that Ukrainian railway products conform with the relevant technical regulations; (ii) the strictness of the manner in which Russia applies its conformity assessment procedure; and (iii) the "nature and gravity" of the risks that non-conformity would create. The Panel stated that, moreover, it would compare the manner of applying the procedure chosen by Russia against the alternative manners of applying Russia's conformity assessment procedure suggested by Ukraine, except if the manner of applying the procedure chosen by Russia does not contribute to giving Russia adequate confidence of conformity.<sup>408</sup>

5.162. With respect to the burden of proof, the Panel considered how the Appellate Body and a previous panel had allocated the burden of proof under Article 2.2.<sup>409</sup> Specifically, in the Panel's view, identification of a less strict manner of application alone is not a sufficient basis for a panel to find that the importing Member's manner of applying its conformity assessment procedure is more strict than necessary to give that Member adequate confidence of conformity.<sup>410</sup> The Panel therefore considered that a complaining party raising an alternative manner of applying a conformity assessment procedure needs to make a *prima facie* case that such an alternative manner of application: (i) is less strict; (ii) makes an equivalent contribution to the objective of providing the importing Member adequate confidence of conformity; and (iii) is reasonably available to the importing Member.<sup>411</sup>

5.163. The Panel considered that the suspension of certificates, as Russia's chosen manner of applying its conformity assessment procedure, contributes substantially to the objective of giving Russia adequate confidence of continued conformity of the Ukrainian railway products covered by

<sup>403</sup> Panel Report, para. 7.413.

<sup>404</sup> Panel Report, para. 7.418.

<sup>405</sup> Panel Report, para. 7.420.

<sup>406</sup> Panel Report, para. 7.422.

<sup>407</sup> Panel Report, para. 7.422.

<sup>408</sup> Panel Report, para. 7.423.

<sup>409</sup> Panel Report, para. 7.428.

<sup>410</sup> Panel Report, para. 7.432.

<sup>411</sup> Panel Report, para. 7.433.



the 14 suspended certificates.<sup>412</sup> Furthermore, the Panel found the suspension of certificates substantially restricts trade, and can be considered as a strict manner of application, albeit withdrawal of certificates would be an even stricter manner.<sup>413</sup> Finally, in the Panel's view, non-conforming railway products may lead to accidents such as train derailments, which, in turn, may cause great harm to human, animal, and plant life or health. The Panel considered that, in view of the products concerned (certain railway rolling stock, railroad switches, other railroad equipment, and parts thereof covered by the suspended certificates), the consequences of a failure of any such products, due to non-conformity with the underlying technical regulations, could reasonably be expected to create substantial risks to human, animal, and plant life or health, as well as to the environment.<sup>414</sup>

5.164. With respect to the first alternative identified by Ukraine, for Russian authorities to communicate with Ukrainian producers, the Panel considered that the alternative had an uncertain outcome and could theoretically lead to a situation that would allow the conformity assessment procedure to continue, just as it could lead to a situation where it would not continue and certificates would be suspended.<sup>415</sup> Furthermore, the Panel noted that the Ukrainian producers' letters to the FBO, offering private security arrangements with a view to allowing inspections to proceed, did not remove the FBO's concerns about sending inspectors to conduct inspections in Ukraine and the certificates remained suspended.<sup>416</sup> Finally, the Panel observed that Ukraine did not elaborate on why it was not reasonable for the FBO to consider that the arrangements for conducting inspection control in Ukraine that had been proposed by Ukrainian producers were not satisfactory or sufficient, and whether, under Russia's domestic law, the FBO could delay suspending certificates of products whose continued conformity could not be verified.<sup>417</sup> Accordingly, the Panel found that Ukraine had not established that communicating with the relevant five Ukrainian producers is a less strict manner of applying Russia's conformity assessment procedure that would have been reasonably available to Russia.<sup>418</sup>

5.165. With respect to the second alternative identified by Ukraine, entrusting inspections in Ukraine to the competent authorities of Kazakhstan or Belarus, the Panel noted that it was not self-evident that the FBO has the power to entrust foreign government authorities to carry out tasks entrusted to it. Moreover, the Panel observed that Ukraine had not provided any evidence of prior instances of the FBO entrusting certification bodies in other countries with the conduct of inspections abroad, and thus considered that Ukraine had not met its burden to establish that this alternative is available to Russia.<sup>419</sup> Accordingly, the Panel found that Ukraine had failed to establish that entrusting the competent authorities of Belarus and Kazakhstan with the conduct of inspections in Ukraine is a less strict manner of applying Russia's conformity assessment procedure that would have been reasonably available to Russia.<sup>420</sup>

5.166. With respect to the third alternative identified by Ukraine, accrediting non-Russian experts or organizations to conduct inspections in Ukraine, the Panel understood that Ukraine referred to the possibility of appointing experts, provided for in Article 10 of Certification System for Federal Railway Transport (CS FRT 01-96).<sup>421</sup> However, for the Panel, it was not clear that this provision provides for the possibility of accrediting non-Russian experts to conduct on-site inspections. While Article 10 did not specify the nationality that accredited experts must have, Ukraine had not provided any evidence to indicate that non-Russian experts had been accredited. The Panel further noted that the system in place is one where experts seek accreditation and does not contemplate that the

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<sup>412</sup> Panel Report, para. 7.450.

<sup>413</sup> Panel Report, paras. 7.453-7.454.

<sup>414</sup> Panel Report, para. 7.457.

<sup>415</sup> Panel Report, para. 7.468. In this regard, the Panel referred to the Appellate Body Report in *US – Gambling*, in which the Appellate Body reversed the panel's finding that, before imposing a WTO-inconsistent measure, the responding party could have entered into consultations with the complaining party to find alternatives. The Appellate Body noted that negotiations are by definition a process, the results of which are uncertain. (Ibid., para. 7.467 (referring to Appellate Body Report, *US – Gambling*, paras. 315-317 and 321))

<sup>416</sup> Panel Report, para. 7.468 (referring to Letter [BCI] from PJSC [BCI] to FBO (Panel Exhibit UKR-18 (BCI))).

<sup>417</sup> Panel Report, para. 7.469.

<sup>418</sup> Panel Report, para. 7.470.

<sup>419</sup> Panel Report, para. 7.474.

<sup>420</sup> Panel Report, para. 7.476.

<sup>421</sup> Panel Report, paras. 7.477 and 7.480.

Ministry approaches experts and issues them accreditation certificates and licences.<sup>422</sup> There was also no evidence on the record to indicate that, at the time that the 14 instructions suspending certificates were issued, there were non-Russian experts qualified to conduct inspection control in Ukraine with valid Russian accreditation certificates. Finally, the Panel observed that there was also no evidence of prior instances of the FBO using accredited experts to conduct inspections abroad.<sup>423</sup> Accordingly, the Panel found that Ukraine had failed to establish that accrediting non-Russian experts or organizations is a less strict manner of applying Russia's conformity assessment procedure that would have been reasonably available to Russia.<sup>424</sup>

5.167. With respect to the fourth alternative identified by Ukraine, conducting off-site inspections, the Panel observed that the main point of contention between the parties was whether, under Article 7.4.1 of the Organization Standard CTO PC-FZT 08-2013 "Procedure of organization and implementation of inspection control of certified products" (PC-FZT 08-2013) (Panel Exhibit RUS-23), which stipulates conditions for the conduct of off-site inspection, the FBO was precluded from conducting off-site inspections for the railway products affected by the 14 suspensions.<sup>425</sup> The parties referred to only two of the conditions in Article 7.4.1, namely, that there be: (i) absence of facts of non-conformity during the previous inspection control; and (ii) absence of consumer complaints as to the quality of certified products.<sup>426</sup> With respect to the first of those two conditions, the Panel understood it to mean that an off-site inspection is excluded *only for products with respect to which a non-conformity* concerning these products or their related production processes had been identified in *the most recent inspection control* covering these products.<sup>427</sup>

5.168. Turning to the availability of off-site inspections with respect to railway products covered by the 14 suspended certificates, the Panel considered that, in the circumstances of the case, it was for Ukraine to submit evidence of absence of non-conformities and consumer complaints. In the Panel's view, Article 7.4.1 was contained in a legal instrument either available publicly or upon request, the producers received an "inspection act" that indicates the results of the inspection, and the FBO would provide information about consumer complaints to the affected producers. Alternatively, the Panel noted that Ukraine could demonstrate that it undertook reasonable efforts to obtain information from Russia regarding any non-conformities during the previous inspection control or any consumer complaints, with an explanation as to why the information could not be obtained. However, Ukraine had not done so for most of the railway products covered by the suspended certificates.<sup>428</sup> The Panel then examined the relevant certificates of each Ukrainian producer that the FBO suspended through each of the instructions at issue.<sup>429</sup> In sum, the Panel concluded that Ukraine had not established, with respect to any of the suspended certificates covered by the challenged 14 instructions, that off-site inspection was available under Article 7.4.1.<sup>430</sup>

5.169. Based on the above, the Panel found that Ukraine had failed to establish, with respect to each of the 14 instructions at issue, that Russia had acted inconsistently with its obligations under Article 5.1.2 of the TBT Agreement.<sup>431</sup>

#### 5.4.2 Claims and arguments on appeal

5.170. On appeal, Ukraine requests us to reverse the conclusions in paragraphs 8.1.b.ii and 8.1.c.iii of the Panel Report that Ukraine had failed to establish, with respect to each of the 14 instructions, that Russia had acted inconsistently with its obligations under Article 5.1.2 of the TBT Agreement.<sup>432</sup>

<sup>422</sup> Panel Report, para. 7.480.

<sup>423</sup> Panel Report, para. 7.480.

<sup>424</sup> Panel Report, para. 7.482.

<sup>425</sup> Panel Report, para. 7.496.

<sup>426</sup> Panel Report, paras. 7.499 and 7.501.

<sup>427</sup> Panel Report, para. 7.513. The other possibilities considered by the Panel were to read the condition at issue as: (i) covering non-conformities identified in the immediately prior inspection control concerning any railway product of the producer, including railway products not covered by the upcoming inspection control; (ii) applying to a non-conformity identified in the most recent inspection control for any of the railway products covered by the upcoming inspection control (which may not be the most recent inspection control of the relevant producer); and (iii) applying also to non-conformities relating to the production process rather than to the specific products produced. (Ibid., paras. 7.509-7.512)

<sup>428</sup> Panel Report, para. 7.519.

<sup>429</sup> Panel Report, paras. 7.520-7.534.

<sup>430</sup> Panel Report, para. 7.535.

<sup>431</sup> Panel Report, para. 7.544.

<sup>432</sup> Ukraine's appellant's submission, paras. 177 and 226.

In Ukraine's view, the Panel's assessment of facts in this respect "lack[s] objectivity, adequate reasoning and explanations, and [is] not impartial", and the Panel accepted Russia's "unsubstantiated assertions".<sup>433</sup>

5.171. In particular, regarding the first alternative of "additional communications with the relevant Ukrainian producers", Ukraine recalls that the burden of proof rests on the party, whether complaining or defending, that asserts the affirmative of a particular claim or defence. In this respect, Ukraine takes issue with the Panel's allocation of burden of proof and asserts that the Panel ignored the fact that the respondent bears the burden to rebut the complainant's case as to the reasonable availability of a particular alternative.<sup>434</sup> In Ukraine's view, the Panel "made the case" for Russia<sup>435</sup> and failed to comply with its duty under Article 11 of the DSU by "making findings despite the absence of adequate rebuttal of the respondent".<sup>436</sup> In addition, according to Ukraine, the Panel allocated a very high burden of proof to Ukraine and expected Ukraine to prove the negative, e.g. by finding that Ukraine failed to elaborate on why it was not reasonable for the FBO to consider that the arrangements for conducting inspection control in Ukraine, which had been proposed by Ukrainian producers, were not satisfactory or sufficient.<sup>437</sup>

5.172. With respect to the second alternative of "entrusting inspections in Ukraine to the competent authorities of Kazakhstan or Belarus", Ukraine asserts that the possibility of this alternative does not seem to be excluded, given the unified legal system, in particular the legal framework for technical regulations and conformity assessment procedures, that Belarus, Kazakhstan, and Russia have under the Treaty on the Establishment of the Common Customs Territory and the Formation of a Customs Union.<sup>438</sup> Furthermore, Ukraine submits that, in finding that Ukraine has failed to provide evidence of prior instances of the FBO entrusting certification bodies in other countries with inspections abroad, the Panel placed on Ukraine an excessive burden of proof.<sup>439</sup> In Ukraine's view, the Panel erred in making findings despite the lack of a rebuttal by Russia with respect to the second alternative measure proposed by Ukraine.<sup>440</sup>

5.173. With respect to the third alternative of "accrediting non-Russian experts or organizations to conduct inspections in Ukraine", Ukraine recalls the Panel's finding that it is not clear whether Article 10 of CS FRT 01-96 provides for the possibility of accrediting non-Russian experts to conduct on-site inspections. Ukraine contends that because Article 10 does not specify that accredited experts must have a certain nationality, the Panel erred in requiring Ukraine to provide evidence that non-Russian experts have been accredited in the past.<sup>441</sup> In addition, Ukraine alleges that the Panel erred in discharging Russia from its burden of proof by concluding that there was no evidence to indicate that there were non-Russian experts qualified to conduct such inspections.<sup>442</sup>

5.174. With respect to the fourth alternative of "conducting off-site inspections", Ukraine alleges that the Panel erred in finding that it was for Ukraine to submit evidence that the two conditions for off-site inspections under Article 7.4.1 of PC-FZT 08-2013 were met, namely, evidence of the absence of non-conformities and of consumer complaints concerning the railway products covered by the suspended certificates.<sup>443</sup> In addition, Ukraine points out that the Panel's understanding that "PC-FZT 08-2013 was available, whether publicly or upon request", contradicted its previous finding that the legal instrument was "not published officially".<sup>444</sup> Ukraine also refers to the lack of explanation by Russian authorities to Ukrainian producers as to the reasons for refusing off-site inspections.<sup>445</sup>

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<sup>433</sup> Ukraine's appellant's submission, para. 190.

<sup>434</sup> Ukraine's appellant's submission, para. 195.

<sup>435</sup> Ukraine's appellant's submission, para. 195.

<sup>436</sup> Ukraine's appellant's submission, para. 198.

<sup>437</sup> Ukraine's appellant's submission, para. 199 (referring to Panel Report, para. 7.469).

<sup>438</sup> Ukraine's appellant's submission, paras. 203-204 and 206.

<sup>439</sup> Ukraine's appellant's submission, para. 209.

<sup>440</sup> Ukraine's appellant's submission, para. 210.

<sup>441</sup> Ukraine's appellant's submission, paras. 212 and 216.

<sup>442</sup> Ukraine's appellant's submission, para. 215 (referring to Panel Report, para. 7.480).

<sup>443</sup> Ukraine's appellant's submission, paras. 221 and 224.

<sup>444</sup> Ukraine's appellant's submission, para. 220 (referring to Panel Report, paras. 7.494 and 7.519).

<sup>445</sup> Ukraine's appellant's submission, para. 222.

5.175. For its part, Russia requests us to uphold the Panel's findings in paragraphs 8.1.b.ii and 8.1.c.iii of the Panel Report.<sup>446</sup> As a preliminary point, Russia submits that Ukraine did not meaningfully address the Panel's findings set out in paragraph 8.1.c.iii of its Report, insofar as Ukraine simply alleged that its assertions with respect to rejections of certificates are similar to those it raises concerning suspension of certificates.<sup>447</sup> In Russia's view, a mere assertion is insufficient to establish a violation of Article 11 of the DSU.

5.176. With respect to the first alternative of "additional communications with the relevant Ukrainian producers", Russia argues that the Panel correctly rejected the alternative proposed by Ukraine.<sup>448</sup> In Russia's view, Ukraine attempts to substitute the obligation of the complainant to "establish the *prima facie* case" with the obligation of a party to "prove the fact it relies on" and shift its burden of proof to Russia.<sup>449</sup> Russia submits that under Article 5.1.2, the obligation to determine the reasonable availability of a less trade-restrictive measure is part of establishing the *prima facie* case and does not qualify as an exception. Therefore, in order to establish a *prima facie* case, Ukraine bears the burden to prove all elements of Article 5.1.2. Russia further asserts that Ukraine acknowledged its burden of proof as a complainant but did not provide sufficient arguments regarding the reasonable availability of the alternative, thus failing to establish a *prima facie* case.<sup>450</sup> Alternatively, Russia asserts that if the Appellate Body were to find that Ukraine had in fact established a *prima facie* case, Russia had succeeded in rebutting that *prima facie* case before the Panel.<sup>451</sup>

5.177. With respect to the second alternative of "entrusting inspections in Ukraine to the competent authorities of Kazakhstan or Belarus", Russia submits that Ukraine's argument that the Panel ignored the lack of rebuttal from Russia is without merit.<sup>452</sup> Russia points out that Ukraine did not provide any reference to CU documents, other legal instruments, or facts showing availability of such an alternative in the course of the Panel proceedings. Russia therefore considers this suggested alternative to be a mere theoretical assumption. Russia points out that the theoretical "possibility" to entrust foreign government authorities to carry out inspections and a "reasonably available alternative" under Article 5.1.2 are two completely different concepts.<sup>453</sup> According to Russia, Ukraine tries to combine two factually different scenarios, namely, Russia's trust in the results of assessments conducted by other CU member officials and the possibility for Russia to require such member officials to conduct assessments on its behalf.

5.178. With respect to the third alternative of "accrediting non-Russian experts or organizations to conduct inspections in Ukraine", Russia submits that the Panel objectively assessed Ukraine's argument, and correctly examined the scope and meaning of Article 10 of CS FRT 01-96.<sup>454</sup> Russia reiterates that Ukraine bears the burden to demonstrate the availability of the alternative but failed to provide evidence in support of its position. In addition, Russia submits that the Panel's conclusion with respect to this alternative measure rests on three separate factual findings, and thus the Panel's conclusion would stand even if the principle asserted by Ukraine were found to apply.<sup>455</sup>

5.179. With respect to the fourth alternative of "conducting off-site inspections", Russia submits that, contrary to Ukraine's assertion, the evidence provided by Russia during the Panel proceedings is relevant.<sup>456</sup> With respect to the publishing of PC-FZT 08-2013, Russia highlights the Panel's conclusion that "access and even publication by third parties is possible and that the standard is not a confidential internal document", and recalls that Ukraine did not object to the public availability of the document during the Panel's proceedings.<sup>457</sup> In response to Ukraine's argument that Russian authorities did not explain to Ukrainian producers the reasons for refusing to conduct off-site

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<sup>446</sup> Russia's appellee's submission, para. 86.

<sup>447</sup> Russia's appellee's submission, para. 89.

<sup>448</sup> Russia's appellee's submission, para. 105.

<sup>449</sup> Russia's appellee's submission, para. 92.

<sup>450</sup> Russia's appellee's submission, paras. 97-98 (referring to Panel Report, paras. 7.468-7.469).

<sup>451</sup> Russia's appellee's submission, para. 103 (referring to Panel Report, para. 7.464).

<sup>452</sup> Russia's appellee's submission, para. 115.

<sup>453</sup> Russia's appellee's submission, para. 113.

<sup>454</sup> Russia's appellee's submission, para. 119.

<sup>455</sup> Russia's appellee's submission, para. 123.

<sup>456</sup> Russia's appellee's submission, para. 127.

<sup>457</sup> Russia's appellee's submission, para. 129.

inspections, Russia asserts that while that may be relevant in relation to Article 5.2.2 of the TBT Agreement, which is not appealed here, it is not a pertinent consideration under Article 5.1.2.<sup>458</sup>

#### 5.4.3 Whether the Panel failed to make an objective assessment of the matter under Article 11 of the DSU with respect to the fourth alternative measure

5.180. Ukraine takes issue with the Panel's allocation of the burden of proof under Article 5.1.2 of the TBT Agreement, and in particular with the Panel's finding that Ukraine failed to establish that each proposed less trade-restrictive alternative is reasonably available to Russia.<sup>459</sup> We therefore begin our analysis by examining the proper allocation of the burden of proof under Article 5.1.2 in light of the assessment to be conducted under this provision, namely, determining whether conformity assessment procedures are more strict or applied more strictly than necessary to give the importing Member adequate confidence of conformity. We then turn to assess whether, in the circumstances of the present case, the Panel failed to make an objective assessment under Article 11 of the DSU in its allocation of the burden of proof when examining the alternative measures proposed by Ukraine.

5.181. The text of Article 5.1 of the TBT Agreement provides, in relevant part:

#### *Article 5*

##### *Procedures for Assessment of Conformity by Central Government Bodies*

5.1 Members shall ensure that, in cases where a positive assurance of conformity with technical regulations or standards is required, their central government bodies apply the following provisions to products originating in the territories of other Members:

...

5.1.2 conformity assessment procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. This means, *inter alia*, that conformity assessment procedures shall not be more strict or be applied more strictly than is necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks non-conformity would create.

5.182. The first sentence of Article 5.1.2 requires WTO Members to ensure that conformity assessment procedures are not prepared, adopted, or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade. Pursuant to the second sentence, "[t]his means, *inter alia*, that conformity assessment procedures shall not be more strict or be applied more strictly than is necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks non-conformity would create". While the first sentence requires that the conformity assessment procedures not create "*unnecessary* obstacles to international trade", the second sentence specifies that conformity assessment procedures "shall not be more strict or be applied more strictly than is *necessary*".

5.183. Both sentences of Article 5.1.2 thus refer to the notion of "necessity". The Appellate Body has previously noted that the word "necessary" refers to a range of degrees of necessity, depending on the connection in which it is used.<sup>460</sup> In this vein, we consider that "necessity" in the first and second sentences of Article 5.1.2 has to be determined in the specific context of this provision. What constitutes an "unnecessary obstacle to international trade" is further informed by the second sentence of Article 5.1.2. The qualification "[t]his means" at the beginning of the second sentence, followed by the conjunction "*inter alia*", indicates that the second sentence describes a situation in which a conformity assessment procedure is prepared, adopted, or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade. Since the second sentence

<sup>458</sup> Russia's appellee's submission, para. 130.

<sup>459</sup> See Ukraine's appellant's submission, paras. 194, 202, 214, and 221.

<sup>460</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 318 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 161).

specifies the meaning of the term "unnecessary" in the first sentence, it provides useful context for understanding how the notion of "necessity" in Article 5.1.2 as a whole should be interpreted.

5.184. Under the second sentence, whether a procedure is "more strict" or is "applied more strictly than is necessary" has to be assessed in relation to whether it gives the importing Member "adequate confidence" that products conform with the applicable technical regulations or standards. In our view, this phrase points to the function of conformity assessment procedures, which is to ensure compliance with the requirements of a technical regulation or standard. Moreover, "the risks non-conformity would create" shall be taken account of. What gives the importing Member "adequate confidence" that certain products comply with a technical regulation or standard may vary depending on the measure at issue and the circumstances of the case. Whether the conformity assessment procedure is more strict or applied more strictly than necessary under the second sentence of Article 5.1.2 has to be assessed against its contribution to this function of giving adequate confidence that products comply with the underlying technical regulation or standard. Furthermore, the risks that non-conformity with a particular technical regulation or standard would create also depend on the objective pursued by the particular technical regulation or standard. In that sense, the objective of the technical regulation or standard may have relevance in the analysis of trade restrictiveness of the conformity assessment procedure.

5.185. In the panel proceedings, both parties and the Panel considered that Article 2.2 provides relevant context for the interpretation of Article 5.1.2.<sup>461</sup> We note similarities in the language of Articles 2.2 and 5.1.2 of the TBT Agreement.<sup>462</sup> Specifically, the first sentences of Articles 2.2 and 5.1.2 contain an obligation for WTO Members not to "prepare[], adopt[] or appl[y]" technical regulations or conformity assessment procedures respectively "with a view to or with the effect of creating unnecessary obstacles to international trade". At the same time, there are relevant differences in the texts of these provisions. For instance, while the second sentence of Article 2.2 refers to "trade-restrictive", the second sentence of Article 5.1.2 refers to "more strict" or "applied more strictly". Moreover, the function of conformity assessment procedures expressed in the second sentence of Article 5.1.2 is to give "adequate confidence" that products conform with the applicable technical regulation or standard. By contrast, the third sentence of Article 2.2 refers to a list of indicative legitimate objectives that technical regulations could fulfil. As we see it, both Articles 2.2 and 5.1.2 set out obligations for WTO Members not to create unnecessary obstacles to international trade with regard to technical regulations and conformity assessment procedures, respectively, and identify certain factors to be considered in a necessity analysis. In particular, the factors relevant to the analysis under Article 2.2 include the legitimate objective of the technical regulation, its trade restrictiveness, and the risks non-fulfilment of the objective would create. Under Article 5.1.2, relevant factors include the function of the conformity assessment procedure, its strictness, and the risks non-conformity with the underlying technical regulation or standard would create.<sup>463</sup>

5.186. Based on these considerations, the existence of an "unnecessary obstacle[]" to international trade" under the first and second sentences of Article 5.1.2 of the TBT Agreement, read together, may be established on the basis of an analysis of the following factors: (i) whether the conformity assessment procedure provides adequate confidence of conformity with the underlying technical regulation or standard; (ii) the strictness of the conformity assessment procedure or of the way in which it is applied; and (iii) the nature of the risks and the gravity of the consequences that would arise from non-conformity with the technical regulation or standard. While the function of conformity assessment procedures is to ensure compliance with the underlying technical regulation or standard,

<sup>461</sup> Panel Report, paras. 7.406-7.413.

<sup>462</sup> Article 2.2 of the TBT Agreement provides: "Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create."

<sup>463</sup> The Appellate Body has stated that an assessment of whether a technical regulation is "more trade-restrictive than necessary" within the meaning of Article 2.2 of the TBT Agreement involves an evaluation of a number of factors. A panel should begin by considering factors that include: (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure. In most cases, a comparison of the challenged measure and possible alternative measures should be undertaken. In particular, it may be relevant for the purpose of this comparison to consider whether the proposed alternative is less trade-restrictive, whether it would make an equivalent contribution to the relevant legitimate objective (taking account of the risks non-fulfilment would create), and whether it is reasonably available. (Appellate Body Report, *US – Tuna II (Mexico)*, para. 322)

the legitimate objective of this regulation or standard would also be relevant in determining the nature of the risks and the gravity of the consequences that would arise from non-conformity. Similarly to Article 2.2, the use of the comparative "more ... than" in the second sentence of Article 5.1.2 suggests that the existence of an "unnecessary obstacle[]" to international trade" in the first sentence may be ascertained on the basis of a comparative analysis of the above factors.<sup>464</sup> Thus, in order to establish that a conformity assessment procedure is more strict than necessary, it may be compared to possible alternative procedures. In this respect, panels should examine whether such alternative measures are reasonably available, are less strict or applied less strictly, and provide an equivalent contribution to giving the importing Member adequate confidence that products conform with the applicable technical regulations or standards. This analysis ultimately involves a holistic weighing and balancing of all relevant factors with respect to the challenged conformity assessment procedure and in comparison with proposed alternative measures.<sup>465</sup>

5.187. With respect to the burden of proof in establishing the existence of an "unnecessary obstacle[]" to international trade" under Article 5.1.2, we note that the Appellate Body has held that as a general matter the burden of proof rests upon the party, whether complaining or defending, that asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, which will fail unless it adduces sufficient evidence to rebut the presumption.<sup>466</sup> In addition, precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case.<sup>467</sup>

5.188. The Appellate Body has said that, thus, the burden of proof with respect to a particular WTO provision "cannot be understood in isolation from the overarching logic of that provision, and the function which it is designed to serve".<sup>468</sup> In this regard, similarly to Article 2.2, the burden to make a *prima facie* case under Article 5.1.2 is on the complainant. By contrast in exceptions employing the concept of necessity, such as Article XX of the GATT 1994 and Article XIV of the General Agreement on Trade in Services (GATS), the burden of proof with respect to the "necessity" of the measure is on the respondent.<sup>469</sup> In order to show that a conformity assessment procedure or its application is inconsistent with Article 5.1.2, the complainant must establish that the challenged measure creates an unnecessary obstacle to international trade on the basis of the first or second sentences of that provision. Under the second sentence, the complainant must present evidence and arguments sufficient to establish that the challenged conformity assessment procedure is more strict or applied more strictly than necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks non-conformity would create. In making its *prima facie* case, a complainant may also seek to identify a possible alternative measure that is less strict or applied less strictly, makes an equivalent contribution to the objective of ensuring adequate confidence, and is reasonably available.<sup>470</sup> It is then for the respondent to rebut the complainant's *prima facie* case, by presenting evidence and arguments showing that the challenged conformity assessment procedure is not more strict or applied more strictly than necessary by demonstrating, for example, that the alternative measure identified by the complainant is not, in fact, reasonably available, is not less strict or applied less strictly, or does not make an equivalent contribution to the objective of ensuring adequate confidence.

5.189. We further recall that the burden of proof with respect to a particular WTO provision "cannot be understood in isolation from the overarching logic of that provision, and the function which it is designed to serve".<sup>471</sup> In this regard, the Appellate Body has observed that while Article XX of the GATT 1994 provides for exceptions, Article 2.2 of the TBT Agreement contains positive obligations, and this difference must be taken into account in the allocation of the burden of proof imposed on respondents and complainants under the respective provisions.<sup>472</sup> Since under Article 5.1.2 of the TBT Agreement the burden is on the complainant to establish the elements of a breach of a positive obligation, we consider that the allocation of the burden of proof for complainants and respondents

<sup>464</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 320.

<sup>465</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.211.

<sup>466</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:1, p. 335.

<sup>467</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:1, p. 335.

<sup>468</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 286. (emphasis omitted)

<sup>469</sup> See Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.328.

<sup>470</sup> See, for Article 2.2 of the TBT Agreement, Appellate Body Report, *US – Tuna II (Mexico)*, para. 323.

<sup>471</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 286. (emphasis omitted)

<sup>472</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.333.

under this provision should be guided by similar considerations to the one under Article 2.2 of the TBT Agreement. Specifically, as noted, while under Article XX of the GATT 1994 a respondent must establish that the alternative measure identified by the complainant is ultimately *not* reasonably available to the respondent, under Article 2.2 of the TBT Agreement a complainant must make a *prima facie* case that its proposed alternative measure *is* reasonably available. In any event, the fact that alternative measures serve as "conceptual tool[s]" in the assessment of the trade restrictiveness of a measure also informs the nature and amount of evidence required.<sup>473</sup> In particular, such alternative measures are of a hypothetical nature for purposes of a necessity analysis, because they do not (yet) exist, or at least not in the particular form proposed by the complainant. Thus, complainants cannot be expected to provide complete and exhaustive descriptions of the alternative measures they propose.<sup>474</sup> Taking into account that the specific details of implementation may depend on the capacity and particular circumstances of the implementing Member in question, it would appear incongruous to expect a complainant to provide detailed information on how a proposed alternative would be implemented by the respondent in practice, and precise and comprehensive estimates of the cost that such implementation would entail.<sup>475</sup> Therefore, once a complainant has established *prima facie* that a proposed alternative is reasonably available, it would then be for the respondent to adduce specific evidence as to why the implementation of this alternative would be actually impracticable, for instance because it is associated with prohibitive costs or substantial technical difficulties.

5.190. With these considerations in mind, we turn to Ukraine's claim that the Panel failed to make an objective assessment of the matter before it pursuant to Article 11 of the DSU in finding that there were no less trade-restrictive alternatives available to Russia within the meaning of Article 5.1.2 of the TBT Agreement, and that Ukraine had failed to establish that Russia acted inconsistently with its obligations under that provision.<sup>476</sup> We recall that, before the Panel, Ukraine put forward four alternative measures: (i) additional communications with the relevant Ukrainian producers; (ii) entrusting on-site inspections in Ukraine to the competent authorities from Kazakhstan and Belarus; (iii) accrediting non-Russian inspectors, either experts or organizations, to conduct inspections in Ukraine; and (iv) off-site inspections.<sup>477</sup> We begin our analysis with Ukraine's claim, which takes issue with the Panel's allocation of the burden of proof under the alternative consisting in the possibility for the FBO to conduct off-site inspections.

5.191. Before the Panel, Ukraine argued that the conducting of off-site inspections by the FBO in Ukraine, a possibility that already existed in Russia's legislation, would be a less trade-restrictive alternative measure. On appeal, Ukraine submits that the Panel erred in finding that it was for Ukraine to submit evidence of compliance with the statutory requirements for conducting such off-site inspections as an alternative to on-site inspections, namely, absence of non-conformities and consumer complaints for the railway products covered by the suspended certificates at issue in this case.<sup>478</sup> In Ukraine's view, the Panel placed an excessive burden of proof on Ukraine and failed to make an objective assessment under Article 11 of the DSU.<sup>479</sup> Ukraine also argues that the Russian authorities did not explain to the Ukrainian producers the reasons for their refusal to conduct the off-site inspections, and the inspection control acts during previous inspections were vague.<sup>480</sup>

5.192. We recall that, before the Panel, Ukraine argued that Russia could have made use of off-site inspections instead of suspending certificates due to the impossibility of conducting on-site inspection control. In Ukraine's view, this alternative measure was reasonably available to Russia because off-site inspections were explicitly provided for in Article 5.3 of CS FRT 12-2003.<sup>481</sup> For its part, Russia submitted that off-site inspections could be conducted only if the conditions set out in Article 7.4.1 of PC-FZT 08-2013 were satisfied.<sup>482</sup> In particular, the disagreement between the parties was whether two of the conditions in Article 7.4.1 of PC-FZT 08-2013, absence of facts of

<sup>473</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.334.

<sup>474</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.334.

<sup>475</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.338.

<sup>476</sup> Ukraine's appellant's submission, para. 176.

<sup>477</sup> Panel Report, para. 7.459.

<sup>478</sup> Ukraine's appellant's submission, para. 221.

<sup>479</sup> Ukraine's appellant's submission, paras. 221 and 224.

<sup>480</sup> Ukraine's appellant's submission, para. 222 (referring to Panel Report, paras. 7.519 and 7.521).

<sup>481</sup> Panel Report, para. 7.484 (referring to Rules of the Certification System for Federal Railway Transport. Procedure for organizing and conducting an inspection control. (CS FRT 12-2003) (Panel Exhibit UKR-3)).

<sup>482</sup> Panel Report, para. 7.487 (referring to PC-FZT 08-2013 (Panel Exhibit RUS-23)).



non-conformity during the previous inspection control and absence of consumer complaints as to the quality of certified products, were fulfilled with respect to the railway products affected by the 14 suspensions at issue.<sup>483</sup> As the Panel explained, while "Ukraine advanced arguments in relation to the availability of off-site inspections, first under Article 5.3 of CS FRT 12-2003, and later, once Russia had referred to Article 7.4.1 of PC-FZT 08-2013, under Article 7.4.1"<sup>484</sup>, Russia provided evidence "to rebut Ukraine's assertions as to the availability of off-site inspections".<sup>485</sup>

5.193. The Panel considered that it was for Ukraine to submit evidence of absence of non-conformities and consumer complaints with respect to the products covered by the 14 suspensions at issue. In the Panel's view, Article 7.4.1 of PC-FZT 08-2013 was contained in a legal instrument either available publicly or upon request, the producers received from the FBO an "inspection act" that indicates the results of the inspection, and the FBO would provide information about consumer complaints to the affected producers. The Panel further noted that, for most relevant railway products, Ukraine did not demonstrate that it undertook reasonable efforts to obtain information from Russia regarding any non-conformities, with an explanation as to why the information could not be obtained.<sup>486</sup> Having examined the relevant certificates of each Ukrainian producer that the FBO suspended through each of the instructions at issue<sup>487</sup>, the Panel concluded that Ukraine had not established, with respect to any of the suspended certificates covered by the 14 challenged instructions, that off-site inspection was available under Article 7.4.1.<sup>488</sup>

5.194. We note that, for the Panel, in those instances where the evidence on the record did not unequivocally establish that both relevant conditions under Article 7.4.1 of PC-FZT 08-2013 were complied with, Ukraine had failed to demonstrate that off-site inspections were reasonably available for the railway products covered by the relevant instructions.<sup>489</sup> The question before us is whether the Panel failed to make an objective assessment of the matter by erroneously placing the burden of proof on Ukraine to adduce evidence as to whether the conditions under Article 7.4.1 were satisfied with respect to the railway products covered by the suspended certificates at issue, as part of Ukraine's *prima facie* case that the alternative was "reasonably available".

5.195. We recall that, in making its *prima facie* case that a conformity assessment procedure is "prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade" under Article 5.1.2 of the TBT Agreement, a complainant may seek to identify a possible alternative measure. As noted above, it is therefore the complainant's burden to establish that such an alternative measure is less trade-restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available. At the same time, considering that proposed alternative measures serve as "conceptual tools", and taking into account that the specific details of implementation of such measures may depend on the particular circumstances of the implementing Member in question, a complainant under Article 5.1.2 cannot be expected to provide detailed information on how a proposed alternative would be implemented by the respondent in practice. Instead, once a complainant has established *prima facie* that a proposed alternative is reasonably available, it is for the respondent to adduce evidence and arguments, in order to rebut the

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<sup>483</sup> Panel Report, paras. 7.499 and 7.501.

<sup>484</sup> Panel Report, para. 7.516. See also Panel Report, paras. 7.484 (referring to Rules of the Certification System for Federal Railway Transport. Procedure for organizing and conducting an inspection control. (CS FRT 12-2003) (Panel Exhibit UKR-3)) and 7.488 (referring to Ukraine's second submission to the Panel, paras. 215-219 and 221-227; opening statement at the second Panel meeting, para. 63).

<sup>485</sup> Panel Report, para. 7.517. Russia submitted evidence of non-conformities or consumer complaints for some of the 73 certificates suspended through the 14 instructions, and Ukraine submitted evidence of previous inspection controls in relation to some of the remaining suspended certificates. (Panel Report, para. 7.518. See also *ibid.*, para. 7.516 (referring to evidence provided by Ukraine, including inspection acts of certified products (Act of inspection dated 23 January 2014 of certified products produced by PJSC [BCI] (Panel Exhibit UKR-151 (BCI)); Act of inspection dated 24 January 2014 of certified products produced by PJSC [BCI] (Panel Exhibit UKR-152 (BCI))); evidence provided by Russia, including documents of the FBO providing for inconsistencies of certified products (Documents of the FBO providing for the inconsistencies of the certified products of PJSC [BCI] (Panel Exhibits RUS-62 (BCI), RUS-63 (BCI), RUS-64 (BCI), RUS-65 (BCI), and RUS-66 (BCI)); Letter dated 23 May 2016 from [BCI] to the FBO (Panel Exhibit RUS-67 (BCI)); Letter dated 13 June 2013 from [BCI] to the Deputy Minister of the MOT (Panel Exhibit RUS-68 (BCI)); Letter dated 3 December 2015 from [BCI] to the FBO (Panel Exhibit RUS-69 (BCI)); Letter dated 17 February 2013 from [BCI] to the FBO (Panel Exhibit RUS-70 (BCI))))))

<sup>486</sup> Panel Report, para. 7.519.

<sup>487</sup> Panel Report, paras. 7.520-7.534.

<sup>488</sup> Panel Report, para. 7.535.

<sup>489</sup> See Panel Report, paras. 7.521-7.534.

complainant's *prima facie* case, by demonstrating, for example, that the alternative measure is not reasonably available and that its implementation would be impracticable, *inter alia*, because implementation costs would be prohibitive or the alternative would entail substantial technical difficulties or undue burden for the Member in question.

5.196. As noted above, in the present case, Ukraine initially argued that Russia could have made use of off-site inspections pursuant to Article 5.3 of CS FRT 12-2003.<sup>490</sup> Russia confirmed the availability of this measure under its legislation, albeit subject to the conditions set out in Article 7.4.1 of PC-FZT 08-2013.<sup>491</sup> In response to Russia invoking Article 7.4.1, Ukraine further contended that Russia failed to provide evidence that the FBO examined the conditions laid down in Article 7.4.1 as regards the certificates suspended through the 14 instructions challenged by Ukraine, before deciding that off-site inspections were not available.<sup>492</sup> We observe that Ukraine challenged only the application of Russia's conformity assessment procedure to the certificates at issue, rather than the procedure itself. It was therefore possible for Ukraine to identify an alternative measure that coincides with an instrument that already existed under Russia's legislative framework. At the same time, alternative measures need not be already present in the legislation of the responding Member, even when a conformity assessment procedure is challenged as applied, and not as such. Indeed, the role of alternative measures is to assist in determining whether a conformity assessment measure taken by a Member is more strict or applied more strictly than is necessary to ensure conformity under Article 5.1.2, and not to positively establish that the conditions set out under national law for applying a different measure may have been present. We also note the Appellate Body's observation, in the context of Article 2.2 of the TBT Agreement, that the nature and degree of evidence required to establish a *prima facie* case of "reasonable availability" of proposed alternative measures should be informed by the fact that "alternative measures are of a hypothetical nature" and "do not yet exist in the Member in question, or at least not in the particular form proposed by the complainant".<sup>493</sup> Above, we took the view that a similar burden of proof applies with regard to the assessment of alternative measures under Article 5.1.2 of the TBT Agreement.

5.197. The purpose of this relational analysis under Article 5.1.2 is therefore to compare the measure at issue and an alternative measure, or their respective applications, in terms of strictness and the degree of contribution to the achievement of the objective to give adequate confidence of conformity. Such comparison cannot be carried out with an alternative measure that is merely theoretical in nature, because, for instance, the implementing Member is not capable of taking it, or because it imposes an undue burden on that Member. At the same time, the comparison of the challenged measure with a hypothetical alternative measure remains at a conceptual level. Thus, the fact that a measure with the same or similar content as the proposed alternative already exists in the legislative framework of the respondent Member does not change the function of the alternative measure as a "conceptual tool" in the necessity analysis. Therefore, as part of making a *prima facie* case, the complainant should provide sufficient indication that the proposed alternative would be reasonably available to the implementing Member, for instance by showing that the costs of the proposed alternatives would not be *a priori* prohibitive, and that potential technical difficulties associated with their implementation would not be of such a substantial nature that they would render the proposed alternatives merely theoretical in nature. The burden would then shift to the respondent to submit evidence substantiating that the proposed alternative measures were indeed merely theoretical in nature, or entailed an undue burden, for instance, because they involved prohibitively high costs or would entail substantial technical difficulties.<sup>494</sup>

5.198. In the present case, even though the alternative proposed by Ukraine coincided with a measure that already existed in Russia's legislation, the alternative remained hypothetical in nature, insofar as it had not yet been used by Russia with respect to the suspensions at issue. The comparison between the measure actually taken by Russia and this alternative measure therefore had to be undertaken at a conceptual level for purposes of making a *prima facie* case as to whether the alternative was reasonably available to Russia. The Panel by contrast considered that "it was for Ukraine to submit evidence of absence of non-conformities and consumer complaints concerning the

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<sup>490</sup> Panel Report, para. 7.483 (referring to Rules of the Certification System for Federal Railway Transport. Procedure for organizing and conducting an inspection control. (CS FRT 12-2003) (Panel Exhibit UKR-3)).

<sup>491</sup> Panel Report, para. 7.487 (referring to PC-FZT 08-2013 (Panel Exhibit RUS-23)).

<sup>492</sup> Panel Report, para. 7.488.

<sup>493</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.328.

<sup>494</sup> See Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.339.

railway products covered by the suspended certificates."<sup>495</sup> It appears that, because the proposed alternative coincided with a measure foreseen in Russia's legislation, the Panel took the view that the burden was on Ukraine to adduce evidence that the conditions attached to the measure, as it existed under Russia's law, would have been met, if the measure were to have been applied to each of the suspensions at issue. However, as observed above, the nature and degree of evidence required to establish the reasonable availability of proposed alternative measures do not change simply because such measures coincide with an instrument foreseen in the legislation of the importing Member. Instead, the burden of proof continues to be informed by the "hypothetical nature" of the alternative measure. Thus, in making the choice to identify an alternative that coincides with an instrument in existence under Russia's legislative framework, Ukraine was not required to demonstrate, for purposes of showing that the alternative was *prima facie* reasonably available, whether the measure described in Article 5.3 of CS FRT 12-2003 and Article 7.4.1 of PC-FZT 08-2013 could have applied in the specific instances related to the suspensions of certificates at issue. In our view, the Panel's analysis conflated two distinct concepts: the alternative measure proposed by Ukraine and the measure in existence under Article 5.3 of CS FRT 12-2003 and Article 7.4.1 of PC-FZT 08-2013.

5.199. Specifically, the question before the Panel under Article 5.1.2 was whether a less strict manner of application of this procedure existed, other than the suspension of certificates, which would also make an equivalent contribution to the objective of providing Russia with adequate confidence that Ukrainian railway products conformed with Russia's technical regulations, and which would be reasonably available to Russia. In this regard, the Panel had to assess whether the possibility of conducting off-site inspections under requirements such as those in Article 7.4.1 of PC-FZT 08-2013 constitutes a reasonably available less strict manner of application. Accordingly, for purposes of establishing reasonable availability, the Panel had to assess whether the alternative, as described by Ukraine, was not merely theoretical in nature and *a priori* did not entail any undue burden for Russia. The Panel should have then turned to examine whether Russia had submitted evidence rebutting Ukraine's *prima facie* case by adducing specific evidence and arguments as to why, in the circumstances of this case, the alternative measure was not in fact reasonably available. The Panel, however, did not address the question whether the description of the measure provided by Ukraine was sufficient to demonstrate *prima facie* that Russia would not be incapable of taking such an alternative measure. Indeed, the Panel should have considered the implications of the fact that the proposed measure already existed as a possible alternative to on-site inspections in Russia's legislation and the extent to which this fact in itself demonstrated that the measure was *prima facie* reasonably available, as opposed to merely theoretical. Instead, the Panel reasoned that, because information on the absence of non-conformities and consumer complaints was in principle available to Ukraine, it was for Ukraine to submit evidence relating to the application of these conditions to the products covered by the suspensions at issue.<sup>496</sup> The availability of certain information to Ukraine, as well as the issue of whether "it undertook reasonable efforts to obtain [this] information from Russia"<sup>497</sup>, is, however, distinct from the issue of which Member bears the burden of proof with respect to the application of the conditions in Article 7.4.1.

5.200. In light of the above, we do not see that, for purposes of establishing the reasonable availability of the alternative measure consisting in the conduct of off-site inspections, it was necessary for Ukraine to provide information about the compliance with the two requirements of Article 7.4.1, namely, the absence of non-conformities and consumer complaints, with respect to the railway products covered by the suspensions at issue. However, the majority of the Panel's findings that Ukraine failed to demonstrate the availability of off-site inspections under Article 7.4.1 for the railway products covered by instructions 1 to 14 are based on *the absence of evidence* on record regarding non-conformities and consumer complaints concerning these products.<sup>498</sup> This was so even in those cases where it remained unclear whether evidence on inconsistencies related to the products at issue<sup>499</sup> or where evidence showed no non-conformities in the most recent inspection control but there was no evidence of consumer complaints with respect to the same products.<sup>500</sup> Therefore, the burden of proof that the Panel placed on Ukraine went beyond what Ukraine was required to establish in making a *prima facie* case that a hypothetical measure, such as the measure

<sup>495</sup> Panel Report, para. 7.519.

<sup>496</sup> Panel Report, para. 7.519.

<sup>497</sup> Panel Report, para. 7.519.

<sup>498</sup> Panel Report, paras. 7.521-7.534.

<sup>499</sup> Panel Report, paras. 7.521, 7.523, and 7.527-7.528.

<sup>500</sup> Panel Report, para. 7.524.

provided for in Article 5.3 of CS FRT 12-2003 and Article 7.4.1 of PC-FZT 08-2013, would have been reasonably available to Russia in the circumstances of the case.

5.201. In sum, we consider that by placing the burden of proof on Ukraine to provide evidence as to the existence of the two conditions under Article 7.4.1 of PC-FZT 08-2013 in all individual instances in the present case and for purposes of establishing that the proposed alternative measure was reasonably available, the Panel erred in its allocation of the burden of proof under Article 5.1.2 of the TBT Agreement with respect to the 14 instructions suspending certificates in the present proceedings.

5.202. We recall that Ukraine also requests us to reverse the Panel's findings in paragraph 8.1.c.iii of the Panel Report regarding the FBO's rejections of applications for new certificates by Ukrainian producers of railway products.<sup>501</sup> Russia submits that Ukraine did not meaningfully address the Panel's findings set out in paragraph 8.1.c.iii, insofar as Ukraine simply alleged that its assertions with respect to rejections of certificates are similar to those it raised concerning suspension of certificates.<sup>502</sup> In Russia's view, a mere assertion is not enough to prove a violation of Article 11 of the DSU.<sup>503</sup> We note that on appeal Ukraine has not put forward separate arguments relating to the Panel's finding concerning the rejections of certificates. Therefore, Ukraine has not substantiated its request for reversal. We further observe that Ukraine's claim before the Panel concerning these rejections was based on a different legislative framework, namely, CU Technical Regulations 001/2011, 002/2011, and 003/2011.<sup>504</sup> Moreover, the relevant alternative measure proposed by Ukraine in this context was different, in that it concerned the availability of off-site testing of samples for applications submitted under scheme 3c in Annex 6 to CU Technical Regulation 001/2011.<sup>505</sup> Most importantly, with respect to the burden of proof, the Panel found as follows:

[T]here is no evidence on record that the FBO's practice of permitting off-site testing of samples under the conditions set out in Article 7.4.1 when processing applications concerning railway products produced in series under CU Technical Regulation 001/2011 has been officially published or is publicly known or available. Nor is there evidence that the FBO informed the producers elsewhere in Ukraine who were applying for new certificates under CU Technical Regulation 001/2011 that off-site testing of samples was a possibility.<sup>506</sup>

5.203. In these circumstances, the Panel considered that Ukraine did not need to demonstrate, as part of substantiating its claim that off-site sampling is a less strict manner of application reasonably available to Russia, that the conditions set out in Article 7.4.1 were satisfied in the case of the applications submitted pursuant to scheme 3c.<sup>507</sup> Taking into account the Panel's conclusion and in the absence of any substantiation by Ukraine, we do not consider that our findings with respect to the Panel's allocation of the burden of proof in the context of Ukraine's claim regarding the suspensions of certificates would have an implication for its analysis regarding the rejections of applications for new certificates. Thus, Ukraine has not established that the Panel failed to make an objective assessment in its allocation of the burden of proof in this respect.

#### 5.4.4 Completion of the legal analysis

5.204. We now turn to assess whether we are in a position to complete the legal analysis and find whether Russia has acted inconsistently with Article 5.1.2 of the TBT Agreement. In order to do so, we consider whether we have sufficient factual findings by the Panel and undisputed facts on the Panel record to find that the alternative manner of applying the conformity assessment procedures: (i) is less strict; (ii) makes an equivalent contribution to the objective of providing the importing Member with adequate confidence of conformity; and (iii) is reasonably available to the importing Member.

<sup>501</sup> Ukraine's appellant's submission, para. 226.

<sup>502</sup> Russia's appellee's submission, para. 89.

<sup>503</sup> Russia's appellee's submission, para. 89.

<sup>504</sup> Panel Report, para. 7.592.

<sup>505</sup> Panel Report, paras. 7.688 and 7.691.

<sup>506</sup> Panel Report, para. 7.697.

<sup>507</sup> Panel Report, para. 7.699.

5.205. With respect to the alternative measure consisting in the conduct of off-site inspections, the Panel found that Ukraine had failed to establish that conducting off-site inspection control was reasonably available under Article 7.4.1 of PC-FZT 08-2013. As we found above, the Panel erred in finding that Ukraine had to demonstrate that no non-conformities and consumer complaints existed pursuant to the requirements of Article 7.4.1 of PC-FZT 08-2013 with respect to the railway products covered by the suspensions at issue. By focusing its assessment on whether Ukraine put forward evidence as to the compliance of these products with the requirements of Article 7.4.1 in each individual case, the Panel did not conduct an analysis of whether Ukraine's own description of the alternative measure was sufficient to make a *prima facie* case as to its reasonable availability. The Panel also did not assess whether the proposed alternative manner of application is less strict and makes an equivalent contribution to the objective of providing Russia with adequate confidence of conformity. In the absence of such an analysis by the Panel, we do not have sufficient factual findings on which to base our completion of the legal analysis. Furthermore, the relevance of a number of pieces of evidence is disputed by the parties.<sup>508</sup> Finally, in weighing and balancing the factors relevant to the existence of an "unnecessary obstacle[] to international trade" under Article 5.1.2 of the TBT Agreement, the Panel gave prominence to its finding that Ukraine failed to demonstrate that there were less strict manners of applying Russia's conformity assessment procedure that were available to the FBO under the applicable conformity assessment procedure.<sup>509</sup> In light of our reversal of the Panel's finding as to the burden of proof in assessing the reasonable availability of the alternative proposed by Ukraine, we cannot rely on the Panel's weighing and balancing analysis. Therefore, given the absence of sufficient factual findings by the Panel and undisputed facts on the Panel record, we are not in a position to conduct an overall assessment of whether Russia applied its conformity assessment procedure more strictly than necessary within the meaning of Article 5.1.2 of the TBT Agreement.

#### 5.4.5 Whether the Panel failed to make an objective assessment of the matter under Article 11 of the DSU with respect to the other alternative measures

5.206. We now turn to consider whether, with respect to the other three alternative measures, the Panel failed to conduct an objective assessment of the matter. We recall our finding that, in determining the existence of reasonably available less trade-restrictive alternative measures under Article 5.1.2 of the TBT Agreement, it is for the complainant to make a *prima facie* case that the proposed alternative is reasonably available to the respondent. In establishing such a *prima facie* case and considering that proposed alternative measures serve as "conceptual tools", a complainant cannot be expected to provide detailed information on how a proposed alternative would be implemented by the respondent in practice. The complainant would nevertheless have to provide sufficient indications that the proposed alternative does not *a priori* impose an undue burden on the respondent, such as prohibitive costs or substantial technical difficulties, and is not merely theoretical in nature.<sup>510</sup>

5.207. We first address the alternative consisting in the FBO accrediting non-Russian experts or organizations to conduct inspections in Ukraine under its accreditation rules and in particular Article 10 of CS FRT 01-96.<sup>511</sup> Unlike the Panel, we do not consider that it was Ukraine's burden to put forward evidence as to why it may have been impracticable for Russia to implement this procedure in practice, for instance because the Ministry could not itself approach experts and issue them with accreditation certificates, and there were no non-Russian experts qualified to conduct inspection control at the time of the suspensions.<sup>512</sup> As noted above, even if Ukraine made the choice to refer to an alternative that was already present in Russia's legislative framework, Ukraine was not required to demonstrate, for purposes of showing that the alternative was *prima facie* reasonably available, that the requirements of the existing measure in Russia's legislation were fulfilled in the specific instances related to the suspensions of certificates. At the same time, we note that, unlike the alternative consisting in the conduct of off-site inspections, Article 10 of CS FRT 01-96 does not specifically outline this alternative, but simply contains no language as to the nationality that an FBO expert must have. Thus, Article 10 does not speak to the reasonable availability of Ukraine's proposed measure. Furthermore, the mere reference to the theoretical possibility of appointing

<sup>508</sup> See e.g. Panel Report, paras. 7.521, 7.523, and 7.527-7.528.

<sup>509</sup> Panel Report, para. 7.539.

<sup>510</sup> See, for Article 2.2 of the TBT Agreement, Appellate Body Reports, *US – COOL* (Article 21.5 – *Canada and Mexico*), para. 5.339.

<sup>511</sup> Panel Report, paras. 7.477 and 7.480.

<sup>512</sup> Panel Report, para. 7.480.

experts of other nationalities due to the absence of any provision to the contrary does not lay out in sufficient detail an alternative manner of application of Russia's conformity assessment procedure allowing the Panel to assess whether *a priori* the measure would impose an undue burden on the respondent, such as prohibitive costs or substantial technical difficulties. In our view, by stating that "it is not clear that [Article 10 of CS FRT 01-96] provides for the possibility of accrediting non-Russian experts to conduct on-site inspections", the Panel recognized that Ukraine's description of the alternative measure was not precise enough to establish that this alternative was reasonably available to Russia. In light of the above, we agree with the Panel that, by merely referring to Russia's rules governing the suspension of certificates and arguing that those rules "do not preclude the accreditation of non-Russian experts, because they do not prescribe the nationality of the experts who can be used"<sup>513</sup>, Ukraine did not meet its burden with respect to the reasonable availability of this alternative.

5.208. Second, we turn to the alternative measure consisting in the FBO entrusting inspections with respect to Ukrainian railway products to the competent authorities in Kazakhstan or Belarus under the rules of the existing CU. We do not see that the mere existence of a customs union with a unified legal framework for technical regulations and conformity assessment procedures<sup>514</sup> necessarily translates into the possibility for one of the customs union's members to entrust competent authorities of another sovereign member with the conduct of inspections in the context of such common rules. While the FBO could have made such a request for assistance, its outcome would have been uncertain. We therefore agree with the Panel's conclusion that it is not self-evident "that the FBO has the power to entrust foreign government authorities to carry out tasks entrusted to it".<sup>515</sup> Moreover, as we see it, there is a difference between the competent authority's power to recognize a certificate issued by another authority and the power of that authority to entrust other competent authorities with the task of performing inspections.<sup>516</sup> Since the power to recognize a certificate issued by another authority does not necessarily entail the power to entrust that authority with the carrying out of an inspection, we do not consider that the Panel erred in concluding that Ukraine failed to make a *prima facie* case with respect to the reasonable availability of this alternative.

5.209. Third, we address the alternative measure consisting in the FBO communicating with the relevant Ukrainian producers in order to create conditions for the carrying out of on-site inspections. In our view, the Panel correctly concluded that the communications between the FBO and the Ukrainian producers have an uncertain outcome and could not in themselves constitute a reasonably available alternative measure capable of comparison with the challenged suspensions.<sup>517</sup> Indeed, such communications "could theoretically lead to a situation that would allow the conformity assessment procedure to continue, just as it could lead to a situation where the conformity assessment procedure would not continue and certificates would be suspended".<sup>518</sup> Furthermore, we note that Ukraine did not elaborate on the substance of the proposed private security arrangements and therefore on why such arrangements could be considered a reasonably available alternative to the suspensions of certificates. We therefore agree with the Panel that Ukraine did not establish that its proposed alternative is reasonably available.

#### 5.4.6 Conclusion

5.210. Ukraine was not required to demonstrate, for purposes of showing that the proposed alternative measure consisting in the conduct of off-site inspections was *prima facie* reasonably available, whether the measure described in Article 5.3 of CS FRT 12-2003 and Article 7.4.1 of PC-FZT 08-2013 could have applied in the specific instances related to the suspensions of certificates at issue. However, the Panel reasoned that, because information on the absence of non-conformities and consumer complaints was in principle available to Ukraine, it was for Ukraine to submit evidence relating to the application of these conditions to the products covered by the suspensions at issue. We therefore find that the Panel failed to make an objective assessment of the matter before it

<sup>513</sup> Panel Report, para. 7.478.

<sup>514</sup> Ukraine's appellant's submission, paras. 203-205.

<sup>515</sup> Panel Report, para. 7.474.

<sup>516</sup> See Ukraine's appellant's submission, para. 208 (referring to Panel Report, paras. 7.927-7.928).

<sup>517</sup> In reaching these conclusions, the Panel relied on the Appellate Body's reasoning in *US – Gambling* that consultations are by definition a process, the results of which are uncertain and therefore not capable of comparison with the measures at issue in that case. (Panel Report, para. 7.467 (referring to Appellate Body Report, *US – Gambling*, para. 317))

<sup>518</sup> Panel Report, para. 7.468.

under Article 11 of the DSU in allocating the burden of proof under Article 5.1.2 of the TBT Agreement in its analysis of this alternative measure. We also find that Ukraine failed to establish that the Panel erred in making an objective assessment of the matter before it pursuant to Article 11 of the DSU in finding that Ukraine failed to establish that the other three proposed alternatives were reasonably available.

5.211. Consequently, we reverse the Panel's finding, in paragraphs 7.544 and 8.1.b.ii of the Panel Report, that Ukraine failed to establish, with respect to each of the 14 instructions suspending certificates, that Russia has acted inconsistently with its obligations under Article 5.1.2, first and second sentences, of the TBT Agreement.

## 5.5 Ukraine's claim concerning the existence of systematic import prevention

5.212. Ukraine requests us to reverse the Panel's finding in paragraph 8.1.e of its Report that, because it did not demonstrate the existence of systematic import prevention of railway products into Russia in the form of an unwritten measure, Ukraine failed to establish its claims of inconsistency with Articles I:1, XI:1, and XIII:1 of the GATT 1994. Ukraine asserts that the Panel failed to make an objective assessment of the matter before it when examining the existence of systematic import prevention by applying an incorrect standard of review and wrongly allocating the burden of proof.<sup>519</sup>

### 5.5.1 The Panel's findings

5.213. Before the Panel, Ukraine claimed that Russia maintained a measure consisting of the systematic prevention of Ukrainian railway products from being imported into Russia by means of: (i) suspending valid certificates held by Ukrainian producers; (ii) refusing to issue new certificates; and (iii) not recognizing certificates issued by other CU countries. Ukraine alleged that this measure was inconsistent with Russia's obligations under Articles I:1, XI:1, and XIII:1 of the GATT 1994.<sup>520</sup> The Panel noted that, to establish the existence of an unwritten measure, a complaining party must provide evidence demonstrating: (i) that the measure is attributable to the responding party; (ii) the precise content of the measure; and (iii) other elements arising from the manner in which the complaining party described or characterized the measure.<sup>521</sup> The Panel added that a complaining party may also have to demonstrate how the different components of the measure operate together as part of a single measure and how such single measure exists as distinct from its components. Furthermore, the Panel noted that the evidentiary threshold for proving the existence of an unwritten measure is high.<sup>522</sup> The Panel further observed that a complaining party seeking to demonstrate *the systematic nature of a measure* must demonstrate that such measure is aimed at achieving a particular policy or result and is done according to a system, plan, or organized method or effort.<sup>523</sup> The systematic nature of a measure could be demonstrated, for instance, by proving that the measure is applied to economic operators in a broad variety of different sectors as part of an organized effort, or coordinated and implemented at the highest levels of government.<sup>524</sup>

5.214. On the basis of the foregoing observations, the Panel went on to examine evidence of the existence of the measure. The Panel noted that the evidence submitted by Ukraine consisted of: (i) three components of the alleged measure (suspensions of certificates, rejections of certificates, and non-recognition of certificates issued in other CU countries); and (ii) trade and economic data concerning the decline in the imports of Ukrainian railway products into Russia and in Ukraine's share of Russia's imports of railway products.<sup>525</sup>

5.215. The Panel began by determining whether the three individual components establish the existence of this measure and its systematic nature. With respect to the first component, namely, the suspension of certificates, the Panel found that the evidence concerning the 14 instructions through which the FBO suspended valid certificates did not support the conclusion that the

<sup>519</sup> Ukraine's appellant's submission, paras. 22-23 and 60.

<sup>520</sup> Panel Report, para. 7.941.

<sup>521</sup> Panel Report, para. 7.946.

<sup>522</sup> Panel Report, para. 7.946 (referring to Appellate Body Reports, *Argentina – Import Measures*, paras. 5.104 and 5.108; *US – Zeroing (EC)*, para. 198; Panel Reports, *Indonesia – Chicken*, paras. 7.616 and 7.656; *Russia – Tariff Treatment*, paras. 7.283, 7.338, and 7.341).

<sup>523</sup> Panel Report, para. 7.947.

<sup>524</sup> Panel Report, para. 7.947 (referring to Appellate Body Reports, *Argentina – Import Measures*, para. 5.142; Panel Report, *Russia – Tariff Treatment*, paras. 7.302-7.311).

<sup>525</sup> Panel Report, para. 7.989.

FBO adopted these instructions with the aim of preventing importation of Ukrainian railway products. Rather, the FBO adopted those instructions because its inability to conduct inspections in Ukraine due to the situation there prevented the FBO from having adequate confidence about the products' conformity with the relevant technical requirements.<sup>526</sup> With respect to the second component, namely, the rejection of certificates, the Panel recalled that the FBO had valid grounds to reject many of the applications for certificates submitted by Ukrainian producers under CU Technical Regulations 001/2011 and 003/2011.<sup>527</sup> Furthermore, the Panel noted that its findings, that in the case of two applications and one product subject to another application the FBO rejected applications unjustifiably and contrary to Russia's obligations under Article 5.1.2, rest on the lack of evidence on the record regarding past non-conformities or consumer complaints involving the producers at issue. With respect to the third component, namely, the non-recognition of certificates issued in other CU countries, the Panel considered that the facts surrounding the application of the non-recognition requirement are in principle consistent with Ukraine's allegation regarding Russia's prevention of the importation of Ukrainian products.<sup>528</sup> However, in the Panel's view, the fact that one of the three elements of the alleged systematic import prevention unjustifiably restricts access to the Russian market was not sufficient to demonstrate the existence of systematic prevention of imports of Ukrainian products as an independent measure.<sup>529</sup> According to the Panel, there was no indication that the combined effect of these distinct measures was the reason for applying *each* of them.<sup>530</sup>

5.216. The Panel then proceeded to the examination of additional evidence submitted by Ukraine in support of the systematic nature of the measure. Regarding Ukraine's evidence relating to the substantial repetition of suspensions of certificates and rejections of new applications for certification, the Panel noted that this evidence showed the number of certificates accepted rather than repetition with regard to rejections of new applications from August 2014.<sup>531</sup> In the Panel's view, although the evidence showed repetition with regard to suspensions of valid certificates since 2014, such evidence was not, by itself, probative of the existence of the measure or of its systematic nature as Russia had justified reasons for such suspensions. The Panel also found no evidentiary basis for the proposition that the FBO should have suspended more certificates also in the case of producers from the other countries identified in the table, but did not.<sup>532</sup> Overall, the Panel did not consider that the differences in the number of certificates held, suspended, and applications rejected, concerning producers from different countries, established the existence of the alleged systematic import prevention.<sup>533</sup>

5.217. Next, the Panel addressed Ukraine's submission that the systematic nature of the measure can be evidenced through a "set of trade restrictive measures" adopted by Russia following the conclusion of the Association Agreement by Ukraine with the European Union (Association Agreement).<sup>534</sup> The Panel agreed that the media articles presented by Ukraine point to tensions in the bilateral relationship in connection with the negotiation and conclusion by Ukraine of the Association Agreement, and also refer to trade action that Russian authorities might take or did take against Ukraine in response. Ultimately, however, the evidence presented to the Panel did not demonstrate that Russia adopted a plan or decided to embark on an organized effort to prevent the importation into Russia of Ukrainian products in general or Ukrainian railway products in particular. Moreover, for the Panel, even if trade-restrictive measures were taken with regard to some Ukrainian products, this did not necessarily mean that such measures were taken also with regard to Ukrainian railway products.<sup>535</sup>

5.218. Overall, with respect to the components of the measure and its systematic nature, the Panel concluded that the evidence submitted by Ukraine did not establish that the three elements have been designed, structured, or operated in combination so as to constitute a separate measure with the aim of systematic prevention.<sup>536</sup> Nor did the evidence establish that those elements form part of a plan or coordinated effort directed at attaining the aim of preventing the importation of Ukrainian

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<sup>526</sup> Panel Report, para. 7.959.

<sup>527</sup> Panel Report, para. 7.960.

<sup>528</sup> Panel Report, paras. 7.962-7.963.

<sup>529</sup> Panel Report, para. 7.964.

<sup>530</sup> Panel Report, para. 7.965.

<sup>531</sup> Panel Report, para. 7.969.

<sup>532</sup> Panel Report, para. 7.970.

<sup>533</sup> Panel Report, para. 7.972.

<sup>534</sup> Panel Report, paras. 7.967 and 7.973.

<sup>535</sup> Panel Report, para. 7.974.

<sup>536</sup> Panel Report, para. 7.990.



railway products into Russia.<sup>537</sup> Finally, according to the Panel, the trade and other economic data submitted by Ukraine also did not establish the existence of the alleged systematic import prevention.<sup>538</sup>

### 5.5.2 Claims and arguments on appeal

5.219. On appeal, Ukraine asserts that the Panel failed to make an objective assessment of the matter before it when examining the existence of systematic import prevention by applying an incorrect standard of review and wrongly allocating the burden of proof. Specifically, Ukraine submits that Russia systematically prevented the importation of railway products from Ukraine by suspending conformity certificates, rejecting the application for new certificates, and refusing the recognition of existing certificates. Ukraine explains that some of these decisions were challenged on an individual basis and that the individual decisions formed part of the evidence showing the existence of the measure at issue.<sup>539</sup> Ukraine contends that, following the implementation of the measures, exports of railway products from Ukraine to Russia, which had reached USD 1.7 billion in 2013, decreased to USD 600 million in 2014 and to only USD 110 million in 2015. For Ukraine, such a drastic drop in exports cannot be justified by anything but an artificial intervention in the traditional and ordinary course of trade.<sup>540</sup>

5.220. Ukraine alleges that the Panel failed to conduct a holistic assessment of all the evidence before it, thus failing to meet the standard of Article 11 of the DSU.<sup>541</sup> Ukraine agrees with the Panel that in order to demonstrate the existence of an unwritten measure the complainant had to provide evidence demonstrating: (i) that the measure is attributable to the respondent; (ii) the precise content of the measure; and (iii) other elements arising from the manner in which the complainant described the measure, such as the nature or operation of the measure.<sup>542</sup> However, for Ukraine, the Panel failed to properly apply this legal standard to the facts of the present case, because it did not consider relevant evidence submitted by Ukraine and did not provide explicit conclusions with regard to the existence of an unwritten measure, before continuing its assessment of specific elements of that measure. Ukraine argues that the order of analysis was of paramount importance in this case, and that by adopting an incorrect order of analysis, the Panel failed to comply with its duty to make an objective assessment of the matter.<sup>543</sup>

5.221. Regarding the Panel's analysis of the systematic nature of the measure, Ukraine recalls that the Panel rejected its arguments concerning the "repetition of suspensions and rejections" of certificates and the "set of trade restrictive measures" and concluded that the evidence failed to demonstrate the existence of the measure or its systematic nature or an organized effort of Russia to prevent Ukrainian imports.<sup>544</sup> Ukraine contends that the Panel erred in setting a very high burden of proof for Ukraine, because such an organized effort was not prescribed in any particular law or regulation.<sup>545</sup> Finally, Ukraine alleges that the Panel erred in reviewing individual measures in isolation from each other and failed to consider evidence in its totality.<sup>546</sup>

5.222. With respect to its allegation that the Panel erred in the allocation of the burden of proof, Ukraine takes issue with a finding made by the Panel in the context of its analysis under Article 5.1.2, namely, that "there is no evidence on record that would allow [the Panel] to either accept or reject Russia's explanation" that it granted applications for certificates of producers located in the eastern regions of Ukraine because no inconsistencies had been identified with regard to the products at issue in the course of the previous inspections, and thus the conditions for off-site testing or inspection were satisfied.<sup>547</sup> Ukraine notes that the Panel's finding of inconsistency under Article 5.1.2 rested on the lack of evidence regarding past non-conformities or consumer complaints in the case of the rejections of certificates, and that Russia's evidence of absence of non-conformities

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<sup>537</sup> Panel Report, para. 7.991.

<sup>538</sup> Panel Report, para. 7.992.

<sup>539</sup> Ukraine's appellant's submission, para. 30.

<sup>540</sup> Ukraine's appellant's submission, para. 31 (referring to Panel Report, para. 2.2).

<sup>541</sup> Ukraine's appellant's submission, para. 34.

<sup>542</sup> Ukraine's appellant's submission, para. 35 (referring to Panel Report, paras. 7.946-7.947).

<sup>543</sup> Ukraine's appellant's submission, paras. 36-37.

<sup>544</sup> Ukraine's appellant's submission, paras. 39-40 (referring to Panel Report, paras. 7.972-7.973 and 7.976).

<sup>545</sup> Ukraine's appellant's submission, para. 40.

<sup>546</sup> Ukraine's appellant's submission, para. 43.

<sup>547</sup> Ukraine's appellant's submission, paras. 48-50 (referring to Panel Report, para. 7.960).

post-dated the date of issuance of the certificates for producers in the eastern regions.<sup>548</sup> Ukraine highlights that this consideration did not preclude the Panel from coming to the conclusion that there was no evidence on the record that would allow it to either accept or reject Russia's explanation.<sup>549</sup> By making such conclusions, the Panel, in Ukraine's view, failed to make an objective assessment by releasing Russia from its burden of proof and placing an unreasonable burden of proof on Ukraine.<sup>550</sup>

5.223. Furthermore, Ukraine alleges that the Panel erred in the application of the burden of proof when assessing evidence relating to the substantial repetition of suspensions and rejections of certificates.<sup>551</sup> For Ukraine, the Panel erred in concluding that "Russia in the case of the challenged suspensions had justified reasons for suspending certificates concerning Ukrainian producers", without providing reasoning for its conclusion that Russia "justified" the reasons for suspending these certificates.<sup>552</sup> In addition, Ukraine takes issue with the Panel's conclusion that it did not have an "evidentiary basis on which to infer that the FBO should have suspended more certificates also in the case of producers from the other countries identified in the table, but did not".<sup>553</sup> In Ukraine's view, even though it was for Russia to prove that the FBO should have suspended more certificates also in the case of producers from other countries, the Panel did not require it to do so.<sup>554</sup> Finally, Ukraine draws attention to the fact that the Panel repeatedly indicated in its analysis that there was not enough evidence to rule on the matter before it.<sup>555</sup> Ukraine submits that the Panel should have sought information from relevant sources pursuant to Article 13 of the DSU in order to gather the information necessary to make an objective assessment of the matter before it.<sup>556</sup>

5.224. Russia requests us to uphold the Panel's findings with respect to the existence of the alleged systematic import prevention.<sup>557</sup> Russia considers that the Panel did not err in its examination of the existence of the alleged systematic import prevention as an unwritten measure.<sup>558</sup> Russia recalls that the Panel, after considering Ukraine's claims with respect to each of the individual components of the measure, only found the existence of inconsistency with respect to one out of three components. In Russia's view, even though the Panel had all the reasons to stop its analysis there and find that the alleged measure did not exist, it went on to examine other arguments and evidence presented by Ukraine. Russia therefore disagrees with Ukraine that the Panel failed to examine information presented by Ukraine in accordance with the established standard of review.<sup>559</sup> In response to the importance of order of analysis asserted by Ukraine, Russia points out that neither Article 11 of the DSU nor WTO jurisprudence requires panels to follow a particular sequence of analysis.<sup>560</sup> Russia asserts that, in any event, the Panel would have reached a negative conclusion as to the existence of the measure at issue, even if the Panel had followed the sequence in paragraph 7.946 of its Report.<sup>561</sup> In addition, Russia points to the Panel's finding that Ukraine failed to demonstrate how the three components operate as a single measure and form part of a coordinated effort to prevent the importation of Ukrainian railway products into Russia.<sup>562</sup> Thus, in Russia's view, the Panel would have lacked a basis for concluding that Ukraine made a *prima facie* case with respect to the existence of the alleged systematic import prevention, even if the Panel had found all three components of the measure to be inconsistent.<sup>563</sup>

5.225. Furthermore, regarding Ukraine's argument that the alleged systematic import prevention was part of a set of trade-restrictive measures adopted by Russia in response to Ukraine's negotiation and conclusion of the Association Agreement, Russia submits that the Panel carefully examined the statements of Russia's officials provided by Ukraine and correctly concluded that the

<sup>548</sup> Ukraine's appellant's submission, para. 50 (referring to Panel Report, para. 7.960).

<sup>549</sup> Ukraine's appellant's submission, paras. 51-52 (referring to Panel Report, para. 7.960).

<sup>550</sup> Ukraine's appellant's submission, para. 51.

<sup>551</sup> Ukraine's appellant's submission, para. 54 (referring to Panel Report, paras. 7.969-7.972).

<sup>552</sup> Ukraine's appellant's submission, para. 54 (quoting Panel Report, para. 7.970).

<sup>553</sup> Ukraine's appellant's submission, para. 55 (quoting Panel Report, para. 7.970).

<sup>554</sup> Ukraine's appellant's submission, para. 55.

<sup>555</sup> Ukraine's appellant's submission, para. 56 (referring to Panel Report, paras. 7.377, 7.480, 7.521-7.524, 7.675, 7.711, 7.960, 7.962, and 7.970).

<sup>556</sup> Ukraine's appellant's submission, paras. 56 and 58.

<sup>557</sup> Russia's appellee's submission, section 2.2.

<sup>558</sup> Russia's appellee's submission, sections 2.2.1.1 and 2.2.1.2.

<sup>559</sup> Russia's appellee's submission, para. 22.

<sup>560</sup> Russia's appellee's submission, para. 23.

<sup>561</sup> Russia's appellee's submission, para. 25.

<sup>562</sup> Russia's appellee's submission, para. 26 (referring to Panel Report, paras. 7.990-7.991).

<sup>563</sup> Russia's appellee's submission, para. 27.

presented evidence failed to demonstrate an "organized effort" on the part of Russia.<sup>564</sup> Further, Russia observes that Ukraine referred to measures imposed by Russia on "other products" as evidence of Russia restricting the importation of Ukrainian "railway products".<sup>565</sup> With respect to the allegedly high burden of proof the Panel placed on Ukraine, Russia points out that the allocation of the burden of proof is not to be determined on the basis of a comparison between the respective difficulties parties may encounter in collecting information to prove the case.<sup>566</sup> Moreover, with respect to the Panel's conclusion that the differences in the number of certificates held, suspended, and applications rejected, concerning producers from different countries, fail to establish the existence of the alleged systematic import prevention, Russia submits that the Panel carefully reviewed the evidence but found no evidence to support Ukraine's arguments.<sup>567</sup>

5.226. With respect to the burden of proof, Russia submits that Ukraine failed to establish that the Panel did not objectively assess the alleged systematic prevention.<sup>568</sup> Russia submits that Ukraine failed to prove the existence of the first and second components of the alleged systematic prevention, namely, the suspension and rejection of applications.<sup>569</sup> In Russia's view, it is clear from paragraph 7.960 of the Panel Report that the Panel examined all the evidence submitted by the parties and concluded that it was not persuaded that the applications unjustifiably rejected by the FBO were proof that the FBO used its powers with the aim or as part of a plan directed at preventing the importation of Ukrainian railway products into Russia.<sup>570</sup> Russia further contends that Ukraine does not allege specific errors with respect to the Panel's conclusion in paragraph 7.965 of its Report that "the mere fact that the non-recognition requirement has been applied alongside the (for the most part) justified suspensions and rejections, which also had the effect of preventing imports of Ukrainian products, does not mean that these distinct measures in fact form a single, coherent measure with a common aim of preventing imports of Ukrainian products through any means possible."<sup>571</sup>

5.227. Regarding the Panel's application of the burden of proof, Russia submits that the Panel examined all the evidence submitted by Ukraine and that it did not "consider that the differences in the number of certificates held, suspended, and applications rejected, concerning producers from different countries[,] establish[] the existence of the alleged systematic import prevention".<sup>572</sup> According to Russia, if Ukraine wished to substantiate the allegation that there were indeed reasons for the FBO to suspend the certificates issued to third-country producers, it was up to Ukraine to substantiate such allegation, which it failed to do.<sup>573</sup> Regarding Ukraine's allegation that the Panel failed to have recourse to Article 13 of the DSU, Russia contends that the Panel was precluded from using its authority under Article 13 in order "to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it".<sup>574</sup> Therefore, Russia submits that the Panel acted consistently with Article 11 of the DSU by abstaining from requesting information under Article 13 of the DSU.<sup>575</sup>

5.228. Finally, Russia submits that if the Appellate Body were to agree with Ukraine's arguments and find that the Panel erred under Article 11 of the DSU, the overall conclusion of the Panel regarding Ukraine's failure to demonstrate the existence of the alleged systematic prevention in paragraphs 7.993-7.995 and 8.1.e of its Report nonetheless stands, because this conclusion was based on Panel findings that Ukraine did not appeal.<sup>576</sup> In Russia's view, the Panel Report confirms that after the examination of each of Ukraine's arguments and evidence, the Panel found no support for Ukraine's position as to the existence of the alleged systematic prevention.<sup>577</sup> Regarding the Panel's conclusion in paragraph 7.965 of its Report, Russia reiterates its position that Ukraine does

<sup>564</sup> Russia's appellee's submission, para. 34 (referring to Panel Report, paras. 7.973-7.974).

<sup>565</sup> Russia's appellee's submission, para. 39.

<sup>566</sup> Russia's appellee's submission, para. 40 (quoting Appellate Body Report, *EC – Sardines*, para. 281).

<sup>567</sup> Russia's appellee's submission, para. 45.

<sup>568</sup> Russia's appellee's submission, para. 85.

<sup>569</sup> Russia's appellee's submission, paras. 54-55 (referring to Panel Report, paras. 7.595 and 7.960).

<sup>570</sup> Russia's appellee's submission, para. 62 (quoting Panel Report, para. 7.960).

<sup>571</sup> Russia's appellee's submission, paras. 63-64.

<sup>572</sup> Russia's appellee's submission, para. 67 (quoting Panel Report, para. 7.972).

<sup>573</sup> Russia's appellee's submission, para. 69.

<sup>574</sup> Russia's appellee's submission, para. 71 (quoting Appellate Body Report, *Japan – Agricultural Products II*, para. 129).

<sup>575</sup> Russia's appellee's submission, para. 72.

<sup>576</sup> Russia's appellee's submission, paras. 74 and 84.

<sup>577</sup> Russia's appellee's submission, para. 76.

not claim specific errors with respect to this conclusion and therefore agrees with the Panel as to the absence of indication that the combined effect of the individual measures is the reason for applying each of them.<sup>578</sup> Furthermore, Russia submits that Ukraine does not appeal the Panel's conclusions in paragraphs 7.984, 7.987, and 7.988 in which the Panel made a factual finding that trade and other economic data did not support Ukraine's position on the existence of the alleged systematic import prevention.<sup>579</sup>

### 5.5.3 Whether the Panel failed to make an objective assessment of the matter under Article 11 of the DSU

5.229. Ukraine takes issue with the Panel's allocation of the burden of proof and assessment of the evidence in its analysis of the existence and systematic nature of the alleged unwritten measure.<sup>580</sup> Specifically, Ukraine considers that the Panel erred in characterizing the measure at issue as comprising only specific decisions suspending certificates, rejecting applications for new certificates, and not recognizing certificates from other CU countries that were separately challenged on an individual basis by Ukraine. Ukraine contends that the individual decisions were only part of the evidence of the unwritten measure, and that the Panel erred in finding that the existence of the alleged unwritten measure was conditional on the WTO-inconsistency of these decisions. In Ukraine's view, this led the Panel to review the individual measures in isolation from one another and prevented it from assessing whether systematic import prevention existed on the basis of all evidence before it.<sup>581</sup>

5.230. We recall that, before the Panel, Ukraine claimed that Russia maintains, since mid-2014, systematic prevention of importation of Ukrainian railway products by means of: (i) suspending valid certificates held by Ukrainian producers; (ii) refusing to issue new certificates; and (iii) not recognizing certificates issued by other CU countries, and that this practice is inconsistent with Russia's obligations under Articles I:1, XI:1, and XIII:1 of the GATT 1994.<sup>582</sup> The Panel noted that "to demonstrate the existence of an unwritten measure, a complaining party must provide evidence demonstrating (a) that the measure is attributable to the responding party; (b) the precise content of the measure; and (c) other elements arising from the manner in which the complaining party described or characterized the measure." In the Panel's view, such other elements could include "demonstrating the specific nature of the measure, i.e., whether it is of general and prospective application or of a different nature" and "how the different components of the measure operate together as part of a single measure and how such single measure exists as distinct from its components".<sup>583</sup> The Panel further observed that "a complaining party seeking to demonstrate the systematic nature of a measure must demonstrate that such measure is aimed at achieving a particular policy or result and is done according to a system, plan, or organized method or effort."<sup>584</sup>

5.231. In its analysis, the Panel first turned to assess whether the instructions through which the FBO suspended valid certificates, the decisions through which the FBO rejected applications for certificates, and the non-recognition requirement applied by Russia's authorities, which it had separately examined in the previous sections of its Report (suspensions, rejections, and non-recognition), were evidence of the existence of this measure and of its systematic nature.<sup>585</sup> In this respect, the Panel found that "the mere fact that the non-recognition requirement has been applied alongside the (for the most part) justified suspensions and rejections, which also had the effect of preventing imports of Ukrainian products, does not mean that these distinct measures in fact form a single, coherent measure with a common aim of preventing imports of Ukrainian products through any means possible."<sup>586</sup> Turning to the additional evidence submitted by Ukraine, the Panel found that neither the figures demonstrating substantial repetition in the suspensions and rejections

<sup>578</sup> Russia's appellee's submission, para. 78 (referring to Panel Report, para. 7.965).

<sup>579</sup> Russia's appellee's submission, paras. 80-83.

<sup>580</sup> Ukraine's appellant's submission, paras. 34-40 and 48-55.

<sup>581</sup> Ukraine's appellant's submission, paras. 42-43.

<sup>582</sup> Panel Report, para. 7.941 (referring to Ukraine's first written submission to the Panel, paras. 187-188).

<sup>583</sup> Panel Report, para. 7.946 (referring to Appellate Body Reports, *Argentina – Import Measures*, paras. 5.104 and 5.108; *US – Zeroing (EC)*, para. 198; Panel Reports, *Indonesia – Chicken*, paras. 7.616 and 7.656; *Russia – Tariff Treatment*, paras. 7.283, 7.338, and 7.341).

<sup>584</sup> Panel Report, para. 7.947 (referring to Appellate Body Reports, *Argentina – Import Measures*, para. 5.142; Panel Report, *Russia – Tariff Treatment*, paras. 7.302-7.311).

<sup>585</sup> Panel Report, para. 7.957.

<sup>586</sup> Panel Report, para. 7.965.

of certificates, nor the media articles evidencing that the alleged systematic import prevention was part of a set of trade-restrictive measures adopted by Russia, established the existence of a plan or organized effort to prevent importation.<sup>587</sup> Finally, the Panel analysed certain import trade data that Ukraine claimed supported the existence of the alleged systematic import prevention.<sup>588</sup> Overall, the Panel considered that Ukraine had failed to demonstrate that Russia systematically prevented the importation of Ukrainian railway products into Russia.<sup>589</sup>

5.232. At the outset, we recall that, in principle, any act or omission attributable to a WTO Member can be challenged as a measure under the WTO dispute settlement system.<sup>590</sup> The measure at issue in WTO dispute settlement proceedings may include either "acts setting forth rules or norms that are intended to have general and prospective application", such as legislation, or "particular acts applied only to a specific situation", such as an administrative decision to impose anti-dumping duties on certain imports.<sup>591</sup> In *US – Zeroing (EC)*, the Appellate Body recognized that an "as such" challenge can, in principle, be brought against a measure that is not expressed in the form of a written document, and there is nothing in the covered agreements or in WTO jurisprudence to suggest that a measure must be in written form.<sup>592</sup> The Appellate Body emphasized, however, that "a panel must not lightly assume the existence of a 'rule or norm' constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document."<sup>593</sup>

5.233. In *Argentina – Import Measures*, the Appellate Body further elaborated on the standard for establishing the existence of an unwritten measure and in particular observed 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."<sup>594</sup> In particular, the Appellate Body considered that, depending on the characteristics of the measure challenged, other elements in addition to attribution to a WTO Member and precise content may need to be substantiated to prove its existence. For instance, a complainant challenging a single measure composed of several different instruments will normally need to provide evidence of how the different components operate together as part of a single measure and how a single measure exists as distinct from its components.<sup>595</sup>

5.234. In contrast to a written measure, the existence of unwritten measures cannot be established by submitting to a panel the text of a legal instrument. Instead, the existence and content of an unwritten measure must be established based on other, often circumstantial, evidence and arguments. Moreover, the specific measure challenged and the way in which it is described or characterized by a complainant will inform the kind of evidence a complainant is required to submit and the elements that it must establish, in order to determine the existence of the challenged measure. A complainant seeking to prove the existence of an unwritten measure will invariably be required to establish the attribution of that measure to a Member and its precise content. Moreover, additional elements may need to be established.<sup>596</sup> For instance, in *Argentina – Import Measures*, the complainants challenged the existence of a single measure consisting of a combination of one or more of the five trade-related requirements (TRRs) in pursuance of a specific policy objective.

<sup>587</sup> Panel Report, paras. 7.972 and 7.974.

<sup>588</sup> Panel Report, para. 7.975.

<sup>589</sup> Panel Report, para. 7.993.

<sup>590</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

<sup>591</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82. Thus, whereas a claim against a measure "as such" concerns a rule or norm intended to have general and prospective application, a claim against a measure "as applied" targets the application of a measure in specific instances.

<sup>592</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 194.

<sup>593</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 196.

<sup>594</sup> In *US – Zeroing (EC)*, the Appellate Body explained that, when an unwritten measure is challenged "as such", the complainant must clearly establish that the alleged "rule or norm" is attributable to the responding Member, its precise content, and that it has general and prospective application. (Appellate Body Report, *US – Zeroing (EC)*, para. 198) In *Argentina – Import Measures*, the Appellate Body clarified that "the notion of measure of general and prospective application" cannot be considered as setting forth a general legal standard. Specifically, "[w]hen an unwritten measure that is not a rule or norm is challenged in WTO dispute settlement, a complainant need not demonstrate its existence based on the same criteria that apply when rules or norms of general and prospective application are challenged." (Appellate Body Reports, *Argentina – Import Measures*, para. 5.107)

<sup>595</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.108.

<sup>596</sup> In this regard, panels need not "apply rigid legal standards or criteria ... based on the nature of the challenge". (Appellate Body Reports, *Argentina – Import Measures*, para. 5.110)

Therefore, as part of its examination of the precise content of the TRRs measure, the panel was required to assess whether the measure was composed of the five individual elements identified by the complainants, and whether the individual TRRs applied and operated as part of a single measure in furtherance of an underlying policy of "managed trade" with the specific objectives of substituting imports and reducing trade deficits.<sup>597</sup>

5.235. The appropriate order of analysis in a given dispute will depend on the characteristics of the measure at issue, as described by the complainant, as well as the arguments and evidence on the record. It may also depend on which elements are the focus of contention between the disputing parties, and which, if any, are conceded or undisputed between the parties.<sup>598</sup> In any event, panels enjoy a margin of discretion to structure their assessment as they see fit, provided they proceed "on the basis of a properly structured analysis"<sup>599</sup>, provide "reasoned and adequate explanations and coherent reasoning"<sup>600</sup>, and base their findings on a "sufficient evidentiary basis".<sup>601</sup> Accordingly, panels are afforded a certain degree of latitude to tailor the sequence and order of analysis, which, however, is informed by the specific claims, measures, facts, and arguments at issue.<sup>602</sup> Therefore, an appellant challenging the sequence and order of analysis adopted by a panel in a given case must demonstrate why, by following a particular sequence, the panel committed an error in the specific circumstances of the case at hand. It is not sufficient for an appellant merely to claim that a panel erred by deviating from a certain sequence and order of analysis in the abstract.<sup>603</sup>

5.236. With respect to Ukraine's argument that the Panel erred by failing to make conclusions with regard to the existence of an unwritten measure before assessing specific elements of that measure<sup>604</sup>, we observe that the Panel in fact took note of the precise content of the alleged measure and listed its constituent elements, including Ukraine's characterization of the measure as "an overarching unwritten measure" that comprises several components and results in the "systematic prevention" of importation of Ukrainian products into Russia.<sup>605</sup> Furthermore, it appears logical, in light of the characteristics of the measure as described by Ukraine, that the Panel's subsequent analysis was focused on examining the existence of a single measure and its systematic nature. Thus, in the circumstances of this case, as part of its assessment of the existence of the unwritten measure, the Panel had to examine evidence relating to the constituent components of the measure, as well as to the way in which the different components interact, in order to achieve a particular objective.<sup>606</sup>

5.237. Next, we turn to review the Panel's analysis regarding the existence of the alleged unwritten measure at issue. As noted, the Panel separately assessed the instructions suspending certificates, the decisions rejecting applications for certificates, and the non-recognition requirement applied by Russia's authorities, which Ukraine had challenged on an individual basis and which the Panel had separately examined in the prior sections of its Report.<sup>607</sup> As the Panel acknowledged, the specific suspension instructions and rejection decisions were only part of the instances of suspensions and rejections on which Ukraine relied as evidence demonstrating the existence of an unwritten measure.<sup>608</sup> Despite this fact, the Panel considered it necessary to separately examine the suspensions, rejections, and non-recognitions challenged by Ukraine on an individual basis. In doing so, the Panel focused its assessment on whether these three elements of the alleged measure had already been found to be inconsistent with Articles 5.1.1 and 5.1.2 of the TBT Agreement in the Panel's prior analysis. Thus, the Panel concluded that "the fact that one of the three elements of the alleged systematic import prevention", namely, the non-recognition of certificates issued in other

<sup>597</sup> Appellate Body Reports, *Argentina – Import Measures*, paras. 5.124-5.126.

<sup>598</sup> See, for Article 2.2 of the TBT Agreement, Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.205.

<sup>599</sup> Appellate Body Report, *Colombia – Textiles*, para. 5.20 (quoting Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 127).

<sup>600</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 713. See also e.g. Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, fn 618 to para. 293.

<sup>601</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 713. See also e.g. Appellate Body Report, *US – Carbon Steel*, para. 142.

<sup>602</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.206 (referring to Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 145; *EC – Seal Products*, para. 5.211).

<sup>603</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.206.

<sup>604</sup> Ukraine's appellant's submission, para. 36.

<sup>605</sup> Panel Report, para. 7.956.

<sup>606</sup> See Appellate Body Reports, *Argentina – Import Measures*, para. 5.108.

<sup>607</sup> Panel Report, para. 7.958.

<sup>608</sup> Panel Report, fn 742 to para. 7.957.

CU countries, "unjustifiably restricts access to the Russian market is not sufficient to demonstrate the existence of systematic prevention of imports of Ukrainian products as an independent measure."<sup>609</sup> The Panel also affirmed that "it is only if the circumstances justifying these decisions disappeared and they were nonetheless maintained or such decisions were nonetheless adopted in respect of new applications, that the issue would arise whether those measures form part of comprehensive systematic import prevention that covers both the recognition of certificates issued in other CU countries and issuance of certificates in Russia."<sup>610</sup> In this regard, Ukraine argues that the Panel examined the individual components of the alleged unwritten measure in isolation from one another and did not assess the existence of systematic import prevention on the basis of all evidence before it.<sup>611</sup> The question therefore arises whether, in examining the existence of the alleged systematic prevention measure based on the consistency of its components with the TBT Agreement, the Panel properly assessed the existence of the overarching measure as an issue separate from the consistency of its elements with the covered agreements.

5.238. We observe in this regard that Ukraine's own description of the measure presupposed the need to focus on the rationale underlying the individual instances of suspensions, rejections, and non-recognition of certificates. Thus, Ukraine argued that "Ukrainian producers have been denied, or have been unable to use, certificates *for reasons other than the lack of conformity* with the relevant technical regulations."<sup>612</sup> In Ukraine's view, Russia, "through *an organized effort*", "put in place all means possible *to prevent imports* of Ukrainian railway products into Russia".<sup>613</sup> Thus, the content of the measure, as described by Ukraine, required a finding that the individual elements of the measure are parts of an organized effort or policy with the objective of "*systematic import prevention*", as opposed to separate instances of instructions and decisions taken for reasons relating to the possibility of assessing conformity with the relevant technical regulations. The discussion before the Panel focused precisely on whether the suspensions and rejections were made for reasons related to achieving positive assurance of conformity, or instead for reasons related to import prevention. Thus, Russia argued that the reason for suspending and rejecting certificates of Ukrainian producers was that the requirements of the relevant Russian technical regulations were not satisfied, i.e. it was impossible to carry out the inspection control in full due to the security situation in Ukraine, and therefore there was no "organised effort" by Russia to prevent imports from Ukraine.<sup>614</sup> By contrast, Ukraine contended that, as demonstrated by the inconsistency of the instructions and decisions challenged on an individual basis, the objective of the suspensions and rejections was not to verify conformity of Ukrainian railway products but to prevent imports of such products into Russia.<sup>615</sup>

5.239. We recall that "a complainant challenging a single measure composed of several different instruments will normally need to provide evidence of how the different components operate together as part of a single measure and how a single measure exists as distinct from its components."<sup>616</sup> In the present case, it was therefore Ukraine's burden to establish that the separate instances of suspensions, rejections, and non-recognition functioned together and formed a single overarching measure, distinct from its parts, in pursuance of an import prevention policy.

5.240. In this context, it appears to us that the rationale behind the suspensions and rejections constituted an important factor for determining whether the components of the alleged overarching

<sup>609</sup> Panel Report, para. 7.964.

<sup>610</sup> Panel Report, para. 7.964.

<sup>611</sup> Ukraine's appellant's submission, para. 43.

<sup>612</sup> Panel Report, para. 7.950 (referring to Ukraine's first written submission to the Panel, para. 147; second written submission to the Panel, paras. 13 and 18; opening statement at the second Panel meeting, paras. 30 and 38-39; response to Panel question No. 143). (emphasis added)

<sup>613</sup> Panel Report, para. 7.951 (referring to Ukraine's first written submission to the Panel, paras. 132-141 and 150-159; second written submission to the Panel, paras. 19-20 and 38-56; opening statement at the second Panel meeting, para. 40). (emphasis added)

<sup>614</sup> Russia's first written submission to the Panel, paras. 22-24; second written submission to the Panel, paras. 34-35.

<sup>615</sup> Ukraine's second written submission to the Panel, para. 20.

<sup>616</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.108 (referring to Panel Reports, *US – COOL*, para. 7.50). In *Argentina – Import Measures*, the panel found that "the combined application and operation of the individual TRRs is an important part of the TRRs measure with distinct content", "the content of the single measure consists of the combined operation of the individual TRRs as one of the tools that Argentina uses to implement the 'managed trade' policy", and "[t]his content is distinct both from that of each TRR – which, taken individually, may not be apt to implement the 'managed trade' policy – and from the content of the 'managed trade' policy itself." (Ibid., para. 5.130)

measure operated together as part of a single measure. Specifically, this rationale related to the impossibility for the FBO to assess conformity of Ukrainian railway products with the relevant Russian technical regulations due to the security situation in Ukraine, and thus to the absence of a comparable situation under Article 5.1.1 of the TBT Agreement. If this were the case, there would be no common policy or plan connecting the various suspensions and rejections, such that they operate together as part of one measure, and thus no proof that "the FBO used its powers with the aim or as part of a plan directed at preventing the importation of Ukrainian railway products into Russia."<sup>617</sup> Instead, each of these individual measures would be based on a separate and independent rationale, namely, the impossibility, in each particular instance, to complete the required steps in the conformity assessment procedure. This is how we understand the Panel's statement that "the fact that one of the three elements of the alleged systematic import prevention ... unjustifiably restricts access to the Russian market is not sufficient to demonstrate the existence of systematic prevention of imports of Ukrainian products as an independent measure."<sup>618</sup> We consider that the Panel's language referring to the consistency or inconsistency of the suspensions and rejections was somewhat imprecise. However, as we see it, the Panel was in fact concerned with the rationale behind such decisions, which would reveal the relationship between them and thus the existence of a common plan. By contrast, a finding of inconsistency under Article 5.1.1 would imply that the concerns about the security situation in Ukraine and the safety for FBO inspectors did not constitute a valid justification for the suspensions and rejections at issue. The question would thus arise as to whether there was a different rationale behind the instructions suspending certificates and decisions rejecting applications for new certificates, including the rationale of preventing imports. As the Panel observed, "it is only if the circumstances justifying these decisions disappeared and they were nonetheless maintained or such decisions were nonetheless adopted in respect of new applications, that the issue would arise whether those measures form part of a comprehensive systematic import prevention that covers both the recognition of certificates issued in other CU countries and issuance of certificates in Russia."<sup>619</sup> Thus, while it may seem that the Panel's reasoning does not properly distinguish between existence and consistency of the alleged measure, we consider that in fact the Panel considered the consistency of components of the measures only insofar as the *justification* underlying their consistency would lead to the conclusion that these decisions were taken independently from one another and not *as part of a common plan*. In turn, finding no evidence of a common plan or organized effort to prevent the importation into Russia of Ukrainian railway products would suggest no overarching unwritten measure of systematic import prevention existed in the present case.

5.241. When the Panel's focus on the consistency or inconsistency of the suspensions and rejections challenged on an individual basis with certain provisions of the TBT Agreement is seen in context of the broader objective of its analysis, it is clear that the rationale behind the enacting of the individual measures was crucial for finding the existence of "a single, coherent measure with a common aim of preventing imports of Ukrainian products through any means possible".<sup>620</sup> Specifically, the fact that this rationale related to the absence of conditions in Ukraine to conduct part of the conformity assessment procedure spoke against Ukraine's argument that there was a common import prevention objective behind these individual measures. This also explains the Panel's initial focus on the challenged measures only, for which there was already evidence on the record relating to the rationale for taking them. In the same vein, by stating that the substantial repetition in the number of suspensions was not probative of the measure's existence due to the absence of evidence regarding the rationale behind such suspensions, the Panel in our view considered that such statistics themselves did not reveal the existence of an aim to achieve a particular policy or result, thereby proving the existence and systematic nature of an unwritten overarching measure.

5.242. Therefore, in our view, the Panel's focus on the rationale underlying the instructions and decisions formed an important part of its analysis as to the existence of the unwritten measure in the particular circumstances of the case. Moreover, we note that the alleged measure, as described by Ukraine, contains in itself an element of inconsistency. Thus, if the suspensions, rejections, and non-recognition operate together with an underlying "systematic import prevention" rationale, such an overarching "import prevention" measure would very likely be found to be inconsistent under the GATT 1994. We recall that determining the existence of an alleged unwritten measure and assessing the consistency of this measure or its components with the covered agreements remain separate

<sup>617</sup> Panel Report, para. 7.960.

<sup>618</sup> Panel Report, para. 7.964.

<sup>619</sup> Panel Report, para. 7.964.

<sup>620</sup> Panel Report, para. 7.965.



steps. At the same time, the specific measure challenged and the way in which it is described or characterized by a complainant will inform the kind of evidence a complainant is required to submit and the elements that it must establish, in order to determine the existence of the challenged measure. In the circumstances of the present case, because Ukraine's description of the measure incorporated the term "import prevention" and because most individual components of the measure were found by the Panel to have a rationale different from "import prevention", the Panel's task of assessing the question of existence of the measure separately from the question of its consistency was rendered particularly difficult. Moreover, as noted above, it was not the Panel's logic that, because the components of the measure were not inconsistent with the TBT Agreement, the overarching measure could not exist. Rather, in the presence of valid justifications explaining why the individual suspensions and rejections were made and relating to concerns about the safety of FBO inspectors, there was no basis for a finding that the different parts of the alleged measure operated together as a single measure distinct from its components. For instance, even if all certificates of Ukrainian railway equipment were suspended or rejected due to the impossibility to conduct off-site inspections, that would not translate into an organized effort to prevent importation, unless the impossibility to conduct such inspections was only a pretext and a different unifying rationale existed. In other words, the Panel simply did not consider that Ukraine presented sufficient evidence revealing the existence of a common plan aimed at import prevention behind the components of the alleged overarching measure.

5.243. Moreover, while Ukraine relied extensively on the panel and the Appellate Body's rationale for determining the existence of an unwritten measure in *Argentina – Import Measures*, the alleged measure at issue in the present case is different. Unlike the European Union in *Argentina – Import Measures*, here Ukraine challenged part of the unwritten measure's components on an individual basis. In this context, the task of the Panel was to determine whether an interaction existed between these individual components, such that they in combination functioned in a manner distinct from their individual operation. Thus, the Panel's understanding of the content and operation of the components on an individual basis, including the rationale underlying their enacting, formed part of its analysis as to whether the different components operated together as a single measure aimed at achieving a particular policy. In *Argentina – Import Measures*, there was also "extensive evidence on the [p]anel record showing that the TRRs measure implements the 'managed trade' policy, and that this policy has been announced in public statements and speeches and on government websites by high-ranking Argentine Government officials, including the President, the Minister of Industry, and the Secretary of Trade".<sup>621</sup> This evidence suggested that "these TRRs are interlinked and operate together as part of a single measure and will continue to be imposed in the future unless and until the policy is repealed or modified."<sup>622</sup> Differently, in the present case, the Panel found that the evidence presented by Ukraine regarding the "set of trade restrictive measures" did not establish the existence of an underlying policy behind the suspensions and rejections. In particular, the Panel considered that "[t]he media articles that Ukraine has presented point to tensions in the bilateral relationship in connection with the negotiation and conclusion by Ukraine of [the] Association Agreement", and "refer to trade action that Russian authorities might take or did take against Ukraine in response".<sup>623</sup> However, ultimately, the evidence did not demonstrate that "Russia adopted a plan or decided to embark on an organized effort to prevent the importation into Russia of Ukrainian products in general or Ukrainian railway products in particular", and "even if trade-restrictive measures were taken with regard to some Ukrainian products, this does not necessarily mean that such measures were taken also with regard to Ukrainian railway products."<sup>624</sup>

5.244. In this regard, Ukraine submits that the Panel allocated an excessive burden of proof on Ukraine in establishing the existence of the measure, in particular due to its unwritten nature.<sup>625</sup> Ukraine relies on the panel's findings in *Argentina – Import Measures*, in which the panel disagreed with Argentina's contention that journalistic material cannot be "considered to have any probative

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<sup>621</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.131.

<sup>622</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.131 (referring to Panel Reports, *Argentina – Import Measures*, paras. 6.162 and 6.230).

<sup>623</sup> Panel Report, para. 7.974.

<sup>624</sup> Panel Report, para. 7.974.

<sup>625</sup> Ukraine's appellant's submission, para. 40.

value" in ascertaining the existence of an unwritten measure.<sup>626</sup> However, as we see it, rather than questioning the credibility of the media articles provided by Ukraine as a source of information, the Panel did not consider them specific enough to establish the existence and systematic nature of an alleged systematic prevention measure applicable to Ukrainian railway equipment.

5.245. The Panel's conclusion with respect to the media articles presented by Ukraine also demonstrates that the Panel's finding as to the existence of the alleged unwritten measure was not based only on its assessment of the rationale behind the suspensions and rejections. Furthermore, the Panel analysed certain import trade data which, in Ukraine's view, supported the existence of the alleged systematic import prevention.<sup>627</sup> The Panel concluded that "[t]he evidence does not demonstrate that the cause of the decrease in Ukraine's imports and import share in Russia was more likely than not the alleged existence of a systematic prevention of imports by Russia", and that "there is evidence on record suggesting that there are other causes that could explain the decrease of imports of Ukrainian railway products into Russia."<sup>628</sup> On appeal, Ukraine does not take issue with this part of the Panel's analysis and conclusions, which was also independent from the Panel's assessment of the rationale behind the suspensions and rejections.

5.246. Thus, in making its ultimate finding that Ukraine failed to demonstrate that Russia systematically prevented the importation of Ukrainian railway products into Russia, the Panel relied on the following conclusions:

[T]he evidence on record does not establish that *the three elements* of the alleged systematic import prevention (suspension of certificates, rejection of certificates, and the general non-recognition of certificates issued in other CU countries) *have been designed, structured, or operated in combination so as to constitute a separate measure* with the aim of systematically preventing imports of Ukrainian railway products into Russia.

Moreover, the evidence does not establish that those elements *form part of a plan or coordinated effort directed at attaining the aim* of preventing the importation of Ukrainian railway products into Russia.

Finally, *the trade and other economic data submitted by Ukraine also does not establish the existence of the alleged systematic import prevention.* The evidence does not demonstrate that the cause of the decrease in Ukraine's imports and import share in Russia was more likely than not the alleged existence of a systematic prevention of imports by Russia. Rather, we consider that there is evidence on record suggesting that there are other causes that could explain the decrease of imports of Ukrainian railway products into Russia.<sup>629</sup>

5.247. In examining the design, structure, and operation of the three elements of the alleged measure, including Ukraine's argument as to the substantial repetition of suspensions and rejections, the Panel focused on the existence of evidence regarding the rationale behind the suspensions of certificates, rejections of applications for new certificates, and the non-recognition requirement. In this respect, we took the view that it was not unreasonable for the Panel to rely on such evidence in determining the existence of a common policy or plan of import prevention connecting the various components of the alleged measure, as opposed to a finding that each of those components was based on the impossibility to complete the required steps in the conformity assessment procedure. Moreover, as noted, the Panel's ultimate finding did not rely only on that logic. Notably, the assessment of Ukraine's argument about the "set of trade restrictive measures", as well as the

<sup>626</sup> Ukraine's appellant's submission, para. 41 (quoting Panel Reports, *Argentina – Import Measures*, paras. 6.70-6.71). Ukraine highlights the panel's statements that "[n]ewspapers or **magazine articles ... can be** useful sources of information, particularly when dealing with unwritten measures and when corroborating facts asserted through other forms of evidence", and that "[a] panel must assess the credibility and persuasiveness of newspapers or magazine articles submitted as evidence, taking into account that the articles may reflect personal opinions, and assess the information contained in those articles contrasting it with the other evidence on the record." (Ibid.)

<sup>627</sup> Panel Report, paras. 7.975-7.988.

<sup>628</sup> Panel Report, para. 7.992.

<sup>629</sup> Panel Report, paras. 7.990-7.992. (emphasis added)

import trade data submitted by Ukraine, also led the Panel to conclude that there was no sufficient evidence demonstrating the existence of the alleged systematic import prevention.

5.248. Finally, we recall that, in reviewing a panel's assessment of the measure at issue, the Appellate Body "will not lightly interfere" with the panel's factual findings, including those concerning "how a municipal law has been applied, the opinions of experts, administrative practice, or pronouncements of domestic courts".<sup>630</sup> Instead, for a claim under Article 11 to succeed, the Appellate Body must be satisfied that the panel "has exceeded its authority as trier of facts".<sup>631</sup> In the present case, the Panel thoroughly examined both parties' evidence, assessed the credibility of that evidence, and reached its findings on this basis. For its part, Ukraine does not explain how a different approach by the Panel to examining the evidence on the record would have led to a different conclusion.

5.249. In sum, given the characteristics of the alleged unwritten measure, as presented by Ukraine, and the Panel's assessment of the evidence on the record, we do not consider that the Panel erred in its objective assessment of the matter before it under Article 11 of the DSU in finding that Ukraine failed to demonstrate that Russia systematically prevented the importation of Ukrainian railway products into Russia.

#### 5.5.4 Conclusion

5.250. The Panel properly considered whether the individual components of the alleged unwritten measure form part of a common plan to prevent imports of Ukrainian products into Russia. The Panel also did not err in taking into consideration the rationale underlying these individual suspensions and rejections.

5.251. We therefore find that Ukraine has not established that the Panel failed to make an objective assessment of the matter before it under Article 11 of the DSU in finding that Ukraine failed to demonstrate that Russia systematically prevented the importation of Ukrainian railway products into Russia.

## 6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions:

### 6.1 The Panel's preliminary ruling

6.2. Russia has not established that the Panel erred in determining the scope of its terms of reference in this dispute.

- a. We therefore uphold the Panel's finding, in paragraphs 8.1.a.i, 8.1.d.iv, and 8.1.d.v of the Panel Report, that Russia has failed to establish that Ukraine's panel request is inconsistent with Article 6.2 of the DSU.

### 6.2 The third measure as a "general" non-recognition requirement

6.3. Russia has not established that the Panel acted inconsistently with Article 11 of the DSU in finding that the third measure is of a "general" character and flows from CU Technical Regulation 001/2011.

- a. We therefore uphold the Panel's finding, in paragraph 7.861 of the Panel Report, that the third measure as a general non-recognition requirement, which the relevant Russian

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<sup>630</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 177. See also e.g. Appellate Body Reports, *US – Wheat Gluten*, para. 151; *US – Carbon Steel*, para. 142; *US – Upland Cotton*, para. 399.

<sup>631</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 713. See also e.g. Appellate Body Report, *US – Wheat Gluten*, para. 151.

authorities considered to flow from CU Technical Regulation 001/2011, had been demonstrated to exist.

### 6.3 The third measure as a single measure

6.4. Russia has not established that Ukraine failed to meet its *prima facie* burden to establish the existence of the third measure as a single measure.

- a. We therefore uphold the Panel's finding, in paragraph 7.861 of the Panel Report, that the third measure had been demonstrated to exist.

### 6.4 The third measure and the Panel's terms of reference

6.5. Russia's claim regarding the terms of reference concerning the third measure is based on the premise that the Panel erred in its preliminary ruling. We have rejected that allegation of error and upheld the Panel's preliminary ruling.

- a. Consequently, we uphold the Panel's finding, in paragraphs 7.823 and 8.1.d.i of the Panel Report, that the non-recognition requirement based on the local production condition is properly before the Panel.

### 6.5 The third measure and the local registration condition

6.6. The Panel's statements challenged by Russia as constituting "findings" concerning the local registration condition were either merely descriptive statements or concerned the third measure within the Panel's terms of reference.

- a. Consequently, we find that Russia has failed to establish that the Panel acted inconsistently with Article 11 of the DSU by continuing to make findings with respect to a matter that was not within its terms of reference.

### 6.6 Article 5.1.1 of the TBT Agreement

6.7. Under Article 5.1.1 of the TBT Agreement, the assessment of whether access is granted under conditions no less favourable "in a comparable situation" should focus on factors having a bearing on the conditions for granting access to conformity assessment to suppliers of like products and the ability of the regulating Member to ensure compliance with the requirements in the underlying technical regulation or standard. Thus, factors relevant to the inquiry of whether a "comparable situation" exists have to affect the specific suppliers to which the conditions for access to conformity assessment granted by the importing Member relate.

6.8. We consider that the Panel did not err in its interpretation of the phrase "in a comparable situation" in Article 5.1.1 of the TBT Agreement. However, in examining factors relevant for establishing the existence of a "comparable situation" in the particular circumstances of this case, the Panel relied too much on information concerning the security situation in Ukraine generally, and did not focus sufficiently on aspects specific to the suppliers who are claimed to have been granted access under less favourable conditions or to the location of the suppliers' facilities. We therefore find that the Panel erred in its application of Article 5.1.1 of the TBT Agreement to the facts of the present case in finding that, between April 2014 and December 2016, Ukrainian suppliers of railway products were denied no less favourable access in a situation that was not comparable to the situation in which Russia granted access to suppliers of Russian railway products and suppliers of railway products from other countries. For the same reasons, we find that the Panel erred in its application of Article 5.1.1 of the TBT Agreement to the facts of the present case in finding that less favourable access conditions were granted to Ukrainian suppliers of railway products in a situation that was not comparable also in the context of the two decisions through which the FBO rejected applications submitted by Ukrainian suppliers under CU Technical Regulation 001/2011 (i.e. decisions 1 and 2).

- a. Consequently, we reverse the Panel's finding, in paragraphs 7.394 and 8.1.b.i of the Panel Report, that Ukraine failed to establish, with respect to each of the 14 challenged

instructions suspending certificates, that Russia acted inconsistently with its obligations under Article 5.1.1 of the TBT Agreement.

- b. We also reverse the Panel's finding, in paragraphs 7.638 and 8.1.c.i of the Panel Report, that Ukraine failed to establish, with respect to the two decisions through which the FBO "returned without consideration" applications for certificates submitted by Ukrainian producers under CU Technical Regulation 001/2011, i.e. decisions 1 and 2, that Russia acted inconsistently with its obligations under Article 5.1.1 of the TBT Agreement.

### 6.7 Article 5.1.2 of the TBT Agreement

6.9. Ukraine was not required to demonstrate, for purposes of showing that the proposed alternative measure consisting in the conduct of off-site inspections was *prima facie* reasonably available, whether the measure described in Article 5.3 of CS FRT 12-2003 and Article 7.4.1 of PC-FZT 08-2013 could have applied in the specific instances related to the suspensions of certificates at issue. However, the Panel reasoned that, because information on the absence of non-conformities and consumer complaints was in principle available to Ukraine, it was for Ukraine to submit evidence relating to the application of these conditions to the products covered by the suspensions at issue. We therefore find that the Panel failed to make an objective assessment of the matter before it under Article 11 of the DSU in allocating the burden of proof under Article 5.1.2 of the TBT Agreement in its analysis of this alternative measure. We also find that Ukraine failed to establish that the Panel erred in making an objective assessment of the matter before it pursuant to Article 11 of the DSU in finding that Ukraine failed to establish that the other three proposed alternatives were reasonably available.

- a. Consequently, we reverse the Panel's finding, in paragraphs 7.544 and 8.1.b.ii of the Panel Report, that Ukraine failed to establish, with respect to each of the 14 instructions suspending certificates, that Russia has acted inconsistently with its obligations under Article 5.1.2, first and second sentences, of the TBT Agreement.

### 6.8 Systematic prevention of imports

6.10. The Panel properly considered whether the individual components of the alleged unwritten measure form part of a common plan to prevent imports of Ukrainian products into Russia. The Panel also did not err in taking into consideration the rationale underlying these individual suspensions and rejections.

- a. We therefore find that Ukraine has not established that the Panel failed to make an objective assessment of the matter before it under Article 11 of the DSU in finding that Ukraine failed to demonstrate that Russia systematically prevented the importation of Ukrainian railway products into Russia.

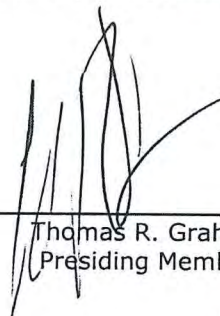
### 6.9 Recommendation

6.11. The Appellate Body recommends that the DSB request Russia to bring its measures found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the TBT Agreement and the GATT 1994, into conformity with its obligations under those Agreements.

Signed in the original in Geneva this 6th day of December 2019 by:



Hong Zhao  
Member



Thomas R. Graham  
Presiding Member



Shree B. C. Servansing  
Member





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RUSSIA – MEASURES AFFECTING THE IMPORTATION OF RAILWAY  
EQUIPMENT AND PARTS THEREOF

AB-2018-7

*Report of the Appellate Body*

*Addendum*

This Addendum contains Annexes A to C to the Report of the Appellate Body circulated as document WT/DS499/AB/R.

The Notices of Appeal and Other Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at 1 in the original may have been renumbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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## LIST OF ANNEXES

## ANNEX A

## NOTICES OF APPEAL AND OTHER APPEAL

Contents		Page
Annex A-1	Ukraine's Notice of Appeal	4
Annex A-2	Russia's Notice of Other Appeal	5

## ANNEX B

## ARGUMENTS OF THE PARTICIPANTS

Contents		Page
Annex B-1	Executive summary of Ukraine's appellant's submission	10
Annex B-2	Executive summary of Russia's other appellant's submission	13
Annex B-3	Executive summary of Russia's appellee's submission	17
Annex B-4	Executive summary of Ukraine's appellee's submission	21

## ANNEX C

## ARGUMENTS OF THE THIRD PARTICIPANTS

Contents		Page
Annex C-1	Executive summary of Canada's third participant's submission	25
Annex C-2	Executive summary of the European Union's third participant's submission	26
Annex C-3	Executive summary of Japan's third participant's submission	27

ANNEX A

NOTICES OF APPEAL AND OTHER APPEAL

Contents		Page
Annex A-1	Ukraine's Notice of Appeal	4
Annex A-2	Russia's Notice of Other Appeal	5



## ANNEX A-1

## UKRAINE'S NOTICE OF APPEAL\*

Pursuant to Article 16.4 of the DSU Ukraine hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *Russia – Measures Affecting the Importation of Railway Equipment and Parts thereof* (WT/DS499/R). Pursuant to Rule 20(1) of the Working Procedures for Appellate Review, Ukraine simultaneously files this Notice of Appeal with the Appellate Body Secretariat.

For the reasons to be further elaborated in its submissions to the Appellate Body, Ukraine appeals, and requests the Appellate Body to reverse the findings, conclusions and recommendations of the Panel, with respect to the following errors contained in the Panel Report:<sup>1</sup>

- a. the Panel failed to make an objective assessment of the matter before it due to the incorrectly applied standard and order of review, burden of proof partially allocated to the parties, biased review of the arguments,<sup>2</sup> and therefore violated Article 11 of the DSU which resulted in finding that there was no systematic prevention of Ukrainian railway products from being imported into the Russian Federation. Thus, Ukraine requests the Appellate Body to reverse the relevant Panel's findings in paragraphs 7.960, 7.965, 7.972, 7.974, 7.993, 7.994, 7.995 and 8.1 (e) of its Report;
- b. the Panel failed to make an objective assessment of the matter before it due to burden of proof partially allocated to the parties and the incorrect standard of review,<sup>3</sup> and therefore violated Article 11 of the DSU which resulted in finding that Ukraine did not establish that the situation in Ukraine was comparable in the meaning of Article 5.1.1 of the TBT Agreement. Thus, Ukraine requests the Appellate Body to reverse the relevant Panel's findings in paragraphs 7.393, 7.394 and 8.1. b(i), c(i) of its Report;
- c. the Panel failed to make an objective assessment of the matter before it due to burden of proof partially allocated to the parties and the incorrect standard of review,<sup>4</sup> and therefore violated Article 11 of the DSU which resulted in finding that there were no less trade-restrictive alternatives available to the Russian Federation, in the meaning of Article 5.1.2 of the TBT Agreement, instead of suspension of certificates and rejection to issue new certificates. Thus, Ukraine requests the Appellate Body to reverse the relevant Panel's findings in paragraphs 7.470, 7.476, 7.482, 7.537 and 8.1 (b)(ii), (c)(iii) of its Report; and
- d. the Panel erred in the interpretation and application of Article 5.1.1 of the TBT Agreement when finding that the situation in Ukraine was not comparable to that in other countries;<sup>5</sup> and thus Ukraine requests the Appellate Body to reverse the relevant Panel's findings in paragraphs findings 7.387 and 8.1 (b)(i), (c)(i) of its Report.

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\* This notification, dated 27 August 2018, was circulated to Members as document WT/DS499/6.

<sup>1</sup> Pursuant to Rule 20(2)(d)(iii) of the *Working Procedures for Appellate Review*, this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of Ukraine to refer to other paragraphs of the Panel Report in the context of its appeal.

<sup>2</sup> See, for example, Panel Report, paras. 7.969-7.972, 7.974, 7.976.

<sup>3</sup> See, for example, Panel Report, paras. 7.285, 7.336, 7.371-7.388, 7.393-7.394, 7.623-7.625, 7.628.

<sup>4</sup> See, for example, Panel Report, paras. 7.450, 7.468, 7.470, 7.476, 7.482, 7.521-7.544, 7.653, 7.656, 7.671, 7.676, 7.704, 7.712, 7.718, 7.719, 7.721, 7.722, 7.226, 7.228, 7.742, 7.745, 7.760.

<sup>5</sup> See, for example, Panel Report, paras. 7.283, 7.285, 7.371-7.388 and 7.394, 7.615-7.616, 7.623, 7.628.

## ANNEX A-2

## RUSSIA'S NOTICE OF OTHER APPEAL\*

1. Pursuant to Article 16.4 and Article 17.1 of the DSU the Russian Federation hereby notifies the Dispute Settlement Body of its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof* (WT/DS499) ("Panel Report"). Pursuant to Rule 23(1) of the Working Procedures for Appellate Review (WT/AB/WP/6, 16 August 2010) ("Working Procedures") the Russian Federation simultaneously files this Notice of Other Appeal with the Appellate Body Secretariat.

2. For the reasons further elaborated in its submissions to the Appellate Body, the Russian Federation appeals and requests the Appellate Body to reverse or modify certain issues of law covered in the Panel Report and legal interpretations developed by the Panel in this dispute.

3. Pursuant to Rule 23(2)(c)(iii) of the Working Procedures the present Notice of Other Appeal provides an indicative list of the paragraphs of the Panel Report containing the alleged errors of law and legal interpretation, without prejudice to the ability of the Russian Federation to refer to other paragraphs of the Panel Report in the context of its appeal.

#### I. APPEAL OF THE PANEL'S ERROR IN INTERPRETING AND APPLYING ARTICLE 6.2 OF THE DSU IN ITS PRELIMINARY RULING

4. The Russian Federation seeks review by the Appellate Body of the Panel's interpretation and application of Article 6.2 of the DSU in its preliminary ruling. In its examination of the Russian Federation's claim on the preliminary ruling the Panel made several errors.

5. First, the Panel erred in concluding that Ukraine's Panel Request presents the problem clearly under Article 6.2 of the DSU by properly linking the measures at issue with the legal basis.

6. Accordingly, the Russian Federation requests that the Appellate Body:

- find that the Panel erred in its legal analysis in paragraphs 7.40-7.41;
- reverse the Panel's findings in paragraphs 7.39 and 7.43.

7. Second, the Panel erred in finding that in respect of the third measure Ukraine's Panel Request had identified a specific measure at issue, in particular:

- the Panel erred by neglecting to determine the meaning of the third measure considered on its face;
- the Panel failed to acknowledge that Ukraine's written submissions confirm neither the words used for the description of the third measure in the Panel Request nor the Panel's interpretation of the third measure.

8. Accordingly, the Russian Federation requests that the Appellate Body:

- find that the Panel erred in its analysis in paragraphs 7.93, 7.97, 7.98 and in its inference in paragraph 7.29 of its Report;
- reverse the Panel's findings in paragraphs 7.99, 7.102 (sentences two and three), 7.103, and 7.104 of its Report;

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\* This notification, dated 3 September 2018, was circulated to Members as document WT/DS499/7.

9. Third, the Panel erred in its conclusion that CU Technical Regulation 001/2011 is identified in the Panel Request with the sufficient degree of precision to embody the third measure.

10. Accordingly, the Russian Federation requests that the Appellate Body:

- reverse paragraphs 7.100-7.104 and, correspondently, paragraph 7.829 (first sentence) of the Panel Report;
- conclude that the third measure was not properly identified in the Panel Request to fall within the Panel's terms of reference.

11. Based on the foregoing, the Russian Federation requests that the Appellate Body reverse the Panel's conclusion in paragraph 8.1(a)(i) that the Russian Federation has failed to establish that the Panel Request is inconsistent with Article 6.2 of the DSU.

12. As a consequence, the Russian Federation also requests that the Appellate Body reverse the Panel's findings and conclusions on Ukraine's claims under Article I:1 of the GATT 1994 and Article III:4 of the GATT 1994 (Sections 7.5.3 – 7.5.3.4 and 7.5.4 – 7.5.4.4, and corresponding paragraphs 8.1(d)(iv) and 8.1(d)(v) of the Panel Report).

## II. APPEAL OF THE PANEL'S ERROR IN INTERPRETING AND APPLYING ARTICLES 6.2, 7.1, AND 11 OF THE DSU IN THE PANEL'S FINDINGS THAT UKRAINE'S THIRD MEASURE WAS WITHIN THE PANEL'S TERMS OF REFERENCE

13. This part of the Russian Federation's appeal concerns several findings made by the Panel in the course of its analysis of the third measure, described by Ukraine in its first written submission ("FWS"), in response to the Russian Federation's claim that this measure is not within the Panel's terms of reference. The Panel erred in its conclusion and related findings that Ukraine's third measure as it was described in Ukraine's FWS, determined and further modified by the Panel was within the Panel's terms of reference, in particular:

14. First, the Panel committed legal errors under Articles 6.2, 7.1 of the DSU in making the following findings related to its analysis of whether the measure described by Ukraine in its FWS is within the Panel's terms of reference:

- any challenge to the alleged non-recognition requirement is within the Panel's terms of reference;
- Ukraine's third measure concerns an alleged requirement that Russia's authorities consider to flow from CU Technical Regulation 001/2011; that under that alleged non-recognition requirement Russia's authorities must not recognize certificates issued to Ukrainian producers in other CU countries unless certain conditions are met; one such condition is that for certificates issued in another CU country to be recognized, the products covered by these certificates must have been produced in a CU country; the third narrative paragraph specifically identifies this production condition;
- the description of the measure in Ukraine's FWS is only "somewhat" different in comparison with the third measure in the Panel Report;
- Ukraine's reference to the Russian Federation's "decision" was not sufficient, in and of itself, for finding that the measure challenged by Ukraine is outside the terms of reference.

15. Accordingly, the Russian Federation requests that the Appellate Body:

- conclude that the measure described by Ukraine in its FWS as "the [alleged] decision of the Russian Federation not to accept in its territory the validity of the conformity assessment certificates issued to Ukrainian producers in other CU countries" is not within the Panel's terms of reference;
- reverse the Panel's findings in paragraph 7.823;

- modify the Panel's finding in the second sentence of paragraph 7.827 by deleting the term "somewhat";
- reverse the Panel's finding in the fourth sentence of paragraph 7.828 that Ukraine's reference "to Russia's 'decision' not to recognize is not sufficient justification, in and of itself, for finding that the measure challenged by Ukraine is outside the terms of reference and not examining the evidence submitted by Ukraine in support of the third measure".

16. As a consequence of the finding that the third measure described by Ukraine in its FWS was not within the Panel's terms of reference the Russian Federation requests that the Appellate Body reverse the Panel's findings on the existence of the measure at issue in Section 7.5.1.2 and particularly in paragraph 7.861 of the Panel Report.

17. Second, with respect to the Panel's determination of the third measure and further modification of its descriptions, the Panel committed legal errors under Articles 6.2, 7.1, and 11 of the DSU in making the following determination and findings:

- the determination that the third measure should be referred to as "the alleged non-recognition requirement flowing from CU Technical Regulation 001/2011", "a general non-recognition requirement, which Russia's Ministry of Transport and its Federal Agency for Railway Transport considered to flow from CU Technical Regulation 001/2011 as they interpreted it", "the general non-recognition requirement (as applied by the identified by the identified Russian authorities in situations where a product certified in another CU country had not been produced in a CU country)";
- the finding that Ukraine has identified the third measure as "the alleged non-recognition requirement flowing from CU Technical Regulation 001/2011";
- the finding that "the non-recognition requirement is properly before the Panel".

18. Accordingly, the Russian Federation requests that the Appellate Body:

- reverse the Panel's determination in the first sentence of paragraph 7.828 that the third measure should be referred to as "the alleged non-recognition requirement flowing from CU Technical Regulation 001/2011" as well as findings in paragraphs 7.850, 7.853, 7.854, 7.861, and 7.881 that the third measure is: "a general non-recognition requirement, which Russia's Ministry of Transport and its Federal Agency for Railway Transport considered to flow from CU Technical Regulation 001/2011 as they interpreted it" and "the general non-recognition requirement (as applied by the identified by the identified Russian authorities in situations where a product certified in another CU country had not been produced in a CU country)";
- reverse the Panel's finding in the third sentence of paragraph 7.828 that Ukraine has identified the third measure as "the alleged non-recognition requirement flowing from CU Technical Regulation 001/2011";
- reverse the Panel's conclusion in paragraph 8.1(d)(i) that "the non-recognition requirement is properly before the Panel".

19. As a consequence of the finding that the measure described by Ukraine in its FWS or "the non-recognition requirement" was not within the Panel's terms of reference (under the first or the second points in this part of the appeal), the Russian Federation also requests the Appellate Body to reverse the Panel's findings and conclusions on the existence of the measure at issue (Sections 7.5.1.2 – 7.5.1.2.1 of the Panel Report) on Ukraine's claims under Article I:1 of the GATT 1994 and Article III:4 of the GATT 1994 (Sections 7.5.3 and 7.5.4 and corresponding paragraphs 8.1(d)(iv) and 8.1(d)(v) of the Panel Report).

### III. APPEAL OF THE PANEL'S ERROR IN INTERPRETING AND APPLYING ARTICLE 11 OF THE DSU TO THE CIRCUMSTANCES OF THE DISPUTE

20. First, the Panel erred under Article 11 of the DSU since it continued making findings with respect to the alleged registration condition and taking these findings into account after it found that this requirement was not within its terms of reference.

21. Second, the Panel erred under Article 11 of the DSU since it relieved Ukraine from the necessity of establishing of a *prima facie* case in respect to the existence of the third measure as a single measure capable of being challenged under the DSU as identified in the Panel Request.

22. Accordingly, the Russian Federation requests that the Appellate Body reverse the Panel's findings in respect of the third measure as contained in paragraphs 7.847, 7.849, 7.850 (the third and the fourth sentences), 7.853, 7.854, 7.861, 7.897, 7.899, 7.917, 7.926 of its Report.

23. As a consequence, the Russian Federation also requests that the Appellate Body reverse the Panel's findings and conclusions on Ukraine's claims under Article I:1 of the GATT 1994 and Article III:4 of the GATT 1994 (Sections 7.5.3 – 7.5.3.4 and 7.5.4 – 7.5.4.4, and corresponding paragraphs 8.1(d)(iv) and 8.1(d)(v) of the Panel Report).

24. Third, the Panel erred in its finding that the third measure as determined by the Panel exists by finding that the "general" non-recognition requirement flows from CU Technical Regulation 001/2011, and in particular:

- the Panel erred in the assessment of the third measure as determined by the Panel by not examining the text of CU Technical Regulation 001/2011;
- the Panel erred by neglecting to find that the assessment of CU Technical Regulation 001/2011 reveals the non-existence of the third measure as determined by the Panel.

25. As a result, the Russian Federation requests that the Appellate Body:

- reverse the Panel's findings in paragraphs 7.823 (the second and the third sentences), 7.846, 7.850 (the third and the fourth sentences), 7.851 to the extent that "[w]hether or not the Ministry and the Federal Agency had the power to interpret CU Technical Regulation 001/2011 and interpreted it correctly is not relevant to [Panel] analysis"; 7.852, 7.853, and 7.854;
- reverse the Panel's finding in paragraph 7.861 of the Panel Report that "the third measure has been demonstrated to exist" and the finding in the same paragraph that "the evidence on the record supports the conclusion that on the date of establishment of this Panel Russia's Ministry of Transport and its Federal Agency for Railway Transport applied a general non-recognition requirement, which these authorities considered to flow from CU Technical Regulation 001/2011 as they interpreted it".

26. Finally, should the Appellate Body find that the Panel erred in its conclusions regarding the existence of the third measure, the Russian Federation requests to reverse the Panel's findings and conclusions on Ukraine's claims under Article I:1 of the GATT 1994 and Article III:4 of the GATT 1994 (Sections 7.5.3 – 7.5.3.4 and 7.5.4 – 7.5.4.4, and corresponding paragraphs 8.1(d)(iv) and 8.1(d)(v) of the Panel Report).

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## ANNEX B

## ARGUMENTS OF THE PARTICIPANTS

Contents		Page
Annex B-1	Executive summary of Ukraine's appellant's submission	10
Annex B-2	Executive summary of Russia's other appellant's submission	13
Annex B-3	Executive summary of Russia's appellee's submission	17
Annex B-4	Executive summary of Ukraine's appellee's submission	21

## ANNEX B-1

## EXECUTIVE SUMMARY OF UKRAINE'S APPELLANT'S SUBMISSION\*

## I. INTRODUCTION

1. Ukraine considers that in the present dispute the Panel failed to effectively rule on the matter before it. Particularly, the Panel failed to execute its function under Article 11 of the DSU with regard to an objective assessment of the matter before it; erred in the interpretation and application of the covered agreements; and, as a consequence, failed to secure a positive solution to a dispute.

2. Realising that the threshold to establish a panel's failure to comply with Article 11 of the DSU is high, Ukraine respectfully presented its Appellant Submission, providing thorough explanation and detailed identification the Panel's specific errors made in respect of objectivity of the assessment of the matter before it.

3. In this Executive Summary, Ukraine will first address the Panel's failure to perform its duty under Article 11 of the DSU; second, Ukraine will address the Panel's erroneous interpretation and application of the term "in a comparable situation" in Article 5.1.1 of the TBT Agreement.

4. By meaning of the Notice of Appeal, Appellant Submission and this Executive Summary, Ukraine requests the Appellate Body to reverse the Panel's findings and conclusions, particularly as set out in paragraphs 8.1(b)(i), 8.1(b)(ii), 8.1(c)(i), 8.1(c)(iii), and 8.1(e) of its Report.

## II. THE PANEL ERRED IN ITS APPLICATION OF THE LAW TO THE FACT AND IN ITS DUTY TO MAKE AN OBJECTIVE ASSESSMENT OF THE MATTER BEFORE IT UNDER ARTICLE 11 OF THE DSU

## A. The Panel failed to make an objective assessment of the systematic prevention of Ukrainian railway products from being imported into the Russian Federation

5. Ukraine submits that the Panel failed to objectively assess the matter before it when examining the existence of the systematic prevention of importation of railway products into the Russian Federation in breach of Article 11 of the DSU.

6. First, the Panel did not complete analysis under its own standard of review (first examining three elements necessary to establish the existence of unwritten measure, and second – specific elements necessary to establish systematic nature of a measure). The Panel, by omitting its own elements of the standard of review, came to the wrong conclusions with regard to the existence of unwritten measure *first*, which resulted in the completely incorrect findings with regard to the existence of systematic prevention.

7. Second, the Panel set wrongfully very high burden of proof for Ukraine to show, for instance, during the assessment of systematic nature of a measure, a "system, plan, or organized method or effort" from the Russian Federation as it could not be prescribed in any particular law or regulation, particularly due to a political nature of such decision.

8. Third, the Panel wrongfully allocated burden of proof between the parties throughout all Sections of the Panel Report by (1) omitting that the Russian Federation presented invalid arguments; (2) deciding that the Russian Federation did not need to present *substantial* arguments; (3) instead putting additional burden of proof upon Ukraine by expecting it to provide more evidence. The specific situations are reflected in the Appellate Submission by Ukraine.

9. Ukraine believes that the Panel did not undertake a holistic assessment of all the evidence before it, namely to allocate impartially burden of proof between the parties, to objectively assess

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\* Word count Executive Summary: 1828. Word count Appellant Submission: 21378.

all evidence before and to apply correctly the standard of review which resulted in breach of Article 11 of the DSU.

#### B. The Panel failed to make an objective assessment of the existence of comparable situation in the meaning of Article 5.1.1 of the TBT Agreement

10. Ukraine considers that the Panel failed to objectively assess the matter before it under Article 11 of the DSU when examining that the situation in Ukraine was not comparable to that in other countries, and therefore justifying the Russian Federation in not sending its inspectors to carry out inspections in Ukraine and in rejecting the relevant applications for certificates of conformity.

11. As a complainant, Ukraine fulfilled its high burden of proof by providing complex set of evidence with regard to the issue of "in a comparable situation" by demonstrating that the Russian Federation applied its conformity assessment procedure so as to grant access for suppliers of like products originating in Ukraine under conditions less favourable than those accorded to suppliers of like Russian products or like products from other countries, in a *comparable situation*.

12. The Russian Federation, in its turn, did not provide relevant and supportive evidence in order to rebut. The comparison as such was not demonstrated by the respondent, therefore, Ukraine was not in a position to rebut arguments or evidences that were not even demonstrated before the Panel.

13. Ukraine also addresses its concerns to the standard of review applied by the Panel and finds that the Panel applied it incorrectly. The Panel findings are mostly based on the information provided by the Russian Federation only during the panel proceedings, rather than on the information that the Russian Federation's authorities transmitted to the producers (in the relevant applicants, the instructions or the cover letters at issue) during initial conformity assessment. Ukraine considers that aim of such information, provided by the respondent during proceedings, is to explain the taken measures *ex post*.

14. On this basis, Ukraine considers that the Panel's findings constitute erroneous assumption that cannot introduce the conclusion that Ukraine was not "in a comparable situation". The Panel failed to make an objective assessment of the matter before it due to burden of proof partially allocated to the parties and the incorrect standard of review. Ukraine is also of a view that this faulty approach to the examination of matter before the Panel in breach of Article 11 of the DSU resulted in the erroneous outcome of the case.

#### C. The Panel failed to make an objective assessment of the existence of less trade-restrictive alternatives in the meaning of Article 5.1.2 of the TBT Agreement

15. Ukraine submits that the Panel failed to objectively assess the matter before it under Article 11 of the DSU when examining the availability of less trade-restrictive alternatives in the meaning of Article 5.1.2 of the TBT Agreement.

16. Ukraine argues that the suspension of certificates is a more strict application of the conformity assessment procedures than necessary and submits that there were available other, less trade-restrictive manners of applying the Russian Federation's conformity assessment procedure such as: (1) additional communications with the relevant Ukrainian producers; (2) entrusting on-site inspections in Ukraine to the competent authorities from Kazakhstan and Belarus; (3) accrediting non-Russian inspectors, either experts or organizations, to conduct inspections in Ukraine; and (4) off-site inspections.<sup>1</sup>

17. The Panel rejected all four alternatives offered by Ukraine because the Panel considered, that they are not, in particular, available.

18. At the same time, the Panel's findings in this regard containing plenty of contradictory conclusions, for example, the Panel concluded that there is evidence showing that the Russian Federation has, in fact, recognized certificates issued by the Kazakh certification body to Russian producers applying through Russian entities,<sup>2</sup> doubt the possibility of the Russian Federation

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<sup>1</sup> Panel Report, para. 7.460.

<sup>2</sup> Panel Report, paras. 7.927-7.928.



to entrust foreign government authorities to carry out these inspection tasks when assessing the second alternative measure.

19. Therefore, Ukraine believes that the Panel failed to make an objective assessment of the matter before it due to burden of proof partially allocated to the parties and the incorrect standard of review, and thus violated Article 11 of the DSU which resulted in finding that there were no less trade-restrictive alternatives available to the Russian Federation instead of suspension of certificates and rejection to issue new certificates.

### III. THE PANEL ERRED IN THE INTERPRETATION AND APPLICATION OF THE TERM "IN A COMPARABLE SITUATION" IN ARTICLE 5.1.1 OF THE TBT AGREEMENT

20. Ukraine submits the Panel erred in the interpretation of Article 5.1.1 of the TBT Agreement in a part of interpretation of the term "in a comparable situation" failing to elaborate what exactly has to be demonstrated and compared in respect to "in a comparable situation".

21. Ukraine has submitted its arguments in support of its claims and provided a relevant comparison between Ukraine and, in particular, the Russian Federation and European Union<sup>3</sup> showing that the Ukrainian *suppliers* at issue and suppliers in other countries are "in a comparable situation".

22. Ukraine respectfully reaffirms its position on interpretation that if the situation of *suppliers* in one country presents common elements and is not "totally" different from the situation of suppliers in another country, they are to be regarded as "comparable".<sup>4</sup> The Panel did not conclude clearly in respect of what the comparison should be made, and, subsequently erred in its conclusion.

23. First, Ukraine considers that the Panel failed to correctly elaborate and substantiate the analogy of legitimate objective ("protecting human life and health") under Article 2.2 of the TBT Agreement to conformity assessment under Article 5.1.1 of the TBT Agreement. Second, the Panel conducted very limited own legal analysis of "in a comparable situation" and completely followed the lead established by the respondent as a defence to make a legal analysis of the matters at issue under the TBT Agreement provision that has never been interpreted before which resulted in the main focus of the Panel's assessment on alleged safety and security situation in Ukraine.

24. Ukraine considers that the Panel made incomplete conclusion concerning "in a comparable situation", which resulted in errors in Panel's findings under Article 5.1.1 of the TBT Agreement. The Panel's failure to undertake this analysis in full constitutes legal error, erroneous assumption and therefore cannot introduce conclusion whether Ukraine was in a "comparable situation".

### IV. CONCLUSION

25. In light of this, Ukraine requests the Appellate Body to reverse the Panel's findings on all the aforementioned issues.

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<sup>3</sup> Panel Report, paras. 7.302-7.306.

<sup>4</sup> Panel Report, para. 7.275, referring to Ukraine's opening statement at the first meeting of the Panel, paras. 44-45; second written submission, paras. 90-93.

## ANNEX B-2

## EXECUTIVE SUMMARY OF RUSSIA'S OTHER APPELLANT'S SUBMISSION

## 1 THE PANEL MADE SEVERAL ERRORS OF LAW IN ITS PRELIMINARY RULING

## 1.1 The Panel erred in its finding that the Panel Request presents the problem clearly under Article 6.2 of the DSU by properly linking the measures at issue with the legal basis

1. A panel request has to plainly connect the legal basis of claims and the challenged measures. Yet, the Panel Request filed by Ukraine merely contains the quotation of the parts of relevant legal provisions with no references to corresponding measures. The matter *meant* by Ukraine had not been clear as evidenced by the discrepancy between what the Panel understood and what Ukraine argued.

2. However, the Panel concluded that the Panel Request conforms to Article 6.2 of the DSU and, thus, erred in law. Had Ukraine formulated the Panel Request properly, the Panel Report would not have been replete with the language that leaves the room for speculations.

## 1.2 The Panel erred in finding that in respect of the third measure the Panel Request had identified a specific measure at issue

3. First, the Panel erred in its analysis of the third measure description in the Panel Request. The legal standard under Article 6.2 of the DSU mandates a panel to begin its analysis of a measure at issue with an examination of the text of a panel request on its face. Contrary to that, in the present case the Panel disregarded how Ukraine described the third measure on its face in the Panel Request and moved to guessing what the measure might have meant according to "contextual interpretation". Accordingly, the Panel (i) failed to consider what the third numbered point of the Panel Request means when read on its face and in comparison to the other two numbered points of section II of the Panel Request; (ii) ignored the contextual importance of the introductory phrase before the list of three numbered points that specifically identifies measures at issue; and, as a consequence, (iii) read in additional meaning otherwise not found in the plain language of the Panel Request.

4. Moreover, the legal standard under Article 6.2 of the DSU allows a panel to consult submissions and statements made during the panel proceedings to confirm the meaning of the words used in a panel request. However, the Panel failed to do so and, thus, ignored the fact that Ukraine's written submissions confirm neither the words used for the description of the third measure in the Panel Request, nor the Panel's interpretation of the third measure.

5. Second, the Panel erred in its conclusion that CU Technical Regulation 001/2011 is identified in the Panel Request with the sufficient degree of precision to embody the third measure in compliance with Article 6.2 of the DSU. CU Technical Regulation 001/2011 is a complex and lengthy legal instrument, addressing various questions of law requiring, thus, a higher degree of specification in the Panel Request to meet the requirements under Article 6.2 of the DSU. By indicating this document in the Panel Request as a whole, i.e. without referring to its particular parts, Ukraine did not put the Russian Federation on sufficient notice about the precise content of the third challenged measure.

6. Absent the reference to the particular aspect at the core of the third measure in the Panel Request read on its face, the Panel erroneously applied Article 6.2 of the DSU when decided that CU Technical Regulation 001/2011 is sufficiently identified to be the third measure.

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## 2 THE PANEL ERRED IN ITS CONCLUSION AND RELATED FINDINGS THAT UKRAINE'S THIRD MEASURE AS IT WAS DESCRIBED IN UKRAINE'S FWS, AND DETERMINED BY THE PANEL WAS WITHIN THE PANEL'S TERMS OF REFERENCE

7. The Panel did not fulfill the requirements of Article 6.2 of the DSU that a complaining party shall identify the specific measures at issue in its request for the establishment of a panel, of Article 7.1 of the DSU that the Panel should examine the matter referred to the DSB by a complainant in its panel request, and of Article 11 of the DSU that the Panel should make an objective assessment of the matter before it.

8. In particular, first, the Panel erred in several findings related to its analysis of whether the measure described by Ukraine in its FWS is within the Panel's terms of reference.

9. Although, the Panel agreed with the Russian Federation that the third measure as described by Ukraine in its FWS differs from the description provided by Ukraine in the Panel Request, it nevertheless went on in its analysis without giving importance to the text of the Panel Request itself (by ignoring the introductory phrase in the fourth paragraph and not examining how specific terms in the description of the measures define and limit the scope of the dispute) and to the difference between the Panel Request and how the third measure appears in Ukraine's FWS.

10. The textual analysis and comparison of the measures described by Ukraine in its FWS with the third measure identified in the Panel Request reveal that these measures are different by description, nature, coverage, and content. In fact, in its FWS Ukraine challenges three different measures (two of which were described as having two additional requirements), which are put forward in different parts of its FWS depending on a particular claim. However, neither of those three measures and two requirements coincide with the third measure as identified in the Panel Request. A measure that was not explicitly identified in the Panel Request as the "specific measure at issue" should not be accepted as the measure at issue within the Panel's terms of reference.

11. Second, the Panel erred in its determination that the third measure should be referred to as "the alleged non-recognition requirement flowing from CU Technical Regulation 001/2011" and in its further modifications of the description of the third measure, as well as in its findings that this measure was identified by Ukraine, and that this measure is properly before the Panel for the following reasons.

12. The Panel's determination that it would refer to the challenged measure as "the alleged non-recognition requirement flowing from CU Technical Regulation 001/2011" constitutes a modification of the description of the measure identified in the Panel Request. The text of the Panel Request does not support the reading of the third measure by the Panel.

13. The Panel's finding that it was Ukraine who had identified the third measure as "alleged non-recognition requirement flowing from CU Technical Regulation 001/2011" also finds no textual support. Accordingly, the Panel's finding that "the non-recognition requirement is properly before the Panel" is an error. By modifying at the later stage in the process, what Ukraine indicated in its Panel Request as the third measure the Panel effectively performed the Ukraine's duty in "identify[ing] the specific measure at issue". However, it is not the Panel's role to "identify" the measure at issue. Under Article 6.2 of the DSU it is the responsibility of the complaining party to correctly and precisely identify the specific measure at issue and then to prove its existence and the violation it alleges. And it is the obligation of the Panel to base its interpretation and findings on the measure as identified by a complainant provided that the measure is within panel's terms of reference.

14. By making a finding on a measure that was not challenged by Ukraine in its Panel Request (the alleged "general non-recognition requirement...") the Panel exceeded its mandate and, thus, acted inconsistently with Articles 7.1 and 11 of the DSU. The Panel's modification of the measure at issue also prejudiced the due process rights of the Russian Federation that are guaranteed under Article 6.2 of the DSU. Furthermore, the finding that the measure described by Ukraine in its FWS falls outside the Panel's terms of reference would logically imply that the Panel failed to objectively assess under Article 11 of the DSU whether Ukraine established a *prima facie* case with respect to the third measure as identified in the Panel Request.

3 THE PANEL ERRED UNDER ARTICLE 11 OF THE DSU SINCE IT CONTINUED MAKING FINDINGS WITH RESPECT TO THE ALLEGED REGISTRATION CONDITION AND TAKING THESE FINDINGS INTO ACCOUNT AFTER IT FOUND THAT THIS REQUIREMENT WAS NOT WITHIN ITS TERMS OF REFERENCE

15. The Panel found that a registration condition (non-recognition resulting from a failure to meet the alleged registration condition) falls outside its terms of reference. However, this finding did not prevent the Panel from repeatedly considering this condition as if this element of the third measure as determined by the Panel had been within the Panel's terms of reference.

16. Without prejudice to its claims on appeal on other issues, the Russian Federation submits that the Panel by doing so erred under Article 11 of the DSU.

4 THE PANEL ERRED UNDER ARTICLE 11 OF THE DSU SINCE IT RELIEVED UKRAINE FROM THE NECESSITY OF ESTABLISHING OF A *PRIMA FACIE* CASE IN RESPECT TO THE EXISTENCE OF THE THIRD MEASURE AS A SINGLE MEASURE CAPABLE OF BEING CHALLENGED UNDER THE DSU AS IDENTIFIED IN THE PANEL REQUEST

17. As evident from its submissions, Ukraine considered the third measure to be composed of several different documents. Consequently, Ukraine had to but failed to make a *prima facie* case to demonstrate the existence of this measure by explaining that its components jointly operate as a single measure distinct from its parts.

18. Without prejudice to the Russian Federation's claims on appeal on other issues, the Panel erred under Article 11 of the DSU when neglected this Ukraine's omission and proceeding from an unsubstantiated presumption about the existence of the said single measure.

5 THE PANEL ERRED IN ITS FINDING THAT THE THIRD MEASURE AS DETERMINED BY THE PANEL EXISTS BY FINDING THAT THE "GENERAL" NON-RECOGNITION REQUIREMENT FLOWS FROM CU TECHNICAL REGULATION 001/2011

19. While analyzing the third measure (as determined by the Panel) the Panel did not explain the standard it used for the analysis even though it affirmed that the third measure was challenged "as such". Furthermore, the Panel did not consider the text of CU Technical Regulation 001/2011 whereas 1) CU Technical Regulation 001/2011 is explicitly named in the description of the third measure in the Panel Request; 2) the Russian Federation submitted references to provisions of CU Technical Regulation 001/2011 and corresponding arguments on its application based on that text.

20. In order to conclude that the non-recognition requirement "flows" from CU Technical Regulation 001/2011 it should be established first of all that the text of CU Technical Regulation 001/2011 includes such a requirement.

21. Had the Panel analyzed the text of CU Technical Regulation 001/2011, it would have found that according to its Article 1 it applies to products manufactured in third countries.

22. This understanding of Article 1 of CU Technical Regulation 001/2011 follows from its text and is supported by the practice of issuance of certificates to producers from third countries and for products manufactured in third countries, the examples of which the Russian Federation has submitted during the Panel proceedings. This understanding is further substantiated by the wording of Article 53(2) of the EAEU Treaty.

23. The Russian Federation submitted all these observations during the Panel proceedings. Yet, the Panel did not consider arguments labelling them as not relevant. Had the Panel examined the text of CU Technical Regulation 001/2011 and the supporting arguments, it would have found the absence of the alleged non-recognition requirement.

24. Since the alleged non-recognition requirement does not flow from CU Technical Regulation 001/2011, the Panel falsely concluded that the said non-recognition requirement was of a general character.

25. The improper examination of the third measure, identified by Ukraine in its Panel Request, resulted in the Panel's failure to fulfil its obligation to make an objective assessment of the matter before it. The Panel disregarded arguments and evidence submitted by the Russian Federation and failed to analyze the text of CU Technical Regulation 001/2011 on its face. These Panel's errors amount to a violation of Article 11 of the DSU.

## 6 CONCLUSIONS

26. The Russian Federation submits that the Panel erred in its application and interpretation of the applicable law in its preliminary ruling alongside the subsequent analysis regarding the third measure in its Report as outlined above and, consequently, requests the Appellate Body to reverse the corresponding findings of the Panel.

## ANNEX B-3

## EXECUTIVE SUMMARY OF RUSSIA'S APPELLEE'S SUBMISSION

## 1 INTRODUCTION

1. At the outset the Russian Federation notes that Ukraine's argumentation throughout its Appellant Submission is nothing but a repetition of its position during the Panel's proceedings lacking any explanation as to why the alleged flaws in the Panel's reasoning amount to a violation of Article 11 of the DSU. The mere repetition of the previous position renders the Appellant Submission of Ukraine effectively equal to the request to substitute the Panel in its original review, that is, to consider the respective claims *de novo*. Bearing this in mind, the Russian Federation demonstrates in its Appellee's Submission that Ukraine's claims on appeal should be dismissed.

## 2 THE PANEL MADE AN OBJECTIVE ASSESSMENT OF THE EXISTENCE OF THE ALLEGED SYSTEMATIC IMPORT PREVENTION

2. Contrary to Ukraine's assertion, the text of the Panel Report confirms that the Panel started its analysis by establishing the content of the measure at issue in order to establish the existence of the alleged unwritten measure.<sup>1</sup> Article 11 of the DSU does not prescribe a panel the precise order of analysis to make an objective assessment of the matter. In any way, the examination of the alleged unwritten measure in another order of analysis would have resulted in the same conclusion, i.e. that the alleged measure does not exist. Thus, the Panel did not commit an error, let alone an error so serious as to cast doubt on the objectivity of the Panel's analysis as required under the Article 11 of the DSU.

3. Ukraine falsely contends that the Panel did not thoroughly examine all the evidence submitted by Ukraine and did not make an objective assessment of this evidence and substantiating arguments. Having done all that, the Panel came to the conclusion that "Ukraine has failed to demonstrate that Russia systematically prevented the importation of Ukrainian railway products into Russia".<sup>2</sup> In particular, the Panel examined the evidence submitted by Ukraine in respect of the alleged "set of trade restrictive measures" as indicated in footnote 762 to paragraph 7.973 of the Panel Report. The media articles presented by Ukraine contain no indication of, or even a hint at, the fact that the Russian Federation has approved a plan to restrict imports from Ukraine in general or that of railway products specifically.

4. Ukraine's assertion that "the Panel took an approach when the review of any individual measure had been conducted in isolation from other measures at issue, without referring to the context of the case" is baseless. The Panel clearly explained in paragraph 7.230 of the Report the rationale behind the order of analysis of Ukraine's claims and did it in full conformity with the requirements of Article 11 of the DSU.

5. Ukraine's allegation that "the Panel proved to be partial in its consideration of facts" is also without merit. It is clear from paragraph 7.960 of the Panel Report that, as the trier of facts and acting in compliance with the requirement of Article 11 of the DSU, the Panel examined all the evidence submitted by the parties and concluded that it was "not persuaded that the applications unjustifiably rejected by the FBO ... are proof that the FBO used its powers with the aim or as part of a plan directed at preventing the importation of Ukrainian railway products into Russia".<sup>3</sup> Thus, Ukraine fails to establish that the Panel committed any error, let alone an error so serious as to cast doubt on the objectivity of the Panel's analysis as required under the Article 11 of the DSU. The Panel Report also confirms that Ukraine in any way failed to prove that the alleged systematic prevention is different from its components and failed to provide evidence as to how exactly the elements of this measure operate together as a single measure. Thus, Ukraine's allegation that the

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<sup>1</sup> Panel Report, *Russia – Railway Equipment*, Section 7.6.1.2.

<sup>2</sup> Panel Report, *Russia – Railway Equipment*, para. 7.993.

<sup>3</sup> Panel Report, *Russia – Railway Equipment*, para. 7.960.

Panel applied "a highly uneven burden of proof" is legally flawed. The complainant must prove its claim.

6. Ukraine argues that "in order to ensure correct and comprehensive assessment of the matter before it, the Panel should have considered a recourse to Article 13 of the DSU". Actually, Ukraine's position is that the Panel failed to have recourse to Article 13 of the DSU despite the fact that the information was necessary for Ukraine to make a *prima facie* case. First, however, in the course of the panel proceedings Ukraine did not request for production of information under Article 13 of the DSU. Second, and most importantly, according to the Appellate Body, panels are precluded from using their authority under Article 13 in order "to rule in favor of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it".<sup>4</sup> Therefore, by abstaining from requesting information under Article 13 of the DSU, the Panel acted in full compliance with the requirements under Article 11 of the DSU.

7. Nevertheless, if the Appellate Body finds that Ukraine's claims are substantiated and the Panel made specific errors under Article 11 of the DSU – *quad non* – this will not affect the overall conclusions by the Panel made in paragraphs 7.993, 7.994, 7.995 and 8.1.(e) of the Report.

### 3 THE PANEL'S CONCLUSION THAT UKRAINE FAILED TO ESTABLISH THAT THE RUSSIAN FEDERATION ACTED INCONSISTENTLY WITH ITS OBLIGATIONS UNDER ARTICLE 5.1.2 OF THE TBT AGREEMENT FULLY COMPLIES WITH THE REQUIREMENTS UNDER ARTICLE 11 OF THE DSU

8. First, Ukraine did not provide any arguments supporting its challenge of the Panel's finding and conclusion in paragraph 8.1.(c)(iii) of the Report making only an assertion alone. Thus, Ukraine's request to reverse the Panel's finding in paragraph 8.1.(c)(iii) shall be rejected without further consideration.

9. Second, the Panel correctly rejected all four alternatives suggested by Ukraine in the course of proceedings as they were not reasonably available to Russian authorities and Ukraine failed to prove the opposite.

10. The Panel correctly rejected the alternative of additional communications with the relevant Ukrainian producers since Ukraine did not substantiate that this alternative is reasonably available. The Panel correctly allocated the burden of proof and correctly established that Ukraine did not establish a *prima facie* case to shift its burden. Ukraine did not show that this alternative is not *a priori* prohibitive.

11. The Panel correctly rejected the alternative of entrusting on-site inspections in Ukraine to the competent authorities from Kazakhstan and Belarus since it was based on a merely theoretical assumption of Ukraine that did not provide any sufficient grounds to show that this alternative is available.

12. The Panel correctly rejected the alternative of accrediting non-Russian inspectors, either experts or organizations, to conduct inspections in Ukraine since the examination of Certification Rules together with other facts on record do not confirm that such alternative exists.

13. The Panel correctly rejected the off-site inspections alternative since the evidence in the course of proceedings demonstrated the absence of this alternative. Ukraine's argument on *ex post* argumentation does not stand in the case of technical regulations and conformity assessment proceedings. Furthermore, the issue of explanation to exporters at the time of suspension concerns the obligation under Article 5.2.2 of the TBT Agreement that is not subject to appeal.

14. Finally, Ukraine persistently seeks to engage the Appellate Body into the examination of facts and reargue its case settled by the Panel contrary to the purpose of the Appellate Body's proceedings and its mandate.

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<sup>4</sup> Appellate Body Report, *Japan – Agricultural Products II*, para. 129.

#### 4 THE PANEL MADE AN OBJECTIVE ASSESSMENT OF THE EXISTENCE OF A COMPARABLE SITUATION WITHIN THE MEANING OF ARTICLE 5.1.1 OF THE TBT

##### 4.1 Panel's alleged failure to observe due process rights: determination of burden of proof and standard of review

15. Ukraine falls short of proving that the Panel failed to observe due process rights in its determination of burden of proof and standard of review.

16. Ukraine erroneously interprets the allocation of the burden of proof in the case of an alleged violation of Article 5.1.1 of the TBT Agreement. First, Ukraine as a party that asserts a violation is responsible for providing proof thereof. The Panel as an original trier of facts found that Ukraine did not substantiate that the situation in Ukraine was comparable to that in the Russian Federation or in other countries. Second, the phrase "in a comparable situation" does not operate as an exception that the defending party may invoke to relieve itself of its obligations under Article 5.1.1 of the TBT Agreement. Rather, it forms a part of a single positive obligation and the opposite interpretation would lead to absurd legal consequences.

17. Further, Ukraine's allegations regarding Panel's standard of review are unsubstantiated. First, in its argumentation, Ukraine essentially seeks reassessment of facts and evidence on record, while re-examination of facts is excluded from the scope of appellate review under Article 17.6 of the DSU. Second, Ukraine's assertion that the analogy of the standard of review in safeguard investigations or customs valuation proceedings should be adopted in the present case is wrong because the disciplines of trade defense and technical regulation are substantially different.

##### 4.2 Panel's alleged non-objective assessment of a comparable situation

18. Virtually all Ukraine's arguments regarding the Panel's assessment of comparable situation either represent or are based on repetition or extension of arguments made during the Panel proceedings. However, at the appellate stage, the Appellate Body does not permit a party to the dispute to recast its arguments made before a panel in the guise of an Article 11 of the DSU claim. Moreover, Ukraine's explanation on why the alleged Panel's errors might have a bearing on the objectivity of the Panel's assessment is premised solely on its disagreement with the Panel's reasoning and weighing of the evidence, which does not substantiate its position regarding the alleged violation of Article 11 of the DSU by the Panel.

19. With respect to "comparable situation", the Russian Federation submits that the Panel has properly conducted its assessment of evidence in their totality and, therefore, acted within the boundaries of its obligations under Article 11 of the DSU, and Ukraine has not provided a single piece of evidence proving the Panel not being objective in its assessment of facts.

#### 5 THE PANEL PROPERLY INTERPRETED AND APPLIED THE TERM "IN A COMPARABLE SITUATION" IN ARTICLE 5.1.1 OF THE TBT AGREEMENT

##### 5.1 Ukraine's failure to argue that the Panel erred in law

20. Ukraine asserted that the Panel erred in law by not interpreting Article 5.1.1 of the TBT in good faith. This is a strong indication that Ukraine in its appeal is actually bringing a claim under Article 11 of the DSU in the guise of a legal error. But Ukraine does not invoke Article 11 of the DSU in this part and, thus, puts forward a claim based on the false legal basis. Besides, Ukraine failed to reason why the alleged Panel's error amounts to acting in bad faith.



## 5.2 The Panel correctly interpreted and applied the term "in a comparable situation" in Article 5.1.1 of the TBT Agreement

21. As a preliminary matter, Panel's conclusion under paragraph 8.1.(c)(i) of the Report was not reached on grounds pertaining to the appeal under point d) of Ukraine's Notice of Appeal. Consequently, that paragraph is beyond this appeal scope as irrelevant to the corresponding claim.

22. The Russian Federation submits that the Panel interpreted Article 5.1.1 in good faith by construing the phrase "in a comparable situation" as informed by its context in the provision and in the TBT Agreement, instead of relying on an excessively literal reading of Article 5.1.1.

23. Further, Ukraine misread the Panel Report as indicating that the Panel drew an analogy between Articles 2.2 and 5.1.1 of the TBT Agreement. Article 2.2 played in the Panel's respective analysis the role of a part of the context, along with many other legal provisions under the TBT Agreement, to interpret Article 2.1 that is instructive as to how no less favourable treatment obligations operate within the TBT Agreement. Accordingly, the link between Articles 2.2 and 5.1.1 in Panel's analysis, if any, is too remote to consider that the Panel applied the legitimate objective under one to the other.

24. By arguing that the Panel did not explain what exactly should be compared under Article 5.1.1 of the TBT Agreement, Ukraine neglected that the degree of competent bodies' discretion in fulfilling their obligations under that provision cannot be described in the abstract. The question of whether the situation is comparable in a particular dispute is a question the answer to which is to be given on a case-by-case basis. With that in mind, the Panel arrived at the correct conclusion that "in this instance related to risks to life and health of FBO inspectors ... the situation in Ukraine was not comparable to other countries", which is based on the proper interpretation of Article 5.1.1 of the TBT Agreement.<sup>5</sup>

25. Consequently, the Panel correctly interpreted and applied the term "in a comparable situation" in Article 5.1.1 of the TBT Agreement.

## 6 CONCLUSIONS

26. For these reasons, all Ukraine's claims on appeal and requests for findings shall be rejected.

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<sup>5</sup> Panel Report, *Russia – Railway Equipment*, para. 7.387.

## ANNEX B-4

## EXECUTIVE SUMMARY OF UKRAINE'S APPELLEE'S SUBMISSION

THE PANEL ACTED CONSISTENTLY WITH ARTICLE 6.2 OF THE DSU IN ITS PRELIMINARY RULING; AND THE PANEL DID NOT ERR IN ITS CONCLUSION AND RELATED FINDINGS THAT UKRAINE'S THIRD MEASURE AS DESCRIBED IN UKRAINE'S FIRST WRITTEN SUBMISSION AND DETERMINED BY THE PANEL WAS WITHIN THE PANEL'S TERMS OF REFERENCE

1. The Russian Federation alleges that the Panel acted inconsistently with Articles 6.2, 7.1 and 11 of the DSU because the Panel Request does not present and identify the specific measure at issue, and because the third measure is not within the Panel's terms of reference.
2. Ukraine submits that the Panel Request met all requirements of the Article 6.2 of the DSU, in particular third requirement – to provide summary of the legal basis sufficient to present the problem clearly. When read as a whole, the Panel Request plainly connects the specific measures at issue with the provisions of the WTO covered agreements that those measures violate. Ukraine's submissions only confirmed the meaning of the words used in the Panel Request without changing the gist of what is at issue.
3. Ukraine considers that the Panel made correct examination by giving due consideration to the measure's meaning on its face.
4. Thereby, Ukraine submits that the Panel Request meets the requirements of Article 6.2 of the DSU and the Panel therefore did not err in examining the measures at issue according to requirements of Article 7.1 of the DSU, did not exceed its mandate, and acted in consistency with the provisions of Article 11 of the DSU with respect to Ukraine's claims under Articles I:1 and III:4 of the GATT 1994.

THE PANEL ACTED CONSISTENTLY WITH ARTICLE 11 OF THE DSU WHEN MAKING FINDINGS WITH RESPECT TO THE REGISTRATION CONDITION

5. Ukraine submits that the Panel acted according to Article 11 of the DSU when making findings with respect to the registration condition.
6. The Russian Federation claims that the Panel committed legal error under Article 11 of the DSU since it continued making findings with respect to the registration condition and taking these findings into account after it found that this requirement was not within its terms of reference.
7. Ukraine recalls the Panel's findings with respect to its terms of reference concerning the third measure as set forth in its Preliminary Ruling. With regard to describing the third measure the Panel finds that the specific measure at issue in the passage of the Panel Request is adequately identified in the panel request, as a whole.<sup>1</sup>
8. **The Panel noted that "... there is the reference to Annex III. It became clear** during the course of the proceedings that one of the instructions mentioned in Annex III identifies the alleged registration condition."<sup>2</sup>
9. Moreover, in its Report the Panel asserted that it is clear from the analysis of the Panel Request in its Preliminary ruling that any challenge to the alleged requirement that the Russian Federation's authorities must not recognize certificates, issued in other CU countries if the certified products were not produced in a CU country, is within its terms of reference.<sup>3</sup>

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<sup>1</sup> Preliminary ruling by the Panel of 17 July 2017, para. 2.12.

<sup>2</sup> Panel Report, paragraph 7.824.

<sup>3</sup> Panel Report, paragraph 7.823.

10. Therefore, Ukraine submits that the measure, set out in the third narrative paragraph of section II of the Panel Request, particularly its second element regarding registration condition, is within the Panel's terms of reference as determined by the Panel.

11. Thus, Ukraine submits that the Panel made an objective assessment of the matter of the case in accordance with Article 11 of the DSU when taking under consideration the registration condition in its findings.

THE PANEL ACTED CONSISTENTLY WITH ARTICLE 11 OF THE DSU AS IT DID NOT RELIEVE UKRAINE FROM THE NECESSITY OF ESTABLISHING A *PRIMA FACIE* CASE IN RESPECT TO THE EXISTENCE OF THE THIRD MEASURE

12. Ukraine believes that the Panel did not err under Article 11 of the DSU as it did not relieve Ukraine from the necessity of establishing of a *prima facie* case in respect to the existence of the third measure.

13. In order to duly demonstrate inconsistency of the challenged third measure concerning non-recognition of the certificates issued in other CU countries with the Articles 2.1 and 5.1.1 of the TBT Agreement and Articles I:1, III:4, X:3(a) and XIII:1 of the GATT 1994, Ukraine provided a thorough argumentation according to well-known legal standards, establishing a *prima facie* case on existence of the third measure.<sup>4</sup>

14. On the basis of Ukraine's arguments the Panel correctly found the existence of third measure as being explicitly prescribed in the texts of the Protocols of the Ministry of Transport and the Letters of the Federal Railway Transport Administration of the Ministry of Transport when they are read together with Technical Regulation 001/2011.

15. It is unclear how the Russian Federation concluded that the Panel relieved Ukraine from the necessity of establishing a *prima facie* case<sup>5</sup> if the detailed argumentation had been provided throughout proceedings.

16. Taking into account that Ukraine established *prima facie* case in respect of the third measure in the panel proceedings, Ukraine submits that the Russian Federation's claim that the Panel erred under Article 11 of the DSU by relieving Ukraine from necessity of establishing *prima facie* case fails on all account.

THE PANEL DID NOT ERR IN ITS FINDING THAT THE THIRD MEASURE AS DETERMINED BY THE PANEL EXISTS BY FINDING THAT THE "GENERAL" NON-RECOGNITION REQUIREMENT FLOWS FROM CU TECHNICAL REGULATION 001/2011

17. The Russian Federation claims that the Panel concluded that the non-recognition requirement flows from CU Technical Regulation 001/2011.<sup>6</sup> The Russian Federation argues that the Panel wrongfully did not examine the text of CU Technical Regulation 001/2011 and stated that if the Panel did so, it would reveal non-existence of the third measure. It submits that the Panel acted in violation of Article 11 of the DSU by not examining CU Technical Regulation 001/2011.

18. In this respect Ukraine submits that the Russian Federation misinterpreted the Panel's conclusion by stating that it was the Panel's finding that the non-recognition requirement flows from CU Technical Regulation 001/2011.<sup>7</sup> However, the Panel did not itself make such conclusion. The Panel explicitly stated that: "... the evidence on the record supports the conclusion that on the date of establishment of this Panel Russia's Ministry of Transport and its Federal Agency for Railway Transport applied a general non-recognition requirement, which these authorities considered to flow from CU Technical Regulation 001/2011 as they interpreted it".<sup>8</sup>

19. As it is apparent from the Panel's conclusion, the Russian authorities considered that the general non-recognition requirement flows from CU Technical Regulation 001/2011. Indeed, the

<sup>4</sup> Ukraine's first Written Submission, paras. 289-399.

<sup>5</sup> The Russian Federation Other Appellant Submission, paras. 110, 117.

<sup>6</sup> Other Appellant Submission of the Russian Federation, para. 123.

<sup>7</sup> Other Appellant Submission of the Russian Federation, para. 123.

<sup>8</sup> Panel report, para. 7.861 (emphasis added).

Russian Federation's Ministry of Transport and its Federal Agency for Railway Transport relied on the provision of CU Technical Regulation 001/2011 when establishing non-recognition requirement.

20. Ukraine disagrees with the mentioned above claim of the Russian Federation. First, the Panel did examine the CU Technical Regulation 001/2011 in its Panel Report.<sup>9</sup> The Panel made such examination in the amount, necessary to make an objective assessment of the matter before it in this regard.

21. Second, Ukraine reiterates that with respect to the third measure it did not challenge the CU Technical Regulation 001/2011 *per se* as it does not require that the applicant must be registered in the same country as the relevant certification body.

22. Therefore, the Russian Federation's allegation that the Panel erred under Article 11 of the DSU by not examining the text of CU Technical Regulation 001/2011 is false. It is irrelevant for the matter under this case to examine a document on existence of discriminatory provisions if such existence was not even alleged by complainant to take place.

23. In this light Ukraine believes that the Panel made a correct examination of the matter before it as it referred to the letters of the Federal Agency for Railway Transport and the Protocol of the Ministry of Transport, challenged by Ukraine under third measure.

24. Thus, the Panel comes to reasoned conclusion that on the date of establishment of this Panel the Russian Federation's Ministry of Transport and its Federal Agency for Railway Transport applied a general non-recognition requirement, which these authorities considered to flow from CU Technical Regulation 001/2011 as they interpreted it.

25. Ukraine believes that it is a duty of the Russian Federation to make sure that its authorities act within its powers and correctly interpret provisions of law. In this particular case, actual application and existence of the measure suggests that the Russian Federation agrees with interpretation and, subsequently, the decision of the Ministry of Transport and its Federal Agency for Railway Transport to apply the non-recognition requirement to Ukrainian producers. On the other hand, if the Russian Federation argues that the relevant authorities did not correctly understand the CU Technical Regulation 001/2011 as it does not contain any non-recognition requirement and, moreover, did not have the power to interpret it in first place, then it has to abolish such decision as being legally unsubstantiated.

26. Considering the abovementioned, Ukraine submits that the Panel acted in accordance with Article 11 when made conclusion on existence of the third measure.

## CONCLUSION

27. In light of all of the above, Ukraine requests the Appellate Body to uphold the Panel's findings on all the aforementioned issues.

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<sup>9</sup> See, for example, Panel Report, paras. 7.592-7.595, 7.614.

## ANNEX C

## ARGUMENTS OF THE THIRD PARTICIPANTS

Contents		Page
Annex C-1	Executive summary of Canada's third participant's submission	25
Annex C-2	Executive summary of the European Union's third participant's submission	26
Annex C-3	Executive summary of Japan's third participant's submission	27

## ANNEX C-1

### EXECUTIVE SUMMARY OF CANADA'S THIRD PARTICIPANT'S SUBMISSION<sup>1</sup>

#### I. ARTICLE 5.1.1 – IN A COMPARABLE SITUATION

##### A. "In a comparable situation" qualifies the scope of the non-discrimination obligation

1. The phrase "in a comparable situation" qualifies the scope of the non-discrimination obligation. If the suppliers of like products are not in a comparable situation, the non-discrimination obligation would not apply.

##### B. Factors to be considered in determining whether the suppliers of like products are "in a comparable situation"

2. A Panel should consider the underlying objective of conformity assessment procedures to obtain adequate confidence that products conform with the technical regulations. Balanced with that objective, is the need for WTO members to extend access to conformity assessment procedures to as wide a variety of potential suppliers as is possible.

##### C. The protection of the health and life of conformity assessment procedure officials is not a consideration to balance under Article 5.1.1

3. The threat to the lives and health of conformity assessment officials that may impede their ability to obtain assurance of conformity can be relevant in determining whether the situations are comparable.

4. However, the protection of life and health of conformity assessment inspectors is not an objective that is balanced with the interests of suppliers of imported products in determining whether the situations are comparable. The Panel should analyse how the WTO Member is reconciling its need to obtain assurance of conformity with its technical regulation, with its obligation to provide access of suppliers of other WTO Members to its conformity assessment procedures.

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<sup>1</sup> Canada's third participant submission contains 2210 words. This Executive Summary contains 248 words.

## ANNEX C-2

### EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S THIRD PARTICIPANT'S SUBMISSION

#### A. UKRAINE'S THIRD GROUND OF APPEAL

1. In circumstances where a party provides a text of a municipal law as evidence, if the text is sufficiently clear on its face, it may not be necessary to complement with evidence of practice to discharge the burden of making a *prima facie* case.

2. Where a WTO Member provides for the possibility of accreditation of external experts in its municipal law it is plausible for a panel to conclude that this procedure is in principle available to that Member.

#### B. UKRAINE'S FOURTH GROUND OF APPEAL

3. The European Union agrees with the legal standard for Article 5.1.1 TBT as set out by the Panel in this dispute.

4. The Panel did not fail to elaborate and apply what exactly should be compared in the context of an Article 5.1.1 TBT analysis. It explained that to determine whether a particular situation is comparable, it is necessary to identify *relevant factors* that render the situation comparable or not. This must be assessed on a *case-by-case basis*.

5. The Panel did not err in applying the legal standard to the facts at issue in considering the risk to the life and health of employees as a relevant factor to determine whether a situation in a Member can be considered comparable or not.

ANNEX C-3

EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION

1. Contrary to the Panel's finding, Japan believes that the requirement that suppliers be "in a comparable situation" does not preclude or restrict the adoption of the two-step analysis under Article 5.1.1 because Articles 2.1 and 5.1.1 not only have similar language and structure, but also because the same rationale for allowing legitimate regulatory distinctions applies to both provisions. Both conformity assessment procedures ("CAPs") and technical regulations can be used for legitimate purposes as well as for disguised restrictions on trade, and the sixth recital of the preamble of the TBT Agreement provides relevant context for Article 5.1.1 as well.

2. Japan believes that, in addressing a claim of *de facto* discrimination under Article 5.1.1, the Appellate Body should undertake a "comparable situation" analysis. This analysis pursuant to the phrase "in a comparable situation" should serve as a preliminary question regarding whether the situation of suppliers subject to conditions for granting access is comparable. Japan understands a "comparable situation" to be a situation that is capable of being compared, which potentially encompasses a relatively broad range of situations.

3. Then, if a comparable situation is found, Japan considers that the Appellate Body should examine whether access to the CAPs concerned is granted for suppliers of like products under different conditions to the detriment of suppliers of railway products originating in Ukraine vis-à-vis suppliers of like products from Russia or any other Member.

4. If positive, the Appellate Body should continue to examine whether the detrimental impact arising from the different conditions for access to the CAPs stems exclusively from the CAPs' objective of determining whether the relevant requirements in technical regulations are fulfilled, rather than reflecting discrimination against the suppliers of Ukrainian products.

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RUSSIA – MEASURES AFFECTING THE IMPORTATION OF RAILWAY  
EQUIPMENT AND PARTS THEREOF

AB-2018-7

*Report of the Appellate Body*

*Addendum*

This Addendum contains Annexes A to C to the Report of the Appellate Body circulated as document WT/DS499/AB/R.

The Notices of Appeal and Other Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at 1 in the original may have been renumbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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## LIST OF ANNEXES

## ANNEX A

## NOTICES OF APPEAL AND OTHER APPEAL

Contents		Page
Annex A-1	Ukraine's Notice of Appeal	4
Annex A-2	Russia's Notice of Other Appeal	5

## ANNEX B

## ARGUMENTS OF THE PARTICIPANTS

Contents		Page
Annex B-1	Executive summary of Ukraine's appellant's submission	10
Annex B-2	Executive summary of Russia's other appellant's submission	13
Annex B-3	Executive summary of Russia's appellee's submission	17
Annex B-4	Executive summary of Ukraine's appellee's submission	21

## ANNEX C

## ARGUMENTS OF THE THIRD PARTICIPANTS

Contents		Page
Annex C-1	Executive summary of Canada's third participant's submission	25
Annex C-2	Executive summary of the European Union's third participant's submission	26
Annex C-3	Executive summary of Japan's third participant's submission	27

ANNEX A

NOTICES OF APPEAL AND OTHER APPEAL

Contents		Page
Annex A-1	Ukraine's Notice of Appeal	4
Annex A-2	Russia's Notice of Other Appeal	5

## ANNEX A-1

## UKRAINE'S NOTICE OF APPEAL\*

Pursuant to Article 16.4 of the DSU Ukraine hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *Russia – Measures Affecting the Importation of Railway Equipment and Parts thereof* (WT/DS499/R). Pursuant to Rule 20(1) of the Working Procedures for Appellate Review, Ukraine simultaneously files this Notice of Appeal with the Appellate Body Secretariat.

For the reasons to be further elaborated in its submissions to the Appellate Body, Ukraine appeals, and requests the Appellate Body to reverse the findings, conclusions and recommendations of the Panel, with respect to the following errors contained in the Panel Report:<sup>1</sup>

- a. the Panel failed to make an objective assessment of the matter before it due to the incorrectly applied standard and order of review, burden of proof partially allocated to the parties, biased review of the arguments,<sup>2</sup> and therefore violated Article 11 of the DSU which resulted in finding that there was no systematic prevention of Ukrainian railway products from being imported into the Russian Federation. Thus, Ukraine requests the Appellate Body to reverse the relevant Panel's findings in paragraphs 7.960, 7.965, 7.972, 7.974, 7.993, 7.994, 7.995 and 8.1 (e) of its Report;
- b. the Panel failed to make an objective assessment of the matter before it due to burden of proof partially allocated to the parties and the incorrect standard of review,<sup>3</sup> and therefore violated Article 11 of the DSU which resulted in finding that Ukraine did not establish that the situation in Ukraine was comparable in the meaning of Article 5.1.1 of the TBT Agreement. Thus, Ukraine requests the Appellate Body to reverse the relevant Panel's findings in paragraphs 7.393, 7.394 and 8.1. b(i), c(i) of its Report;
- c. the Panel failed to make an objective assessment of the matter before it due to burden of proof partially allocated to the parties and the incorrect standard of review,<sup>4</sup> and therefore violated Article 11 of the DSU which resulted in finding that there were no less trade-restrictive alternatives available to the Russian Federation, in the meaning of Article 5.1.2 of the TBT Agreement, instead of suspension of certificates and rejection to issue new certificates. Thus, Ukraine requests the Appellate Body to reverse the relevant Panel's findings in paragraphs 7.470, 7.476, 7.482, 7.537 and 8.1 (b)(ii), (c)(iii) of its Report; and
- d. the Panel erred in the interpretation and application of Article 5.1.1 of the TBT Agreement when finding that the situation in Ukraine was not comparable to that in other countries;<sup>5</sup> and thus Ukraine requests the Appellate Body to reverse the relevant Panel's findings in paragraphs findings 7.387 and 8.1 (b)(i), (c)(i) of its Report.

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\* This notification, dated 27 August 2018, was circulated to Members as document WT/DS499/6.

<sup>1</sup> Pursuant to Rule 20(2)(d)(iii) of the *Working Procedures for Appellate Review*, this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of Ukraine to refer to other paragraphs of the Panel Report in the context of its appeal.

<sup>2</sup> See, for example, Panel Report, paras. 7.969-7.972, 7.974, 7.976.

<sup>3</sup> See, for example, Panel Report, paras. 7.285, 7.336, 7.371-7.388, 7.393-7.394, 7.623-7.625, 7.628.

<sup>4</sup> See, for example, Panel Report, paras. 7.450, 7.468, 7.470, 7.476, 7.482, 7.521-7.544, 7.653, 7.656, 7.671, 7.676, 7.704, 7.712, 7.718, 7.719, 7.721, 7.722, 7.226, 7.228, 7.742, 7.745, 7.760.

<sup>5</sup> See, for example, Panel Report, paras. 7.283, 7.285, 7.371-7.388 and 7.394, 7.615-7.616, 7.623, 7.628.

## ANNEX A-2

## RUSSIA'S NOTICE OF OTHER APPEAL\*

1. Pursuant to Article 16.4 and Article 17.1 of the DSU the Russian Federation hereby notifies the Dispute Settlement Body of its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof* (WT/DS499) ("Panel Report"). Pursuant to Rule 23(1) of the Working Procedures for Appellate Review (WT/AB/WP/6, 16 August 2010) ("Working Procedures") the Russian Federation simultaneously files this Notice of Other Appeal with the Appellate Body Secretariat.

2. For the reasons further elaborated in its submissions to the Appellate Body, the Russian Federation appeals and requests the Appellate Body to reverse or modify certain issues of law covered in the Panel Report and legal interpretations developed by the Panel in this dispute.

3. Pursuant to Rule 23(2)(c)(iii) of the Working Procedures the present Notice of Other Appeal provides an indicative list of the paragraphs of the Panel Report containing the alleged errors of law and legal interpretation, without prejudice to the ability of the Russian Federation to refer to other paragraphs of the Panel Report in the context of its appeal.

#### I. APPEAL OF THE PANEL'S ERROR IN INTERPRETING AND APPLYING ARTICLE 6.2 OF THE DSU IN ITS PRELIMINARY RULING

4. The Russian Federation seeks review by the Appellate Body of the Panel's interpretation and application of Article 6.2 of the DSU in its preliminary ruling. In its examination of the Russian Federation's claim on the preliminary ruling the Panel made several errors.

5. First, the Panel erred in concluding that Ukraine's Panel Request presents the problem clearly under Article 6.2 of the DSU by properly linking the measures at issue with the legal basis.

6. Accordingly, the Russian Federation requests that the Appellate Body:

- find that the Panel erred in its legal analysis in paragraphs 7.40-7.41;
- reverse the Panel's findings in paragraphs 7.39 and 7.43.

7. Second, the Panel erred in finding that in respect of the third measure Ukraine's Panel Request had identified a specific measure at issue, in particular:

- the Panel erred by neglecting to determine the meaning of the third measure considered on its face;
- the Panel failed to acknowledge that Ukraine's written submissions confirm neither the words used for the description of the third measure in the Panel Request nor the Panel's interpretation of the third measure.

8. Accordingly, the Russian Federation requests that the Appellate Body:

- find that the Panel erred in its analysis in paragraphs 7.93, 7.97, 7.98 and in its inference in paragraph 7.29 of its Report;
- reverse the Panel's findings in paragraphs 7.99, 7.102 (sentences two and three), 7.103, and 7.104 of its Report;

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\* This notification, dated 3 September 2018, was circulated to Members as document WT/DS499/7.

9. Third, the Panel erred in its conclusion that CU Technical Regulation 001/2011 is identified in the Panel Request with the sufficient degree of precision to embody the third measure.

10. Accordingly, the Russian Federation requests that the Appellate Body:

- reverse paragraphs 7.100-7.104 and, correspondingly, paragraph 7.829 (first sentence) of the Panel Report;
- conclude that the third measure was not properly identified in the Panel Request to fall within the Panel's terms of reference.

11. Based on the foregoing, the Russian Federation requests that the Appellate Body reverse the Panel's conclusion in paragraph 8.1(a)(i) that the Russian Federation has failed to establish that the Panel Request is inconsistent with Article 6.2 of the DSU.

12. As a consequence, the Russian Federation also requests that the Appellate Body reverse the Panel's findings and conclusions on Ukraine's claims under Article I:1 of the GATT 1994 and Article III:4 of the GATT 1994 (Sections 7.5.3 – 7.5.3.4 and 7.5.4 – 7.5.4.4, and corresponding paragraphs 8.1(d)(iv) and 8.1(d)(v) of the Panel Report).

## II. APPEAL OF THE PANEL'S ERROR IN INTERPRETING AND APPLYING ARTICLES 6.2, 7.1, AND 11 OF THE DSU IN THE PANEL'S FINDINGS THAT UKRAINE'S THIRD MEASURE WAS WITHIN THE PANEL'S TERMS OF REFERENCE

13. This part of the Russian Federation's appeal concerns several findings made by the Panel in the course of its analysis of the third measure, described by Ukraine in its first written submission ("FWS"), in response to the Russian Federation's claim that this measure is not within the Panel's terms of reference. The Panel erred in its conclusion and related findings that Ukraine's third measure as it was described in Ukraine's FWS, determined and further modified by the Panel was within the Panel's terms of reference, in particular:

14. First, the Panel committed legal errors under Articles 6.2, 7.1 of the DSU in making the following findings related to its analysis of whether the measure described by Ukraine in its FWS is within the Panel's terms of reference:

- any challenge to the alleged non-recognition requirement is within the Panel's terms of reference;
- Ukraine's third measure concerns an alleged requirement that Russia's authorities consider to flow from CU Technical Regulation 001/2011; that under that alleged non-recognition requirement Russia's authorities must not recognize certificates issued to Ukrainian producers in other CU countries unless certain conditions are met; one such condition is that for certificates issued in another CU country to be recognized, the products covered by these certificates must have been produced in a CU country; the third narrative paragraph specifically identifies this production condition;
- the description of the measure in Ukraine's FWS is only "somewhat" different in comparison with the third measure in the Panel Report;
- Ukraine's reference to the Russian Federation's "decision" was not sufficient, in and of itself, for finding that the measure challenged by Ukraine is outside the terms of reference.

15. Accordingly, the Russian Federation requests that the Appellate Body:

- conclude that the measure described by Ukraine in its FWS as "the [alleged] decision of the Russian Federation not to accept in its territory the validity of the conformity assessment certificates issued to Ukrainian producers in other CU countries" is not within the Panel's terms of reference;
- reverse the Panel's findings in paragraph 7.823;

- modify the Panel's finding in the second sentence of paragraph 7.827 by deleting the term "somewhat";
- reverse the Panel's finding in the fourth sentence of paragraph 7.828 that Ukraine's reference "to Russia's 'decision' not to recognize is not sufficient justification, in and of itself, for finding that the measure challenged by Ukraine is outside the terms of reference and not examining the evidence submitted by Ukraine in support of the third measure".

16. As a consequence of the finding that the third measure described by Ukraine in its FWS was not within the Panel's terms of reference the Russian Federation requests that the Appellate Body reverse the Panel's findings on the existence of the measure at issue in Section 7.5.1.2 and particularly in paragraph 7.861 of the Panel Report.

17. Second, with respect to the Panel's determination of the third measure and further modification of its descriptions, the Panel committed legal errors under Articles 6.2, 7.1, and 11 of the DSU in making the following determination and findings:

- the determination that the third measure should be referred to as "the alleged non-recognition requirement flowing from CU Technical Regulation 001/2011", "a general non-recognition requirement, which Russia's Ministry of Transport and its Federal Agency for Railway Transport considered to flow from CU Technical Regulation 001/2011 as they interpreted it", "the general non-recognition requirement (as applied by the identified by the identified Russian authorities in situations where a product certified in another CU country had not been produced in a CU country)";
- the finding that Ukraine has identified the third measure as "the alleged non-recognition requirement flowing from CU Technical Regulation 001/2011";
- the finding that "the non-recognition requirement is properly before the Panel".

18. Accordingly, the Russian Federation requests that the Appellate Body:

- reverse the Panel's determination in the first sentence of paragraph 7.828 that the third measure should be referred to as "the alleged non-recognition requirement flowing from CU Technical Regulation 001/2011" as well as findings in paragraphs 7.850, 7.853, 7.854, 7.861, and 7.881 that the third measure is: "a general non-recognition requirement, which Russia's Ministry of Transport and its Federal Agency for Railway Transport considered to flow from CU Technical Regulation 001/2011 as they interpreted it" and "the general non-recognition requirement (as applied by the identified by the identified Russian authorities in situations where a product certified in another CU country had not been produced in a CU country)";
- reverse the Panel's finding in the third sentence of paragraph 7.828 that Ukraine has identified the third measure as "the alleged non-recognition requirement flowing from CU Technical Regulation 001/2011";
- reverse the Panel's conclusion in paragraph 8.1(d)(i) that "the non-recognition requirement is properly before the Panel".

19. As a consequence of the finding that the measure described by Ukraine in its FWS or "the non-recognition requirement" was not within the Panel's terms of reference (under the first or the second points in this part of the appeal), the Russian Federation also requests the Appellate Body to reverse the Panel's findings and conclusions on the existence of the measure at issue (Sections 7.5.1.2 – 7.5.1.2.1 of the Panel Report) on Ukraine's claims under Article I:1 of the GATT 1994 and Article III:4 of the GATT 1994 (Sections 7.5.3 and 7.5.4 and corresponding paragraphs 8.1(d)(iv) and 8.1(d)(v) of the Panel Report).

### III. APPEAL OF THE PANEL'S ERROR IN INTERPRETING AND APPLYING ARTICLE 11 OF THE DSU TO THE CIRCUMSTANCES OF THE DISPUTE

20. First, the Panel erred under Article 11 of the DSU since it continued making findings with respect to the alleged registration condition and taking these findings into account after it found that this requirement was not within its terms of reference.

21. Second, the Panel erred under Article 11 of the DSU since it relieved Ukraine from the necessity of establishing of a *prima facie* case in respect to the existence of the third measure as a single measure capable of being challenged under the DSU as identified in the Panel Request.

22. Accordingly, the Russian Federation requests that the Appellate Body reverse the Panel's findings in respect of the third measure as contained in paragraphs 7.847, 7.849, 7.850 (the third and the fourth sentences), 7.853, 7.854, 7.861, 7.897, 7.899, 7.917, 7.926 of its Report.

23. As a consequence, the Russian Federation also requests that the Appellate Body reverse the Panel's findings and conclusions on Ukraine's claims under Article I:1 of the GATT 1994 and Article III:4 of the GATT 1994 (Sections 7.5.3 – 7.5.3.4 and 7.5.4 – 7.5.4.4, and corresponding paragraphs 8.1(d)(iv) and 8.1(d)(v) of the Panel Report).

24. Third, the Panel erred in its finding that the third measure as determined by the Panel exists by finding that the "general" non-recognition requirement flows from CU Technical Regulation 001/2011, and in particular:

- the Panel erred in the assessment of the third measure as determined by the Panel by not examining the text of CU Technical Regulation 001/2011;
- the Panel erred by neglecting to find that the assessment of CU Technical Regulation 001/2011 reveals the non-existence of the third measure as determined by the Panel.

25. As a result, the Russian Federation requests that the Appellate Body:

- reverse the Panel's findings in paragraphs 7.823 (the second and the third sentences), 7.846, 7.850 (the third and the fourth sentences), 7.851 to the extent that "[w]hether or not the Ministry and the Federal Agency had the power to interpret CU Technical Regulation 001/2011 and interpreted it correctly is not relevant to [Panel] analysis"; 7.852, 7.853, and 7.854;
- reverse the Panel's finding in paragraph 7.861 of the Panel Report that "the third measure has been demonstrated to exist" and the finding in the same paragraph that "the evidence on the record supports the conclusion that on the date of establishment of this Panel Russia's Ministry of Transport and its Federal Agency for Railway Transport applied a general non-recognition requirement, which these authorities considered to flow from CU Technical Regulation 001/2011 as they interpreted it".

26. Finally, should the Appellate Body find that the Panel erred in its conclusions regarding the existence of the third measure, the Russian Federation requests to reverse the Panel's findings and conclusions on Ukraine's claims under Article I:1 of the GATT 1994 and Article III:4 of the GATT 1994 (Sections 7.5.3 – 7.5.3.4 and 7.5.4 – 7.5.4.4, and corresponding paragraphs 8.1(d)(iv) and 8.1(d)(v) of the Panel Report).

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## ANNEX B

## ARGUMENTS OF THE PARTICIPANTS

Contents		Page
Annex B-1	Executive summary of Ukraine's appellant's submission	10
Annex B-2	Executive summary of Russia's other appellant's submission	13
Annex B-3	Executive summary of Russia's appellee's submission	17
Annex B-4	Executive summary of Ukraine's appellee's submission	21

## ANNEX B-1

## EXECUTIVE SUMMARY OF UKRAINE'S APPELLANT'S SUBMISSION\*

## I. INTRODUCTION

1. Ukraine considers that in the present dispute the Panel failed to effectively rule on the matter before it. Particularly, the Panel failed to execute its function under Article 11 of the DSU with regard to an objective assessment of the matter before it; erred in the interpretation and application of the covered agreements; and, as a consequence, failed to secure a positive solution to a dispute.

2. Realising that the threshold to establish a panel's failure to comply with Article 11 of the DSU is high, Ukraine respectfully presented its Appellant Submission, providing thorough explanation and detailed identification the Panel's specific errors made in respect of objectivity of the assessment of the matter before it.

3. In this Executive Summary, Ukraine will first address the Panel's failure to perform its duty under Article 11 of the DSU; second, Ukraine will address the Panel's erroneous interpretation and application of the term "in a comparable situation" in Article 5.1.1 of the TBT Agreement.

4. By meaning of the Notice of Appeal, Appellant Submission and this Executive Summary, Ukraine requests the Appellate Body to reverse the Panel's findings and conclusions, particularly as set out in paragraphs 8.1(b)(i), 8.1(b)(ii), 8.1(c)(i), 8.1(c)(iii), and 8.1(e) of its Report.

## II. THE PANEL ERRED IN ITS APPLICATION OF THE LAW TO THE FACT AND IN ITS DUTY TO MAKE AN OBJECTIVE ASSESSMENT OF THE MATTER BEFORE IT UNDER ARTICLE 11 OF THE DSU

## A. The Panel failed to make an objective assessment of the systematic prevention of Ukrainian railway products from being imported into the Russian Federation

5. Ukraine submits that the Panel failed to objectively assess the matter before it when examining the existence of the systematic prevention of importation of railway products into the Russian Federation in breach of Article 11 of the DSU.

6. First, the Panel did not complete analysis under its own standard of review (first examining three elements necessary to establish the existence of unwritten measure, and second – specific elements necessary to establish systematic nature of a measure). The Panel, by omitting its own elements of the standard of review, came to the wrong conclusions with regard to the existence of unwritten measure *first*, which resulted in the completely incorrect findings with regard to the existence of systematic prevention.

7. Second, the Panel set wrongfully very high burden of proof for Ukraine to show, for instance, during the assessment of systematic nature of a measure, a "system, plan, or organized method or effort" from the Russian Federation as it could not be prescribed in any particular law or regulation, particularly due to a political nature of such decision.

8. Third, the Panel wrongfully allocated burden of proof between the parties throughout all Sections of the Panel Report by (1) omitting that the Russian Federation presented invalid arguments; (2) deciding that the Russian Federation did not need to present *substantial* arguments; (3) instead putting additional burden of proof upon Ukraine by expecting it to provide more evidence. The specific situations are reflected in the Appellate Submission by Ukraine.

9. Ukraine believes that the Panel did not undertake a holistic assessment of all the evidence before it, namely to allocate impartially burden of proof between the parties, to objectively assess

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\* Word count Executive Summary: 1828. Word count Appellant Submission: 21378.

all evidence before and to apply correctly the standard of review which resulted in breach of Article 11 of the DSU.

#### B. The Panel failed to make an objective assessment of the existence of comparable situation in the meaning of Article 5.1.1 of the TBT Agreement

10. Ukraine considers that the Panel failed to objectively assess the matter before it under Article 11 of the DSU when examining that the situation in Ukraine was not comparable to that in other countries, and therefore justifying the Russian Federation in not sending its inspectors to carry out inspections in Ukraine and in rejecting the relevant applications for certificates of conformity.

11. As a complainant, Ukraine fulfilled its high burden of proof by providing complex set of evidence with regard to the issue of "in a comparable situation" by demonstrating that the Russian Federation applied its conformity assessment procedure so as to grant access for suppliers of like products originating in Ukraine under conditions less favourable than those accorded to suppliers of like Russian products or like products from other countries, in a *comparable situation*.

12. The Russian Federation, in its turn, did not provide relevant and supportive evidence in order to rebut. The comparison as such was not demonstrated by the respondent, therefore, Ukraine was not in a position to rebut arguments or evidences that were not even demonstrated before the Panel.

13. Ukraine also addresses its concerns to the standard of review applied by the Panel and finds that the Panel applied it incorrectly. The Panel findings are mostly based on the information provided by the Russian Federation only during the panel proceedings, rather than on the information that the Russian Federation's authorities transmitted to the producers (in the relevant applicants, the instructions or the cover letters at issue) during initial conformity assessment. Ukraine considers that aim of such information, provided by the respondent during proceedings, is to explain the taken measures *ex post*.

14. On this basis, Ukraine considers that the Panel's findings constitute erroneous assumption that cannot introduce the conclusion that Ukraine was not "in a comparable situation". The Panel failed to make an objective assessment of the matter before it due to burden of proof partially allocated to the parties and the incorrect standard of review. Ukraine is also of a view that this faulty approach to the examination of matter before the Panel in breach of Article 11 of the DSU resulted in the erroneous outcome of the case.

#### C. The Panel failed to make an objective assessment of the existence of less trade-restrictive alternatives in the meaning of Article 5.1.2 of the TBT Agreement

15. Ukraine submits that the Panel failed to objectively assess the matter before it under Article 11 of the DSU when examining the availability of less trade-restrictive alternatives in the meaning of Article 5.1.2 of the TBT Agreement.

16. Ukraine argues that the suspension of certificates is a more strict application of the conformity assessment procedures than necessary and submits that there were available other, less trade-restrictive manners of applying the Russian Federation's conformity assessment procedure such as: (1) additional communications with the relevant Ukrainian producers; (2) entrusting on-site inspections in Ukraine to the competent authorities from Kazakhstan and Belarus; (3) accrediting non-Russian inspectors, either experts or organizations, to conduct inspections in Ukraine; and (4) off-site inspections.<sup>1</sup>

17. The Panel rejected all four alternatives offered by Ukraine because the Panel considered, that they are not, in particular, available.

18. At the same time, the Panel's findings in this regard containing plenty of contradictory conclusions, for example, the Panel concluded that there is evidence showing that the Russian Federation has, in fact, recognized certificates issued by the Kazakh certification body to Russian producers applying through Russian entities,<sup>2</sup> doubt the possibility of the Russian Federation

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<sup>1</sup> Panel Report, para. 7.460.

<sup>2</sup> Panel Report, paras. 7.927-7.928.

to entrust foreign government authorities to carry out these inspection tasks when assessing the second alternative measure.

19. Therefore, Ukraine believes that the Panel failed to make an objective assessment of the matter before it due to burden of proof partially allocated to the parties and the incorrect standard of review, and thus violated Article 11 of the DSU which resulted in finding that there were no less trade-restrictive alternatives available to the Russian Federation instead of suspension of certificates and rejection to issue new certificates.

### III. THE PANEL ERRED IN THE INTERPRETATION AND APPLICATION OF THE TERM "IN A COMPARABLE SITUATION" IN ARTICLE 5.1.1 OF THE TBT AGREEMENT

20. Ukraine submits the Panel erred in the interpretation of Article 5.1.1 of the TBT Agreement in a part of interpretation of the term "in a comparable situation" failing to elaborate what exactly has to be demonstrated and compared in respect to "in a comparable situation".

21. Ukraine has submitted its arguments in support of its claims and provided a relevant comparison between Ukraine and, in particular, the Russian Federation and European Union<sup>3</sup> showing that the Ukrainian *suppliers* at issue and suppliers in other countries are "in a comparable situation".

22. Ukraine respectfully reaffirms its position on interpretation that if the situation of *suppliers* in one country presents common elements and is not "totally" different from the situation of suppliers in another country, they are to be regarded as "comparable".<sup>4</sup> The Panel did not conclude clearly in respect of what the comparison should be made, and, subsequently erred in its conclusion.

23. First, Ukraine considers that the Panel failed to correctly elaborate and substantiate the analogy of legitimate objective ("protecting human life and health") under Article 2.2 of the TBT Agreement to conformity assessment under Article 5.1.1 of the TBT Agreement. Second, the Panel conducted very limited own legal analysis of "in a comparable situation" and completely followed the lead established by the respondent as a defence to make a legal analysis of the matters at issue under the TBT Agreement provision that has never been interpreted before which resulted in the main focus of the Panel's assessment on alleged safety and security situation in Ukraine.

24. Ukraine considers that the Panel made incomplete conclusion concerning "in a comparable situation", which resulted in errors in Panel's findings under Article 5.1.1 of the TBT Agreement. The Panel's failure to undertake this analysis in full constitutes legal error, erroneous assumption and therefore cannot introduce conclusion whether Ukraine was in a "comparable situation".

### IV. CONCLUSION

25. In light of this, Ukraine requests the Appellate Body to reverse the Panel's findings on all the aforementioned issues.

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<sup>3</sup> Panel Report, paras. 7.302-7.306.

<sup>4</sup> Panel Report, para. 7.275, referring to Ukraine's opening statement at the first meeting of the Panel, paras. 44-45; second written submission, paras. 90-93.

## ANNEX B-2

## EXECUTIVE SUMMARY OF RUSSIA'S OTHER APPELLANT'S SUBMISSION

## 1 THE PANEL MADE SEVERAL ERRORS OF LAW IN ITS PRELIMINARY RULING

## 1.1 The Panel erred in its finding that the Panel Request presents the problem clearly under Article 6.2 of the DSU by properly linking the measures at issue with the legal basis

1. A panel request has to plainly connect the legal basis of claims and the challenged measures. Yet, the Panel Request filed by Ukraine merely contains the quotation of the parts of relevant legal provisions with no references to corresponding measures. The matter *meant* by Ukraine had not been clear as evidenced by the discrepancy between what the Panel understood and what Ukraine argued.

2. However, the Panel concluded that the Panel Request conforms to Article 6.2 of the DSU and, thus, erred in law. Had Ukraine formulated the Panel Request properly, the Panel Report would not have been replete with the language that leaves the room for speculations.

## 1.2 The Panel erred in finding that in respect of the third measure the Panel Request had identified a specific measure at issue

3. First, the Panel erred in its analysis of the third measure description in the Panel Request. The legal standard under Article 6.2 of the DSU mandates a panel to begin its analysis of a measure at issue with an examination of the text of a panel request on its face. Contrary to that, in the present case the Panel disregarded how Ukraine described the third measure on its face in the Panel Request and moved to guessing what the measure might have meant according to "contextual interpretation". Accordingly, the Panel (i) failed to consider what the third numbered point of the Panel Request means when read on its face and in comparison to the other two numbered points of section II of the Panel Request; (ii) ignored the contextual importance of the introductory phrase before the list of three numbered points that specifically identifies measures at issue; and, as a consequence, (iii) read in additional meaning otherwise not found in the plain language of the Panel Request.

4. Moreover, the legal standard under Article 6.2 of the DSU allows a panel to consult submissions and statements made during the panel proceedings to confirm the meaning of the words used in a panel request. However, the Panel failed to do so and, thus, ignored the fact that Ukraine's written submissions confirm neither the words used for the description of the third measure in the Panel Request, nor the Panel's interpretation of the third measure.

5. Second, the Panel erred in its conclusion that CU Technical Regulation 001/2011 is identified in the Panel Request with the sufficient degree of precision to embody the third measure in compliance with Article 6.2 of the DSU. CU Technical Regulation 001/2011 is a complex and lengthy legal instrument, addressing various questions of law requiring, thus, a higher degree of specification in the Panel Request to meet the requirements under Article 6.2 of the DSU. By indicating this document in the Panel Request as a whole, i.e. without referring to its particular parts, Ukraine did not put the Russian Federation on sufficient notice about the precise content of the third challenged measure.

6. Absent the reference to the particular aspect at the core of the third measure in the Panel Request read on its face, the Panel erroneously applied Article 6.2 of the DSU when decided that CU Technical Regulation 001/2011 is sufficiently identified to be the third measure.

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## 2 THE PANEL ERRED IN ITS CONCLUSION AND RELATED FINDINGS THAT UKRAINE'S THIRD MEASURE AS IT WAS DESCRIBED IN UKRAINE'S FWS, AND DETERMINED BY THE PANEL WAS WITHIN THE PANEL'S TERMS OF REFERENCE

7. The Panel did not fulfill the requirements of Article 6.2 of the DSU that a complaining party shall identify the specific measures at issue in its request for the establishment of a panel, of Article 7.1 of the DSU that the Panel should examine the matter referred to the DSB by a complainant in its panel request, and of Article 11 of the DSU that the Panel should make an objective assessment of the matter before it.

8. In particular, first, the Panel erred in several findings related to its analysis of whether the measure described by Ukraine in its FWS is within the Panel's terms of reference.

9. Although, the Panel agreed with the Russian Federation that the third measure as described by Ukraine in its FWS differs from the description provided by Ukraine in the Panel Request, it nevertheless went on in its analysis without giving importance to the text of the Panel Request itself (by ignoring the introductory phrase in the fourth paragraph and not examining how specific terms in the description of the measures define and limit the scope of the dispute) and to the difference between the Panel Request and how the third measure appears in Ukraine's FWS.

10. The textual analysis and comparison of the measures described by Ukraine in its FWS with the third measure identified in the Panel Request reveal that these measures are different by description, nature, coverage, and content. In fact, in its FWS Ukraine challenges three different measures (two of which were described as having two additional requirements), which are put forward in different parts of its FWS depending on a particular claim. However, neither of those three measures and two requirements coincide with the third measure as identified in the Panel Request. A measure that was not explicitly identified in the Panel Request as the "specific measure at issue" should not be accepted as the measure at issue within the Panel's terms of reference.

11. Second, the Panel erred in its determination that the third measure should be referred to as "the alleged non-recognition requirement flowing from CU Technical Regulation 001/2011" and in its further modifications of the description of the third measure, as well as in its findings that this measure was identified by Ukraine, and that this measure is properly before the Panel for the following reasons.

12. The Panel's determination that it would refer to the challenged measure as "the alleged non-recognition requirement flowing from CU Technical Regulation 001/2011" constitutes a modification of the description of the measure identified in the Panel Request. The text of the Panel Request does not support the reading of the third measure by the Panel.

13. The Panel's finding that it was Ukraine who had identified the third measure as "alleged non-recognition requirement flowing from CU Technical Regulation 001/2011" also finds no textual support. Accordingly, the Panel's finding that "the non-recognition requirement is properly before the Panel" is an error. By modifying at the later stage in the process, what Ukraine indicated in its Panel Request as the third measure the Panel effectively performed the Ukraine's duty in "identify[ing] the specific measure at issue". However, it is not the Panel's role to "identify" the measure at issue. Under Article 6.2 of the DSU it is the responsibility of the complaining party to correctly and precisely identify the specific measure at issue and then to prove its existence and the violation it alleges. And it is the obligation of the Panel to base its interpretation and findings on the measure as identified by a complainant provided that the measure is within panel's terms of reference.

14. By making a finding on a measure that was not challenged by Ukraine in its Panel Request (the alleged "general non-recognition requirement...") the Panel exceeded its mandate and, thus, acted inconsistently with Articles 7.1 and 11 of the DSU. The Panel's modification of the measure at issue also prejudiced the due process rights of the Russian Federation that are guaranteed under Article 6.2 of the DSU. Furthermore, the finding that the measure described by Ukraine in its FWS falls outside the Panel's terms of reference would logically imply that the Panel failed to objectively assess under Article 11 of the DSU whether Ukraine established a *prima facie* case with respect to the third measure as identified in the Panel Request.

3 THE PANEL ERRED UNDER ARTICLE 11 OF THE DSU SINCE IT CONTINUED MAKING FINDINGS WITH RESPECT TO THE ALLEGED REGISTRATION CONDITION AND TAKING THESE FINDINGS INTO ACCOUNT AFTER IT FOUND THAT THIS REQUIREMENT WAS NOT WITHIN ITS TERMS OF REFERENCE

15. The Panel found that a registration condition (non-recognition resulting from a failure to meet the alleged registration condition) falls outside its terms of reference. However, this finding did not prevent the Panel from repeatedly considering this condition as if this element of the third measure as determined by the Panel had been within the Panel's terms of reference.

16. Without prejudice to its claims on appeal on other issues, the Russian Federation submits that the Panel by doing so erred under Article 11 of the DSU.

4 THE PANEL ERRED UNDER ARTICLE 11 OF THE DSU SINCE IT RELIEVED UKRAINE FROM THE NECESSITY OF ESTABLISHING OF A *PRIMA FACIE* CASE IN RESPECT TO THE EXISTENCE OF THE THIRD MEASURE AS A SINGLE MEASURE CAPABLE OF BEING CHALLENGED UNDER THE DSU AS IDENTIFIED IN THE PANEL REQUEST

17. As evident from its submissions, Ukraine considered the third measure to be composed of several different documents. Consequently, Ukraine had to but failed to make a *prima facie* case to demonstrate the existence of this measure by explaining that its components jointly operate as a single measure distinct from its parts.

18. Without prejudice to the Russian Federation's claims on appeal on other issues, the Panel erred under Article 11 of the DSU when neglected this Ukraine's omission and proceeding from an unsubstantiated presumption about the existence of the said single measure.

5 THE PANEL ERRED IN ITS FINDING THAT THE THIRD MEASURE AS DETERMINED BY THE PANEL EXISTS BY FINDING THAT THE "GENERAL" NON-RECOGNITION REQUIREMENT FLOWS FROM CU TECHNICAL REGULATION 001/2011

19. While analyzing the third measure (as determined by the Panel) the Panel did not explain the standard it used for the analysis even though it affirmed that the third measure was challenged "as such". Furthermore, the Panel did not consider the text of CU Technical Regulation 001/2011 whereas 1) CU Technical Regulation 001/2011 is explicitly named in the description of the third measure in the Panel Request; 2) the Russian Federation submitted references to provisions of CU Technical Regulation 001/2011 and corresponding arguments on its application based on that text.

20. In order to conclude that the non-recognition requirement "flows" from CU Technical Regulation 001/2011 it should be established first of all that the text of CU Technical Regulation 001/2011 includes such a requirement.

21. Had the Panel analyzed the text of CU Technical Regulation 001/2011, it would have found that according to its Article 1 it applies to products manufactured in third countries.

22. This understanding of Article 1 of CU Technical Regulation 001/2011 follows from its text and is supported by the practice of issuance of certificates to producers from third countries and for products manufactured in third countries, the examples of which the Russian Federation has submitted during the Panel proceedings. This understanding is further substantiated by the wording of Article 53(2) of the EAEU Treaty.

23. The Russian Federation submitted all these observations during the Panel proceedings. Yet, the Panel did not consider arguments labelling them as not relevant. Had the Panel examined the text of CU Technical Regulation 001/2011 and the supporting arguments, it would have found the absence of the alleged non-recognition requirement.

24. Since the alleged non-recognition requirement does not flow from CU Technical Regulation 001/2011, the Panel falsely concluded that the said non-recognition requirement was of a general character.

25. The improper examination of the third measure, identified by Ukraine in its Panel Request, resulted in the Panel's failure to fulfil its obligation to make an objective assessment of the matter before it. The Panel disregarded arguments and evidence submitted by the Russian Federation and failed to analyze the text of CU Technical Regulation 001/2011 on its face. These Panel's errors amount to a violation of Article 11 of the DSU.

## 6 CONCLUSIONS

26. The Russian Federation submits that the Panel erred in its application and interpretation of the applicable law in its preliminary ruling alongside the subsequent analysis regarding the third measure in its Report as outlined above and, consequently, requests the Appellate Body to reverse the corresponding findings of the Panel.



## ANNEX B-3

## EXECUTIVE SUMMARY OF RUSSIA'S APPELLEE'S SUBMISSION

## 1 INTRODUCTION

1. At the outset the Russian Federation notes that Ukraine's argumentation throughout its Appellant Submission is nothing but a repetition of its position during the Panel's proceedings lacking any explanation as to why the alleged flaws in the Panel's reasoning amount to a violation of Article 11 of the DSU. The mere repetition of the previous position renders the Appellant Submission of Ukraine effectively equal to the request to substitute the Panel in its original review, that is, to consider the respective claims *de novo*. Bearing this in mind, the Russian Federation demonstrates in its Appellee's Submission that Ukraine's claims on appeal should be dismissed.

## 2 THE PANEL MADE AN OBJECTIVE ASSESSMENT OF THE EXISTENCE OF THE ALLEGED SYSTEMATIC IMPORT PREVENTION

2. Contrary to Ukraine's assertion, the text of the Panel Report confirms that the Panel started its analysis by establishing the content of the measure at issue in order to establish the existence of the alleged unwritten measure.<sup>1</sup> Article 11 of the DSU does not prescribe a panel the precise order of analysis to make an objective assessment of the matter. In any way, the examination of the alleged unwritten measure in another order of analysis would have resulted in the same conclusion, i.e. that the alleged measure does not exist. Thus, the Panel did not commit an error, let alone an error so serious as to cast doubt on the objectivity of the Panel's analysis as required under the Article 11 of the DSU.

3. Ukraine falsely contends that the Panel did not thoroughly examine all the evidence submitted by Ukraine and did not make an objective assessment of this evidence and substantiating arguments. Having done all that, the Panel came to the conclusion that "Ukraine has failed to demonstrate that Russia systematically prevented the importation of Ukrainian railway products into Russia".<sup>2</sup> In particular, the Panel examined the evidence submitted by Ukraine in respect of the alleged "set of trade restrictive measures" as indicated in footnote 762 to paragraph 7.973 of the Panel Report. The media articles presented by Ukraine contain no indication of, or even a hint at, the fact that the Russian Federation has approved a plan to restrict imports from Ukraine in general or that of railway products specifically.

4. Ukraine's assertion that "the Panel took an approach when the review of any individual measure had been conducted in isolation from other measures at issue, without referring to the context of the case" is baseless. The Panel clearly explained in paragraph 7.230 of the Report the rationale behind the order of analysis of Ukraine's claims and did it in full conformity with the requirements of Article 11 of the DSU.

5. Ukraine's allegation that "the Panel proved to be partial in its consideration of facts" is also without merit. It is clear from paragraph 7.960 of the Panel Report that, as the trier of facts and acting in compliance with the requirement of Article 11 of the DSU, the Panel examined all the evidence submitted by the parties and concluded that it was "not persuaded that the applications unjustifiably rejected by the FBO ... are proof that the FBO used its powers with the aim or as part of a plan directed at preventing the importation of Ukrainian railway products into Russia".<sup>3</sup> Thus, Ukraine fails to establish that the Panel committed any error, let alone an error so serious as to cast doubt on the objectivity of the Panel's analysis as required under the Article 11 of the DSU. The Panel Report also confirms that Ukraine in any way failed to prove that the alleged systematic prevention is different from its components and failed to provide evidence as to how exactly the elements of this measure operate together as a single measure. Thus, Ukraine's allegation that the

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<sup>1</sup> Panel Report, *Russia – Railway Equipment*, Section 7.6.1.2.

<sup>2</sup> Panel Report, *Russia – Railway Equipment*, para. 7.993.

<sup>3</sup> Panel Report, *Russia – Railway Equipment*, para. 7.960.

Panel applied "a highly uneven burden of proof" is legally flawed. The complainant must prove its claim.

6. Ukraine argues that "in order to ensure correct and comprehensive assessment of the matter before it, the Panel should have considered a recourse to Article 13 of the DSU". Actually, Ukraine's position is that the Panel failed to have recourse to Article 13 of the DSU despite the fact that the information was necessary for Ukraine to make a *prima facie* case. First, however, in the course of the panel proceedings Ukraine did not request for production of information under Article 13 of the DSU. Second, and most importantly, according to the Appellate Body, panels are precluded from using their authority under Article 13 in order "to rule in favor of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it".<sup>4</sup> Therefore, by abstaining from requesting information under Article 13 of the DSU, the Panel acted in full compliance with the requirements under Article 11 of the DSU.

7. Nevertheless, if the Appellate Body finds that Ukraine's claims are substantiated and the Panel made specific errors under Article 11 of the DSU – *quad non* – this will not affect the overall conclusions by the Panel made in paragraphs 7.993, 7.994, 7.995 and 8.1.(e) of the Report.

### 3 THE PANEL'S CONCLUSION THAT UKRAINE FAILED TO ESTABLISH THAT THE RUSSIAN FEDERATION ACTED INCONSISTENTLY WITH ITS OBLIGATIONS UNDER ARTICLE 5.1.2 OF THE TBT AGREEMENT FULLY COMPLIES WITH THE REQUIREMENTS UNDER ARTICLE 11 OF THE DSU

8. First, Ukraine did not provide any arguments supporting its challenge of the Panel's finding and conclusion in paragraph 8.1.(c)(iii) of the Report making only an assertion alone. Thus, Ukraine's request to reverse the Panel's finding in paragraph 8.1.(c)(iii) shall be rejected without further consideration.

9. Second, the Panel correctly rejected all four alternatives suggested by Ukraine in the course of proceedings as they were not reasonably available to Russian authorities and Ukraine failed to prove the opposite.

10. The Panel correctly rejected the alternative of additional communications with the relevant Ukrainian producers since Ukraine did not substantiate that this alternative is reasonably available. The Panel correctly allocated the burden of proof and correctly established that Ukraine did not establish a *prima facie* case to shift its burden. Ukraine did not show that this alternative is not *a priori* prohibitive.

11. The Panel correctly rejected the alternative of entrusting on-site inspections in Ukraine to the competent authorities from Kazakhstan and Belarus since it was based on a merely theoretical assumption of Ukraine that did not provide any sufficient grounds to show that this alternative is available.

12. The Panel correctly rejected the alternative of accrediting non-Russian inspectors, either experts or organizations, to conduct inspections in Ukraine since the examination of Certification Rules together with other facts on record do not confirm that such alternative exists.

13. The Panel correctly rejected the off-site inspections alternative since the evidence in the course of proceedings demonstrated the absence of this alternative. Ukraine's argument on *ex post* argumentation does not stand in the case of technical regulations and conformity assessment proceedings. Furthermore, the issue of explanation to exporters at the time of suspension concerns the obligation under Article 5.2.2 of the TBT Agreement that is not subject to appeal.

14. Finally, Ukraine persistently seeks to engage the Appellate Body into the examination of facts and reargue its case settled by the Panel contrary to the purpose of the Appellate Body's proceedings and its mandate.

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<sup>4</sup> Appellate Body Report, *Japan – Agricultural Products II*, para. 129.

#### 4 THE PANEL MADE AN OBJECTIVE ASSESSMENT OF THE EXISTENCE OF A COMPARABLE SITUATION WITHIN THE MEANING OF ARTICLE 5.1.1 OF THE TBT

##### 4.1 Panel's alleged failure to observe due process rights: determination of burden of proof and standard of review

15. Ukraine falls short of proving that the Panel failed to observe due process rights in its determination of burden of proof and standard of review.

16. Ukraine erroneously interprets the allocation of the burden of proof in the case of an alleged violation of Article 5.1.1 of the TBT Agreement. First, Ukraine as a party that asserts a violation is responsible for providing proof thereof. The Panel as an original trier of facts found that Ukraine did not substantiate that the situation in Ukraine was comparable to that in the Russian Federation or in other countries. Second, the phrase "in a comparable situation" does not operate as an exception that the defending party may invoke to relieve itself of its obligations under Article 5.1.1 of the TBT Agreement. Rather, it forms a part of a single positive obligation and the opposite interpretation would lead to absurd legal consequences.

17. Further, Ukraine's allegations regarding Panel's standard of review are unsubstantiated. First, in its argumentation, Ukraine essentially seeks reassessment of facts and evidence on record, while re-examination of facts is excluded from the scope of appellate review under Article 17.6 of the DSU. Second, Ukraine's assertion that the analogy of the standard of review in safeguard investigations or customs valuation proceedings should be adopted in the present case is wrong because the disciplines of trade defense and technical regulation are substantially different.

##### 4.2 Panel's alleged non-objective assessment of a comparable situation

18. Virtually all Ukraine's arguments regarding the Panel's assessment of comparable situation either represent or are based on repetition or extension of arguments made during the Panel proceedings. However, at the appellate stage, the Appellate Body does not permit a party to the dispute to recast its arguments made before a panel in the guise of an Article 11 of the DSU claim. Moreover, Ukraine's explanation on why the alleged Panel's errors might have a bearing on the objectivity of the Panel's assessment is premised solely on its disagreement with the Panel's reasoning and weighing of the evidence, which does not substantiate its position regarding the alleged violation of Article 11 of the DSU by the Panel.

19. With respect to "comparable situation", the Russian Federation submits that the Panel has properly conducted its assessment of evidence in their totality and, therefore, acted within the boundaries of its obligations under Article 11 of the DSU, and Ukraine has not provided a single piece of evidence proving the Panel not being objective in its assessment of facts.

#### 5 THE PANEL PROPERLY INTERPRETED AND APPLIED THE TERM "IN A COMPARABLE SITUATION" IN ARTICLE 5.1.1 OF THE TBT AGREEMENT

##### 5.1 Ukraine's failure to argue that the Panel erred in law

20. Ukraine asserted that the Panel erred in law by not interpreting Article 5.1.1 of the TBT in good faith. This is a strong indication that Ukraine in its appeal is actually bringing a claim under Article 11 of the DSU in the guise of a legal error. But Ukraine does not invoke Article 11 of the DSU in this part and, thus, puts forward a claim based on the false legal basis. Besides, Ukraine failed to reason why the alleged Panel's error amounts to acting in bad faith.

## 5.2 The Panel correctly interpreted and applied the term "in a comparable situation" in Article 5.1.1 of the TBT Agreement

21. As a preliminary matter, Panel's conclusion under paragraph 8.1.(c)(i) of the Report was not reached on grounds pertaining to the appeal under point d) of Ukraine's Notice of Appeal. Consequently, that paragraph is beyond this appeal scope as irrelevant to the corresponding claim.

22. The Russian Federation submits that the Panel interpreted Article 5.1.1 in good faith by construing the phrase "in a comparable situation" as informed by its context in the provision and in the TBT Agreement, instead of relying on an excessively literal reading of Article 5.1.1.

23. Further, Ukraine misread the Panel Report as indicating that the Panel drew an analogy between Articles 2.2 and 5.1.1 of the TBT Agreement. Article 2.2 played in the Panel's respective analysis the role of a part of the context, along with many other legal provisions under the TBT Agreement, to interpret Article 2.1 that is instructive as to how no less favourable treatment obligations operate within the TBT Agreement. Accordingly, the link between Articles 2.2 and 5.1.1 in Panel's analysis, if any, is too remote to consider that the Panel applied the legitimate objective under one to the other.

24. By arguing that the Panel did not explain what exactly should be compared under Article 5.1.1 of the TBT Agreement, Ukraine neglected that the degree of competent bodies' discretion in fulfilling their obligations under that provision cannot be described in the abstract. The question of whether the situation is comparable in a particular dispute is a question the answer to which is to be given on a case-by-case basis. With that in mind, the Panel arrived at the correct conclusion that "in this instance related to risks to life and health of FBO inspectors ... the situation in Ukraine was not comparable to other countries", which is based on the proper interpretation of Article 5.1.1 of the TBT Agreement.<sup>5</sup>

25. Consequently, the Panel correctly interpreted and applied the term "in a comparable situation" in Article 5.1.1 of the TBT Agreement.

## 6 CONCLUSIONS

26. For these reasons, all Ukraine's claims on appeal and requests for findings shall be rejected.

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<sup>5</sup> Panel Report, *Russia – Railway Equipment*, para. 7.387.

## ANNEX B-4

## EXECUTIVE SUMMARY OF UKRAINE'S APPELLEE'S SUBMISSION

THE PANEL ACTED CONSISTENTLY WITH ARTICLE 6.2 OF THE DSU IN ITS PRELIMINARY RULING; AND THE PANEL DID NOT ERR IN ITS CONCLUSION AND RELATED FINDINGS THAT UKRAINE'S THIRD MEASURE AS DESCRIBED IN UKRAINE'S FIRST WRITTEN SUBMISSION AND DETERMINED BY THE PANEL WAS WITHIN THE PANEL'S TERMS OF REFERENCE

1. The Russian Federation alleges that the Panel acted inconsistently with Articles 6.2, 7.1 and 11 of the DSU because the Panel Request does not present and identify the specific measure at issue, and because the third measure is not within the Panel's terms of reference.

2. Ukraine submits that the Panel Request met all requirements of the Article 6.2 of the DSU, in particular third requirement – to provide summary of the legal basis sufficient to present the problem clearly. When read as a whole, the Panel Request plainly connects the specific measures at issue with the provisions of the WTO covered agreements that those measures violate. Ukraine's submissions only confirmed the meaning of the words used in the Panel Request without changing the gist of what is at issue.

3. Ukraine considers that the Panel made correct examination by giving due consideration to the measure's meaning on its face.

4. Thereby, Ukraine submits that the Panel Request meets the requirements of Article 6.2 of the DSU and the Panel therefore did not err in examining the measures at issue according to requirements of Article 7.1 of the DSU, did not exceed its mandate, and acted in consistency with the provisions of Article 11 of the DSU with respect to Ukraine's claims under Articles I:1 and III:4 of the GATT 1994.

THE PANEL ACTED CONSISTENTLY WITH ARTICLE 11 OF THE DSU WHEN MAKING FINDINGS WITH RESPECT TO THE REGISTRATION CONDITION

5. Ukraine submits that the Panel acted according to Article 11 of the DSU when making findings with respect to the registration condition.

6. The Russian Federation claims that the Panel committed legal error under Article 11 of the DSU since it continued making findings with respect to the registration condition and taking these findings into account after it found that this requirement was not within its terms of reference.

7. Ukraine recalls the Panel's findings with respect to its terms of reference concerning the third measure as set forth in its Preliminary Ruling. With regard to describing the third measure the Panel finds that the specific measure at issue in the passage of the Panel Request is adequately identified in the panel request, as a whole.<sup>1</sup>

8. **The Panel noted that "... there is the reference to Annex III. It became clear** during the course of the proceedings that one of the instructions mentioned in Annex III identifies the alleged registration condition."<sup>2</sup>

9. Moreover, in its Report the Panel asserted that it is clear from the analysis of the Panel Request in its Preliminary ruling that any challenge to the alleged requirement that the Russian Federation's authorities must not recognize certificates, issued in other CU countries if the certified products were not produced in a CU country, is within its terms of reference.<sup>3</sup>

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<sup>1</sup> Preliminary ruling by the Panel of 17 July 2017, para. 2.12.

<sup>2</sup> Panel Report, paragraph 7.824.

<sup>3</sup> Panel Report, paragraph 7.823.

10. Therefore, Ukraine submits that the measure, set out in the third narrative paragraph of section II of the Panel Request, particularly its second element regarding registration condition, is within the Panel's terms of reference as determined by the Panel.

11. Thus, Ukraine submits that the Panel made an objective assessment of the matter of the case in accordance with Article 11 of the DSU when taking under consideration the registration condition in its findings.

THE PANEL ACTED CONSISTENTLY WITH ARTICLE 11 OF THE DSU AS IT DID NOT RELIEVE UKRAINE FROM THE NECESSITY OF ESTABLISHING A *PRIMA FACIE* CASE IN RESPECT TO THE EXISTENCE OF THE THIRD MEASURE

12. Ukraine believes that the Panel did not err under Article 11 of the DSU as it did not relieve Ukraine from the necessity of establishing of a *prima facie* case in respect to the existence of the third measure.

13. In order to duly demonstrate inconsistency of the challenged third measure concerning non-recognition of the certificates issued in other CU countries with the Articles 2.1 and 5.1.1 of the TBT Agreement and Articles I:1, III:4, X:3(a) and XIII:1 of the GATT 1994, Ukraine provided a thorough argumentation according to well-known legal standards, establishing a *prima facie* case on existence of the third measure.<sup>4</sup>

14. On the basis of Ukraine's arguments the Panel correctly found the existence of third measure as being explicitly prescribed in the texts of the Protocols of the Ministry of Transport and the Letters of the Federal Railway Transport Administration of the Ministry of Transport when they are read together with Technical Regulation 001/2011.

15. It is unclear how the Russian Federation concluded that the Panel relieved Ukraine from the necessity of establishing a *prima facie* case<sup>5</sup> if the detailed argumentation had been provided throughout proceedings.

16. Taking into account that Ukraine established *prima facie* case in respect of the third measure in the panel proceedings, Ukraine submits that the Russian Federation's claim that the Panel erred under Article 11 of the DSU by relieving Ukraine from necessity of establishing *prima facie* case fails on all account.

THE PANEL DID NOT ERR IN ITS FINDING THAT THE THIRD MEASURE AS DETERMINED BY THE PANEL EXISTS BY FINDING THAT THE "GENERAL" NON-RECOGNITION REQUIREMENT FLOWS FROM CU TECHNICAL REGULATION 001/2011

17. The Russian Federation claims that the Panel concluded that the non-recognition requirement flows from CU Technical Regulation 001/2011.<sup>6</sup> The Russian Federation argues that the Panel wrongfully did not examine the text of CU Technical Regulation 001/2011 and stated that if the Panel did so, it would reveal non-existence of the third measure. It submits that the Panel acted in violation of Article 11 of the DSU by not examining CU Technical Regulation 001/2011.

18. In this respect Ukraine submits that the Russian Federation misinterpreted the Panel's conclusion by stating that it was the Panel's finding that the non-recognition requirement flows from CU Technical Regulation 001/2011.<sup>7</sup> However, the Panel did not itself make such conclusion. The Panel explicitly stated that: "... the evidence on the record supports the conclusion that on the date of establishment of this Panel Russia's Ministry of Transport and its Federal Agency for Railway Transport applied a general non-recognition requirement, which these authorities considered to flow from CU Technical Regulation 001/2011 as they interpreted it".<sup>8</sup>

19. As it is apparent from the Panel's conclusion, the Russian authorities considered that the general non-recognition requirement flows from CU Technical Regulation 001/2011. Indeed, the

<sup>4</sup> Ukraine's first Written Submission, paras. 289-399.

<sup>5</sup> The Russian Federation Other Appellant Submission, paras. 110, 117.

<sup>6</sup> Other Appellant Submission of the Russian Federation, para. 123.

<sup>7</sup> Other Appellant Submission of the Russian Federation, para. 123.

<sup>8</sup> Panel report, para. 7.861 (emphasis added).

Russian Federation's Ministry of Transport and its Federal Agency for Railway Transport relied on the provision of CU Technical Regulation 001/2011 when establishing non-recognition requirement.

20. Ukraine disagrees with the mentioned above claim of the Russian Federation. First, the Panel did examine the CU Technical Regulation 001/2011 in its Panel Report.<sup>9</sup> The Panel made such examination in the amount, necessary to make an objective assessment of the matter before it in this regard.

21. Second, Ukraine reiterates that with respect to the third measure it did not challenge the CU Technical Regulation 001/2011 *per se* as it does not require that the applicant must be registered in the same country as the relevant certification body.

22. Therefore, the Russian Federation's allegation that the Panel erred under Article 11 of the DSU by not examining the text of CU Technical Regulation 001/2011 is false. It is irrelevant for the matter under this case to examine a document on existence of discriminatory provisions if such existence was not even alleged by complainant to take place.

23. In this light Ukraine believes that the Panel made a correct examination of the matter before it as it referred to the letters of the Federal Agency for Railway Transport and the Protocol of the Ministry of Transport, challenged by Ukraine under third measure.

24. Thus, the Panel comes to reasoned conclusion that on the date of establishment of this Panel the Russian Federation's Ministry of Transport and its Federal Agency for Railway Transport applied a general non-recognition requirement, which these authorities considered to flow from CU Technical Regulation 001/2011 as they interpreted it.

25. Ukraine believes that it is a duty of the Russian Federation to make sure that its authorities act within its powers and correctly interpret provisions of law. In this particular case, actual application and existence of the measure suggests that the Russian Federation agrees with interpretation and, subsequently, the decision of the Ministry of Transport and its Federal Agency for Railway Transport to apply the non-recognition requirement to Ukrainian producers. On the other hand, if the Russian Federation argues that the relevant authorities did not correctly understand the CU Technical Regulation 001/2011 as it does not contain any non-recognition requirement and, moreover, did not have the power to interpret it in first place, then it has to abolish such decision as being legally unsubstantiated.

26. Considering the abovementioned, Ukraine submits that the Panel acted in accordance with Article 11 when made conclusion on existence of the third measure.

## CONCLUSION

27. In light of all of the above, Ukraine requests the Appellate Body to uphold the Panel's findings on all the aforementioned issues.

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<sup>9</sup> See, for example, Panel Report, paras. 7.592-7.595, 7.614.

## ANNEX C

## ARGUMENTS OF THE THIRD PARTICIPANTS

Contents		Page
Annex C-1	Executive summary of Canada's third participant's submission	25
Annex C-2	Executive summary of the European Union's third participant's submission	26
Annex C-3	Executive summary of Japan's third participant's submission	27



## ANNEX C-1

### EXECUTIVE SUMMARY OF CANADA'S THIRD PARTICIPANT'S SUBMISSION<sup>1</sup>

#### I. ARTICLE 5.1.1 – IN A COMPARABLE SITUATION

##### A. "In a comparable situation" qualifies the scope of the non-discrimination obligation

1. The phrase "in a comparable situation" qualifies the scope of the non-discrimination obligation. If the suppliers of like products are not in a comparable situation, the non-discrimination obligation would not apply.

##### B. Factors to be considered in determining whether the suppliers of like products are "in a comparable situation"

2. A Panel should consider the underlying objective of conformity assessment procedures to obtain adequate confidence that products conform with the technical regulations. Balanced with that objective, is the need for WTO members to extend access to conformity assessment procedures to as wide a variety of potential suppliers as is possible.

##### C. The protection of the health and life of conformity assessment procedure officials is not a consideration to balance under Article 5.1.1

3. The threat to the lives and health of conformity assessment officials that may impede their ability to obtain assurance of conformity can be relevant in determining whether the situations are comparable.

4. However, the protection of life and health of conformity assessment inspectors is not an objective that is balanced with the interests of suppliers of imported products in determining whether the situations are comparable. The Panel should analyse how the WTO Member is reconciling its need to obtain assurance of conformity with its technical regulation, with its obligation to provide access of suppliers of other WTO Members to its conformity assessment procedures.

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<sup>1</sup> Canada's third participant submission contains 2210 words. This Executive Summary contains 248 words.

## ANNEX C-2

### EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S THIRD PARTICIPANT'S SUBMISSION

#### A. UKRAINE'S THIRD GROUND OF APPEAL

1. In circumstances where a party provides a text of a municipal law as evidence, if the text is sufficiently clear on its face, it may not be necessary to complement with evidence of practice to discharge the burden of making a *prima facie* case.

2. Where a WTO Member provides for the possibility of accreditation of external experts in its municipal law it is plausible for a panel to conclude that this procedure is in principle available to that Member.

#### B. UKRAINE'S FOURTH GROUND OF APPEAL

3. The European Union agrees with the legal standard for Article 5.1.1 TBT as set out by the Panel in this dispute.

4. The Panel did not fail to elaborate and apply what exactly should be compared in the context of an Article 5.1.1 TBT analysis. It explained that to determine whether a particular situation is comparable, it is necessary to identify *relevant factors* that render the situation comparable or not. This must be assessed on a *case-by-case basis*.

5. The Panel did not err in applying the legal standard to the facts at issue in considering the risk to the life and health of employees as a relevant factor to determine whether a situation in a Member can be considered comparable or not.

ANNEX C-3

EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION

1. Contrary to the Panel's finding, Japan believes that the requirement that suppliers be "in a comparable situation" does not preclude or restrict the adoption of the two-step analysis under Article 5.1.1 because Articles 2.1 and 5.1.1 not only have similar language and structure, but also because the same rationale for allowing legitimate regulatory distinctions applies to both provisions. Both conformity assessment procedures ("CAPs") and technical regulations can be used for legitimate purposes as well as for disguised restrictions on trade, and the sixth recital of the preamble of the TBT Agreement provides relevant context for Article 5.1.1 as well.

2. Japan believes that, in addressing a claim of *de facto* discrimination under Article 5.1.1, the Appellate Body should undertake a "comparable situation" analysis. This analysis pursuant to the phrase "in a comparable situation" should serve as a preliminary question regarding whether the situation of suppliers subject to conditions for granting access is comparable. Japan understands a "comparable situation" to be a situation that is capable of being compared, which potentially encompasses a relatively broad range of situations.

3. Then, if a comparable situation is found, Japan considers that the Appellate Body should examine whether access to the CAPs concerned is granted for suppliers of like products under different conditions to the detriment of suppliers of railway products originating in Ukraine vis-à-vis suppliers of like products from Russia or any other Member.

4. If positive, the Appellate Body should continue to examine whether the detrimental impact arising from the different conditions for access to the CAPs stems exclusively from the CAPs' objective of determining whether the relevant requirements in technical regulations are fulfilled, rather than reflecting discrimination against the suppliers of Ukrainian products.

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