

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

Third Party Submission of  
the United States of America

June 8, 2017

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**TABLE OF ACRONYMS**

<b>Acronym</b>	<b>Full Name</b>
CAP	Conformity Assessment Procedure
CU	Customs Union of the Republic of Belarus, the Republic of Kazakhstan and the Russian Federation
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
GATT 1994	<i>General Agreement on Tariffs and Trade 1994</i>
HS Code	Harmonized System Code
TBT Agreement	<i>Agreement on Technical Barriers to Trade</i>
WTO	World Trade Organization

**TABLE OF REPORTS**

<b>Short title</b>	<b>Full Citation</b>
<i>Argentina – Financial Services (AB)</i>	Appellate Body Report, <i>Argentina – Measures Relating to Trade in Goods and Services</i> , WT/DS453/AB/R, adopted 9 May 2016
<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001
<i>Argentina – Import Measures (AB)</i>	Appellate Body Reports, <i>Measures Affecting the Importation of Goods</i> , WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
<i>Canada – Autos (AB)</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000
<i>Canada – Autos (Panel)</i>	Panel Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R
<i>China – Raw Materials (AB)</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012
<i>Colombia – Ports of Entry</i>	Panel Report, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry</i> , WT/DS366/R and Corr.1, adopted 20 May 2009
<i>EC – Asbestos (AB)</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001
<i>EC – Bananas III (AB)</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997
<i>EC – Bananas III (US) (Panel)</i>	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States</i> , WT/DS27/R/USA, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R

<p><i>EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US) (AB)</i></p>	<p>Appellate Body Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador</i>, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr. 1 / <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States</i>, WT/DS27/AB/RW/USA and Corr. 1, adopted 22 December 2008</p>
<p><i>EC – Chicken Cuts (AB)</i></p>	<p>Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i>, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1</p>
<p><i>EC – Sardines (AB)</i></p>	<p>Appellate Body Report, <i>European Communities – Trade Description of Sardines</i>, WT/DS231/AB/R, adopted 23 October 2002</p>
<p><i>EC – Seal Products (AB)</i></p>	<p>Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i>, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014</p>
<p><i>EC – Seal Products (Panel)</i></p>	<p>Panel Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i>, WT/DS400/R / WT/DS401/R / and Add. 1, adopted 18 June 2014, as modified by Appellate Body Reports, WT/DS400/AB/R / WT/DS401/AB/R</p>
<p><i>EC – Selected Customs Matters (AB)</i></p>	<p>Appellate Body Report, <i>European Communities – Selected Customs Matters</i>, WT/DS315/AB/R, adopted 11 December 2006</p>
<p><i>Guatemala – Cement I (AB)</i></p>	<p>Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i>, WT/DS60/AB/R, adopted 25 November 1998</p>
<p><i>India – Autos (Panel)</i></p>	<p>Panel Report, <i>India – Measures Affecting the Automotive Sector</i>, WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002</p>
<p><i>Indonesia – Autos</i></p>	<p>Panel Report, <i>Indonesia – Certain Measures Affecting the Automobile Industry</i>, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and 4</p>
<p><i>Japan – Alcoholic Beverages II (AB)</i></p>	<p>Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i>, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996</p>

<i>US – Carbon Steel (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002
<i>US – Certain EC Products (AB)</i>	Appellate Body Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/AB/R, adopted 10 January 2001
<i>US – Certain EC Products (Panel)</i>	Panel Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/R and Add.1, adopted 10 January 2001, as modified by Appellate Body Report WT/DS165/AB/R
<i>US – Clove Cigarettes (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/AB/R, adopted 24 April 2012
<i>US – Clove Cigarettes (Panel)</i>	Panel Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R
<i>US – Continued Zeroing (AB)</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009
<i>US – COOL (AB)</i>	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012
<i>US – COOL (Panel)</i>	Panel Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R
<i>US – COOL (Article 21.5) (AB)</i>	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements - Recourse to Article 21.5 of the DSU by Canada and Mexico</i> , WT/DS384/AB/R / WT/DS386/AB/R, adopted 29 May 2015
<i>US – Corrosion-Resistant Steel Sunset Review (AB)</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004

<i>US – Countervailing and Anti-Dumping Measures (AB)</i>	Appellate Body Report, <i>United States – Countervailing and Anti-Dumping Measures on Certain Products from China</i> , WT/DS449/AB/R and Corr.1, adopted 22 July 2014
<i>US – Poultry (China)</i>	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R, adopted 25 October 2010
<i>US – Tuna II (Mexico) (AB)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/R, adopted 13 June 2012
<i>US – Tuna II (Mexico) (Panel)</i>	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R
<i>US – Tuna II (Mexico) (Article 21.5) (AB)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico</i> , WT/DS381/AB/RW, adopted 3 December 2015
<i>US – Wool Shirts and Blouses (AB)</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1

## I. INTRODUCTION

1. The United States welcomes the opportunity to provide its views on certain issues raised in this dispute. The United States has a strong interest in the proper interpretation of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”) and the *Agreement on Technical Barriers to Trade* (“TBT Agreement”) and in a coherent understanding of the relationship between those agreements. The United States in this third party submission provides its view of the proper legal interpretation of Articles I:1 and XIII of the GATT 1994 and Articles 5.1, 5.1.1, 5.1.2, and 2.1 of the *Agreement on Technical Barriers to Trade*. The United States also comments briefly on the preliminary ruling request of the Russian Federation (“Russia”).

## II. ESTABLISHING THE EXISTENCE OF AN UNWRITTEN MEASURE

2. In this dispute, Ukraine challenges three alleged Russian measures under various provisions of the GATT 1994 and the TBT Agreement. The first challenged measure at issue (Measure I) consists, as Ukraine argues, of the “systematic prevention of Ukrainian railway products from being imported into the Russian Federation.”<sup>1</sup> Ukraine claims that the measure is implemented by Russia’s suspension of conformity assessment certificates issued to Ukrainian suppliers, refusal to issue new certificates, and non-recognition of certificates issued by other members of the Customs Union (CU).<sup>2</sup> Russia argues that Ukraine has failed to demonstrate that this measure exists. Specifically, Russia claims that Ukraine has “fail[ed] to include and work through the very specific requirements” that Russia alleges exist for challenging an unwritten measure under a provision of the WTO Agreement.<sup>3</sup>

3. Articles 7.1 and 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“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.”<sup>4</sup> 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.”<sup>5</sup> Thus, to seek findings from the DSB, through a panel’s report, on a challenged measure, a complainant must establish that the measure existed at the time of the panel’s establishment.

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<sup>1</sup> See Ukraine’s First Written Submission, paras. 142, 145.

<sup>2</sup> See Ukraine’s First Written Submission, paras. 4, 147.

<sup>3</sup> See Russia’s First Written Submission, para. 14.

<sup>4</sup> See *US – Carbon Steel (AB)*, para. 125; *Guatemala – Cement I (AB)*, para. 72.

<sup>5</sup> *EC – Chicken Cuts (AB)*, para. 156; see also *EC – Selected Customs Matters (AB)*, para. 187 (finding that the panel’s review of the consistency of the challenged measure with the covered agreements properly should “have focused on these legal instruments as they existed and were administered at the time of establishment of the Panel”); *US – Certain EC Products (AB)*, paras. 61, 79-82; *China – Raw Materials (AB)*, para. 264.



4. 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.<sup>6</sup> 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 challenged measure, to the extent that such content is the object of the claims raised.”<sup>7</sup>

5. Further, depending on the characteristics or nature of the alleged measure, proving its existence may also require proving additional elements.<sup>8</sup> For example, where a Member alleged that a measure had systematic, present, and continued application<sup>9</sup>, the Member was required to substantiate those particular allegations.<sup>10</sup> However, what a complaining party must prove depends on what such member has alleged.<sup>11</sup> Thus, it is not the case that there are unique, “very specific” requirements for proving the existence of an unwritten measure<sup>12</sup> or that the dictionary definitions of certain terms a complaining party uses set a rigid standard the Member must meet.<sup>13</sup> Rather, a Member is simply required to show, by evidence and argument, that the challenged measure, as described in its submission, actually exists.

6. In this dispute, Ukraine alleges that Measure I consists of the “systematic prevention of Ukrainian railway products from being imported into the Russian Federation.”<sup>14</sup> Ukraine describes this measure as the “action of making impracticable the importation of Ukrainian railway products” and explains that it is implemented by three means: suspension of conformity assessment certificates issued to Ukrainian suppliers, refusal to issue new certificates, and non-recognition of certificates issued by other members of the CU.<sup>15</sup> In support of its claim that this measure exists, Ukraine has presented dozens of exhibits and pages of evidence and argumentation. For example, Ukraine has presented evidence showing that, since 2014, Russia has suspended and not renewed 313 conformity assessments certificates held by producers of

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<sup>6</sup> *Argentina – Import Measures (AB)*, para. 5.100; *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 81.

<sup>7</sup> *Argentina – Import Measures (AB)*, para. 5.104.

<sup>8</sup> *Argentina – Import Measures (AB)*, para. 5.104.

<sup>9</sup> *Argentina – Import Measures (AB)*, paras. 5.117-118; 5.134, 5.146.

<sup>10</sup> While the United States continues to disagree that the alleged “continued use” of a particular methodology in a string of instances is a measure other than repeated application of that methodology, where a complaining party has alleged such a “continued use” measure, it has been required to substantiate its allegations. *US – Continued Zeroing (AB)*, paras. 180-185.

<sup>11</sup> *Argentina – Import Measures (AB)*, para. 5.107.

<sup>12</sup> *But see* Russia’s Written Submission, para. 14; *but see also id.* para. 37 (arguing that Ukraine has failed to demonstrate “that Measure I constitutes a rule or a principle of general application”).

<sup>13</sup> *But see* Russia’s Written Submission, para. 16.

<sup>14</sup> *See* Ukraine’s Written Submission, paras. 142, 145.

<sup>15</sup> *See* Ukraine’s Written Submission, para. 147.

Ukrainian railway products, giving essentially the same explanation.<sup>16</sup> At the same time, Russia has rejected nearly all applications by producers of Ukrainian railway products for new conformity assessment certificates (other than applications by producers in certain politically unstable regions bordering Russia)<sup>17</sup> and has also declined to recognize certifications of Ukrainian products made by other countries.<sup>18</sup> As a result, the number of certificates held by Ukrainian producers has declined dramatically since 2013.<sup>19</sup> Ukraine has also presented evidence showing that, for railway product producers from other countries, conformity assessment certificates have been suspended at a much lower rate and applications have been granted at a much higher rate, so that, for example, European and Kazakh producers of railway products both currently hold more valid conformity assessment certificates than in 2013.<sup>20</sup> Ukraine also has presented data showing that the number of Ukrainian companies exporting railway products to Russia, the volume of Ukrainian railway product exports to Russia, and the share of Russia’s railway product imports filled by Ukrainian products have all declined precipitously since 2012.<sup>21</sup> Finally, Ukraine has presented evidence showing that Russia has taken other measures to restrict trade with Ukraine since Ukraine signed a free trade agreement with the EU in 2014.<sup>22</sup>

7. Thus, to come within the Panel’s terms of reference in light of Articles 7.1, 6.2, and 3.3 of the DSU, it is the Panel’s task to consider whether this evidence is sufficient to establish the existence of the challenged measure, as Ukraine describes it. Contrary to Russia’s arguments, there is no additional need to “work through” any additional “specific requirements” due to the unwritten nature of Measure I.<sup>23</sup> In particular, there is no requirement that Ukraine demonstrate the “systematic” nature of the measure based on the definition of the word proposed by Russia.<sup>24</sup> Rather, if the Panel finds that the evidence and argumentation Ukraine has presented establishes that the three types of Russian actions Ukraine has described exist and “prevent” or “mak[e] impracticable the importation of Ukrainian railway products” into Russia, then Ukraine has satisfied its burden of establishing the existence of Measure I.

### III. ARTICLE I:1 OF THE GATT 1994

8. Ukraine challenges Measure I under Article I:1 of the GATT 1994. Specifically, Ukraine argues that, “through the systematic prevention of railway products of Ukrainian origin from

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<sup>16</sup> See Ukraine’s Written Submission, paras. 72-79, 85-88, 95-101, 108-112, 118-127, 154-155.

<sup>17</sup> See Ukraine’s First Written Submission, paras. 80-81, 89-91, 102-104, 156-157, 172-178.

<sup>18</sup> See Ukraine’s First Written Submission, paras. 128-129.

<sup>19</sup> See Ukraine’s First Written Submission, paras. 158, 165.

<sup>20</sup> See Ukraine’s First Written Submission, paras. 161-164.

<sup>21</sup> See Ukraine’s First Written Submission, paras. 158, 168-171.

<sup>22</sup> See Ukraine’s First Written Submission, paras. 132-141.

<sup>23</sup> See Russia’s First Written Submission, para. 14.

<sup>24</sup> See Russia’s First Written Submission, para. 16 (arguing that Ukraine failed to prove the “systematic” nature of the measure and claiming that “systematic” necessarily refers to something “done according to a system, plan, or organized method” or as part of “an ‘organized effort’ undertaken in support of a particular ‘aim’”).

being imported,” Russia fails to “immediately and unconditionally” grant to Ukrainian railway products the advantage it grants to like products originating in the territories of other Members.<sup>25</sup> Russia argues that Measure I falls outside the scope of Article I:1<sup>26</sup> and that Ukraine failed to establish a *prima facie* case under the provision because it did not demonstrate that the products at issue are “like products”<sup>27</sup> or that Ukrainian products are denied any advantage accorded to the products of other Members.<sup>28</sup>

9. Article I:1 of the GATT 1994 provides, as relevant:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation . . . and with respect to all rules and formalities in connection with importation and exportation . . . any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members.

10. Thus, as the parties appear to agree, a complaining party must demonstrate four elements to establish that a measure is inconsistent with Article I:1: (1) that the measure falls within the scope of Article I:1; (2) that the measure confers an “advantage, favour, privilege, or immunity” to some “product originating in or destined for any other country”; (3) that the products at issue are “like products”; and (4) that the advantage is not “accorded immediately and unconditionally to the like product originating in . . . the territories of all other Members.”<sup>29</sup>

11. With respect to the first element, the text of Article I:1 – particularly the reference to “all rules and formalities in connection with importation” – conveys the broad scope of the types of measures potentially covered by the provision.<sup>30</sup> Consequently, as previous panels and the Appellate Body have found, the term “rules and formalities in connection with importation” encompasses “a wide range of measures,” including “countervailing duties, additional bonding requirements and activity function rules.”<sup>31</sup>

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<sup>25</sup> See Ukraine’s First Written Submission, paras. 189, 197.

<sup>26</sup> See Russia’s First Written Submission, paras. 33-37.

<sup>27</sup> See Russia’s First Written Submission, paras. 38-45.

<sup>28</sup> See Russia’s First Written Submission, para. 48.

<sup>29</sup> See Ukraine’s First Written Submission, paras. 192-196; Russia’s First Written Submission, para. 32; see also *EC – Seal Products (AB)*, para. 5.86.

<sup>30</sup> See, e.g., *EC – Seal Products (AB)*, para. 5.86 (“Article I:1 sets out a fundamental non-discrimination obligation under the GATT 1994. . . . Thus, if a Member grants *any* advantage to *any* product originating in the territory of *any* other country, such advantage must be accorded ‘immediately and unconditionally’ to like products originating from all Members.”).

<sup>31</sup> See *US – Poultry (China)*, para. 7.407; *US – Certain EC Products (Panel)*, para. 6.54; *EC – Bananas III (AB)*, para. 206.

12. Russia asserts that Ukraine has failed to satisfy the first element because it has failed to argue or prove that the challenged measure is a “rule or norm of general application.”<sup>32</sup> However, as discussed in the previous section, there is nothing in the DSU establishing a general requirement that a complaining Member challenging an unwritten measure make such a showing.<sup>33</sup> Nor does the text of Article I:1 impose such a requirement. Indeed, as discussed above, panels and the Appellate Body have confirmed the broad scope of the provision, 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, *i.e.*, a rule that prevents the importation of the vast majority of Ukrainian railway products,<sup>34</sup> that measure would appear to constitute a “rule[] . . . in connection with importation” within the scope of Article I:1.

13. As to the second element, the text of Article I:1 is clear that it applies to “any advantage” accorded to the products of “any Member.”<sup>35</sup> Previous reports have found that “advantages,” within the meaning of Article I:1 “are those that create more favourable competitive opportunities or affect the relationship between products of different origins.”<sup>36</sup> In this dispute, 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, and that, therefore, the “opportunity to sell railway products on the Russian market . . . after having obtained certificates” is an “advantage” under Article I:1.<sup>37</sup> Russia has not disputed that this element is satisfied.<sup>38</sup>

14. 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.<sup>39</sup> In certain circumstances, namely 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.”<sup>40</sup> In all those instances, the measure at issue, on its face, discriminated between products solely on the basis of national origin.<sup>41</sup> Where this is not the case, previous reports have analyzed whether the

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<sup>32</sup> See Russia’s First Written Submission, para. 33-37.

<sup>33</sup> When presented with an argument similar to Russia’s, the Appellate Body rejected it. See *Argentina – Import Measures (AB)*, paras. 5.105, 5.107.

<sup>34</sup> See Ukraine’s First Written Submission, para. 202.

<sup>35</sup> See, e.g., *Canada – Autos (AB)*, para. 79 (noting that Article I:1 “refer[s] not to *some* advantages granted ‘with respect to’ the subjects that fall within the defined scope of the Article, but to ‘*any advantage*’; not to *some* products, but to ‘*any product*’; and not to like products from *some* other Members, but to like products originating in or destined for ‘*all other*’ Members”).

<sup>36</sup> See *Colombia – Ports of Entry*, para. 7.341; see *US – Poultry (China)*, para. 7.415; *EC – Bananas III (US) (Panel)*, para. 7.239; see also *EC – Bananas III (AB)*, para. 206 (upholding the panel’s finding).

<sup>37</sup> See Ukraine’s First Written Submission, paras. 203-206.

<sup>38</sup> See Russia’s First Written Submission, paras. 32-51.

<sup>39</sup> See *EC – Asbestos (AB)*, para. 102.

<sup>40</sup> See *US – Poultry (China)*, para. 7.426. A hypothetical analysis has also been employed in cases where a like product analysis was impossible due to, for example, a ban on imports. See *id.*

<sup>41</sup> See *US – Poultry (China)*, para. 7.429; *Colombia – Ports of Entry*, paras. 7.355-356; see also *India – Autos (Panel)*, paras. 7.174-176 (taking an analogous approach in the context of Article III:4); *Canada – Autos*

products at issue are “like” under Article I:1 based on, *inter alia*, the following criteria: (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.”<sup>42</sup>

15. 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.”<sup>43</sup> 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.”<sup>44</sup> 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.”<sup>45</sup>

16. Russia argues that Ukraine has not satisfied this element because it has not shown that “the alleged prevention of railway products from being imported to [Russia] *due to their Ukrainian origin*.”<sup>46</sup> Russia further argues that Ukraine has not met its burden because certain Ukrainian producers still hold certificates and producers of other WTO Members have been denied certificates pursuant to Russia’s rules and, therefore, any difference in “competitive opportunities . . . is simply created by the ability of foreign producers to comply with the relevant requirements of Russian law on certification.”<sup>47</sup> As discussed above, however, if a measure has a “detrimental impact” on the competitive opportunities of the product of any Member, it may have denied an advantage available to the product of another Member.<sup>48</sup> A separate assessment of whether the Ukrainian origin of the products was the cause of their being denied the advantage at issue is not required.

17. Further, the fact that a limited number of Ukrainian producers have been able to obtain or retain valid certificates is not decisive. As Ukraine notes, the relevant inquiry is whether the advantage at issue is accorded unconditionally to the *group* of Ukrainian like products.<sup>49</sup> As the Appellate Body explained in the context of Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, the non-discrimination analysis concerns the treatment accorded “on the one

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(Panel), para. 10.74 (same); *Indonesia – Autos*, para. 14.113 (taking an analogous approach in the context of Article III:2); *Argentina – Hides and Leather*, paras. 11.168-11.170 (same); *see also Argentina – Financial Services (AB)*, para. 6.36 (“[W]e note that measures allowing the application of a presumption of ‘likeness’ will typically be measures involving a *de jure* distinction between products of different origin.”).

<sup>42</sup> *See, e.g., US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.408; *Japan – Alcoholic Beverages II (AB)*, p. 20; *US – Poultry (China)*, para. 7.425 (and the reports cited therein).

<sup>43</sup> *See EC – Seal Products (AB)*, para. 5.88.

<sup>44</sup> *See EC – Seal Products (AB)*, para. 5.88.

<sup>45</sup> *See EC – Seal Products (AB)*, para. 5.90.

<sup>46</sup> *See* Russia’s First Written Submission, para. 48 (emphasis added).

<sup>47</sup> *See* Russia’s First Written Submission, paras. 49-50.

<sup>48</sup> *See EC – Seal Products (AB)*, paras. 5.88-93; *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.338.

<sup>49</sup> *See* Ukraine’s First Written Submission, paras. 208-209.

hand, . . . to the group of like products imported from the complaining Member” and, “on the other hand, that accorded to the group of like domestic products and/or the group of like products originating in any other country.”<sup>50</sup> The Appellate Body in *EC – Seal Products* adopted the same framework in applying Article I:1 of the GATT 1994, comparing the treatment accorded to “virtually all . . . seal products” of the one WTO Member with “the vast majority of seal products” from the complaining Members.<sup>51</sup> And in this context, Ukraine has put forward significant evidence suggesting that the *group* of Ukrainian railway products is not accorded the relevant advantage on the same terms as the *group* of like products from other countries.<sup>52</sup>

#### IV. ARTICLE 5.1 OF THE TBT AGREEMENT

18. Ukraine has brought claims under Article 5.1 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.”<sup>53</sup> Ukraine argues that both measures fall within the scope of Article 5.1 because they involve the application of mandatory conformity assessment procedures (CAP).<sup>54</sup>

19. The text of Article 5.1 of the TBT Agreement provides, in relevant part: “Members shall ensure that, in cases where a positive assurance of conformity with technical regulations or standards is required, their central government bodies apply the following provisions to products originating in the territories of other Members.” Accordingly, the chapeau of Article 5.1 sets out two elements: (1) an underlying technical regulation or standard; and, (2) the requirement of a positive assurance of conformity with such technical regulation or standard.

20. With regard to the first element, a “technical regulation” is defined in Annex 1 of the TBT Agreement as a:

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with

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<sup>50</sup> *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.27 (explaining, in the context of Article 2.1 of the TBT Agreement: “Once the like products have been properly identified, Article 2.1 requires a panel to compare, on the one hand, the treatment accorded under the measure at issue to the group of like products imported from the complaining Member with, on the other hand, that accorded to the group of like domestic products and/or the group of like products originating in any other country.”); *see also EC – Seal Products (AB)*, para. 5.117 (explaining, in the context of Article III:4 of the GATT 1994: “[W]e consider that the ‘treatment no less favourable’ standard . . . prohibits WTO Members from modifying the conditions of competition in the marketplace to the detriment of the group of imported products vis-à-vis the group of like domestic products.”).

<sup>51</sup> *See EC – Seal Products (AB)*, para. 5.95.

<sup>52</sup> *Compare* Ukraine’s First Written Submission, paras. 153-159 *with id.* paras. 161-164; *see id.* para. 171.

<sup>53</sup> *See* Ukraine’s First Written Submission, paras. 238, 336, 345.

<sup>54</sup> *See* Ukraine’s First Written Submission, paras. 243-247, 338-341.

terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

There are thus three criteria for a document to constitute a technical regulation: (1) “the document must apply to an identifiable product or group of products”; (2) “the document must lay down one or more characteristics of the product”; and, (3) “compliance with the product characteristics must be mandatory.”<sup>55</sup>

21. With regard to the second element, where a “positive assurance” of conformity is “required,” Article 5.1 should be interpreted “in accordance with the ordinary meaning to be given to [its] terms . . . in their context and in the light of its object and purpose.”<sup>56</sup> In this regard, “positive” is relevantly defined as “[e]xplicitly laid down; admitting no question; explicit, express, definite, precise.”<sup>57</sup> “Required” is defined as something “[t]hat is required, requisite, necessary.”<sup>58</sup> Read together, the phrase “in cases where a positive assurance of conformity with technical regulations or standards is required” should be understood to refer to a situation in which an explicit, definite assurance of conformity with the relevant technical regulation or standard is necessary (*e.g.*, for import into or sale in a Member’s market).

22. In this dispute, Ukraine alleges that three documents constitute technical regulations underlying Measure II: Technical Regulation No. 001/2011 “On the safety of railway rolling stock,” Technical Regulation No. 002/2011 “On the high-speed rail safety,” and Technical Regulation No. 003/2011 “On the safety of rail transport infrastructure.”<sup>59</sup> Ukraine alleges that “pass[ing] the necessary conformity assessment procedures” is required for railway products subject to these regulations to be placed on the Russian market and that, therefore, a “positive assurance of conformity” with these technical regulations is “required,” within the meaning of Article 5.1.<sup>60</sup> Russia appears not to dispute either of these elements,<sup>61</sup> and the United States understands the facts on the record to support Ukraine’s submissions in this respect.

23. With respect to Measure III, Ukraine alleges that the technical regulation at issue is Technical Regulation No. 001/2011 “On the safety of railway rolling stock.”<sup>62</sup> Ukraine also alleges that certification of railway products covered by the regulation as meeting “the relevant safety and technical requirements set out in this Technical Regulation” is a necessary

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<sup>55</sup> *US – Tuna II (Mexico) (AB)*, para. 183; *EC – Sardines (AB)*, para. 176; *US – COOL (Panel)*, paras. 7.297, 7.214; *US – Clove Cigarettes (Panel)*, para. 7.24.

<sup>56</sup> See DSU, art. 3.2 (“The Members recognize that [the WTO dispute settlement system] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements *in accordance with customary rules of interpretation of public international law*) (emphasis added); see also, *e.g.*, *US – Gasoline (AB)*, p. 17.

<sup>57</sup> *Shorter Oxford English Dictionary*, vol. 2, p. 2300, 4th edn, (1993).

<sup>58</sup> *Shorter Oxford English Dictionary*, vol. 2, p. 2557, 4th edn, (1993).

<sup>59</sup> See Ukraine’s First Written Submission, para. 53; *id.* paras. 243-244.

<sup>60</sup> See Ukraine’s First Written Submission, para. 55; *id.* paras. 56-65; *id.* paras. 243-247.

<sup>61</sup> See Russia’s First Written Submission, paras. 72-73.

<sup>62</sup> See Ukraine’s First Written Submission, paras. 336, 341.

precondition for such products being sold on the Russian market.<sup>63</sup> In its response to Ukraine’s arguments under Article 5.1, Russia does not contest that Technical Regulation 001/2011 is a technical regulation or that a positive assurance of conformity is required for covered products to be sold on the Russian market.<sup>64</sup> However, as discussed further below, in the context of Article 2.1 of the TBT Agreement, Russia argues that Measure III, as formulated by Ukraine, is not a “technical regulation,” within the meaning of Annex I of the TBT Agreement.<sup>65</sup>

24. The United States submits that, if Measure III is found to be a technical regulation, within the definition set out in Annex I of the TBT Agreement, for purposes of Article 2.1, it should likewise be found to satisfy the first element of the Article 5.1 chapeau. Conversely, if Russia were to prevail on that argument, Measure III would likewise be outside the scope of Article 5.1 of the TBT Agreement.<sup>66</sup> The second element of the chapeau of Article 5.1 seems uncontested among the parties, and the United States sees no reason, based on the facts presented, for the Panel to find otherwise.

#### A. Article 5.1.1 of the TBT Agreement

25. Ukraine challenges the application of Measure II and Measure III under Article 5.1.1 of the TBT Agreement.<sup>67</sup> With respect to both measures, Ukraine argues that Russia “applie[s]” the relevant conformity assessment procedures “in a manner which grants access for suppliers of railway products originating in Ukraine under conditions less favourable” than those accorded to suppliers of like products originating in other Members.<sup>68</sup> Russia argues that Ukraine has failed to make a *prima facie* case under Article 5.1.1 because it failed to establish “the likeness of the products at issue”<sup>69</sup> and that the situation in Ukraine and in “any other country supplying like products” to Russia are “comparable.”<sup>70</sup>

26. TBT Article 5.1.1 provides that, where Article 5.1 applies, Members shall ensure that:

[C]onformity assessment procedures are prepared, adopted and applied so as to grant access for suppliers of like products originating in the territories of other Members under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country, in a comparable situation; access entails suppliers’ right to an assessment of conformity under the rules of the procedure, including, when foreseen by this

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<sup>63</sup> See Ukraine’s First Written Submission, para. 341.

<sup>64</sup> See Russia’s First Written Submission, paras. 141-142; *see also id.* para. 119.

<sup>65</sup> See Russia’s First Written Submission, paras. 112-124.

<sup>66</sup> See *EC – Seal Products (AB)*, para. 6.1(a).

<sup>67</sup> See Ukraine’s First Written Submission, paras. 248, 336.

<sup>68</sup> See Ukraine’s First Written Submission, paras. 248, 336.

<sup>69</sup> See Russia’s First Written Submission, paras. 74-75.

<sup>70</sup> See Russia’s First Written Submission, paras. 77-86.



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procedure, the possibility to have conformity assessment activities undertaken at the site of facilities and to receive the mark of the system.

27. Thus, 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.”

28. 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 explanatory note to this definition provides greater clarity, explaining that “[c]onformity assessment procedures include, *inter alia*, procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval as well as their combinations.” In this dispute, it appears that the parties do not contest that this element is satisfied with respect to both Measure II and Measure III.<sup>71</sup>

29. 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 in the context of Article I:1, a panel must examine “likeness” based upon the specific facts at issue. While certain panels have assumed “likeness” when the measure at issue, on its face, discriminates between products solely on the basis of origin, in most instances, panels and the Appellate Body have analyzed likeness on the basis of fact-specific criteria.<sup>72</sup> Factors assessed have included: (1) the properties, nature and quality of the products; (2) end-uses of the products; (3) consumers’ tastes and habits in respect of the products; and (4) the international classification of the products for tariff purposes.

30. The third element entails a comparison between the “access” granted to suppliers of products of a complaining Member and to suppliers of like products “originating in” other Members, “in a comparable situation.” “Access” is defined in Article 5.1.1 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 “originating in” the complaining party, on the one hand, and to suppliers of products “originating in” the responding party or other Members, on the other. (It is the origin of the *products* that is relevant to the comparison.)

31. Further, the comparison is between the access granted to suppliers of like products originating in another country, “in a comparable situation.” The definition of “comparable” is “able to be compared.”<sup>73</sup> “Compare,” in turn, is defined as “liken, pronounce similar” and “be

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<sup>71</sup> See Russia’s First Written Submission, paras. 73, 139-145.

<sup>72</sup> See, e.g., *US – Clove Cigarettes (AB)*, paras. 104-233

<sup>73</sup> *Shorter Oxford English Dictionary*, vol. 1, p. 457, 4th edn, (1993).

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compared; bear comparison; be on terms of equality with.”<sup>74</sup> 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.

32. With respect to Measure II, Russia argues that the situations in Ukraine, on the one hand, and in other countries, on the other, are not “comparable.”<sup>75</sup> As the party making the assertion, it is Russia’s responsibility to adduce objective evidence to substantiate its claim.<sup>76</sup>

### **B. Article 5.1.2 of the TBT Agreement**

33. Ukraine also challenges the application of Measures II and III under Article 5.1.2 of the TBT Agreement.<sup>77</sup> With respect to Measure II, Ukraine argues that by suspending the certificates of producers of Ukrainian railway products and rejecting their applications for new certificates based on the “alleged impossibility of carrying out the inspection procedure,” Russia applied the relevant CAP “with the effect of creating unnecessary obstacles to international trade.”<sup>78</sup> Similarly, with respect to Measure III, Ukraine argues that, by “requiring that only entities registered in the same country as the relevant certification body can apply for certification,” Russia applies the CAP with the effect of creating unnecessary obstacles to international trade.<sup>79</sup> Russia argues Ukraine has not established a *prima facie* case with respect to either measure.<sup>80</sup>

34. Article 5.1.2 of the TBT Agreement provides that, where Article 5.1 applies, Members shall ensure that:

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

35. Thus, for a complaining 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

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<sup>74</sup> *Shorter Oxford English Dictionary*, vol. 1, p. 457, 4th edn, (1993).

<sup>75</sup> See Russia’s First Written Submission, paras. 77-78. It appears that, with respect to Measure II, the “less favourable” treatment aspect of the third element is not contested. See *id.* para. 76.

<sup>76</sup> See *US – Wool Shirts and Blouses (AB)*, p. 14.

<sup>77</sup> See Ukraine’s First Written Submission, paras. 266; 347.

<sup>78</sup> See Ukraine’s First Written Submission, para. 266.

<sup>79</sup> See Ukraine’s First Written Submission, para. 347.

<sup>80</sup> See Russia’s First Written Submission, paras. 100, 152.

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the article then describes a way in which a measure could be applied in a manner that would contravene the obligation set out in the first sentence.<sup>81</sup>

36. 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 and was discussed above in that context. As already mentioned, the parties do not appear to dispute that both Measure II and Measure III meet this element, nor do any facts on the record suggest to the United States that this is not the case.<sup>82</sup>

37. With respect to the second element, a key inquiry is whether a conformity assessment procedure is with a view to or 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.”<sup>83</sup> “Necessary” refers to something that “cannot be dispensed with or done without; requisite; essential; needful.”<sup>84</sup> An “unnecessary obstacle” to international trade therefore suggests something that blocks or hinders trade between Members that is not requisite or essential.

38. 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.” That is, a procedure that is more strict (or more strictly applied) than is necessary to provide to the importing Member the sufficient confidence that the products do conform – for example, because sufficient confidence can be provided through a less strict conformity assessment procedure – would breach Article 5.1.2.

39. The parties in this dispute both argue that the text of Article 5.1.2 is similar to that of Article 2.2 of the TBT Agreement and, on this basis, frame their arguments based on an analytical framework developed under Article 2.2.<sup>85</sup> Specifically, the parties 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.<sup>86</sup> Regarding Measure II, Russia acknowledges that Ukraine has suggested two alternative measures: (1) communicating with Ukrainian companies to arrange conditions for carrying out in-person inspections; and, (2) remote inspections, including

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<sup>81</sup> *EC – Seals (Panel)*, paras. 7.512-513.

<sup>82</sup> See Russia’s First Written Submission, paras. 73, 89-93, 139-145, 147-152.

<sup>83</sup> *Shorter Oxford English Dictionary*, vol. 2, p. 1970 4th edn, (1993).

<sup>84</sup> *Shorter Oxford English Dictionary*, vol. 2, p. 1895 4th edn, (1993).

<sup>85</sup> See Ukraine’s First Written Submission, para. 265; Russia’s First Written Submission, para. 91; *EC – Seal Products (Panel)*, para. 7.539.

<sup>86</sup> See Ukraine’s First Written Submission, para. 275; Russia’s First Written Submission, paras. 93-100.

accepting results from other CU countries.<sup>87</sup> However, Russia argues Ukraine has not proven that either alternative “would provide an equivalent assurance of conformity required by the current regulation” and that, therefore, Ukraine has not satisfied Article 5.2.1.<sup>88</sup> With regard to Measure III, Ukraine argues that accepting certifications of Ukrainian products from other CU members would provide an equivalent level of protection and would be less trade-restrictive.<sup>89</sup> Russia asserts that this approach would not meet Russia’s desired level of protection.<sup>90</sup>

40. The text of Article 5.1.2 does not require that a complaining party identify a less trade-restrictive alternative measure that provides adequate confidence, nor establish the existence of such an alternative.<sup>91</sup> In the context of Article 2.2, the Appellate Body has found that “comparison with proposed alternative measures should be understood as a ‘conceptual tool’ for the purpose of assessing whether a challenged technical regulation is more trade restrictive than necessary.”<sup>92</sup> Similarly, it would appear that under Article 5.1.2 an assessment of a proposed alternative measure may be used as a tool but is not a legal element required under this provision.

41. We also note 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. First, 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. Second, Article 2.2 refers to the “fulfill[ment]” of objectives, which, in light of the sixth preambular recital of the TBT Agreement, has been interpreted as referring to a Member’s right to achieve legitimate objectives “at the levels it considers appropriate.”<sup>93</sup> Article 5.1.2, by contrast, refers to the “adequate confidence” of a Member that products conform with a technical regulation or standard. 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.

42. Finally, with regard to the analysis of proposed less trade-restrictive alternative measures in this dispute, the United States recalls that determining the level of “confidence” achieved by a CAP measure 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.”<sup>94</sup> 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

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<sup>87</sup> See Russia’s First Written Submission, paras. 94-98; Ukraine’s First Written Submission, para. 275.

<sup>88</sup> See Russia’s First Written Submission, para. 98.

<sup>89</sup> See Ukraine’s First Written Submission, para. 349.

<sup>90</sup> See Russia’s First Written Submission, para. 151.

<sup>91</sup> See *US – Tuna II (Mexico) (AB)*, para. 322; *but see* Russia’s Written Submission, para. 93.

<sup>92</sup> *US – COOL (Article 21.5) (AB)*, para. 5.200; *US – Tuna II (Mexico) (AB)*, para. 322.

<sup>93</sup> See *US – Tuna II (Mexico) (AB)*, para. 316.

<sup>94</sup> *US – Tuna II (Mexico) (AB)*, para. 314.

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chosen level of confidence, but must “independently and objectively assess” the contribution “actually achieved by the measure at issue.”<sup>95</sup>

43. 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.”<sup>96</sup> 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.

44. The United States also notes that the Committee on Technical Barriers to Trade has outlined a number of approaches to facilitate the acceptance of conformity assessment results.<sup>97</sup> These may be relevant as indicating approaches that other WTO Members have considered not to hinder trade, relatively speaking, and that can provide a high level of confidence that products conform to the requirements of technical regulations and standards.

## V. ARTICLE 2.1 OF THE TBT AGREEMENT

45. Ukraine claims that Measure III is inconsistent with Article 2.1 of the TBT Agreement. Specifically, Ukraine claims that, by the application of Technical Regulation No. 001/2011 reflected in the Protocol of the Ministry of Transport No. A.4-3 and the decisions listed in Annex III to Ukraine’s panel request, Russia accords to Ukrainian railway products “less favourable treatment” than that accorded to like products of national origin and like products originating in other Members.<sup>98</sup> Russia claims that Ukraine has not established a *prima facie* case with respect to this claim because, *inter alia*, Measure III is not a technical regulation, and Ukraine has not demonstrated the “likeness” or “less favourable treatment” elements of Article 2.1.<sup>99</sup>

46. Article 2.1 of the TBT Agreement states:

Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

47. Thus, to establish a breach of Article 2.1, the complainant must prove three elements: (i) “the measure at issue constitutes a ‘technical regulation’ within the meaning of Annex 1.1”; (ii) the imported products are “like the domestic product or the product of other origins”; and (iii) the

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<sup>95</sup> See *US – Tuna II (Mexico) (AB)*, paras. 314, 317.

<sup>96</sup> See Russia’s First Written Submission, para. 93.

<sup>97</sup> Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995, Annexes to Part 1, G/TBT/1/Rev.12, 21 January 2015, p. 45.

<sup>98</sup> See Ukraine’s First Written Submission, para. 289; see also *id.* para. 310.

<sup>99</sup> See Russia’s First Written Submission, paras. 124, 125, 128-137.

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“treatment accorded to imported products [is] less favourable than that accorded to like domestic products or like products from other countries.”<sup>100</sup>

48. With regard to the first element, as discussed in the context of Article 5.1 above, Annex I.1 of the TBT Agreement provides the definition of “technical regulation.” Under this definition, a “document” constitutes a technical regulation if it “lays down product characteristics or their related processes and production methods” and if compliance with the content of such document is “mandatory.”<sup>101</sup> The term “document” means “something written, inscribed, etc., which furnishes evidence or information upon any subject.”<sup>102</sup> The term could, therefore, “cover a broad range of instruments or apply to a variety of measures.”<sup>103</sup> A determination of whether a measure is a technical regulation is fact-specific and “must be made in light of the characteristics of the measure at issue and the circumstances of the case.”<sup>104</sup>

49. In this dispute, it is uncontested that Ukraine has shown that Technical Regulation No. 001/2011 falls within the definition of “technical regulation.”<sup>105</sup> Nevertheless, Russia argues that Measure III is not a “technical regulation” because it consists of Technical Regulation No. 001/2011 *and* a second group of documents (*i.e.*, the Protocol of the Ministry of Transport No. A.4.3 and the decisions listed in Annex III to Ukraine’s panel request), which, Russia argues, do not meet the requirements of being a technical regulation.<sup>106</sup> Thus, Russia’s argument is that, for a measure to fall within the scope of Article 2.1, each document comprising the measure or its application (in the case of “as applied” claims such as the one in this dispute) must separately meet the elements of a “technical regulation” under Annex I.1 of the TBT Agreement.

50. Such a reading is inconsistent with the text and proper interpretation of Article 2.1. Article 2.1 applies “in respect of technical regulations.” Thus, the relevant inquiry is whether the “measure at issue constitutes a technical regulation,”<sup>107</sup> not whether each component of the measure at issue separately constitutes a technical regulation. Such a determination is made “in light of the features of the measure” and the particular circumstances of the dispute.<sup>108</sup> In *US – Tuna II (Mexico)*, for example, the inquiry was whether the U.S. tuna measure, which was

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<sup>100</sup> *US – Tuna II (Mexico) (AB)*, para. 202 (citing *US – Clove Cigarettes (AB)*, para. 87).

<sup>101</sup> See *EC – Seal Products (AB)*, para. 5.10.

<sup>102</sup> See *US – Tuna II (Mexico) (AB)*, para. 185 (citing *Shorter Oxford English Dictionary*, 6<sup>th</sup> edn., A. Stevenson (ed.) (Oxford University Press, 2007), vol. 1, p. 731).

<sup>103</sup> *US – Tuna II (Mexico) (AB)*, para. 185.

<sup>104</sup> *US – Tuna II (Mexico) (AB)*, para. 188; *EC – Sardines (AB)*, paras. 192, 193.

<sup>105</sup> See Ukraine’s First Written Submission, paras. 316-319; Russia’s First Written Submission, paras. 114-115, 119.

<sup>106</sup> See Russia’s First Written Submission, paras. 117-124.

<sup>107</sup> *US – Tuna II (Mexico) (AB)*, para. 202 (citing *US – Clove Cigarettes (AB)*, para. 87).

<sup>108</sup> *US – Tuna II (Mexico) (AB)*, para. 190.

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composed of a law, regulations, and a court decision, constituted a single technical regulation, not whether each element of the measure was a technical regulation.<sup>109</sup>

51. In this dispute, it is clear from Ukraine’s panel request and submission that Measure III, as Ukraine challenges it, consists of an alleged manner of applying Technical Regulation No. 001/2011.<sup>110</sup> This manner of application, Ukraine argues, is evinced in a second group of documents Ukraine references in its description of Measure III.<sup>111</sup> Therefore, the relevant inquiry, for purposes of the first element of Article 2.1, is whether Technical Regulation No. 001/2011, as applied through the listed instruments, is a technical regulation. If the Panel finds that this is the case – and it is not clear how a technical regulation could cease to be a technical regulation by virtue of being applied – it is not relevant whether the other documents themselves separately fall within the definition of Annex I.1 of the TBT Agreement.

52. With regard to the second element of Article 2.1, the “like products” analysis is a fact-specific inquiry that must be decided on a case-by-case basis (like the analogous inquiry in the context of Article I:1 of the GATT 1994, discussed above).<sup>112</sup> Past panels have analyzed likeness under Article 2.1 with reference to, *inter alia*, (i) the “physical properties of the products”; (ii) the “extent to which the products are capable of serving the same or similar end-uses”; (iii) the “extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand”; and, (iv) the international tariff classification of the products.<sup>113</sup> Past panels have omitted a detailed analysis and assumed “likeness,” but only when the measure at issue, on its face, discriminates between products solely on the basis of origin.<sup>114</sup> Otherwise, panels have conducted the requisite fact-specific analysis.<sup>115</sup>

53. The third element of Article 2.1, “less favourable treatment,” has in past reports been found to have two components: (1) the challenged measure “modifies the conditions of competition in the relevant market to the detriment of the group of imported products *vis-à-vis* the group of like domestic products or like products originating in any other country”; and (2) “the detrimental impact on imports [does not] stem[] exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.”<sup>116</sup> In conducting the analysis under the latter step, a panel must examine whether the regulatory

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<sup>109</sup> See *US – Tuna II (Mexico) (AB)*, paras. 191-199.

<sup>110</sup> See Ukraine’s First Written Submission, paras. 289, 312-315.

<sup>111</sup> See Ukraine’s First Written Submission, paras. 312-315.

<sup>112</sup> See *US – Tuna II (Mexico) (Panel)*, para. 7.238.

<sup>113</sup> See *US – Tuna II (Mexico) (Panel)*, paras. 7.235, 7.238-247; see also *EC – Seal Products (Panel)*, paras. 7.136-140 (finding vacated on other grounds); *US – Clove Cigarettes (AB)*, paras. 118-120.

<sup>114</sup> See *US – COOL (Panel)*, para. 7.254.

<sup>115</sup> See *US – Tuna II (Mexico) (Panel)*, paras. 7.235, 7.238-247; *US – Clove Cigarettes (Panel)*, paras. 7.122-123, 7.149-248; *US – Clove Cigarettes (AB)*, paras. 156-160; *EC – Seal Products (Panel)*, paras. 7.136-140.

<sup>116</sup> *US – Tuna II (Mexico) (AB)*, para. 215.

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distinctions that account for the detrimental impact “are designed and applied in an even-handed manner such that they may be considered ‘legitimate’ for the purposes of Article 2.1.”<sup>117</sup>

54. In this dispute, Russia argues that Ukrainian products are not subject to “less favourable treatment” because, in respect of Belarussian certifications, Ukrainian and other products are subject to the same treatment. Specifically, Russia claims that its authorities would not accept a Belarussian certification of Ukrainian products due to a particular policy (adopted, Russia asserts, by the Eurasian Economic Commission (EEC) policy) that does not allow Belarussian authorities to certify railway products for conformity with Technical Regulation 001/2011 for sale outside Belarus.<sup>118</sup> Russia asserts that the non-recognition of the Belarussian certificates would be the same “with respect to any producer of any origin.”<sup>119</sup>

55. The United States recalls that the comparison relevant to the Article 2.1 analysis is the treatment accorded by the challenged measure to Ukrainian products, on the one hand, and to like products of Russia or any other Member (in this case, as Ukraine alleges, Belarus and Kazakhstan), on the other. An EEC interpretation of another international agreement would not affect Russia’s obligations under Article 2.1 of the TBT Agreement. Further, the United States recalls that the party making an assertion bears the burden of substantiating it with evidence.<sup>120</sup> As yet, Russia has provided no evidence that its authorities do not recognize Belarussian or Kazakh certifications of Belarussian or Kazakh railway products as meeting the requirements of Technical Regulation 001/2011.<sup>121</sup> And Ukraine has produced evidence showing that Russia does import railway products from both countries which may suggest this is not the case.<sup>122</sup>

## VI. CONCLUSION

56. The United States thanks the Panel for its consideration of the U.S. views on issues raised in this dispute.

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<sup>117</sup> *US – COOL (Article 21.5) (AB)*, para. 5.92; *see also US – Tuna II (Mexico) (AB)*, n.461 (citing *US – Clove Cigarettes (AB)*, para. 182); *US – COOL (AB)*, para. 271.

<sup>118</sup> *See* Russia’s First Written Submission, paras. 133-135.

<sup>119</sup> *See* Russia’s First Written Submission, para. 135.

<sup>120</sup> *US – Wool Shirts and Blouses (AB)*, p. 14.

<sup>121</sup> *See* Russia’s First Written Submission, para. 135.

<sup>122</sup> *See* Ukraine’s First Written Submission, pp.60-61.