Russia – Measures Affecting the Importation of Railway Equipment and Parts
(DS499)

Third Party Executive Summary
of the United States of America

September 18, 2017

EXECUTIVE SUMMARY OF U.S. THIRD PARTY WRITTEN SUBMISSION

I. ESTABLISHING THE EXISTENCE OF AN UNWRITTEN MEASURE

1. The first challenged measure consists, allegedly, of the "systematic prevention of Ukrainian railway products from being imported into [Russia]." Ukraine claims Russia implements this measure by suspending conformity assessment certificates of Ukrainian suppliers, refusing to issue new certificates, and not recognizing certificates issued by other Customs Union (CU) members. Russia claims Ukraine has failed to prove the measure exists.

2. Articles 7.1 and 6.2 of the DSU establish that, to be within a panel's terms of reference, a measure must exist at the time of the panel's establishment. Article 7.1 provides that, unless otherwise decided, a panel's terms of reference are "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request. Under DSU Article 6.2, the "matter" to be examined by the DSB consists of "the specific measures at issue" and "brief summary of the legal basis of the complaint." As the Appellate Body recognized in *EC – Chicken Cuts*, "[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel." Thus, to seek findings from the DSB on a challenged measure, a complainant must establish that the measure existed at the time of the panel's establishment.

3. The burden of making this showing is not, in principle, different when the measure at issue is an unwritten measure as opposed to a written measure. The text of DSU Article 3.3 makes this clear, stating that the dispute settlement system addresses any "measures taken by another Member" that a Member alleges impair benefits accruing to it under the covered agreements. Thus, for written or unwritten measures alike, what the complainant must establish is that "the measure it challenges is attributable to the respondent, as well as the precise content of that . . . measure, to the extent that such content is the object of the claims raised." Thus, contrary to Russia's arguments, there are not unique, "very specific" requirements for proving the existence of an unwritten measure; a Member is simply required to show, by evidence and argument, that the challenged measure, as described in its submission, actually exists.

II. ARTICLE I:1 OF THE GATT 1994

4. Ukraine challenges Measure I under Article I:1 of the GATT 1994. To establish that a measure is inconsistent with Article I:1, a Member must show: (1) the measure falls within the scope of Article I:1; (2) the measure confers an "advantage, favour, privilege, or immunity" to some "product originating in or destined for any other country"; (3) the products at issue are "like products"; and (4) the advantage is not "accorded immediately and unconditionally to the like product originating in . . . the territories of all other Members."

5. With respect to the first element, the text of Article I:1 conveys the broad scope of the types of measures potentially covered by the provision. As past reports have found, "rules and formalities in connection with importation" encompasses "a wide range of measures." Russia asserts that Ukraine has failed to satisfy the first element because it failed to argue or prove that the challenged measure is a "rule or norm of general application." However, nothing in the DSU or the text of Article I:1 establishes a general requirement that a Member challenging an unwritten measure make such a showing. Indeed, panels and the Appellate Body have confirmed the broad scope of Article I:1, in terms of the types of measures it covers. Therefore, if the Panel

finds that Ukraine has proven the existence of the measure it alleges, that measure would appear to constitute a "rule[] . . . in connection with importation" within the scope of Article I:1.

6. As to the second element, Article I:1 applies to "any advantage" accorded to the products of "any Member." Ukraine has explained that obtaining a conformity assessment certificate is "the only way for railway products to enter the Russian market," that exporting to Russia is "a very favourable market opportunity" for Ukraine. Russia has not disputed this element is met.

7. As to the "like products" element, whether products are "like" is a fact-specific analysis that must be done on a case-by-case basis. In certain circumstances – where the "difference in treatment between domestic and imported products is based exclusively on the products' origin" – panels have conducted a "hypothetical like product analysis." In all those instances, the measure at issue, on its face, discriminated between products solely on the basis of national origin. Where this is not the case, reports have analyzed whether products are "like" based on, *inter alia*: (i) "the products' properties, nature, and quality"; (ii) "the products' end-uses"; (iii) "consumers' tastes and habits – more comprehensively termed consumers' perceptions and behavior – in respect of the products"; and (iv) "the products' tariff classification."

8. With respect to the final element, Article I:1 requires that "any advantage granted by a Member to imported products must be made available 'unconditionally,' or *without* conditions, to like imported products from all Members." The Appellate Body has recognized that Article I:1 applies to any conditions "that have a detrimental impact on the competitive opportunities for like imported products from *any* Member." Thus, "where a measure modifies the conditions of competition between like imported products to the detriment of the third-country imported products at issue, it is inconsistent with Article I:1." Russia argues Ukraine has not satisfied this element because it has not shown that the alleged prevention of imports of railway products is "*due to their Ukrainian origin*" and because certain Ukrainian producers still hold certificates. But if a measure has a "detrimental impact" on the competitive opportunities of products of a Member, an assessment of whether the products' origin was the cause of the detrimental impact is not required. Further, the fact that a limited number of Ukrainian producers have been able to obtain or retain valid certificates is not decisive. The relevant inquiry is whether the advantage at issue is accorded unconditionally to the *group* of Ukrainian like products. Ukraine has put forward significant evidence suggesting that the *group* of Ukrainian products is not accorded the relevant advantage on the same terms as the *group* of like products of other Members.

III. ARTICLE 5.1.1 OF THE TBT AGREEMENT

9. Ukraine has brought claims under Article 5.1.1 of the TBT Agreement against Measure II, the "instructions to suspend certificates and decisions to refuse to issue new certificates," and Measure III, the "decision . . . not to accept in [Russian] territory the validity of the conformity assessment certificates issued to Ukrainian producers in other CU countries." To establish that a measure is inconsistent with Article 5.1.1, a complaining Member must demonstrate three elements in addition to those required under the Article 5.1 chapeau: (1) the measure concerns a "conformity assessment procedure"; (2) the products at issue are "like products"; and, (3) access to the CAP is granted on a "less favourable" basis to suppliers of products originating in the territory of a Member than to "suppliers of like products of national origin or originating in any other country, in a comparable situation."

10. As to the first element, Annex 1 of the TBT Agreement defines a "conformity assessment

procedure" as "[a]ny procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled." The parties do not contest that this element is satisfied with respect to Measures II and III. The second element, whether the products at issue are "like products," is analogous to the analysis under other provisions of the WTO Agreements, including Article I:1 of the GATT 1994, as discussed above.

11. The third element entails comparing the "access" granted suppliers of products of a complaining Member and suppliers of like products of other Members, "in a comparable situation." "Access" is defined as entailing the "right to an assessment of conformity under the rules of the procedure." Thus, the comparison is between the right to an assessment granted to suppliers of products of the complaining Member and to suppliers of products of other Members. Further, the comparison is between the access granted to suppliers of like products of another Member, "in a comparable situation." The definition of "comparable" is "able to be compared." "Compare," in turn, means "liken, pronounce similar" and "be compared; bear comparison; be on terms of equality with." The word thus suggests that two things are of the same type, such that they can be compared, and that they are "similar" or equal.

IV. ARTICLE 5.1.2 OF THE TBT AGREEMENT

12. Ukraine also challenges Measures II and III under Article 5.1.2 of the TBT Agreement. For a Member to establish that a measure is inconsistent with Article 5.1.2, it must show, in addition to the two elements of the chapeau of Article 5.1, that the measure involves a CAP and that such CAP is "prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade." The second sentence of Article 5.1.2 describes a way a measure could be applied that would contravene the obligation of the first sentence.

13. The first element of Article 5.1.2, that the measure at issue involves a "conformity assessment procedure," is the same as the first element of Article 5.1.1, discussed above. With respect to the second element, a key inquiry is whether a conformity assessment procedure is with a view to or with the effect of creating "unnecessary obstacles to international trade." The pertinent definition of "obstacle" is "a thing that stands in the way and obstructs progress; a hindrance; an obstruction." "Necessary" refers to something that "cannot be dispensed with or done without; requisite; essential; needful." An "unnecessary obstacle" to trade thus suggests something that blocks or hinders trade between Members that is not requisite or essential.

14. The second sentence of Article 5.1.2 states that "[t]his means … that conformity assessment procedures shall not be more strict or more strictly applied than is necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards." Thus, under Article 5.1.2, an "unnecessary obstacle" is one that is not "necessary to give the importing Member adequate confidence" that products conform to the applicable technical regulation or standard. As to the level of confidence, Article 5.1.2 refers to "adequate confidence . . . taking account of the risks non-conformity would create."

15. The parties argue that the text of Article 5.1.2 is similar to Article 2.2 of the TBT Agreement and, on this basis, frame their arguments based on a framework developed under Article 2.2. That is, they dispute whether Ukraine has satisfied Article 5.1.2 based on whether it has proven the existence of a less trade-restrictive alternative measure that makes an equivalent contribution to assuring conformity with the relevant technical regulations. Article 5.1.2 does not *require* a complaining party to identify or establish a less trade-restrictive alternative

measure that provides adequate confidence. But assessment of a proposed alternative measure may be used as a conceptual tool for assessing whether a measure breaches Article 5.1.2.

16. There are textual differences between the provisions to bear in mind when analogizing the legal standard of Article 2.2 to that of Article 5.1.2. Article 2.2 refers to an undefined category of "legitimate objective[s]," whereas Article 5.1.2 indicates that the objective of a CAP is to assure that products conform to the relevant technical regulation. Further Article 2.2 refers to the "fulfill[ment]" of objectives, which refers to a Member's right to achieve legitimate objectives "at the levels it considers appropriate," while Article 5.1.2 refers to "adequate confidence" that products conform with a technical regulation. Considering these differences, any analysis of proposed alternative measures under Article 5.1.2 would concern the level of "confidence" that the challenged measure provides, the extent to which the measure hinders trade, and how those aspects of the measure compare to any proposed alternative measures.

17. Determining the level of "confidence" achieved by a CAP or a proposed alternative measure is an objective analysis. As the Appellate Body found in the context of Article 2.2, the "degree of achievement of a particular objective may be discerned from the design, structure, and operation of the technical regulation, as well as from evidence relating to the application of the measure." As in its assessment of a measure's objective, a panel is not bound by a Member's characterization of a measure's contribution to a chosen level of confidence, but must "independently and objectively assess" the contribution "actually achieved by the measure." For example, Russia argues that the practice of Belarus and Kazakhstan is "outside the scope of the present article, as the benchmark to be used in the analysis is the level of protection sought by Russia and not any other country." While the United States agrees that the relevant level of protection is that "sought by Russia," that does not mean that any differences between Russia's practices and those of other countries can be characterized as reflecting a different level of protection. Rather, the inquiry is whether the content of the alternative measures proposed by Ukraine reflects the same level of "confidence" that the products at issue comply with the relevant technical regulations as the challenged Russian measures.

EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT

I. SCOPE OF ARTICLE 2.1 AND ARTICLE 5.1 OF THE TBT AGREEMENT

18. Articles 2 and 5 of the TBT Agreement concern two different categories of measures. Article 2 concerns the preparation, adoption, and applications of technical regulations. To fall within the scope of Article 2.1, a particular claim must be "in respect of" one or more "technical regulations," as defined in Annex 1.1 of the TBT Agreement. By contrast, Article 5 concerns conformity assessment procedures, which are defined in Annex 1.3 of the TBT Agreement as a procedure "to determine that relevant requirements in technical regulations or standards are fulfilled." To fall within the scope of Article 5.1, a claim must address the preparation, adoption, or application of a "conformity assessment procedure" where a "positive assurance of conformity" with a technical regulation or standard is required. Thus, while a single legal instrument may contain both a technical regulation and an applicable conformity assessment procedure, Articles 2 and 5 cover distinct matters through distinct disciplines.

19. Ukraine has challenged Measure III under Article 2.1 and Article 5.1, raising different aspects of the measure in its claims. We recall that panels need address only those claims and legal issues that "must be addressed in order to resolve the matter in issue in the dispute." Here,

Ukraine seemingly has advanced two competing explanations for the same conduct: (1) that Technical Regulation 001/2011, as applied by Russia, precludes the importation of Ukrainian products because they are not produced in the CU (under Article 2.1); and (2) that Ukrainian entities are afforded less favorable conditions of access to the conformity assessment procedure because they must be registered in the CU country issuing the conformity assessment certificate (under Article 5.1). Therefore, the Panel must assess, as a matter of fact, whether Russia interprets Technical Regulation 001/2011 or the related conformity assessment procedure as Ukraine alleges, *i.e.*, whether the conduct described by Ukraine reflects application of the technical regulation itself or a condition on access to the conformity assessment procedure. Resolution of this factual issue under municipal law will make it clear whether Ukraine's claim against Measure III can be resolved under Article 2 or Article 5. For example, if the Panel finds that Russia does not apply Technical Regulation 001/2011 only to products produced in the CU, it would dispose of Ukraine's Article 2.1 claim.

EXECUTIVE SUMMARY OF U.S. RESPONSES TO PANEL QUESTIONS TO THIRD PARTIES

20. The Panel asked "to what extent the two-step analysis developed by the Appellate Body under Article 2.1 can be applied to Article 5.1.1" in "cases of alleged *de facto* discrimination." The obligation set out in Article 5.1.1 of the TBT Agreement is substantively different from that set out in Article 2.1. Textual differences between the provisions render the two-step analysis applied in certain reports under Article 2.1 not appropriate in the context of Article 5.1.1.

21. Article 2.1 provides that Members shall ensure that, in respect of technical regulations, like products from one Member are "accorded treatment no less favourable" than like products of another Member. In certain disputes, the Appellate Body found that "treatment no less favourable" should be "assessed by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products." It also found that not all technical regulations that have a "detrimental impact" on imports are inconsistent with Article 2.1. Rather, if the detrimental impact "stems exclusively from a legitimate regulatory distinction," the technical regulation is not inconsistent with Article 2.1. Thus, Article 2.1 is an outcome-oriented provision. It addresses the "treatment" accorded products of different Members, and it requires that, if the products of one Member receive less favorable treatment under a measure than the products of another Member, that the difference be explained entirely by a "legitimate regulatory distinction." Unsurprisingly, in every report in which the Appellate Body explained this standard, it emphasized that the critical basis for the standard it articulated under Article 2.1 was the phrase "treatment no less favourable."

22. Article 5.1.1 of the TBT Agreement, by contrast, does not concern the "treatment" accorded products of different Members or suppliers of those products. Rather, it concerns the "access" to conformity assessment procedures accorded to suppliers of like products originating in different Members "in a comparable situation." "Access" is defined as entailing "suppliers' right to an assessment of conformity under the rules of the procedure." Thus, Article 5.1.1 is about the rights of suppliers of products originating in different Members to an assessment of conformity, "*under the rules of the procedure*" established by the Member. It does not require any particular outcome in terms of the rate at which suppliers receive assessments under the procedure or the results of those assessments.

23. This means that an apparent negative impact on the competitive opportunities of products originating in a particular country does not have the same meaning or place in the analysis under

Article 5.1.1 as under Article 2.1. Specifically, the critical inquiry under Article 5.1.1 is not whether there is a "detrimental impact"; it is whether suppliers of a Member are granted less favorable "right[s] to an assessment of conformity" under the rules of the procedure as are suppliers of like products of other Members in comparable situations.

24. For example, suppose suppliers of products originating in the territory of a Member, as a group, were failing to receive assessments under the relevant conformity assessment procedure, while suppliers of like products originating in other Members were receiving such assessments. Article 5.1.1 provides that the relevant inquiry is *not* whether the suppliers of products of the first Member are receiving less favorable "treatment" under the rules of the procedure. Rather, it is whether their rights to an assessment of conformity, under the rules of the procedure, are less favorable than those of suppliers of like products of other Members, in a comparable situation. A critical inquiry in this regard could be whether the suppliers of products of the Member that were failing to receive assessments were "in a comparable situation" as the suppliers of like products of national origin or originating in another Member. But the mere fact that the rule of the conformity assessment procedure at issue resulted in a detrimental impact on the suppliers of products of a Member would not be necessarily suggest a potential claim under Article 5.1.1.

25. Conversely, there could be a breach of Article 5.1.1 even in the absence of any detrimental impact. For example, if suppliers originating in the territory of a Member, as a group, were failing to receive assessments under the relevant conformity assessment procedures and suppliers of products of other Members were receiving conformity assessments but, as a group, were invariably failing to receive positive assessments, there may be no detrimental impact on the products of the first Member. There might, however, be a breach of Article 5.1.1 (depending on whether the suppliers of the products of the Member and other Members were "in a comparable situation") because "access" to the CAP is not given on a "no less favourable" basis to suppliers of products of all Members. In this regard, we note that situations where a measure, including a conformity assessment procedure, causes a detrimental impact on the products of a Member could still be addressed under Articles I:1 and III:4 of the GATT 1994. Article 5.1.1 thus sets out an additional obligation concerning the "access" to the conformity assessment procedures accorded to suppliers of products of different Members. Situations where the rules of a CAP resulted in a detrimental impact on the competitive opportunities of suppliers of products of certain Members might also be addressed under Article 5.1.2. That is, the reason that the CAP at issue provided less favorable competitive opportunities for suppliers of products of one Member, as opposed to others, might make it "more strict" or "applied more strictly" than necessary to give the importing Member its chosen level of confidence that products conform with the applicable technical regulation.

26. In short, the text of Article 5.1.1 sets out a different standard than the one past Appellate Body reports have applied under Article 2.1. None of the third parties that have proposed importing this Article 2.1 analysis have reconciled that approach with the text of Article 5.1.1.