



## **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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**ANNEX A**

NOTICES OF APPEAL AND OTHER APPEAL

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**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 measures 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

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**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.

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**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 consistence 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

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## **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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