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

REPORT OF THE PANEL

Addendum

BCI DELETED, AS INDICATED BY [[XXX]]

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS499/R.

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PRELIMINARY RULING

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PRELIMINARY RULING BY THE PANEL
(CONCLUSIONS)

17 July 2017

1.1. Having carefully considered the Russian Federation's (Russia) request of 3 April 2017 for a preliminary ruling pursuant to Article 6.2 of the DSU, Ukraine's reply of 13 April 2017, the parties' additional comments of 18 May 2017 and 31 May 2017, as well as the parties' oral statements and responses to the Panel's questions of 10 July 2017 and 14 July 2017, and the third parties' written submissions of 8 June 2017, the Panel communicates its conclusions on Russia's request today, as provided for in the revised timetable adopted by the Panel on 10 April 2017. More detailed reasons in support of these conclusions will be provided in due course and at the latest in the Interim Panel Report.

1.2. This Ruling, together with the more detailed reasons supporting it, will become an integral part of the Panel's Final Report, subject to any changes that may be necessary in the light of comments received from the parties at the interim review stage.

1.3. A copy of this communication will be transmitted to the third parties for information.

2 WHETHER UKRAINE'S REQUEST FOR THE ESTABLISHMENT OF A PANEL FAILS TO "PRESENT THE PROBLEM CLEARLY"

2.1. In its preliminary ruling request, Russia claims that the request for the establishment of a panel (panel request) is inconsistent with Article 6.2 of the Dispute Settlement Understanding (DSU) because it fails to "present the problem clearly". Under this claim, Russia raises several distinct issues, which the Panel addresses in turn below.

2.1 Whether the panel request fails to provide the legal basis sufficient to present the problem clearly

2.2. According to Russia, section IV of the panel request does not provide any explanation of how each challenged measure is allegedly inconsistent with the obligations contained in the provisions of the covered agreements listed in that section. On this basis, Russia considers that the panel request fails to "present the problem clearly" with respect to all the measures described therein. Russia therefore requests the Panel to find that the measures described in the panel request are outside its terms of reference.

2.3. The Panel finds that, in respect of the challenged measures, the panel request provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

2.2 Whether the panel request fails to identify the specific measures at issue

2.4. Russia argues that the reference to "railway products" in the panel request is insufficient to provide certainty as to the particular measures that Ukraine is challenging. On this basis, Russia requests that the Panel find that all the measures described in the panel request are outside its terms of reference.

2.5. The Panel finds that the panel request adequately identifies the specific measures at issue.

2.3 Whether by failing to identify the like domestic products or the like products from any other country, the panel request fails to present the problem clearly in respect of the claims raised under 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

2.6. Russia argues that in order to present the problem clearly, a panel request that concerns claims relating to the national treatment and the most-favoured nation treatment obligations must identify, respectively, the like domestic products and the like products from any other country. Russia considers that the panel request fails to do this. On this basis, Russia requests that the Panel find that the claims under Articles 2.1 and 5.1.1 of the TBT Agreement as well as under Articles I:1, III:4, X:3(a) and XIII:1 of the GATT 1994 fall outside its terms of reference.

2.7. The Panel finds that, in respect of the claims under 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, the panel request provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

2.4 Whether the panel request calls upon the Panel to look beyond the covered agreements

2.8. Russia asks the Panel to confirm its understanding that measure III[1] is limited to Customs Union "Technical Regulation No. 001/2011 'On safety of railway rolling stock'". In addition, Russia claims that if the Panel finds that measure III includes the "Protocol of the Ministry of Transport of the Russian Federation regarding issuance by certification authority of the Customs Union of the certificates of conformity for products manufactured by third-countries No. A 4-3 adopted on 20 January 2015 and the instructions mentioned in Annex III" to the panel request, measure III falls outside the Panel's terms of reference because through this measure Ukraine would be asking the Panel to make findings under the Customs Union regulation.

2.9. The Panel finds that Russia's request for confirmation of its understanding regarding measure III does not constitute a claim that the panel request is inconsistent with Article 6.2. The Panel therefore need not, and does not, make a ruling under Article 6.2 in relation to this request.

2.10. As regards Russia's conditional claim that measure III falls outside the Panel's terms of reference because it calls upon the Panel to look beyond the covered agreements, the Panel finds that the panel request raises legal claims only under the covered agreements and that Russia's claim is therefore unfounded.

2.5 Whether in describing measure III, the panel request fails to identify the "specific measure at issue"

2.11. Russia argues that when describing measure III in the panel request, Ukraine refers to Customs Union Technical Regulation No. 001/2011 generally, without specifying which particular provision(s) it is challenging. In addition, Russia considers that the reference to "the instructions mentioned in Annex III" as well as "the Protocol of the Ministry of Transport of the Russian Federation regarding issuance by certification authority of the Customs Union of the certificates of conformity for products manufactured by third-countries No. A 4-3 adopted on 20 January 2015", which Ukraine proposes to read together with the aforementioned Customs Union Technical Regulation, does not help to identify the measure clearly. On this basis, Russia considers that the panel request fails to adequately identify a specific measure at issue and requests that the Panel find that this measure is outside its terms of reference.

2.12. The Panel finds that the specific measure at issue in the passage of the panel request to which Russia refers is adequately identified in the panel request, as a whole.

2.6 Whether only section II of the panel request contains the measures challenged

2.13. Russia requests the Panel to confirm its understanding that the measures at issue are only those covered in the fourth paragraph of section II of the panel request.

[1] According to Russia's preliminary ruling request, measure III is identified in subparagraph 3) of section II of the panel request.

2.14. The Panel finds that Russia's request for confirmation of its understanding regarding the measures at issue does not constitute a claim that the panel request is inconsistent with Article 6.2. The Panel therefore need not, and does not, make a ruling under Article 6.2 in relation to this request.

3 WHETHER UKRAINE'S PANEL REQUEST EXPANDS THE SCOPE OF THE DISPUTE

3.1. In its preliminary ruling request, Russia claims that the panel request is inconsistent with Article 6.2 because it expands the scope of the dispute. Under this claim, Russia raises several distinct issues, which the Panel addresses in turn below.

3.1 Whether measures I[2] and II[3] expand the scope of the dispute

3.2. Russia argues that the measures described in paragraph 4 of section II (entitled "The measures at issue") of the panel request do not correspond to the exact measures challenged in section II (entitled "Measures at issue") of the request for consultations (consultations request). On this basis, the Russian Federation considers that the panel request expands the scope of the dispute and dramatically changes its essence. The Russian Federation therefore requests that the Panel find that measures I and II are outside its terms of reference.

3.3. The Panel finds that the panel request does not expand the scope or change the essence of the dispute in respect of the measures referred to by Russia.

3.2 Whether measure I, taken alone, expands the scope of the dispute

3.4. The Russian Federation argues that the description of measure I in the panel request refers to a new measure that was not identified in the consultations request. In particular, the Russian Federation considers that the reference to "systematic" in the panel request affects the nature of the challenged measure. On this basis, the Russian Federation considers that the panel request impermissibly expands the scope of the dispute.

3.5. The Panel finds that the panel request does not expand the scope or change the essence of the dispute in respect of the measure referred to by Russia.

3.3 Whether certain aspects of measure II, taken alone, expand the scope of the dispute

3.6. The Russian Federation argues that several references contained in the description of measure II in the panel request were not provided in the consultations request, namely the references to: (a) specific instructions of the FBO RC-FRT concerning the suspensions of certificates of Ukrainian producers and identified in Annex I, (b) two of the decisions listed in Annex II to the panel request, and (c) the communications listed in Annex III to the panel request. On this basis, the Russian Federation considers that, since the documents listed in Annexes I, II and III, were not mentioned in the consultations request, they constitute new measures that impermissibly expand the scope of the dispute.

3.7. The Panel finds that the panel request does not expand the scope or change the essence of the dispute in respect of the measure referred to by Russia.

4 OVERALL CONCLUSION

4.1. In the light of the above, none of the objections raised by Russia in its preliminary ruling request under Article 6.2 of the DSU lead the Panel to dismiss from its inquiry any measures or claims set out in the panel request.

[2] According to Russia's preliminary ruling request, measure I is identified in subparagraph 1) of section II of the panel request.

[3] According to Russia's preliminary ruling request, measure II is identified in subparagraph 2) of section II of the panel request.

4.2. This conclusion does not bear on the separate question whether the measures at issue are inconsistent with Russia's obligations under the WTO agreements.

ANNEX B

WORKING PROCEDURES OF THE PANEL

ANNEX B-1

WORKING PROCEDURES FOR THE PANEL

Adopted on 24 March 2017 and subsequently modified on 4 October 2017

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential except as communicated in the Panel report. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Ukraine requests such a ruling, the Russian Federation shall submit its response to the request in its first written submission. If the Russian Federation requests such a ruling, Ukraine shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits

upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that it is practical to do so.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by Ukraine could be numbered UKR-1, UKR-2, etc. If the last exhibit in connection with the first submission was numbered UKR-5, the first exhibit of the next submission thus would be numbered UKR-6. Exhibit submitted by the Russian Federation could be numbered RUS-1, RUS-2, etc.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Ukraine to make an opening statement to present its case first. Subsequently, the Panel shall invite the Russian Federation to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall have an opportunity to orally answer these questions. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Ukraine presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the Russian Federation if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the Russian Federation to present its opening statement, followed by Ukraine. If the Russian Federation chooses not to avail itself of that right, the Panel shall invite Ukraine to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that

interpretation is needed, each party shall provide additional copies to the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. In the event that interpretation is needed, each third party shall provide additional copies to the interpreters, through the Panel Secretary. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to these questions within a deadline to be determined by the Panel.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of the executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit, in accordance with the timetable adopted by the Panel, (i) an integrated executive summary of the facts and arguments as presented to the Panel in its first written submissions, first opening and closing oral statements and, optionally, responses to questions following the first substantive meeting, and (ii) a separate integrated executive summary of its written rebuttal, second opening and closing oral statements and, optionally, responses to questions following the second substantive meeting, in accordance with the timetable adopted by the Panel. Each integrated executive summary shall be limited to no more than 15 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

Interim review

21. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

23. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

24. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them via the Digital Dispute Settlement Registry (DDSR) by 5:00 p.m. (Geneva time) on the due dates established by the Panel. The electronic version uploaded into the DDSR shall constitute the official version for the purposes of the record of the dispute. Upload into the DDSR shall also constitute electronic service on the Panel, the other party, and the third parties.[1]

b. In case any party or third party is unable to meet the 5:00 p.m. deadline because of technical difficulties in uploading these documents into the DDSR, the party or third party concerned shall inform the DS Registry without undue delay with a copy to DDSRSupport@wto.org and the other party and, where appropriate, the third parties through the DDSR or via e-mail and provide an electronic version of all documents to be submitted to the Panel by e-mail, including any exhibits. The e-mail shall be addressed to DSRegistry@wto.org, the Panel Secretary, and the other party and, where

[1] When a party or third party uploads a document (including exhibits) into the DDSR, in accordance with this paragraph, it shall send a notification to the Panel, the other party, and the third parties, as appropriate, via e-mail, identifying the document, including the number of the exhibits uploaded. The notification to the Panel should be addressed to DSRegistry@wto.org and to the Panel Secretary. The Panel shall also notify the parties and the third parties, as appropriate, via e-mail when it uploads a document into the DDSR.

appropriate, the third parties. The documents sent by e-mail shall be filed no later than 6:00 p.m. on the date due, together with the DDSR E-docket template. If the file size of specific exhibits makes transmission by e-mail impossible, or it would require more than five e-mail messages, owing to the number of exhibits to be filed, to transmit all of them by e-mail, the specific large file size exhibits, or those that cannot be attached to the first five e-mail messages, shall be filed with the DS Registry (office No. 2047) and provided to the other party and, where appropriate, the third parties by no later than 9:30 a.m. the next working day on a CD-ROM, DVD, or USB stick, together with the DDSR E-docket template. In that case, the party or third party concerned shall send a notification to the DS Registry, the Panel Secretary, the other party, and the third parties, as appropriate, no later than 6:00 pm on the due date, via e-mail, identifying the numbers of the exhibits that cannot be transmitted by e-mail.

c. In case any party or third party is unable to access[2] a document filed through the DDSR because of technical difficulties, it shall promptly, and in any case no later than 5 p.m. on the next working day after the due date for the filing of the document, inform the DS Registrar (with a copy to DDSRSupport@wto.org), the Panel Secretary, and the party or third party that filed the document, of the problem by e-mail and shall, if possible, identify the relevant document(s). The DS Registrar or the Panel Secretary will promptly try to identify a solution to the technical problem. In the meantime, the party or third party that filed the document(s) shall, promptly after being informed of the problem, provide an electronic version of the relevant document(s) to the affected party or third party by e-mail, with a copy to the DS Registry (DSRegistry@wto.org) to allow access to the document(s) while the technical problem is being addressed. The DS Registrar or the Panel Secretary may also provide an electronic version of the relevant document(s) by e-mail if the affected party or third party has reason to believe that the party or third party that filed the document(s) cannot provide the document(s) more promptly. The DS Registrar or the Panel Secretary shall in that case copy the party or third party that filed the document(s) on the e-mail message.

d. By 5:00 p.m. the next working day following the electronic filing, each party and third party shall file one paper copy of all documents it submits to the Panel, including the exhibits, with the DS Registry. The DS Registrar shall stamp the documents with the date and time of the filing.

e. The Panel shall provide the parties with the descriptive part, the interim report and the final report, as well as of other documents as appropriate, via the DDSR. When the Panel provides the parties or third parties both paper and electronic versions of a document, the electronic version uploaded into the DDSR shall constitute the official version for the purposes of the record of the dispute.

25. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

[2] For the purposes of this paragraph, being unable to access shall be understood as (i) not being able to see the document in the DDSR, and (ii) not being able to open or download the document from the DDSR.

ANNEX B-2

ADDITIONAL WORKING PROCEDURES CONCERNING
BUSINESS CONFIDENTIAL INFORMATION (BCI)

Adopted on 23 March 2017

1. These procedures apply to any business confidential information ("BCI") that a party wishes to submit to the Panel.

2. For the purposes of these procedures, BCI is defined as any information that has been designated as such by the party submitting the information, that is not available in the public domain, and the release of which would seriously prejudice an essential interest of the Member submitting the information or of the person or entity that supplied the information to that Member.

3. No person may have access to BCI except a member of the Panel or the WTO Secretariat, an employee of a party or third party, and an outside advisor acting on behalf of a party or third party for the purposes of this dispute. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products at issue or an officer or employee of an association of such enterprises.

4. A party or third party having access to BCI shall treat it as confidential, i.e. shall not disclose that information other than to those persons authorized to have access to it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.

5. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains business confidential information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. In case of exhibits, the party submitting BCI in the form of an Exhibit shall mark it as (BCI) next to the exhibit number (e.g. Exhibit UKR-1 (BCI), Exhibit RUS-1(BCI)). Should the party submit specific BCI within a document which is considered to be public, the specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]".

6. Any BCI that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label on the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

7. If a party submits a document containing BCI to the Panel, the other party or any third party referring to that BCI in its documents, including written submissions, written versions of oral statements and documents submitted in binary-encoded form, shall mark the document and any storage medium, and use double brackets, as set out in paragraphs 5 and 6.

8. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.

9. If a party considers that information submitted by the other party should have been designated as BCI and it objects to such submission without BCI designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties. The Panel shall deal with the objection, as appropriate. The same procedure shall be

followed if a party considers that information submitted by the other party with the notice "Contains Business Confidential Information" should not be designated as BCI. Each party shall act in good faith and exercise restraint in designating information as BCI. The Panel shall have the right to intervene in any manner that it deems appropriate, if it is of the view that restraint in the designation of BCI is not being exercised.

10. The parties, third parties, the Panel, the WTO Secretariat, and any others who have access to documents containing BCI under the terms of these Additional Working Procedures shall store all documents containing BCI so as to prevent unauthorized access to such information.

11. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not disclose any information that the party has designated as BCI.

12. If (a) pursuant to Article 16.4 of the DSU, the Panel report is adopted by the DSB, or the DSB decides by consensus not to adopt the Panel report, (b) pursuant to Article 12.12 of the DSU, the authority for establishment of the Panel lapses, or (c) pursuant to Article 3.6 of the DSU, a mutually satisfactory solution is notified to the DSB before the Panel completes its task, within a period to be fixed by the Panel, each party and third party shall return all documents (including electronic material and photocopies) containing BCI to the party that designated such information as BCI, or certify in writing to the Panel and the other party (or the parties, in the case of a third party returning such documents) that all such documents (including electronic material and photocopies) have been destroyed, consistent with the party's record-keeping obligations under its domestic laws. The parties and third parties may, however, retain one copy of each of the documents containing BCI for their archives, subject to prior written agreement of the party having designated such information as BCI and their continued adherence to the terms of these Additional Working Procedures. The Panel and the WTO Secretariat shall likewise return all such documents or certify to the parties that all such documents have been destroyed. The WTO Secretariat shall, however, have the right to retain one copy of each of the documents containing BCI for the archives of the WTO or for transmission to the Appellate Body in accordance with paragraph 13 below.

13. If a party formally notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU, the WTO Secretariat will inform the Appellate Body of these procedures and will transmit to the Appellate Body any BCI governed by these procedures as part of the record, including any submissions containing information designated as BCI under these working procedures. Such transmission shall occur separately from the rest of the Panel record, to the extent possible. In the event of an appeal, the Panel and the WTO Secretariat shall return all documents (including electronic material and photocopies) containing BCI to the party that designated such information as BCI, or certify to the parties that all such documents (including electronic material and photocopies) have been destroyed, except as otherwise provided above. Following the completion or withdrawal of an appeal, the parties and third parties shall promptly return all such documents or certify to the parties that all such documents have been destroyed, taking account of any applicable procedures adopted by the Appellate Body. The parties and third parties may, however, retain one copy of each of the documents containing BCI for their archives, subject to prior written agreement of the party having designated such information as BCI and their continued adherence to the terms of these Additional Working Procedures.

ANNEX C

ARGUMENTS OF THE PARTIES

UKRAINE

RUSSIAN FEDERATION

ANNEX C-1

FIRST PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE

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I. INTRODUCTION

1. Prior to 2014, Ukrainian producers of railway products were obtaining mandatory conformity assessment certificates ("certificates") from the relevant authorities in the Russian Federation – the Federal Budgetary Organization "Register of Certification on the Federal Railway Transport" (FBO "RC FRT"). These certificates enabled them to export their railway products to the Russian Federation and to place them on the Russian market.

2. Since 2014, however, the Russian Federation started suspending valid certificates that had been issued to producers of Ukrainian railway products in a systematic manner and without providing any legitimate reason. The Russian Federation also started systematically refusing to issue new certificates, rejecting applications submitted by Ukrainian producers or returning them without consideration. In addition, certificates issued by the authorities of other Customs Union ("CU") countries were not recognized by the authorities of the Russian Federation.

3. Ukraine therefore challenges the following three groups of measures:

- First, the systematic prevention of Ukrainian railway products from being imported into the Russian Federation by suspending the valid certificates, by refusing to issue new certificates and by not recognizing the certificates issued by the competent authorities of other CU countries;
- Second, the suspensions of certificates and the rejections of new applications for certificates, as listed in Annexes I and II to the panel request; and
- Third, the decision of the Russian Federation not to accept in its territory the validity of the certificates issued to Ukrainian producers in other CU countries found in the Protocol of the Ministry of Transport of the Russian Federation No. A 4-3 and the individual decisions of the Federal Agency for Railway Transport listed in Annex III to the panel request.

II. CLAIMS CONCERNING THE SYSTEMATIC PREVENTION OF UKRAINIAN RAILWAY PRODUCTS FROM BEING IMPORTED INTO THE RUSSIAN FEDERATION

A. The Measure at Issue

4. The first measure that Ukraine challenges is the systematic prevention of Ukrainian railway products from being imported into the Russian Federation. The prevention of Ukrainian railway products from being imported into the Russian Federation consists of the action by the Russian Federation of making it impracticable for Ukrainian railway products to be imported into the Russian Federation. This action occurs by way of suspension of valid certificates issued to Ukrainian producers, refusal to issue new certificates to Ukrainian producers and non-recognition of valid certificates issued by the competent authorities of other CU countries.

5. This measure is of a "systematic" nature. The Appellate Body in *Argentina – Import Measures* defined the meaning of a measure that has "systematic application" as a measure that does not have "sporadic unrelated applications". The panel in *Russia – Tariff Treatment* stated that the dictionary definitions of "systematic" indicate that this word denotes "something that is done according to a system, plan or organized method". That panel added that it may "be possible to infer the existence of a system where the observed repetition is so substantial as to render it more likely than not that an underlying system, plan, organized method or effort exists."

6. Ukraine established that Ukrainian railway producers currently hold 83% fewer certificates issued by the Russian Federation than they held in 2013 before the start of the systematic prevention. This has led the number of Ukrainian producers exporting to the Russian Federation to drop by 86%. In light of these figures, it is justified to infer that the prevention of Ukrainian products from being imported into the Russian Federation is based on an underlying organized effort put in place by the Russian Federation and is therefore systematic.

7. Moreover, the "systematic" nature of the Russian Federation's measure is further supported by the fact that this measure is achieved by all possible means, that it applies to substantially all Ukrainian producers and that it is part of a set of trade restrictive measures taken by the Russian Federation in connection with the conclusion by Ukraine of an Association Agreement with the European Union, which provides for the creation of an EU – Ukraine Deep and Comprehensive Free Trade Area/DCFTA.

B. The Claims

8. Ukraine submits that through this measure, the Russian Federation violates Articles I:1, XI:1 and XIII:1 of the GATT 1994.

1. Claim under Article I:1 of the GATT 1994

9. Ukraine submits that the Russian Federation violates Article I:1 of the GATT 1994 because, through the systematic prevention of railway products of Ukrainian origin from being imported into the Russian Federation, the Russian Federation does not immediately and unconditionally grant to railway products originating in Ukraine the advantage it grants to like products originating in other WTO Members.

10. Four elements must be demonstrated to establish an inconsistency with Article I:1. First, the measure at issue must fall within the scope of Article I:1. The systematic prevention of Ukrainian railway products from being imported into the Russian Federation is a measure covered by Article I:1 as it is a rule in connection with importation. More specifically, it is a principle regulating the importation of Ukrainian railway products since, according to this principle, the Russian Federation prevents Ukrainian railway products except those produced in certain areas of Ukraine from being imported into the Russian Federation by any means. Hence, in light of the broad interpretation to be given to the term "rules", the systematic prevention falls within the scope of Article I:1 as a rule in connection with importation.

11. Second, the measure must grant an "advantage, favour, privilege or immunity". The advantage granted by the measure at issue is the opportunity for the railway products from other countries to be imported into the Russian Federation, as a consequence of the certificates issued by the Russian authorities for these products.

12. Third, the products concerned must be "like products". In *Argentina – Hides and Leather*, the panel recognized that where a measure does not distinguish on the basis of the physical characteristics or end-uses of the products, but instead on the basis of factors which are not relevant to the definition of likeness, the products may be presumed to be like. The measure at issue does not distinguish between products based on the physical characteristics or end-uses of the products but on the basis of their origin. It follows that the products may be presumed to be like without the need to conduct a detailed likeness analysis.

13. Fourth, it must be demonstrated that the advantage granted by the measure is not accorded "immediately" and "unconditionally" to like products originating in the territory of all Members. As only Ukrainian railway products have lost the opportunity to be imported into the Russian Federation, the advantage – in the form of the opportunity to export railway products to the Russian Federation – is not accorded immediately and unconditionally to Ukrainian railway products as it is to railway products originating in countries other Ukraine.

14. In conclusion, by systematically preventing Ukrainian railway products from being imported into the Russian Federation, the Russian Federation grants an advantage to railway products originating in countries other than Ukraine which is not granted immediately and unconditionally to Ukrainian railway products, since the railway products originating in such other countries can be imported into and placed on the Russian market on the basis of the certificates issued by the

Russian authorities while Ukrainian railway products cannot, thereby violating Article I:1 of the GATT 1994.

2. Claim under Article XI:1 of the GATT 1994

15. Ukraine submits that the systematic prevention of Ukrainian railway products from being imported into the Russian Federation violates Article XI:1of the GATT 1994 because it prohibits or restricts the importation of Ukrainian railway products.

16. First, the measure falls within the scope of Article XI:1, which refers broadly to any "measure" that prohibits or restricts imports or exports. Since the measure at issue constitutes a "rule" instituted or maintained by the Russian Federation, it *a fortiori* constitutes a "measure" within the meaning of Article XI:1 of the GATT 1994.

17. Second, the measure at issue constitutes a prohibition or restriction on the importation of railway products from Ukraine. This flows from the nature of the measure itself since it consists of the action by the Russian Federation of making it impracticable for Ukrainian railway products to be imported into the Russian Federation.

3. Claim under Article XIII:1 of the GATT 1994

18. Ukraine claims that the Russian Federation also violates Article XIII:1 of the GATT 1994. Ukraine submits that prohibitions and restrictions which are inconsistent with Article XI:1 also violate Article XIII:1, if they are not applied similarly to all third countries.

19. Since the Russian Federation systematically prevents the importation of railway products of Ukrainian origin into the Russian Federation without similarly restricting the importation of railway products from other third counties, the Russian Federation therefore violates Article XIII:1 of the GATT 1994.

III. CLAIMS CONCERNING THE INSTRUCTIONS SUSPENDING CERTIFICATES AND THE DECISIONS REFUSING THE ISSUANCE OF NEW CERTIFICATES

A. The Measures at Issue

20. The second set of measures challenged by Ukraine covers the fourteen instructions listed in Annex I to the panel request whereby the FBO "RC FRT" suspended the certificates held by five producers of Ukrainian railway products, based on the alleged lack of conditions to undertake the inspection of the certified products. It also covers the three decisions listed in Annex II to the panel request whereby the FBO "RC FRT" refused to issue new certificates to three producers of Ukrainian railway products, based on the impossibility of carrying out the certification procedure in full and the alleged failure to provide documents necessary for certification.

B. The Claims

21. Ukraine submits that the instructions of the FBO "RC FRT" to suspend the certificates of the producers of Ukrainian railway products and the decisions to reject their applications for new certificates, as listed in Annexes I and II to the panel request, demonstrate that the Russian Federation applied its conformity assessment procedures in a manner that is inconsistent with Articles 5.1.1, 5.1.2 and 5.2.2 of the TBT Agreement.

22. At the outset, Ukraine notes that the Russian Federation does not challenge the existence of these measures and the fact that they relate to the application of conformity assessment procedures.

1. Claim under Article 5.1.1 of the TBT Agreement

23. Ukraine submits that the Russian Federation violates Article 5.1.1 of the TBT Agreement by applying its 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 of national origin or originating in any other country, in a comparable situation.

24. In the present case, the FBO "RC FRT" suspended seventy three certificates of the five producers of Ukrainian railway products based on the alleged impossibility to carry out the inspection control of the certified products.The information contained in the FBO "RC FRT" register confirms that similar decisions were not taken with regard to domestic products or products from other WTO Members which have continued to enjoy an unrestricted access to the conformity assessment procedures in the Russian Federation.

25. It follows that by refusing to carry out the inspections and by suspending the certificates on this basis, the Russian authorities applied the conformity assessment procedures to suppliers of products originating in Ukraine in a less favourable manner than that accorded to suppliers of domestic railway products and railway products originating in other countries, thereby violating Article 5.1.1 of the TBT Agreement.

26. Similar considerations apply to the FBO "RC FRT" decisions to reject applications for new certificates under the CU Technical Regulations taken on the basis of the alleged impossibility of carrying out the certification procedure in full or the alleged lack of documents necessary for the certification. These decisions effectively denied the right of the suppliers of Ukrainian railway products to an assessment of conformity under the rules set out in the CU Technical Regulations. At the same time, the number of certificates issued by the FBO "RC FRT" to suppliers of domestic railway products and suppliers of railway products originating in other countries clearly show that they did not face the same obstacles as the suppliers of Ukrainian railway products.

27. It follows that, by refusing to carry out the certification procedure and by rejecting the applications for new certificates, the Russian authorities applied the conformity assessment procedures to suppliers of railway products originating in Ukraine in a less favourable manner than that accorded to suppliers of domestic railway products and railway products originating in other countries, thereby violating Article 5.1.1 of the TBT Agreement.

28. Ukraine notes that, contrary to what has been argued by the Russian Federation, the suppliers of Ukrainian railway products were "in a comparable situation" to suppliers of like products of Russian origin or originating in any other country. Ukraine submits that the assessment of such "comparability" needs to be supplier-specific, meaning that the authorities cannot generally refer to the alleged political situation of the country without examining the situation of each specific supplier.

29. In any event, the Russian Federation’s argument that the situation in Ukraine can hardly be compared to the situation in any other country supplying like products must be dismissed. The Russian Federation’s argument that the inspections could not have taken place due to the alleged "dangerous conditions" in Ukraine is undermined by various factual elements including the fact that, as recognized by the Russian Federation itself, producers located in certain areas of Ukraine were able to receive certificates.

30. Ukraine further notes that the authorities of other countries performing similar functions to that of the FBO "RC FRT" inspectors visited Ukraine during the relevant time period.The fact that the Russian inspectors could safely travel to and within Ukraine is also confirmed by the high number of Russian citizens who entered the territory of Ukraine in that period, including for "official, business and diplomatic" purposes.

2. Claim under Article 5.1.2 of the TBT Agreement

31. Ukraine submits that the Russian Federation violates Article 5.1.2 of the TBT Agreement because, by suspending the existing certificates and by refusing to issue new certificates on the basis of the alleged impossibility to carry out the inspection controls or the alleged lack of the required documents, it applies its conformity assessment procedures with the effect of creating unnecessary obstacles to international trade and more strictly than necessary in order to give itself adequate confidence that railway products originating in Ukraine conform with the applicable technical regulations, in the light of the risk that non-conformity would create.

32. The instructions suspending the existing certificates did not explain the reasons why inspections were not possible. Nor did they indicate what actions could be taken by the relevant producers in order to allow for such inspections to take place. They also did not take into account the possibility of conducting a remote inspection whereby railway products manufactured in Ukraine would be sent to the Russian Federation for inspection.

33. Likewise, the decisions taken by the FBO "RC FRT" to reject applications for new certificates simply indicated that the certification procedure could not be carried out in full or that the company did not provide the documents necessary for the certification, without any further explanation or guidelines for the companies concerned. At the same time, however, the same certification procedure was successfully carried out by the certification bodies of Belarus and Kazakhstan, which shows that the reasons underlying the FBO "RC FRT" decisions were unfounded.

34. Seen from the perspective of the second sentence of Article 5.1.2, the instructions to suspend the certificates and the decisions to reject applications for new certificates also demonstrate that the Russian Federation applied its conformity assessment procedures more strictly than necessary to ensure that railway products originating in Ukraine conform with the applicable technical regulations, taking into account the risk non-conformity would create. With respect to trade-restrictiveness of these measures, it is clear that the manner in which the Russian Federation applied its conformity assessment procedures in the present case has a severe restrictive effect on the imports of railway products originating in Ukraine as products covered by the relevant instructions and decisions can no longer be placed on the Russian market.

35. Moreover, there were reasonably available less trade-restrictive measures which could have been applied by the Russian Federation. Those measures include communicating with the relevant producers in order to ensure conditions for carrying out the inspections and the certification procedure in general, and the possibility to carry out remote inspections. Furthermore, the practice of Belarus and Kazakhstan demonstrates that inspections in Ukraine were possible and were successfully carried out by the authorities of these two countries. This indicates that another alternative measure would have been to entrust the inspections to the authorities of Belarus and Kazakhstan. These measures would have made an equivalent contribution to assuring conformity by allowing the FBO "RC FRT" to effectively carry out the relevant conformity assessment procedures instead of blocking the importation of Ukrainian producers of railway products.

36. It follows that, in those circumstances, the instructions suspending the existing certificates and the decisions rejecting the applications for new certificates were not justified. Given that without valid certificates, railway products cannot be placed on the Russian market, by taking these instructions and decisions, the Russian Federation applied its conformity assessment procedures with the effect of creating unnecessary obstacles to international trade and more strictly than necessary, thereby violating Article 5.1.2 of the TBT Agreement.

3. Claim under Article 5.2.2 of the TBT Agreement

37. Ukraine submits that the Russian Federation violates Article 5.2.2 of the TBT Agreement because the FBO "RC FRT" did not promptly examine the completeness of the documentation of Ukrainian producers applying for certificates and did not inform the applicants in a precise and complete manner of all deficiencies and failed to transmit as soon as possible the results of its assessment under the applicable conformity assessment procedures in a precise and complete manner allowing the applicants to take corrective actions, if necessary.

38. Ukraine notes that the instructions suspending the existing certificates and the decisions refusing to issue new certificates were extremely vague and did not contain explanations as to which specific conditions regarding inspection control were lacking as well as indications as to the actions that should be taken by the producers concerned. Therefore, the FBO "RC FRT" failed to inform the applicants in a precise and complete manner of all deficiencies in their applications and failed to transmit the results of its (preliminary) assessment in a precise and complete manner so that corrective action may be taken if necessary.

39. The Russian Federation submits that one of the letters sent by the FBO "RC FRT" allegedly contained very precise information as to the reasons of the impossibility to carry out the inspection control. However, the explanation provided in that letter according to which the inspection control

could not take place due to "the military operation … on the territory of Donetsk and Luhansk regions" and the alleged restrictions on the entry to Ukraine of Russian male citizens between the age of 16 and 60 does not stand. Furthermore, this explanation also clearly does not place the company in a position to know what corrective actions it could take to remedy the situation. It follows that that letter fails to meet the standard of Article 5.2.2.

40. As to the remaining instructions suspending the existing certificates and decisions refusing the issuance of new certificates, they did not provide any reasons why inspections could not take place or why the certification procedure could not be carried out in full. The Russian Federation does not dispute this fact. Indeed, the only argument made by the Russian Federation in that regard is that "all producers asking for certification were fully aware of the relevant situation and the reasons for the inability to conduct the inspection control". It is unclear what exactly is the "relevant situation" to which the Russian Federation refers. In any event, pursuant to Article 5.2.2, it is for the competent body – that is, the FBO "RC FRT" – to inform the applicants in a precise and complete manner of all deficiencies and the result(s) of its assessment and not to assume that the applicants are "fully aware" of the situation.

41. Finally, the decision annulling the applications for new certificates, due to the alleged failure to provide documents necessary for certification, failed to indicate which specific documents were missing and thus failed to inform the applicant, in a precise and complete manner, of all deficiencies in his applications. This is particularly so given that the same applications were previously accepted by the FBO "RC FRT" without any mention of the missing documents.

IV. CLAIMS CONCERNING THE DECISION OF THE RUSSIAN FEDERATION NOT TO ACCEPT IN ITS TERRITORY THE VALIDITY OF THE CONFORMITY ASSESSMENT CERTIFICATES ISSUED TO UKRAINIAN PRODUCERS IN OTHER CU COUNTRIES

A. The Measure at Issue

42. The third measure challenged by Ukraine is the decision of the Russian Federation not to accept in its territory the validity of the conformity assessment certificates issued to Ukrainian producers in other CU countries. Pursuant to this measure, the Russian Federation imposes two additional requirements, namely: (1) that only products manufactured in the territory of the CU may be subject to certification; and (2) that only entities registered in the same country as the relevant certification body may apply for certification. These requirements are found in the Protocol of the Ministry of Transport No. A 4-3 and the decisions listed in Annex III to the panel request which rely on Technical Regulation No. 001/2011. The Russian Federation uses these two requirements as reasons for not recognizing the validity of certificates issued for railway products of Ukrainian origin by certification bodies in other CU countries.

B. The Claims

43. Ukraine submits that the decision of the Russian Federation not to accept in its territory the validity of the certificates issued to producers of Ukrainian railway products in other CU countries – based on the requirements that (1) only products manufactured in the territory of the CU may be subject to certification and (2) only entities registered in the same country as the relevant certification body may apply for certification –violates Articles 2.1, 5.1.1 and 5.1.2 of the TBT Agreement as well as Articles I:1, III:4 and X:3(a) of the GATT 1994.

1. Claim under Article 2.1 of the TBT Agreement

44. Ukraine submits that the Russian Federation's decision not to accept in its territory the validity of certificates issued to Ukrainian producers by certification bodies in other CU countries violates the MFN and national treatment obligations laid down in Article 2.1 of the TBT Agreement.

45. First, the measure falls within the scope of Article 2.1 of the TBT Agreement. Pursuant to Article 2.1, a WTO Member must ensure that no discriminatory treatment is accorded" in respect of" technical regulations. The Russian Federation agrees that Technical Regulation No. 001/2011 is a "technical regulation" within the meaning of the TBT Agreement. This technical regulation serves as the basis for the Russian Federation's decision not to accept in its territory the validity of the certificates issued to producers of Ukrainian railway products in other CU countries. It follows that

the measure at issue is a measure "in respect of technical regulations" within the meaning of Article 2.1 of the TBT Agreement.

46. Second, the Ukrainian railway products and the Russian railway products and railway products originating in other countries are "like". Since the measure at issue distinguishes between the products exclusively on the basis of the origin, Ukraine submits that railway products from Ukraine must be considered as "like" railway products from the Russian Federation or any other country.

47. Third, the measure at issue accords to Ukrainian railway products treatment less favourable than that accorded to Russian railway products and railway products originating in other countries. Indeed, through its decision not to recognize the validity of certificates issued to Ukrainian producers in other CU countries, based on the requirement that only products manufactured in the territory of the CU may be subject to certification, railway products originating in Ukraine that comply with the requirements of Technical Regulation No. 001/2011 are denied access to the Russian market. This decision violates Article 2.1 because it accords Ukrainian railway products treatment less favourable than that accorded to railway products from the CU countries.

48. Furthermore, the measure at issue accords less favourable treatment to Ukrainian railway products than to Russian railway products. Indeed, while Russian railway products can obtain certification and the certificates obtained for those products in other CU countries are accepted as valid, Ukrainian products are not given the same treatment.

2. Claim under Article 5.1.1 of the TBT Agreement

49. Ukraine submits that the Russian Federation violates Article 5.1.1 of the TBT Agreement because, by requiring that only entities registered in the same country as the relevant certification body may apply for certification, the Russian Federation applies its conformity assessment procedures so as to grant access for suppliers of railway products originating in Ukraine under conditions less favourable than those accorded to suppliers of like products of national origin or originating in any other country, in a comparable situation.

50. This requirement is based on Article 6 of Technical Regulation No. 001/2011, entitled "conformity assessment", which lays down procedures for mandatory certification of railway products designed to ensure the conformity of such products with the relevant safety and technical requirements. It follows that this requirement is subject to Article 5 of the TBT Agreement.

51. This requirement has been used by the Russian Federation in order to refuse recognizing the validity of certificates issued in Belarus for Ukrainian railway products on the basis of an application from an entity registered in the Russian Federation. At the same time, it appears that the Russian Federation does not apply the same requirement to assessing the validity of certificates issued to Russian producers applying through a Russian registered entity in other CU countries. It follows that, by imposing this requirement with regard to suppliers of railway products originating in Ukraine, the Russian Federation grants access for suppliers of those products under conditions less favourable than those accorded to suppliers of railway products of national origin.

52. Moreover, the Russian authorities themselves have issued certificates to suppliers of railway products on the basis of applications from entities registered in other CU countries.

53. As a result, the manner in which the Russian Federation applies the requirement that only entities registered in the same country as the relevant certification body may apply for certification is inconsistent with the national treatment and the MFN obligations imposed by Article 5.1.1 of the TBT Agreement.

3. Claim under Article 5.1.2 of the TBT Agreement

54. Ukraine submits that the Russian Federation violates Article 5.1.2 of the TBT Agreement because, by requiring that only entities registered in the same country as the relevant certification body may apply for certification, the Russian Federation applies its conformity assessment procedures with the effect of creating unnecessary obstacles to international trade.

55. This requirement implies that in order to be able to apply for conformity assessment certificates necessary for placing their railway products on the market of the Russian Federation, suppliers of Ukrainian railway products must establish an entity in the Russian Federation or conclude a contract with an entity acting as a foreign supplier. This, in turn, results in the imposition of additional costs and administrative burdens for the producers of Ukrainian railway products.

56. Ukraine submits that other less trade-restrictive alternative measures were available to the Russian Federation. In particular, the Russian Federation could have accepted that applicants registered in the territory of other CU members may apply for certificates and that such certificates are equally valid. Indeed, since technical requirements applicable to railway products set out in Technical Regulation No. 001/2011 are the same throughout the CU, there is no reason why certificates of conformity with these requirements issued in Belarus or Kazakhstan for an entity established in the Russian Federation would not provide the Russian Federation with the adequate confidence that the products conform with that technical regulation.

4. Claim under Article I:1 of the GATT 1994

57. Ukraine submits that the Russian Federation violates Article I:1 of the GATT 1994 because its decision not to accept in its territory the validity of the certificates issued to Ukrainian producers in other CU countries is based on requirements that discriminate among like products originating in different countries.

58. First, the measure at issue constitutes a requirement affecting the internal sale and offering for sale of railway products because the refusal to recognize the validity of certificates issued in other CU countries implies that railway products originating in Ukraine, for which such certificates have been obtained, cannot be placed on the market of the Russian Federation. Thus, the measure falls within the scope of Article I:1.

59. Second, the railway products originating in Ukraine and the railway products originating in other countries must be treated as "like products" since the measure distinguishes solely on the basis of the origin.

60. Third, the opportunity to obtain certificates necessary for placing railway products on the Russian market constitutes an advantage within the meaning of Article I:1 of the GATT 1994. Therefore, the requirement that only products manufactured in the territory of the CU may be subject to certification under Technical Regulation No. 001/2001, used by the Russian Federation as a reason for not recognizing the certificates issued by certification bodies in other CU countries, grants an advantage to products manufactured in the CU countries.

61. Fourth, that advantage is not granted "immediately" and "unconditionally" to like products originating in Ukraine because the Russian Federation refuses altogether to recognize certificates issued to Ukrainian products in other CU countries.

62. It follows that the Russian Federation’s decision not to accept in its territory the validity of certificates issued to Ukrainian producers in other CU countries is inconsistent with the MFN obligation under Article I:1 of the GATT 1994.

5. Claim under Article III:4 of the GATT 1994

63. Ukraine submits that the Russian Federation violates Article III:4 of the GATT 1994 because its decision not to accept in its territory the validity of the certificates issued to Ukrainian producers in other CU countries accords less favourable treatment to Ukrainian railway products than the treatment accorded to like products of national origin.

64. First, as explained for the purposes of its claim under Article I:1 of the GATT 1994, the measure at issue constitutes a requirement affecting the internal sale and offering for sale of railway products and railway products originating in Ukraine and Russian railway products are to be considered as "like".

65. According to the third measure at issue, only certificates issued for products manufactured in the CU to applicants located in the same country as the relevant certification body may be recognized in the Russian Federation. This means that Russian railway producers may use certificates obtained in other CU countries in the Russian Federation, while this is not the case for Ukrainian producers. Hence, the Russian Federation treats suppliers of railway products originating in Ukraine less favourably than suppliers of domestic railway products and thus violates the national treatment obligation under Article III:4 of the GATT 1994.

6. Claims under Article X:3(a) of the GATT 1994

66. Ukraine submits that the Russian Federation violates Article X:3(a) of the GATT 1994 because Technical Regulation No. 001/2011, read together with the Protocol of the Ministry of Transport No. A 4-3 and the decisions listed in Annex III to the panel request, has not been administered in a uniform, impartial and reasonable manner.

67. Ukraine submits that Technical Regulation No. 001/2011, read together with the Protocol of the Ministry of Transport No. A 4-3 and the decisions listed in Annex III to the panel request, falls within the scope of Article X:1, and thus also within the scope of Article X:3(a). Technical Regulation No. 001/2011 is a regulation affecting the sale of railway products. It affects "an unidentified number of economic operators, including domestic and foreign producers", and therefore it is a measure of general application.

68. The Russian Federation applies the two additional requirements solely with regard to Ukrainian railway products with certificates issued in other CU countries. It does not apply these requirements in the same manner to products manufactured in the Russian Federation or to products originating in countries other than Ukraine. In light of the above, Ukraine submits the following.

69. First, Ukraine submits that the measure at issue is not administered in a uniform manner. Indeed, the Russian Federation has granted certificates to producers located in the European Union despite the requirement that only products manufactured in the CU may be subject to certification. Likewise, despite the requirement that only entities registered in the same country as the relevant certification body may apply for certification, the FBO "RC FRT" granted certificates to Kazakh and Belarusian producers applying through Kazakh and Belarusian entities and recognized certificates issued by the Kazakh certification body to Russian producers applying through Russian entities. At the same time, the Russian Federation refuses to recognize the validity of the certificates of similarly situated Ukrainian producers.

70. Second, Ukraine claims that the measure at issue is not administered in an impartial manner. Since the two requirements are applied only with respect to products originating in Ukraine in order to deny the validity of the certificates issued to Ukrainian railway products by certification bodies in other CU countries, the manner in which the Russian authorities has administered the measure has not been impartial.

71. Third, Ukraine submits that the measure at issue is not administered in a reasonable manner. Indeed, the fact that the two requirements have been raised only in some cases but not in others clearly shows that the measure has been administered by the Russian authorities in an unreasonable manner in order to discriminate against railway products from Ukraine.

72. It follows that the measure has not been administered in a uniform, impartial and reasonable manner contrary to Article X:3(a) of the GATT 1994.

ANNEX C-2

SECOND PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE

I. THE SYSTEMATIC PREVENTION OF UKRAINIAN RAILWAY PRODUCTS FROM BEING IMPORTED INTO THE RUSSIAN FEDERATION (FIRST MEASURE)

A. Ukraine has shown the existence of the first measure

1. The first measure at issue is the systematic prevention of Ukrainian railway products from being imported into the Russian Federation. This measure is unwritten. Its content is the prevention of the importation of Ukrainian railway products into the Russian Federation. That measure has a systematic character and is attributable to the Russian Federation. Ukraine has proven the existence of each of these elements.

2. Ukraine puts forth that the systematic prevention of Ukrainian railway products from being imported into the Russian Federation started gradually during the first half of 2014 and intensified in June 2014, meaning around the time of Ukraine's final signature of the Association Agreement with the European Union, which provides for the creation of an EU – Ukraine Deep and Comprehensive Free Trade Area/DCFTA.

3. Evidence showing the existence of this measure includes not only the individual decisions listed in Annexes I to III to the panel request but also the systematic suspension of certificates, refusals to issue new certificates and non-recognition of certificates issued in other Customs Union ("CU") countries as shown by the drastic decrease in the number of certificates held by Ukrainian producers; the substantial decrease in imports of Ukrainian railway products into the Russian Federation and the fact that the systematic prevention only concerns railway products originating in Ukraine and not in other countries.

4. Under the CU Customs Code, products cannot be released for internal consumption if they do not comply with the applicable prohibitions and restrictions (including, among others, non-tariff regulations such as technical regulations). Hence, documents showing compliance with applicable technical regulations, meaning conformity assessment certificates, must be filed with the customs declaration and presented to the Russian customs authorities in order to release the goods from customs and place them on the Russian market. It follows that railway products cannot be imported if no certificates are submitted at the time of importation.

5. The Russian Federation manifestly errs in alleging that the decrease in imports from Ukraine is due to a decrease in production. In fact, the available evidence shows that production actually decreased as a result of the first measure at issue. First, railway products are (primarily) goods that are made to order, meaning that production only starts after an order has been placed. Therefore, where Ukrainian producers are prevented from selling their products on the Russian market due to their lack of certificates, production naturally decreases. Second, Ukrainian railway companies have confirmed, in several public statements, that production decreased as a result of the measure at issue. Third, the Russian Federation wrongly argues that the decrease in production is due to an "industrial crisis" in Ukraine, the evidence provided being irrelevant.

6. Furthermore, the Russian Federation fails to substantiate its allegation that any increase in the import share of European Union and Chinese railway products and the substantial decrease in the import share of Ukrainian railway products result from the fact that "the products imported from the [European Union] and China to the Russian Federation are absolutely different from the products exported from Ukraine." In any event, most of the products mentioned by the Russian Federation in support of this allegation overlap with Ukrainian railway products.

7. The systematic nature of the measure means that the prevention from importation is "done according to a system, plan or organized method or effort" and is distinct from "sporadic, unrelated applications of individual" measures. Ukraine has shown the systematic nature of this measure. First, in accordance with the panel's findings in *Russia – Tariff Treatment*, in some cases it may be possible to infer the existence of systematic activity from observed repetition, where the repetition is so substantial as to render it more likely than not that an underlying system exists. In this case, Ukrainian railway producers effectively held 83% fewer certificates at the date of the establishment of the Panel than they did before the start of the systematic prevention. It follows that those producers enjoyed less than one fifth of the export opportunities available to Ukrainian producers prior to the start of the first measure at issue. Similarly, the number of producers holding certificates dropped by 86%. Thus, less than one fifth of the Ukrainian railway producers could still benefit from the export opportunities. Second, Ukraine submitted other evidence showing the existence of an underlying system, plan or organized method or effort, in particular the fact that there exists "some objective connection or relationship between the identified instances". In fact, the systematic prevention of Ukrainian railway products from importation into the Russian Federation is achieved through all possible means. The reason given by the Russian authorities for suspending certificates and rejecting applications for new certificates is always the same. Furthermore, the Russian Federation granted certificates only to producers located in certain regions of Ukraine identified at paragraph 172 of Ukraine's first written submission. In addition, Ukraine has shown that the measure at issue forms part of a set of trade restrictive measures taken by the Russian Federation in connection with the conclusion by Ukraine of the Association Agreement with the European Union.

8. Finally, the Russian Federation wrongly alleges that Ukraine should show that all Ukrainian exports are prevented from entering the Russian Federation and incorrectly maintains that the fact that some Ukrainian railway products are still being imported implies that the prevention of importation cannot be "systematic". However, the "systematic" character of a measure does not require that importation is prevented "in each and every situation".

B. The first measure violates Article I:1 of the GATT 1994

9. The Russian Federation contests Ukraine's claim under Article I:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") on three grounds: (i) Ukraine has not shown that the measure at issue is a norm of general application; (ii) Ukraine has not established that Ukrainian railway products are like railway products of third countries; and (iii) Ukraine has failed to show that Ukrainian railway products were not granted an advantage as compared to railway products of third countries.

10. First, the Russian Federation ignores the fact that the Panel's examination of Ukraine's claims under Articles I:1, XI:1 and XIII:1 of the GATT 1994 presupposes that the Panel has concluded that the Russian Federation's systematic prevention of Ukrainian railway products from being imported into the Russian Federation exists. If the Panel finds that the measure exists, it concludes that the Russian Federation applies a rule in connection with importation falling within the scope of Article I:1 of the GATT 1994. Second, if the Panel confirms that the measure exists and therefore makes an origin-based distinction, it may be presumed, for the purposes of Article I:1 of the GATT 1994, that the products are like. The fact that the measure at issue is an unwritten measure does not preclude that that measure is found to make a *de jure* distinction between products of different origins. Third, the Russian Federation's argument that Ukrainian producers did not enjoy the advantage of importation into the territory of the Russian Federation due to the fact that they did not "comply with the relevant requirements of Russian law on certification" is likewise irrelevant if the Panel concludes that the Russian Federation's systematic prevention of Ukrainian railway products from being imported into the Russian Federation exists.

C. The first measure violates Article XI:1 of the GATT 1994

11. The subject of Ukraine's claim under Article XI:1 of the GATT 1994 is the systematic prevention of railway products originating in Ukraine from being imported into the Russian Federation. That claim is targeted at neither the technical requirements laid down in the Technical Regulations "On the safety of railway rolling stock" No. 001/2011; "On the high-speed rail safety" No. 002/2011; and "On the safety of rail transport infrastructure" No. 003/2011 ("CU Technical Regulations") nor the individual decisions suspending certificates, rejecting applications for new certificates or failing to recognise certificates issued in other CU countries. The Russian Federation therefore errs in arguing that the measure is neither a restriction nor a prohibition "on the importation" of goods because the requirement of a valid certificate is an internal measure applicable to both imported and domestic railway products subject to mandatory certification under the law applicable in the Russian Federation.

12. In that regard, Ukraine refers to the panel report in *India – Autos*. That report explained that the scope of Article XI:1 is sufficiently broad so that "any form of limitation imposed on, or in relation to importation constitutes a restriction on importation within the meaning of Article XI:1." That panel added that the scope of Article XI:1 is not strictly limited to border measures because any condition that has a "limiting effect" on imports will be inconsistent with Article XI:1. Ukraine considers it relevant also that the Appellate Body in *Argentina – Import Measures* has held that "[t]he use of the word `quantitative' in the title of Article XI of the GATT 1994 informs the interpretation of the words `restriction' and `prohibition' in Article XI:1, suggesting that the coverage of Article XI includes those prohibitions and restrictions that limit the quantity or amount of a product being imported or exported." Ukraine has shown that Ukrainian railway products subject to mandatory certification are systematically prevented from importation into the Russian Federation. Therefore, that measure imposes a limitation on the quantity of imports of Ukrainian railway products into the Russian Federation.

D. The first measure violates Article XIII:1 of the GATT 1994

13. Ukraine submits that the scope of application of Article XIII:1 of the GATT is not limited to restrictions authorised as exceptions to the general prohibition of restrictions under Article XI:1. Ukraine has demonstrated that importation from other countries is not similarly restricted. For instance, European and Kazakh producers currently hold more valid certificates than they did before the start of the systematic prevention. It follows that the Russian Federation violates Article XIII:1 of the GATT 1994.

II. THE INSTRUCTIONS SUSPENDING THE EXISTING CERTIFICATES AND THE DECISIONS REFUSING THE ISSUANCE OF NEW CERTIFICATES (SECOND GROUP OF MEASURES)

A. The measures violate Article 5.1.1 of the TBT Agreement

14. Ukraine submits that the instructions of the Federal Budgetary Organization "Register of Certification on the Federal Railway Transport" ("FBO "RC FRT"") to suspend the certificates of the producers of Ukrainian railway products and the decisions to reject their applications for new certificates, as listed in Annexes I and II to the panel request, are inconsistent with Article 5.1.1 of the Agreement on Technical Barriers to Trade ("TBT Agreement").

15. Taking into account the differences in the wording between Article 2.1 and Article 5.1.1 of the TBT Agreement, Ukraine considers that the two-step test developed in the specific context of Article 2.1 of the TBT Agreement is not directly transposable to Article 5.1.1 of the TBT Agreement. In particular, any second step in the context of claims of *de facto* discrimination under Article 5.1.1 of the TBT Agreement should necessarily be circumscribed by the objective pursued by conformity assessment procedures, namely to ensure that products conform with technical regulations.

16. Ukraine submits that the Russian Federation violates Article 5.1.1 of the TBT Agreement because it has applied conformity assessment procedures so as to grant access for suppliers of railway products originating in Ukraine under conditions less favourable than those accorded to suppliers of like products of Russian origin or originating in any other third country, in a comparable situation.

17. The Russian Federation's rebuttal is limited to asserting that Ukraine failed to demonstrate the likeness of the products at issue and claiming that suppliers of Ukrainian railway products and suppliers of railway products originating in other countries are not in "a comparable situation".

18. First, the instructions suspending the certificates and the decisions rejecting applications for new certificates distinguish on the basis of the location of the producers concerned by those measures, and thus, the origin of the products. Indeed, certificates were suspended and applications for new certificates were rejected because the conditions for conducting inspections in Ukraine were, allegedly, lacking. That reason is therefore unrelated to the characteristics of the products covered by the measures. It is based on the fact that the producers concerned are located in Ukraine. Due to that origin-based distinction, likeness may be presumed.

19. Second, in all the instructions and decisions at issue (except one), the reason given for not carrying out the inspections was the alleged impossibility of carrying out the inspection as a result of the situation in Ukraine. Therefore, those measures *de jure* discriminate against Ukrainian suppliers of railway products. It follows that the question as to whether the Panel should follow a two-step analysis similar to the one developed by the Appellate Body in the context of Article 2.1 of the TBT Agreement, appears to be irrelevant. Indeed, the Appellate Body expressly referred to the legitimate regulatory distinction test in case of *de facto* discrimination. Therefore, the Panel should only examine whether, through the measures at issue, the conformity assessment procedures have been applied so as to grant access for suppliers of Ukrainian railway products under different conditions to the detriment of those suppliers in comparison to suppliers of like products of Russian origin or suppliers of like products originating in any other Members, in a comparable situation. In that respect, the Russian Federation's rebuttal is limited to arguing that there is no violation of Article 5.1.1 of the TBT Agreement because "the situation in Ukraine that made the completion of certification procedure impossible can hardly be compared to situation in any other country supplying like products to the Russian Federation." To the extent that what is at issue is whether suppliers are in a comparable situation, the Panel is required to examine whether, in the light of the arguments and evidence presented by both parties, it can be concluded that the Ukrainian suppliers at issue and Russian suppliers and suppliers in other countries are in a "comparable situation".

20. Ukraine underlines that the reason(s) invoked by the Russian Federation to argue that the situation of Ukrainian suppliers was not comparable to the situation of suppliers in other countries is provided by the Russian Federation *ex post*. The general explanation about alleged security concerns that is advanced by the Russian Federation in these proceedings casts serious doubts as whether the decisions taken by the Russian Federation were truly motivated by those concerns.

21. In any case, the Russian Federation's assertions about security concerns in Ukraine and entry restrictions for Russian citizens into Ukraine are baseless. In that regard, Ukraine has demonstrated that the Ukrainian authorities imposed no such restrictions. With regard to the alleged general uncertainty concerning the safety conditions in the territory of Ukraine, the Russian Federation has relied mainly on various press articles. Ukraine has shown that the sporadic events described in those articles are irrelevant because they took place in the cities of Odessa and Kyiv (where none of the producers affected by the suspensions of certificates and the rejections of applications listed in Annexes I and II to the panel request are located) or took place outside of the relevant time period. The Russian Federation has relied also on the travel advice of the Russian Ministry of Foreign Affairs. However, Ukraine has established that the probative value of that document is questionable. Ukraine has also shown why the Declaration by the employees of the FBO "RC FRT" refusing to go to Ukraine and the letters sent by Ukrainian producers in which the latter offered to ensure the safety of Russian inspectors cannot support the Russian Federation's position. Putting aside the questionable probative value of the abovementioned declaration, in fact, that declaration confirms that the management of the FBO "RC FRT" considered it safe for Russian inspectors to travel to Ukraine for carrying out the required inspection controls. Ukraine has explained that the letters of Ukrainian producers were sent in response to the letters from the FBO "RC FRT" suspending the relevant certificates due to the alleged lack of conditions for carrying out the inspections. As a result, those letters may not be used as evidence of the recognition of risks of the safety of inspectors. Ukraine has also demonstrated that there is no basis for the Russian Federation's argument that, by travelling to Ukraine, FBO "RC FRT" inspectors would risk being sentenced to eight years in prison. Finally, the absence of entry restrictions is confirmed by the high number of Russian citizens travelling to

Ukraine during the period concerned (2014-2017) and the fact that during that period, inspectors from other countries visited Ukraine and successfully performed the relevant inspections.

B. The measures violate Article 5.1.2 of the TBT Agreement

22. Ukraine submits that, under Article 5.1.2 of the TBT Agreement, the relevant test is similar to that under Article 2.2 of the TBT Agreement. It follows that the Panel should assess the necessity of the obstacles to international trade resulting from the application of the conformity assessment procedures at issue by considering: (i) the degree of contribution made by the measure to the objective of achieving a positive assurance of conformity with the relevant requirements of a technical regulation or standard; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective of achieving a positive assurance of conformity with the relevant requirements of a technical regulation or standard (thus, meaning non-conformity). As a conceptual tool, the Panel may also compare the challenged measure with possible alternative, reasonably available measures that are less trade restrictive and would make an equivalent contribution to the objective of achieving a positive assurance of conformity with the relevant requirements of a technical regulation or standard, taking into account the risks non-fulfilment of achieving a positive assurance of conformity (and not of any other legitimate objective) would create. Furthermore, in assessing whether the alternative measure makes an "equivalent" contribution, there is a margin of appreciation.

23. At the same time, the second and third sentences of Article 2.2 of the TBT Agreement and the second sentence of Article 5.1.2 of the TBT Agreement do not fully correspond and a proper interpretation of Article 5.1.2 of the TBT Agreement must take into account those differences. First, a complainant must show a violation of the requirements in both sentences of Article 5.1.2 of the TBT Agreement in order for a panel to find that a measure violates that provision. Second, under the second sentence of Article 5.1.2 of the TBT Agreement, it is necessary to examine whether, by preparing, adopting or applying the conformity assessment procedure at issue, a WTO Member is seeking to obtain "adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks non-conformity would create". In that regard, Ukraine considers that where a WTO Member suspends conformity assessment certificates or rejects applications for new certificates on grounds other than the lack of the conformity of the products with the applicable technical regulations or other than the imperative conditions without which conformity may not be reviewed, that Member applies a conformity assessment procedure with a view to or with the effect of creating unnecessary obstacles to international trade. Under Article 5.1.2 of the TBT Agreement, WTO Members are not free to set any level of confidence as regards the risk that goods might not satisfy the relevant requirements in technical regulations or standards. The obligations found in Article 5.1.2 of the TBT Agreement apply only, in accordance with Article 5.1 of the TBT Agreement, "in cases where a positive assurance of conformity with technical regulations or standards is required". Furthermore, the second sentence of Article 5.1.2 of the TBT Agreement refers to "adequate confidence that products conform with the applicable technical regulations or standards". It follows that, if it is shown that the rejection of applications for certificates and the suspension of existing certificates make no contribution to that objective, those measures violate Article 5.1.2 of the TBT Agreement. In the present case, the grounds for the FBO "RC FRT" decisions are completely unrelated to the conformity of the products with the applicable technical regulations and to the imperative conditions without which conformity may not be reviewed. Therefore, the measures listed in Annexes I and II to the panel request are trade restrictive measures that make no contribution to the objective of achieving adequate confidence that Ukrainian railway products conform with the applicable technical regulations.

24. The Russian Federation's rebuttal of Ukraine's claim under Article 5.1.2 of the TBT Agreement is limited to rejecting Ukraine's arguments as regards the availability of less restrictive alternative measures. Ukraine therefore understands that the Russian Federation does not contest the other elements of Ukraine's *prima facie* case of a violation of Article 5.1.2 of the TBT Agreement.

25. First, the Russian Federation has not shown why on-site inspections were required and therefore remote inspections were unavailable for all of the producers whose certificates were suspended or whose applications were rejected. The Russian Federation argues that under Russian law, "the remote inspections were available in exceptional situations and were not applied for high-danger goods" and that "the certification body also took into account the amount of objects subject to inspection and the level of their potential danger". However, Ukraine has demonstrated that the Russian Federation conducted remote inspections for Ukrainian products under the CS FRT Rules and the CU Technical Regulations. Ukraine has also rebutted the allegation that on-site inspections were required because the products covered by the instructions and decisions were large size products. In fact, the instructions and decisions covered both large size and other than large-size products. Furthermore, the Russian Federation carried out remote inspections for large size products. Finally, Ukraine has shown that the Russian Federation may not rely on the fact that there have allegedly been issues of non-conformity and consumers' complaints regarding the products covered by the instructions and decisions. The evidence before the Panel shows that those issues of non-conformity and consumers' complaints only relate to a small number of the products covered by the instructions and decisions. It follows that remote inspections were reasonably available to the Russian Federation as a less trade restrictive alternative measure.

26. Second, Ukraine suggests that the Russian Federation could have entrusted inspections to the authorities of the Republic of Belarus and Kazakhstan, which regularly carried out inspections in Ukraine. No provision of the relevant CU Technical Regulations precludes the possibility of entrusting the conduct of an inspection to an accredited certification body from another CU member included in the Unified Register of Certification Bodies and Testing Laboratories of the Customs Union ("certification body"). In fact, the Treaty on the Eurasian Economic Union ("EAEU Treaty") explicitly provides for the possibility that one member state accredits a conformity assessment authority registered in another member state.

27. Third, Ukraine argues that the Russian Federation could have accredited non-Russian inspectors in order to carry out inspections in Ukraine as the relevant rules contain no limitation as to the nationality of inspectors.

C. The measures violate Article 5.2.2 of the TBT Agreement

28. Ukraine submits that the Russian Federation violates Article 5.2.2 of the TBT Agreement because (i) through the decisions refusing the issuance of new certificates, the FBO "RC FRT" failed to promptly examine the completeness of the documentation submitted by the applicants and to inform them in a precise and complete manner of all deficiencies in their applications (second obligation of Article 5.2.2 of the TBT Agreement); and (ii) through the instructions suspending the existing certificates and the decisions refusing the issuance of new certificates, the FBO "RC FRT" failed to transmit the results of the assessment in a precise and complete manner that would allow the applicants to take corrective actions (third obligation of Article 5.2.2 of the TBT Agreement).

29. The second obligation of Article 5.2.2 of the TBT Agreement applies when the competent body receives an application. Ukraine interprets the phrase "when receiving an application", taking into account the immediate context found in the first sentence of Article 5.2.2 of the TBT Agreement, to refer to any situation in which a request is made for a conformity assessment procedure to be processed. The third obligation applies throughout conformity assessment procedure because it requires the competent body to transmit the results of the "assessment" to the applicant. It follows that the phrase "the results of the assessment" must be interpreted to mean the results of the overall assessment made under the conformity assessment procedure as well as the results of the assessment made with respect to each procedure that is a necessary element of the conformity assessment procedure. Furthermore, that phrase covers also the circumstances in which not all procedures forming part of the overall conformity assessment procedure may have been completed. Article 5.2.2 of the TBT Agreement requires that the transmission must be done "as soon as possible" and "in a precise and complete manner". It follows that the competent body is required to communicate the results of the assessment quickly and without any undue delay. Moreover, the information transmitted to the applicant must be complete and accurate so that the applicant is put in a position that he can make an informed decision as to whether and, if so, what corrective action is required. Such corrective action might take different forms. Depending on the circumstances at issue that action might consist of correcting deficiencies in the application, providing additional documents or altering the product in order to ensure its conformity with the applicable technical regulations or standards. Ukraine

submits that the specific obligations imposed by Article 5.2.2 of the TBT Agreement equally apply to conformity assessment procedures carried out after a certificate of conformity has been issued.

30. Regarding the three decisions refusing the issuance of new certificates, the FBO "RC FRT" did not comply with the second obligation under Article 5.2.2 of the TBT Agreement. The language of the first and second decisions shows that the FBO "RC FRT" did not examine the completeness of the documentation as it decided to return the applications "without consideration". As regards the third decision, Ukraine submits that the mere listing of the provision containing *all* of the required documents is insufficient in order to inform the applicant, "in a precise and complete manner", of the specific documents claimed to be missing.

31. Ukraine submits that the fourteen instructions suspending the existing certificates of Ukrainian producers violate the third obligation under Article 5.2.2 of the TBT Agreement. Each of those instructions, informing the applicants of the results of the FBO "RC FRT"'s assessment that inspections could not take place, referred to the impossibility of carrying out the inspection control as the reason for suspending the relevant certificates. The instructions suspending the certificates "due to the lack of conditions for inspection control" should inform the affected Ukrainian producers of the results of the producer-specific assessment which led the FBO "RC FRT" to conclude that there were "no conditions for inspection control" for those producers. Information that is not relevant to a specific producer does not qualify as "the results of the assessment" within the meaning of Article 5.2.2 of the TBT Agreement because it does not place that producer in a position to know why its certificates have been suspended or what corrective action(s) may be taken.

32. The three decisions of the FBO "RC FRT" rejecting the applications for new certificates also failed to transmit to the applicants the results of the FBO "RC FRT"'s assessment in a precise and complete manner so that corrective action could be taken if necessary. Two of those decisions referred to the impossibility "to carry out the certification procedure in full" as the reason for rejecting the applications, and therefore failed to communicate the results of its assessment in a sufficiently precise or complete manner. They contained no explanation of why the FBO "RC FRT" found it to be impossible to carry out the certification procedure in full. In any event, the *ex post* explanation of the Russian Federation concerning the alleged impossibility to carry out on-site inspections simply does not stand taking into account that the producers concerned applied for certification under schemes which do not require the FBO "RC FRT" inspectors to visit the producer's facilities. The third decision was based on the alleged lack of documents necessary for certification. Given that the relevant applications have been submitted under a different provision of CU Technical Regulation No. 003/2011, namely under Article 6(21), and the fact that they had been accepted by the FBO "RC FRT" with reference to that provision in its earlier decisions, Ukraine considers that a simple reference to Article 6(28) of the same technical regulation did not inform the applicant "in a precise and complete manner" of the results of the competent body's assessment so as to know what corrective action to take.

III. THE DECISION OF THE RUSSIAN FEDERATION NOT TO ACCEPT IN ITS TERRITORY THE VALIDITY OF THE CONFORMITY ASSESSMENT CERTIFICATES ISSUED TO UKRAINIAN PRODUCERS IN OTHER CU COUNTRIES (THIRD MEASURE)

A. Introduction

33. The Russian Federation argues that there is no "decision" not to recognize the certificates issued to Ukrainian producers in other CU countries and that Ukrainian railway products for which certificates were issued by certification bodies in other CU countries can "freely circulate in the EAEU". However, the evidence provided by the Russian Federation does not support these assertions and is contradicted by Ukraine's own evidence. The documents submitted by Ukraine demonstrate that the Russian Federation's decision is based on two additional requirements, namely that only products manufactured in the CU may be subject to certification and that only entities registered in the same country as the relevant certification body may apply for certification.

B. The third measure violates Article 2.1 of the TBT Agreement

34. Ukraine submits that the decision of the Russian Federation not to accept in its territory the validity of the certificates issued to producers of Ukrainian railway products in other CU countries violates Articles 2.1 of the TBT Agreement.

35. The Russian Federation argues that that decision falls outside the scope of Article 2.1 of the TBT Agreement because it "is not a technical regulation". However, Ukraine has shown that that measure is "in respect of" a technical regulation such as CU Technical Regulation No. 001/2011 which serves as the basis for the Russian Federation's decision not to accept in its territory the validity of the certificates issued to producers of Ukrainian railway products in other CU countries. It follows that the measure at issue is a measure "in respect of technical regulation".

36. The third measure at issue is based on the fact that the Russian Federation recognizes only certificates issued for (i) products manufactured in the territory of the CU and (ii) upon application from an entity registered in the same country as the relevant certification body. Those two criteria are applied by the Russian Federation only with regard to producers of Ukrainian railway products. Therefore the measure distinguishes on the basis of origin. As a consequence, the likeness of the railway products concerned may be presumed.

37. The Russian Federation submits that none of the instruments mentioned in the description of the third measure "contain[s] any 'additional requirements' based on the origin of Ukrainian producers". Ukraine has established that, while the text of CU Technical Regulation No. 001/2011 does not require that only railway products manufactured in the territory of the CU may be subject to certification, the Russian Federation nonetheless applies this requirement to Ukrainian producers. As a result of that additional requirement, the Russian Federation declares the certificates issued for Ukrainian railway products in other CU countries to be invalid. As a consequence, those products cannot be placed on the Russian market. At the same time, the certificates obtained for Russian railway products in other CU countries are accepted as valid, and thus, those products have unrestricted access to the Russian market. Since the distinction made by that additional requirement is based solely on the origin of railway products, the measure at issue discriminates *de jure* against the imported products. There is thus no need to examine whether or not the detrimental impact of that measure on imports stems exclusively from a legitimate regulatory distinction.

38. The Russian Federation also alleges that the actual reason for not recognising the Belarusian certificates issued to Ukrainian producers was the lack of certificates for the components of the products concerned. Putting aside the fact that this is yet another *ex post* explanation which was never mentioned by the Russian authorities, Ukraine has shown that the Belarusian certification body in April 2015 terminated the two certificates due to some editorial errors and not because of the alleged lack of certificates of components.

39. Finally, Ukraine submits that, by rejecting the validity of certificates issued to Ukrainian producers, the Russian Federation accords to railway products imported from Ukraine treatment less favourable than the treatment accorded to railway products originating in other countries. First, the additional requirement that only products manufactured in the territory of the CU may be subject to certification in and of itself discriminates between Ukrainian railway products and railway products from other CU countries. Second, the manner in which this requirement has been applied by the Russian Federation, namely only with respect to railway products from Ukraine, discriminates between products imported from Ukraine and products imported from any other country. Since the distinction made by that additional requirement is based solely on the origin of railway products, it *de jure* discriminates against Ukrainian railway products. Thus, the Panel's analysis may end here.

C. The third measure violates Article 5.1.1 of the TBT Agreement

40. The Russian Federation argues that Ukraine failed to demonstrate the likeness of the products at issue and failed to demonstrate that the measure violates the national treatment and the MFN obligations under Article 5.1.1 of the TBT Agreement.

41. Ukraine submits that if the Panel finds that Ukrainian railway products are like Russian railway products and railway products originating in other countries for the purposes of Article 2.1 of the TBT Agreement, the products would also be like under Article 5.1.1 of the TBT Agreement.

42. Under Article 5.1.1 of the TBT Agreement, Ukraine does not take issue with the additional requirement concerning the manufacturing place of railway products (challenged under Article 2.1 of the TBT Agreement) but with the second additional requirement concerning the location of the entity applying for certification. The text of Article 6(9) of CU Technical Regulation No. 001/2011 does not expressly require the applicant for certification to be registered in the same country as the relevant certification body. However, the Russian Federation nonetheless applies this requirement to producers of Ukrainian railway products in order not to accept the validity of their certificates obtained in other CU countries. The same requirement is not applied to assessing the validity of certificates issued to Russian producers. Furthermore, the Russian authorities themselves have issued certificates to suppliers of railway products on the basis of applications from entities registered in other CU countries. It follows that the third measure is inconsistent with the MFN and the national treatment obligations imposed by Article 5.1.1 of the TBT Agreement.

D. The third measure violates Article 5.1.2 of the TBT Agreement

43. As a result of the Russian Federation's decision not to accept in its territory the validity of certificates issued to Ukrainian producers in other CU countries on the basis of the requirement that only entities registered in the same country as the relevant certification body may apply for certification, the Russian Federation effectively prevents Ukrainian railway products covered by those certificates from being imported into the territory and placed on the market of the Russian Federation. This measure therefore severely restricts trade of those Ukrainian products and violates Article 5.1.2 of the TBT Agreement.

44. The Russian Federation argues that the absence of a requirement according to which only entities registered in the same country as the relevant certification body may apply for certification "would create a risk of non-compliance with the Technical Regulation No. 001/2011". According to Ukraine, no such risk exists because the certificates received by Ukrainian producers in other CU countries were issued under CU Technical Regulation No. 001/2011, meaning that the products covered by those certificates complied with the requirements of that technical regulation. Furthermore, Ukraine has demonstrated that there are less trade restrictive alternative measures available to the Russian Federation which would make an equivalent contribution to giving positive assurance that the relevant requirements of CU Technical Regulation No. 001/2011 are fulfilled. Those measures include accepting that applicants registered in the territory of other CU countries may apply for certification and that certificates obtained by those applicants are valid.

E. The third measure violates Article I:1 of the GATT 1994

45. In response to Ukraine's claim under Article I:1 of the GATT 1994, the Russian Federation argues that Ukraine has failed to demonstrate that the products at issue are "like". The decision of the Russian Federation not to accept in its territory the validity of the certificates issued to producers of Ukrainian railway products in other CU countries is based on the fact that the Russian Federation recognizes only certificates issued for (i) products manufactured in the territory of the CU and (ii) upon application from an entity registered in the same country as the relevant certification body. Both requirements are expressly mentioned in the text of the relevant instruments. Hence, the third measure does not distinguish between products based on the physical characteristics or end-uses of the products *per se*. It follows that the likeness of the railway products concerned has been established.

F. The third measure violates Article III:4 of the GATT 1994

46. By arguing, in response to Ukraine's claim under Article III:4 of the GATT 1994, that the measure does not modify the conditions of competition, the Russian Federation ignores the fact that, according to the third measure at issue, only certificates issued for products manufactured in the CU to applicants located in the same country as the relevant certification body may be recognized in the Russian Federation. This means that Russian railway producers can use certificates obtained in other CU countries in the Russian Federation, while this is not the case for Ukrainian producers. Hence, the Russian Federation treats suppliers of railway products originating in third countries less favourably than suppliers of domestic railway products.

G. The third measure violates Article X:3(a) of the GATT 1994

47. Finally, Ukraine has demonstrated that, for the purposes of its claim under Article X:3(a) of the GATT 1994, the FBO "RC FRT" has granted a certificate to a Polish producer who had applied through a company located in Kazakhstan. Moreover, the Russian Federation has granted certificates of conformity to Kazakh and Belarusian producers applying through Kazakh and Belarusian entities. The Russian Federation has also recognized certificates issued by the Kazakh certification body to Russian producers applying through Russian entities. This clearly demonstrates that the two requirements applied by the Russian Federation in order not to recognize the validity of certificates issued to Ukrainian producers in other CU countries are not equally applied with respect to the Russian producers or producers from other third countries. It is also clear that, in light of the language used in the documents listed in Annex III to the panel request, the actions taken in those documents have a significant impact on the overall administration of the measure towards Ukrainian producers, and not simply on the outcome of a single case. It follows that the Russian Federation administers the third measure at issue in a non-uniform, non-impartial and unreasonable manner thereby violating Article X:3(a) of the GATT 1994.

IV. CONCLUSIONS

48. For the reasons set out above, Ukraine respectfully requests the Panel to find that the measures at issue are inconsistent with the TBT Agreement and the GATT 1994.

ANNEX C-3

FIRST PART OF EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION

1. INTRODUCTION

1. In this dispute, Ukraine challenges several aspects of Russia's legal framework as well as the decisions and instructions of Russian authorities relating to certification process.

2. Ukraine's claims are based on an erroneous understanding of the WTO law and an intentional misrepresentation of Russian legislation, revealing Ukraine's intent to justify under the WTO law import into the Russian Federation market of unsafe and substandard goods. The claims raised by Ukraine in this dispute encroach upon the right of a Member enshrined in the WTO law to ensure quality of the imports to its territory.

2. FAILURE OF UKRAINE TO FULFIL THE REQUIREMENTS OF ARTICLE 6.2 OF THE DSU

3. Russia argues that Ukraine failed to satisfy the requirements of Article 6.2 of the DSU. Ukraine failed to link the measures at issue and the legal basis, since the provisions of the covered agreements allegedly being violated are listed in Section IV "Legal Basis for the Complaint" of the Panel Request without any reference to or link with the measures challenged listed in Section II of the Panel Request.

4. Reference to the "railway products" and "other railroad equipment" as goods at issue is too vague and does not allow to identify the specific measures being challenged. "Railway products" and "other railroad equipment" are not defined in the Harmonized System of Nomenclature, they are not terms that are defined in any authoritative dictionary and not commercial terms that are readily understandable in the international trade. Moreover, Articles 2.1, 5.1.1 of the TBT Agreement as well as Articles I:1, III:4, X:3(a), XIII:1 of the GATT refer to the "like products", thus in order to understand the problem at issue the product at issue is to be identified.

5. In paragraph 3 of Section II of the Panel Request Ukraine alleges that the competent authorities of the Russian Federation "decided that Technical Regulation No. 001/2011 is applicable only to goods produced in the CU countries." That means that Ukraine challenges whether or not Russian authorities correctly understood the provisions of the CU Technical Regulation. As the CU Technical Regulation as well as any other CU Decisions, other acts of the bodies of the Eurasian Economic Union are not covered agreements in the sense of Article 1.1 of the DSU, the Russian Federation believes that any determination regarding the consistency of any actions/omissions of the EAEU Member State with such acts or decisions of the CU Bodies is out of the Panel's terms of reference.

6. The scope of Measure III is limited to "Technical Regulation No. 001/2011 "On safety of railway rolling stock"", since the wording "read together with" means that other documents listed by Ukraine in point "3)", are not measures *per se*, but rather evidence or arguments Ukraine makes a reference to in its Panel Request. In any event Ukraine failed to identify the "specific measures at issue" referring to the Technical Regulation No. 001/2011 "On safety of railway rolling stock" generally, without specification of any particular provisions.

7. Measure I and Measure II as described in the Panel Request are distinct in their nature and substance from any of the documents set out in Section II of the Consultations Request, since Section II of the Consultations Request limits the scope of the measures challenged only to the documents and does not include any particular actions or omissions allegedly undertaken by such authorities, including "systemic" ones.

8. Measure I taken alone expands the scope of the dispute, since nowhere in the Consultations Request Ukraine referred to any "systematic" violations.

9. Finally, certain aspects of Measure II taken alone expand the scope of the dispute in the Consultations Request Ukraine failed to refer to any specific instructions. The essence of Measure II challenged by Ukraine in the Panel Request is the specific individual decisions. Without identification of these decisions it is impossible to understand the essence of the measure. Ukraine also failed to specify both the date and the number of the letter referred to in Annex III of the Panel Request, making it impossible for the respondent even to identify and locate the challenged document. Moreover, Letters [[xxx]] and [[xxx]] are two absolutely new measures that cannot be reasonably inferred from the Consultations Request, where Ukraine specifically stated that this measure deals with applications for certificates pursuant to Technical Regulation No. 003/2011, while these letters refer to the certificates issued pursuant to Technical Regulation No. 001/2011.

3. MEASURE I

3.1 UKRAINE FAILED TO PROVE THE EXISTENCE OF AN UNWRITTEN MEASURE OF A SYSTEMATIC NATURE

10. Measure I challenged by Ukraine is "the systematic prevention of Ukrainian railway products from being imported into the Russian Federation".

11. It follows from the way the challenge is framed and Measure I is formulated by Ukraine that Measure I is an unwritten, overarching measure that is claimed to be different from the legal acts based on or through which Russian authorities act or the actions of such authorities.

12. Ukraine failed to make any analysis of the existence of this unwritten measure and failed to show its systematic nature.

13. There is no evidence submitted by Ukraine showing that there is something else in addition to the acts of the authorities challenged as Measure II that could show that Measure I actually exists or justify a stand-alone claim against Measure I. Ukraine submitted no evidence of "the organized effort" on the part of the Russian authorities that could turn the acts of application challenged as Measure II into Measure I.

14. Export from Ukraine to the Russian Federation still takes place and Ukraine acknowledges that a number of certificates were issued to Ukrainian producers, but manipulates the facts in an attempt to demonstrate that they should not be taken into account. In fact, Ukraine asks the Panel to ignore the fact that the certificates continue to be issued with respect to Ukrainian products.

15. In its argumentation Ukraine ignores that the reasons for suspension and rejection of certain certificates were provided to Ukrainian producers. The reasons for the rejection of application varied and were specifically provided in the relevant letters to the Ukrainian producers concerned.

16. Ukraine argues that "Russian authorities have not suspended certificates and have not refused to issue new certificates to producers of railway products from third countries". Under Russian legislation, the reasons for the suspension of certificates are the same for all producers from any country and all goods irrespective of their country of origin.

17. As of April 18, 2017 Russian Certification Body FBO "RC FRT" (hereinafter referred to as FBO "RC FRT") suspended 283 certificates, which would be valid, but for suspension: 29 from Germany, 28 from Ukraine, 7 from Check Republic, 5 from Italy, 4 from France, 11 from Spain, 4 from Switzerland, 3 from Serbia, 2 from Austria, 1 from Swiss, 5 from Poland, 1 from Latvia, 2 from Belarus, 8 from Kazakhstan and 173 from Russia. Thus FBO "RC FRT" suspends certificates of producers from any country if the relevant requirements of Technical Regulations are not satisfied.

18. The evidence presented by Ukraine on "information on the Russian import market of railway products" only shows that there was decrease in the imports in the Russian Federation. Indeed, there was a decrease in the imports, however, it was a decrease of imports from all countries. Thus this evidence does not show that specifically Ukrainian producers were prevented from importing into the Russian Federation.

19. Moreover, the decrease in Ukrainian imports to the Russian Federation resulted from the decrease of production Ukraine, and the complainant fails to account for that in its argumentation.

The revenue of [[xxx]] has decreased by 89,5% in 2015 as compared to 2014, of [[xxx]] by 10,1%, of [[xxx]] by 51,3%, of [[xxx]] by 19,5%, of [[xxx]] by 71%.

20. For these reasons Russia claims that Ukraine failed to make a *prima facie* case with respect to the existence and the contents of the unwritten measure and, consequently, to establish the very existence of the measure it is trying to challenge. In any event, Ukraine failed to show the systematic nature of the alleged measure.

3.2 CLAIM 1 MEASURE I ALLEGEDLY VIOLATES ARTICLE I:1 OF THE GATT

21. Ukraine claims that "the Russian Federation violates Article I:1 of the GATT because, through the systematic prevention of railway products of Ukrainian origin from being imported into the Russian Federation, the Russian Federation does not immediately and unconditionally grant to railway products originating in Ukraine the advantage it grants to like products originating in the territories of all other contracting parties."

22. Firstly, when describing the contents of Measure I, nowhere does Ukraine argue that the measure constitutes a rule or norm of general application. When proceeding to the claim of violation of Article I:1, Ukraine blatantly states that Measure I "is a principle regulating the importation of Ukrainian railway products", while providing no substantiation of such allegation.

23. Ukraine failed to demonstrate that Measure I constitutes a rule or a principle of general application both as part of the challenge of Measure I as such, and as part of its claim of violation of Article I:1. Therefore Ukraine failed to establish a *prima facie* case that Measure I falls within the scope of Article I:1 of the GATT.

24. Secondly, under Article I:1 of the GATT it is only between like products that the MFN treatment obligation applies and discrimination within the meaning of Article I:1 may occur. Products that are not like may be treated differently.

25. The only argumentation Ukraine presents is that "as the measure at issue is applied solely to Ukrainian railway products .., it must be assumed that the products are like". The assumption of likeness advanced by Ukraine does not apply since both the acts and their application that are at issue in this case do not differentiate on the origin of the goods and apply across the border. Ukraine does not even attempt to show the likeness of the products at issue. Hence, the Russian Federation submits that Ukraine failed to make a *prima facie* case with respect to the likeness of products at issue.

26. Thirdly, a measure granting an advantage within the meaning of Article I:1 of the GATT is a measure that "create more favourable competitive opportunities" or affects the commercial relationship between products of different origins.

27. According to the texts of letters and instructions to which Ukraine refers, there is no basis for establishing the alleged prevention of railway products from being imported to the Russian Federation due to their Ukrainian origin. Furthermore, these letters and instructions are not discriminatory as they are applied equally with respect to all imports of "railroad products".

28. CU Technical regulations No. 001/2011 "On Safety of Railway Rolling Stock"; No. 002/2011 "On Safety of High-Speed Rail Transport" and No. 003/2011 "On Safety of Rail Transportation Infrastructure" establish the conditions for placing of the relevant products on the CU market. The only argument Ukraine makes to prove the alleged discrimination is that today Ukrainian producers hold only 40 certificates. However this shows only the fact that other producers failed to satisfy the requirements of the relevant CU Technical regulations and due to the reasons stated by the FBO "RC FRT" in the relevant documents were not granted certification.

29. Therefore, the difference in competitive opportunities, if there is any, is simply created by the ability of foreign producers to comply with the relevant requirements of Russian laws on certification.

30. For the above reasons the Russian Federation submits that Ukraine's claim of the alleged inconsistency of Measure I with Article I:1 of the GATT is unfounded.

3.3 CLAIM 2 MEASURE I ALLEGEDLY VIOLATES ARTICLE XI:1 OF THE GATT

31. In support of the alleged violation of Article XI:1 of the GATT Ukraine argues that systemic prevention of Ukrainian railway products from being imported into the Russian Federation "constitutes a "rule" instituted or maintained by the Russian Federation. It thus falls within the scope of Article XI:1 of the GATT which covers any "measure"".

32. Russia argues that the interpretation advanced by Ukraine in relation to its claim under Article XI:1 of the GATT is impermissibly broad. "Article XI:1 of the GATT does not cover any restriction, but only those restrictions that are instituted or maintained by any Member "on the importation" (or exportation) of products".

33. Russia argues that Measure I does not constitute a measure maintained "on the importation" or "on the exportation" of any product under Article XI:1 of the GATT and thus it is outside the scope of Article XI:1 of the GATT. Measure I is neither a restriction nor a prohibition on the importation of products. Requirement for obtaining a valid certificate in order to be placed on Russia's market is an internal measure that applies equally to imported and domestic products subject to mandatory certification under relevant applicable legislation in Russia, rather than a measure on the importation of the products at issue.

34. Since the requirements for certification do not limit the importation or exportation of the goods at issue, the Russian Federation submits that (i) Measure I is outside the scope of Article XI of the GATT and (ii) Ukraine failed to establish a *prima facie* case of violation of Article XI of the GATT.

3.4 CLAIM 3 MEASURE I ALLEGEDLY VIOLATES ARTICLE XIII:1 OF THE GATT

35. Russia submits that Ukraine's claim on inconsistency of Measure I with Article XIII:1 of the GATT should be rejected because Article XIII is not applicable in the present dispute.

36. Article XIII of the GATT prohibits discrimination in the administration of quantitative restrictions and is extended to restrictions authorized as exceptions to the general ban on non-tariff restrictions within Article XI:1 of the GATT.

37. Measure I cannot be considered to be "with regard to" or "in connection with" the importation. Therefore Article XIII of the GATT does not apply to Measure I as is it neither a quantitative restriction prohibited by Article XI:1 of the GATT, nor a quantitative restriction that is otherwise allowed under WTO law.

38. Moreover, Ukraine failed to make a *prima facie* case with respect to the likeness of goods at issue, since (i) the basis for the assumption of likeness is wrong; (ii) Ukraine failed to specify the goods at issue and (iii) did not establish their likeness to the goods of third countries.

39. Finally, arguing that the importation from all other countries must be "similarly restricted", the only statement Ukraine makes is that "the measure at issue does not similarly restrict the importation of like products from all other countries as *only* products originating in Ukraine are systematically prevented from being imported into the Russian Federation". Ukraine failed to demonstrate the existence of restriction distinct from administration of certification procedures. Ukraine also failed to identify any country whose imports to Russia are not restricted in the same way as allegedly Ukrainian goods are, in light of the fact that Russia similarly suspends the certificates issued to the producers irrespective of their origin if the relevant requirements of CU Technical Regulations are not fulfilled. Hence, the Russian Federation argues, that Ukraine failed to make a *prima facie* case of violation by Measure I of Article XIII:1 of the GATT.

40. For the above stated reasons, the Russian Federation argues that Ukraine failed to establish a violation of Article XIII:1 of the GATT by Measure I.

4. MEASURE II

41. Measure II challenged by Ukraine consists of: 14 instructions whereby the FBO "RC FRT" suspended the certificates held by five producers of Ukrainian railway products and three decisions

as listed in Annex II to the Panel Request whereby the FBO "RC FRT" refused to issue new certificates to three producers of Ukrainian railway products.

4.1 CLAIM 4 MEASURE II ALLEGEDLY VIOLATES ARTICLE 5.1.1 OF THE TBT AGREEMENT

42. The Russian Federation submits that Ukraine failed to establish a *prima facie* case of violation of Article 5.1.1 of the TBT Agreement. Russia submits that Ukraine failed to make any analysis of the goods at issue and did not explain how those goods are like to the domestic goods and goods of third countries, to which Ukraine refers.

43. When Ukraine refers to the fact that FBO "RC FRT" issued 1103 certificates to producers of railway products in the Russian Federation, 39 and 23 certificates to Kazakh and Belarusian producers respectively and 97 certificates to producers from the European Union, it ignores the fact that all these certificates are issued with respect to different goods, the likeness of which to the goods originating in Ukraine was not shown.

44. Moreover, Ukraine ignored the requirements of Article 5.1.1 of the TBT Agreement since it requires a Member to grant access for suppliers of like products 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*. The Russian Federation argues that the situation in Ukraine that made the completion of certification procedure impossible can hardly be compared to situation in any other country supplying like products to the Russian Federation.

45. The certificates to which Ukraine refers in Annex I to the Panel Request were suspended because it was impossible to carry out the inspection control of the certified products. This was due to the military actions within the territory of Ukraine which posed threat to the lives and health of the FBO "RC FRT" employees. Unsafe and dangerous conditions in Ukraine are evidenced from the multiple publicly available sources. In total, from mid-April 2014 to 15 February 2017, the Office of the United Nations High Commissioner for Human Rights recorded 33,146 casualties among Ukrainian armed forces, civilians and members of the armed groups. This includes 9,900 people killed and 23,246 injured.

46. Moreover, it should be noted that non-citizens of Ukraine traveling to the Republic of Crimea not in accordance with Ukrainian legislation are subject to criminal prosecution facing up to 8 years of imprisonment. The citizens of Russia do not travel to the Republic of Crimea in accordance with Ukrainian laws as of March 2014. To that extent up to 8 years of imprisonment are practically automatic within the territory of Ukraine for any Russian citizen that travelled to Crimea after March 2014.

47. The employees of the FBO "RC FRT" were unable to carry out the inspection control necessary for maintenance of the certificates as well as inspection of production due to the uncertainty with respect to the safety of the Russian employees. In other countries to which Ukraine refers there were no circumstances that could prevent carrying out the certification procedure in full, such as no grounds for the employees to be concerned about their safety or security.

48. With respect to the Decision [[xxx]] dated 9 February 2015, whereby the FBO "RC FRT" annulled the applications with reference to the failure to provide documents necessary for certification, these applications contained only two documents, out of ten required.

49. For the above stated reasons the Russian Federation argues that Ukraine failed to establish a *prima facie* case of violation of Article 5.1.1 of the TBT Agreement by Measure II and that therefore Measure II is consistent with Article 5.1.1 of the TBT Agreement.

4.3 CLAIM 5 MEASURE II ALLEGEDLY VIOLATES ARTICLE 5.1.2 OF THE TBT AGREEMENT

50. In order to establish a violation of Article 5.1.2 of the TBT Agreement Ukraine provides two alternative supposedly less trade-restrictive measures:"[…] the FBO "RC FRT" could have communicated with the relevant producers in order to ensure, if and where necessary, conditions for carrying out the inspections and the certification procedure in general. It could have also made use of the possibility to carry out remote inspections" (emphasis added). However, Ukraine failed

to show how these alternative measures would make an equivalent contribution to the achievement of the objective at the level of protection sought by the Russian Federation. Thus Ukraine failed to establish a *prima facie* case of violation of Article 5.1.2 of the TBT Agreement.

51. With respect to the alternatives suggested by Ukraine Russia argues that there were communications between the employees of the FBO "RC FRT" and the relevant companies. However, these communications did not help to ensure the conditions for carrying out the inspections and the certification procedure in general.

52. With respect to the second alternative, the remote inspections were not available to the Russian Federation pursuant to the applicable technical regulations. Ukraine has not shown how the remote inspections would provide an equivalent assurance of conformity of high-danger goods at issue with the applicable requirements, especially in light of the fact that almost [[xxx]]% of accidents on the Russian rail roads were due to the defective products produced in Ukraine.

53. Therefore, Russia is of the view that Ukraine failed to make a *prima facie* case establishing that less trade restrictive alternatives were available to Russia that could make an equivalent contribution to assuring conformity of the products at issue with the relevant technical regulations at the level of protection sought by the Russian Federation.

54. For the above stated reasons, the Russian Federation argues that Ukraine failed to show that the manner in which Russia applies its conformity assessment is more restrictive that necessary and thus establish the violation of Article 5.1.2 of the TBT Agreement by Measure II.

4.4 CLAIM 6 MEASURE II ALLEGEDLY VIOLATES ARTICLE 5.2.2 OF THE TBT AGREEMENT

55. The relevant part of Article 5.2.2 of the TBT Agreement indicates that "the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the assessment in a precise and complete manner to the applicant so that corrective action may be taken if necessary".

56. However, letter [[xxx]] of 8 August 2014, the FBO "RC FRT" sent to PJSC [[xxx]] instruction No. [[xxx]] whereby it suspended seven certificates for various railway products and indicated that the certificates were suspended since there were no conditions for inspection control. The FBO "RC FRT" indicated that the certificates had to be suspended due to the military actions in the territory of Donetsk and Lugansk which are causing threats to the officers' lives and health. The authorities also referred to Ukraine's restrictions of the entry to the territory of Ukraine of Russian male citizens between 16 and 60 years old. They indicated that this constituted the basis for a lack of conditions for conducting the inspection control.

57. Moreover, all producers asking for certification were fully aware of the relevant situation and the reasons for the inability to conduct the inspection control necessary for the certification.

58. For the reasons stated above, the Russian Federation argues that Ukraine failed to establish the violation of Article 5.2.2 of the TBT Agreement by Measure II.

5. MEASURE III

5.1 CLAIM 7 MEASURE III ALLEGEDLY VIOLATES ARTICLE 2.1 OF THE TBT AGREEMENT

59. Ukraine does not challenge the measure defined in its Panel Request, i.e. Technical Regulation No. 001/2011 "On safety of railway rolling stock". Instead, Ukraine has put forward a new and very different measure according to which the measure at issue is the Russian Federation's "decision to refuse to recognize the validity of certificates issued to Ukrainian producers by certification bodies in other CU countries". There is no trace of this new measure in the Panel Request. This new measure even does not deal with the Technical Regulation No. 001/2011 "On safety of railway rolling stock".

60. Such a new measure significantly changes and extends the scope of the dispute in comparison with the scope established in the Panel Request, thus Russia argues that the Panel

Request does not comply with the requirements of Article 6.2 of the DSU as regards this measure and, consequently, that the claims related to Measure III fall outside the Panel's terms of reference.

61. In any event the Russian Federation submits that Protocol of the Ministry of Transport No. A 4-3 and the Letters of the Federal Railway Transport Administration of the Ministry of Transport of the Russian Federation which allegedly contain the decision of the Russian Federation not to accept the validity of the certificates do not constitute a technical regulation and, thus, fall outside the scope of Article 2.1 of the TBT Agreement.

62. To be a technical regulation the document must apply to an identifiable product or group of products. However, these documents are not applied to any products, but rather deal with validity of the certificates. The document must also lay down one or more characteristics of the product, which is not the case with these documents. These documents do not describe ""features", "qualities", "attributes", or other "distinguishing mark" of a product". Finally, the requirement that compliance with the product characteristics must be mandatory is also not satisfied. These documents are individual decisions with respect to specific certificates. They do not establish any mandatory product characteristics. For these reasons, the Russian Federation argues that Protocol of the Ministry of Transport No. A 4-3 and the decisions listed in Annex III to the Panel Request are not technical regulations within the meaning of the TBT Agreement and thus do not fall within the scope of Article 2.1 of the TBT Agreement.

63. Secondly, Ukraine failed to prove that "the measure at issue distinguishes between the products exclusively on the basis of origin", and therefore there is no ground for the presumption of likeness claimed by Ukraine in this dispute. Ukraine also failed to make any analysis of the goods at issue and did not explain how those goods are like to the domestic goods and goods of third countries. Ukraine simply failed to identify products at issue, to provide any goods-specific analysis and, thus, failed to make a *prima facie* case with respect to likeness of the goods at issue.

64. Thirdly, the letters referred to by Ukraine do not contain any discriminatory provisions. Products manufactured in the territory of the CU are indeed subject to certification under Technical Regulation No. 001/2011. However, contrary to what is argued by Ukraine, it is not stated in either of the documents referred to by Ukraine that Technical Regulation No. 001/2011 applies *only* to such products.

65. Article 1 of Technical Regulation No. 001/2011 clarifies this matter and specifies that "[t]his technical regulation of the Customs Union (hereinafter - TR) applies to newly *developed* (upgradeable), *manufactured* railway rolling stock and their parts, *put into circulation* for use on railway tracks and total uncommon 1520 mm in the customs territory of the CU with velocities up to 200 km/h inclusive." That means that Technical Regulation No. 001/2011 is applicable in all these cases.

66. Documents to which Ukraine refers do not contain any "additional requirements" based on the origin of Ukrainian producers.

67. The reason for non-recognition of the certificates was that the products produced in Ukraine were certified upon the application to the Republic of Belarus certification body without certification of the components subject to mandatory conformity as required under Article 6(51) of Technical Regulation No. 001/2011.

68. In its explanatory latter as of 19 May 2014 № VK-969/16 the Eurasian Economic Commission clarified that the goods that are subject to mandatory certification under the CU Technical Regulations and which *were not* subject to mandatory certification before the CU Technical Regulations entered into force can be put into circulation only within the territory of the CU Member, whose legislation did not prescribe the mandatory certification of the goods at issue.

69. Belarus legislation did not provide for the certification of the components, while Russian legislation did. The Republic of Belarus certification body certified the Ukrainian producer despite of the lack of certificates of conformity for the components. That was the reason for the non-

recognition of the certificates at issue by the Russian Federation and that would be the case with respect to any producer of any origin.

70. For this reason Russia argues that Ukraine failed to show the violation of Article 2.1 of the TBT Agreement by Measure III.

5.2 CLAIM 8 MEASURE III ALLEGEDLY VIOLATES ARTICLE 5.1.1 OF THE TBT AGREEMENT

71. In its Panel Request Ukraine stated that the measure at issue is Technical Regulation No. 001/2011. However, describing Measure III in Claim 8 in its first written submission Ukraine puts forward new measure described as the conformity assessment procedures set out in Article 6(9) of Technical Regulation No. 001/2011. Thus Ukraine challenges neither the Technical Regulation, as it was stated in the Panel Request nor the decisions of the Russian Federation's authorities, as it is stated in Claim 7, but rather the application of Article 6(9) of Technical Regulation No. 001/2011 by the Federal Agency for Railway Transport. This measure is not specified in the Panel Request and cannot be reasonably derived from any other measure that is specified in the Panel Request. Thus, the Russian Federation argues that the Panel Request does not comply with the requirements of Article 6.2 of the DSU as regards this measure and, consequently, that this claim is outside the Panel's terms of reference.

72. In any event, firstly, Russia argues that in its argumentation of violation of Article 5.1.1 of the TBT Agreement Ukraine does not make any analysis of the issue of likeness and does not explain how the goods at issue are like the domestic goods and goods of third countries, to which Ukraine refers.

73. Secondly, Ukraine failed to show that there is any differential treatment with respect to products of Ukrainian origin in comparison to the products of other third countries or national origin.

74. Technical Regulation No. 001/2011 is applicable to railway rolling stock and their parts, put into circulation in the customs territory of the CU irrespective of their origin, and the documents to which Ukraine refers do not contain any "additional requirements" based on the origin of Ukrainian producers.

5.3 CLAIM 9 MEASURE III ALLEGEDLY VIOLATES ARTICLE 5.1.2 OF THE TBT AGREEMENT

75. Since the description of measure in Claim 8 and Claim 9 is identical, Russia refers to Section 5.2. above, where Russia explains why Measure III is outside the Panel's terms of reference.

76. In any event Ukraine failed to show that Measure III is inconsistent with Article 5.1.2 of the TBT Agreement, since it results in the imposition of additional costs and administrative burdens for the producers of Ukrainian railway products.

77. The degree of contribution of this measure to its objective is specifically provided in the CU Technical Regulation No. 001/2011, that is, "to ensure compliance of the supplied products with the requirements of this CU technical regulation and to bear responsibility for non-compliance of the products with the requirements of this CU technical regulation".

78. In the present situation Belarus legislation did not provide for the certification of the components, while Russia's legislation did. The lack of such requirement would not equally contribute to the level of protection sought by the Russian Federation.

79. For these reasons the Russian Federation argues that Measure III does not create unnecessary obstacles to international trade and fully complies with Article 5.1.2 of the TBT Agreement.

5.4 CLAIM 10 MEASURE III ALLEGEDLY VIOLATES ARTICLE I:1 OF THE GATT

80. Since the measure challenged by Ukraine in Claim 7 and Claim 10 of its first written submission is the same, Russia refers to Section 5.1. above, in which Russia explains why Measure III is outside the Panel's terms of reference.

81. In any event, firstly, Ukraine failed to present any analysis of the likeness of the products at issue and simply stated that "railway products imported from Ukraine and railway products imported from other countries into the Russian Federation are "like products". Hence, the Russian Federation argues that Ukraine failed to make a *prima facie* case with respect to the likeness of goods at issue.

82. Secondly, Ukraine claims that Measure III "grants an advantage to products manufactured in the territory of CU countries–i.e. Belarus and Kazakhstan - but not to other WTO Members, including Ukraine", since "only products manufactured in the territory of the CU may be subject to certification under Technical Regulation No. 001/2001".

83. However, as it has already been explained, products manufactured in the territory of the CU are indeed subject to certification under Technical Regulation No. 001/2011. However, contrary to what is argued by Ukraine Technical Regulation No. 001/2011 is applicable to railway rolling stock and their parts put into circulation in the customs territory of the CU irrespective of their origin, and the documents to which Ukraine refers do not contain any requirements based on the origin of Ukrainian producers. Thus, Russia argues that Measure III is not inconsistent with Russia's MFN obligation under Article I:1 of the GATT.

5.5 CLAIM 11 MEASURE III ALLEGEDLY VIOLATES ARTICLE III:4 OF THE GATT

84. Since the measure challenged by Ukraine in Claim 7, Claim 10 and Claim 11 of its first written submission is the same, Russia refers to Section 5.1 above, where Russia explains, why Measure III challenged by Ukraine is outside the Panel's terms of reference.

85. In any event, firstly, Ukraine failed to present any analysis of the likeness of the products at issue and simply stated that "railway products imported from Ukraine are like domestic railway products". Hence, the Russian Federation argues, that Ukraine failed to make a *prima facie* case with respect to the likeness of goods at issue.

86. Secondly, Ukraine argues that Measure III is inconsistent with Article III:4 of the GATT due to the alleged imposition of two additional requirements: (1) that Technical Regulation No. 001/2011 applies *only* to products manufactured in the territory of CU; (2) that only entities registered in the same CU country as the relevant certification body can apply for certification.

87. With respect to the first requirement Russia has already explained that Technical Regulation No. 001/2011 is applicable to railway rolling stock and their parts put into circulation in the customs territory of the CU irrespective of their origin.

88. With respect to the second requirement in the present case domestic suppliers are already registered in the Russian Federation and thus shall not establish an additional entity or conclude a contract. Even if, for the sake of the argument, this treatment were considered to be different from that accorded to the foreign suppliers, it would not render the measure to be inconsistent with Article III:4 of the GATT, since this difference does not modify the conditions of competition. Ukraine failed to explain how the competitive opportunities of its producers were modified.

89. For the above stated reasons, Russia argues that Measure III is not inconsistent with Article III:4 of the GATT.

5.5.1 CLAIM 12 MEASURE III ALLEGEDLY VIOLATES ARTICLE X:3(A) OF THE GATT

90. Ukraine claims "that the Russian Federation violates Article X:3(a) of the GATT because Technical Regulation No. 001/2011, read together with the Protocol of the Ministry of Transport No. A 4-3 and the decisions listed in Annex III to the Panel Request, has not been administered in a uniform, impartial and reasonable manner."[1]

91. Ukraine identifies Technical Regulation No. 001/2011 as a whole and the Protocol of the Ministry of Transport No. A 4-3 as a part of the measure at issue. These acts could not on their

[1] Ukraine's first written submission, para. 379.

face be covered by Article X:3(a) of the GATT. Only administration of these acts could fall within the scope of this Article.

92. Ukraine failed to make *prima facie* case and prove that it challenges not the legal acts as a whole but rather administration of these acts. In fact, Ukraine failed to show that the challenged laws are not administered in a uniform, impartial and reasonable manner.

93. The Technical Regulation No. 001/2011 is applied in a uniform manner, as the scope of its application, as stated in Article 1, is the following: "[t]his technical regulation of the Customs Union (hereinafter - TR) applies to newly *developed* (upgradeable), *manufactured* railway rolling stock and their parts, *put into circulation* for use on railway tracks and total uncommon 1520mm in the customs territory of the CU with velocities up to 200 km / h inclusive." The Technical Regulation No. 001/2011 is applied in an impartial manner, as it is applied in unbiased and unprejudiced manner without any distinction on the basis of origin. Finally, the Technical Regulation No. 001/2011 is applied in a reasonable manner, since the certificates at issue were suspended for a legitimate reason, i.e. the lack of certification of the components.

94. For the above stated reasons, the Russian Federation argues that it applies the Technical Regulation No. 001/2011 in full conformity with Article X:3(a) of the GATT.

6. CONCLUSIONS

95. For the reasons set out in the present submission, the Russian Federation requests the Panel to dismiss all Ukraine's claims and to find that the challenged measures are not inconsistent with Russia's obligations under WTO Agreements.

ANNEX C-4

SECOND PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION

BCI DELETED, AS INDICATED BY [[XXX]]

1. INTRODUCTION

1. Ukraine's claims are based on an erroneous understanding of WTO law and an intentional misrepresentation of Russian legislation and the acts of the Russian authorities. These claims as they are put forward by Ukraine encroach upon the rights of a Member enshrined in the WTO Agreements, in particular the right to ensure the safety of products circulating on its market.

2. Moreover, throughout this dispute Ukraine has not been coherent in laying out its claims, constantly modifying and re-arranging them in each subsequent document and statement as well as the substance and description of the measures at issue. Ukraine consistently tries to modify and expand the scope of the dispute, keeping its claims a moving target, in violation of Article 6.2 of the DSU.

3. Furthermore, Ukraine essentially requests the Panel to totally discount the probative value of entire sets of evidence demonstrating facts that are of crucial importance for the resolution of this dispute, in particular, the evidence showing the present and continued importation of Ukrainian "railway products" into Russia and the evidence documenting the entry restrictions imposed by Ukraine with respect to Russian citizens and general uncertainty with respect to safety conditions within the territory of Ukraine.

2. MEASURE I

2.1 UKRAINE FAILED TO PROVE THE EXISTENCE OF AN UNWRITTEN MEASURE OF A SYSTEMATIC NATURE

4. Measure I, as challenged by Ukraine, is "[t]he systematic prevention of Ukrainian producers from exporting their railway products to the Russian Federation by way of suspension of their valid conformity assessment certificates, refusal to issue new conformity assessment certificates and the non-recognition of conformity assessment certificates issued by the competent authorities of other members of the CU".[1]

5. Ukraine confirms that Measure I is an unwritten, overarching measure that is claimed to be different from the individual decisions of the Russian authorities.[2] That means that the content of Measure II, i.e. "the suspensions of conformity assessment certificates, the rejections of new applications for conformity assessment certificates and the refusals to recognize valid conformity assessment certificates issued by other CU countries with regard to Ukrainian producers"[3], according to Ukraine's intentions, should be different from that of Measure I. However, in the course of the proceedings Ukraine has not identified the difference in content of Measure I vis-à-vis Measure II and, thus, the precise content of Measure I.

6. This Panel must reject Ukraine's attempt to "repackage" determinations made in the context of specific conformity assessment procedures as an unwritten "systematic prevention" measure. The evidence submitted by Ukraine consists of nothing more than the suspension of some certificates, refusal of applications for new certificates and the alleged non-recognition of several certificates that are the subject of Ukraine's claims under the TBT Agreement. As the panels have found in *Russia – Tariff Treatment* and *Indonesia – Chicken*, even if such determinations were somehow considered to

[1] Panel Request, p. 2.
[2] Opening Statement of Ukraine, 10 July 2017, para. 12.
[3] Panel Request, p. 2.

be repetitious, that would nonetheless be insufficient, without more, to establish the existence of an overarching system, plan, organized method or effort.[4]

7. Ukraine confirmed that it is challenging an "overarching" measure that has "general scope" because it prevents the importation of "all" Ukrainian "railway products" into the Russian Federation. However, evidence on the Panel record demonstrates that FBO "RC FRT" issued 25 certificates for Ukrainian suppliers before the entry into force of the Customs Union Technical Regulations 001/2011, 002/2011, and 003/2011, and that those certificates remained valid in the period of 2014-2016.[5] The evidence also demonstrates that the FBO issued 19 certificates of conformity to Ukrainian producers after the entry into force of the said Customs Union Technical Regulations.[6] Finally, the evidence also establishes that Belarus and Kazakh certification bodies issued 35 certificates of conformity to Ukrainian producers and on the basis of those certificates, "railway products" were and are free to circulate in the EAEU territory, including the territory of the Russian Federation.[7]

8. Thus, Ukraine has failed to establish the content of the alleged measure as Ukraine itself has defined it. The evidence on the Panel record demonstrates that no "general" measure exists, applicable to "all" Ukrainian railway products, pursuant to which these products cannot be imported into the Russian Federation.

9. Ukraine confirmed that the alleged "systematic prevention" measure is distinct from individual determinations to suspend, refuse or not to recognize conformity certificates. Put differently, like the European Union and Brazil before it, Ukraine seeks to establish a "systematic" measure that is greater than the sum of its parts, insofar as its normative content is separate and distinct from specific determinations in individual cases.

10. Ukraine first alleges that the suspension, refusal and alleged non-recognition of certificates demonstrate a systematic effort because these are "all possible means" by which Russia restricts the importation of Ukrainian railway products.[8] This argument is purely semantic, and amounts to nothing more than a restatement of the repeated application argument. As the panel in *Indonesia – Chicken* recently found, the fact that certain measures have similar trade-restrictive effects is insufficient, without more, to determine that these measures are established pursuant to an overarching system or plan. Ukraine makes no effort to establish that the alleged "systematic prevention" measure has a normative content that is different from the individual determinations that it challenges in this dispute.

11. Second, Ukraine refers to the fact that the reasons for suspensions and refusals are "repetitively the same" as further evidence of the existence of a system, plan, organized method or effort.[9] FBO "RC FRT" did in fact react in the same manner whenever entry restrictions and general uncertainty with respect to safety conditions in Ukraine rendered it impossible to perform on-site inspections. This does not establish, however, the existence of a system, plan, organized method or effort to restrict the importation of Ukrainian railway products. Rather, it simply corroborates the fact that these determinations were consistent with Russia's assessment of the risks faced by its inspectors.

12. Finally, Ukraine refers to alleged trade-restrictive measures purportedly imposed by Russia on other products as evidence of the existence of an organized method or effort pursuant to which the importation of Ukrainian railway products is restricted.[10] This evidence is entirely irrelevant for the Panel's disposition of this issue, as it relates to different products, which are not like products to those imported from Ukraine.

13. Moreover, Ukraine's challenge against the alleged "systematic prevention" measure effectively converts the procedural obligations imposed by Article 5 of the TBT Agreement into substantive obligations imposed as a condition for the importation of goods into Russia. In the absence of any evidence demonstrating the existence of a separate and distinct substantive rule applied on the importation of Ukrainian railway products into the Russian Federation, conformity assessment procedures that are purportedly inconsistent with Articles 5.1.1, 5.1.2, and 5.2.2 of the TBT

[4] Panel Report, *Russia – Tariff Treatment*, para. 7.383.
[5] Russian Federation's second written submission, paras. 16-23 and Exhibit RUS-48 (BCI).
[6] Exhibit RUS-49 (BCI).
[7] Exhibit RUS-51 (BCI).
[8] Ukraine's second written submission, para. 48.
[9] Ukraine's second written submission, para. 49.
[10] Ukraine's second written submission, paras. 51-55.

Agreement would not suffice to establish the existence of a distinct substantive rule that applies as a condition for the importation of railway products into Russia.

14. In addition, Ukraine failed to prove that the alleged "systematic prevention measure" is maintained "on the importation". As Canada noted, accepting Ukraine's line of argumentation "could result in subjecting all measures that regulate the internal sale, distribution or use of a product to Article XI. This will blur the distinction between border and internal measures under the GATT 1994".[11]

15. In our view, this distinction is important for this case and clearly stems from the interpretative note to Article III of the GATT. According to this note, even if a certain measure or regulation is enforced at the time or point of importation, such a measure or regulation still falls under Article III of the GATT and is not subject to Article XI of the GATT whenever it is also imposed on domestic products. The measure, as defined by Ukraine, consists of nothing more than conformity assessment procedures that, as evidenced by the text of Article 1 of the CU Technical Regulation, are applied to both imported and domestic products that are released for circulation within the EAEU customs territory. The suggestion put forward by Ukraine, that a requirement to present a certificate of conformity at point of importation as a condition for the goods to be allowed for free circulation within the territory of the Russian Federation transforms this requirement into a border measure,[12] is not viable and not supported by the existing WTO jurisprudence.[13] The certification requirements and procedures are applied to the products irrespectively of their origin (whether imported or domestic) when they are put into circulation in the Russian Federation. In this regard domestic products are treated in the same manner as the products of third countries. To that extent the certification requirements and procedures are measures affecting internal sale, distribution and use of products within the meaning of the GATT Article III. To that extent Measure I, if it existed, should therefore be analysed only from the perspective of Article III of the GATT, not Article XI, and, consequently, not Article XIII of the GATT.

2.2 CLAIM 1 MEASURE I ALLEGEDLY VIOLATES ARTICLE I:1 OF THE GATT

16. Ukraine argues that it has shown that Measure I is a rule "in connection with importation"[14], as required by Article I:1 of the GATT. However, Ukraine failed to provide any evidence that Measure I "is a principle regulating the importation of Ukrainian railway products". Ukraine states that "what needs to be established is not whether the technical requirements constitute restrictions on importation but whether the systematic prevention of Ukrainian railway products from being imported into the Russian Federation constitutes a restriction on importation."[15]

17. However, Ukraine itself stated that Measure I consists of suspension of valid certificates, refusal to issue new certificates and non-recognition of certificates.[16] Ukraine does not challenge that these actions cannot be characterized as rules "in connection with importation". Ukraine never explains how "suspension of valid certificates, refusal to issue new certificates and non-recognition of certificates" taken together can be regarded as a separate and distinct measure different in nature, i.e. a rule "in connection with importation". As explained above certification requirements and procedures are measures affecting internal sale, distribution and use of products, both domestic and imported. Therefore, these measures cannot qualify as measure, rule, or requirement "on importation" or "in connection with importation".

18. Therefore, Ukraine failed to establish a *prima facie* case that Measure I falls within the scope of Article I:1 of the GATT 1994.

19. Ukraine argues that "[t]he structure and design of this measure do not distinguish between products based on the physical characteristics or end-uses of the products but on the origin of the

[11] Third Party Submission of Canada, 8 June 2017, paras. 20-21.
[12] First Written Submission of Ukraine, paras. 217-219.
[13] Panel Report, *EU – Asbestos,* para. 8.91; Panel Report*, Canada – Administration of the Foreign Investment Review Act*, 7 February 1984,para.5.14; Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, 19 June 1992, para. 5.63.
[14] Opening Statement of Ukraine, 10 July 2017, para. 26.
[15] Opening Statement of Ukraine, 10 July 2017, para. 33.
[16] Ukraine's first written submission, paras. 145-147, Panel Request, p. 2.

products."[17] However, there is uncontested evidence on the Panel record demonstrating that Ukrainian producers continue to hold valid conformity certificates for "railway products".[18]

20. This evidence demonstrates that the distinctions reflected in the determinations by FBO"RC FRT" are not "exclusively based on the origin of the products", therefore the presumption of likeness is *inapplicable* in the circumstances of this dispute. Ukraine essentially argues that the presumption of likeness applies to any measure that distinguishes "solely on the basis of a criterion that is unrelated to the products *per se*", such as its physical characteristics or end uses.[19] This, however, is *not* what established Appellate Body jurisprudence stands for. In *Argentina – Financial Services*, the Appellate Body explained that the presumption of likeness applies only when the complainant establishes that the measure at issue distinguishes exclusively on the basis of the origin of the product. If, however, the measure differentiates on the basis of any other factors, regardless of whether those factors are related to the products *per se*, then the presumption is inapplicable and likeness must be determined with reference to the relevant criteria.[20]

21. In the present dispute, Ukraine never purported to establish that the measures differentiated *exclusively* on the basis of the origin of the products. Quite the contrary, Ukraine seems to concede that "the reason for suspending the certificates was that the conditions for conducting inspections were lacking, since – according to the Russian Federation – the situation in Ukraine posed threat to lives and health of the FBO employees."[21] At a minimum, the issuance of certificates for certain Ukrainian producers would suggest that the distinction drawn by the measures at issue is *not exclusively based on the origin of a product*. Plus, there is no basis in the WTO jurisprudence for the novel "based on the location of producer" test advocated by Ukraine.[22] For these reasons, Ukraine failed to establish the likeness of the goods at issue.

22. Ukraine argues that "[t]he advantage granted is the opportunity for the railway products from other countries to be imported into the Russian Federation".[23] However, actual imports of Ukrainian products[24] to the Russian Federation evidence that such opportunity was granted by Russia to Ukrainian products in question.

23. In full compliance with Article I:1 of the GATT 1994 the components of the measure challenged by Ukraine do not contain any advantage that was granted to the third countries not granted to Ukraine. The components of Measure I do not create more favourable competitive opportunities and do not affect the commercial relationship between products of different origin.

24. For this reasons the Russian Federation asks the Panel to find that Ukraine failed to establish that products originating from Ukraine were not granted any advantage in violation of Article I:1 of the GATT 1994.

2.3 CLAIM 2 MEASURE I ALLEGEDLY VIOLATES ARTICLE XI:1 OF THE GATT

25. Should the Panel find that Measure I exists, Russia argues that Ukraine failed to make a *prima facie* case that Measure I constitutes a measure covered by Article XI:1 of the GATT, since Measure I as challenged by Ukraine does not constitute a measure maintained "on the importation" or "on the exportation" of any product, as explained above. Thus, the Russian Federation asks the Panel to find that Ukraine failed to establish a violation of Article XI of the GATT 1994.

2.4 CLAIM 3 MEASURE I ALLEGEDLY VIOLATES ARTICLE XIII:1 OF THE GATT

26. The Russian Federation asks the panel to find that Ukraine failed to establish a violation of Article XIII:1 of the GATT 1994 by Measure I, as Ukraine failed to establish (1) that the measure at issue is a measure "in connection with" the importation, (2) the likeness of the products at issue, as well as (3) that the importation from all other countries was not "similarly restricted".

[17] Opening Statement of Ukraine, 10 July 2017, para. 28.
[18] See Exhibit UKR-12 and Ukraine's responses to panel questions, para. 98.
[19] Ukraine's answers to panel questions, para. 28.
[20] Appellate Body Report, *Argentina – Financial Services*, paras. 6.37 and 6.45.
[21] Ukraine's answers to panel questions, para. 29.
[22] Ukraine's opening statement at the first panel meeting, para. 40.
[23] Ukraine's first written submission, para. 203.
[24] Ukraine's first written submission, para. 168. and Exhibits RUS 72, 73 (BCI), 78 (BCI).

3. MEASURE II

27. Measure II challenged by Ukraine consists of: 14 instructions whereby the FBO "RC FRT" suspended the certificates held by five producers of Ukrainian railway products and three decisions as listed in Annex II to the Panel Request whereby the FBO "RC FRT" refused to issue new certificates to three producers of Ukrainian railway products.

3.1 CLAIM 4 MEASURE II ALLEGEDLY VIOLATES ARTICLE 5.1.1 OF THE TBT AGREEMENT

28. Ukraine failed to establish a *prima facie* case of violation of Article 5.1.1 of the TBT Agreement since it did not demonstrate (1) that products of suppliers from Ukraine are like products of national origin or originating in other countries; and (2) that those suppliers are granted access under conditions less favourable than those accorded to suppliers of like domestic products and suppliers of like products originating in any other country, in a comparable situation.

29. With respect to the likeness of the products at issue Russia refers the Panel to the analysis summarized in paragraphs 19-21 above, with respect to Measure I.

30. Even if it is assumed, for the sake of the argument, that the products at issue are like, the Russian Federation argues that it grants access for suppliers of like products originating in the territories of other Members, including Ukraine, 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, as required by Article 5.1.1.

31. The Russian Federation argues that situation within Ukraine is not comparable to the situation in a third country in the context of granting access to the conformity assessment procedures, due to the entry restrictions imposed by Ukraine with respect to Russian citizens and general uncertainty with respect to the safety conditions within the territory of Ukraine, which make it impossible for the Russian experts to conduct on-site conformity assessment procedure, as required by Russian legislation:

32. First, the evidence from independent sources provided by Russia documents uncertainty with respect to safety conditions within the territory of Ukraine in 2014-2016. Second, due to the lack of guarantees of their safety, the employees of the FBO "RC FRT" indeed refused to go to the territory of Ukraine in order to conduct inspections as also evidenced from the declaration of FBO "RC FRT" employees.[25]

33. Third, the Russian Federation provided the Panel with multiple evidence showing the existence of entry restrictions with respect to Russian citizens imposed by Ukraine[26] The Protocol of the Border Department of Odessa was publicly available along with the Ukraine State Border Agency's public communications and other communications in the press on restrictions of the entry of the citizens of the Russian Federation to Ukraine.[27] The Protocol specifically establishes that "entry of male citizens of the Russian Federation from 16 to 60 years old through the state border with the purpose of entry to Ukraine is suspended." This Protocol was issued by the governmental body of Ukraine, i.e. the Border Department of Odessa. It refers to the broader prohibitions and restrictions imposed by the Administration of the State Border of Ukraine set out therein. This Protocol and, more importantly, the Orders referred to therein were consequently considered, in particular by the FBO employees, as a prohibition to enter the territory of Ukraine.

34. Forth, legislation of Ukraine provides for the liability "for entry into and exit from the temporarily occupied territory of Ukraine". Article 332-1 of the Criminal Code of Ukraine provides for up to 8 years of imprisonment for "violation of the procedure of entry in and exit from the temporarily occupied territory of Ukraine".[28] Given that Russian citizens travel to the Republic of Crimea as of March 2014 in accordance with the legislation of the Russian Federation and, consequently, face up to 8 years of imprisonment practically automatically, this legislation of Ukraine creates serious uncertainty with respect to safety conditions of stay of Russian citizens in Ukraine.

[25] Exhibit RUS – 6 (BCI).

[26] Russia's responses to questions from the Panel to the parties in the context of the first meeting, question 15.

[27] Russia's second written submission, para. 99.

[28] Exhibit RUS – 22.

35. Finally, the fact that there was uncertainty with respect to the safety of the Russian employees is evidenced from the letters sent by Ukrainian companies themselves.[29] The companies promised "to ensure the security of stay within the territory of Ukraine, including the passport control, of the experts", which evidences the companies' understanding that there were unsafe conditions in Ukraine.

36. Thus, the situation in Ukraine that made the completion of the certification procedure impossible was not comparable to the situation in any other country supplying like products to the Russian Federation.

37. In any event Ukraine failed to prove that the allegedly different treatment of Ukrainian producers in comparison to those of any other origin does not steam exclusively from a legitimate regulatory distinction. Even if the Panel decides that there is a different treatment of Ukrainian producers, *quod non*, the treatment is based on the premise that no country should be prevented from taking measures necessary for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, since the necessity to conduct the on-site inspections is based on the necessity to fulfil the objectives of the CU Technical Regulations, i.e. to protect, *inter alia,* human life and health, animals and plants (Article 1.3. of the CU Technical Regulation 001/2011). Thus, when it was possible to ensure safety of the products put into circulation on the Russian market without conducting on-site inspections, the Russian Federation conducted the inspection control without visiting the premises of the suppliers. Moreover, the certificates for products which required on-site inspections were suspended, not terminated.

38. For the above stated reasons, the Russian Federation asks the Panel to find that Ukraine failed to establish a violation of Article 5.1.1 of the TBT Agreement by Measure II.

3.2 CLAIM 5 MEASURE II ALLEGEDLY VIOLATES ARTICLE 5.1.2 OF THE TBT AGREEMENT

39. Under Article 5.1.2 of the TBT Agreement Members shall ensure that "conformity assessment procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. 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."

40. The claimant bears the burden of proof to show that there were alternative measures reasonably available to the respondent capable of making an equivalent contribution to the achievement of the objective at the level of protection sought. The relative levels of contribution achieved by the challenged measure and the proposed alternative measure are to be compared.[30]Ukraine failed to satisfy the above standard. In particular, Ukraine failed to explain how any of the alternatives it suggested could ensure the level of protection sought by the Russian Federation.

41. Ukraine argues that remote inspections are reasonably available alternatives to the suspension of certificates at issue in this dispute.[31] However, in case of the suspended certificates in question remote inspection controls could not achieve the same level of assurance of conformity, since the evidence on the record demonstrates that in respect of each of the producers whose certificates have been suspended either because previous inspections identified inconsistencies[32], and/or because claims were filed in respect of the quality of production of the certified products.[33] Absence of these factors (inconsistencies and claims) is a precondition for remote inspection to ensure the same level of assurance of conformity as on-site inspections.

42. Ukraine further argues that on-site inspections conducted by non-Russian nationals, including Belarus and Kazakh officials, is an alternative to the suspensions and refusals at issue. These resources are obviously not reasonably available to Russia, and, in any event, the Russian Government does not have jurisdiction over nationals from other governments. If Ukrainian producers

[29] Exhibit UKR-21 (BCI); Exhibit UKR-41 (BCI).
[30] Appellate Body Report, *US – Tuna II (Mexico)*, para. 330.
[31] Ukraine's second written submission, para. 220.
[32] Exhibits RUS – 62-66 (BCI).
[33] Exhibits RUS 67-70 (BCI).

wish to be inspected and certified by Belarus and Kazakh certification bodies, they can do so by applying to the certification bodies of the respective EAEU Member States directly. This, in the Russian Federation's view, clearly indicates that this kind of measure is not a true "alternative" to conformity assessment procedures for the purposes of the Panel's analysis under Article 5.1.2.

43. Therefore, Ukraine failed to make a *prima facie* case of reasonable availability of less trade restrictive alternatives to Russia capable of making an equivalent contribution to assuring conformity of the products at issue with the relevant technical regulation and thus, Ukraine failed to establish that Measure II violates Article 5.1.2 of the TBT Agreement.

3.3 CLAIM 6 MEASURE II ALLEGEDLY VIOLATES ARTICLE 5.2.2 OF THE TBT AGREEMENT

44. Contrary to what is argued by Ukraine and in full compliance with Article 5.2.2 of the TBT Agreement, in the Decision [[xxx]] dated 9 February 2015 the FBO "RC FRT" specifically referred to the failure of the applicant to provide complete set of documents necessary for certification as provided by Article 6(28) of the CU Technical Regulation No. 003/2011. Other letters challenged by Ukraine informed an applicant in a precise way of the reasons to suspend the certificates, i.e. that there were no conditions for inspection. Thus, Ukraine failed to establish a violation of Article 5.2.2 of the TBT Agreement by Measure II.

4. MEASURE III

4.1 MEASURE III AS FORMULATED BY UKRAINE IS OUTSIDE THE PANEL'S TERMS OF REFERENCE

45. It follows from the Panel Request that the measure at issue is Technical Regulation No. 001/2011 "On Safety of Railway Rolling Stock", read together with the Protocol of the Ministry of Transport and the instructions mentioned in Annex III.

46. However, Ukraine does not challenge the above measure defined in the Panel Request. Instead, under the umbrella of Measure III Ukraine challenges new measures that are outside the Panel's terms of reference, since they have not been referred to in the Panel Request, as is required under Article 6.2 of the DSU. In its First Written Submission Ukraine challenges new measures: the alleged decision of the Russian authorities not to recognize the certificates issued to Ukrainian producers by certification bodies in other CU countries[34] and "the conformity assessment procedures set out in Article 6(9) of the CU Technical Regulation No. 001/2011". In its Second Written Submission, Ukraine challenges another set of new measures: the alleged requirements "that only products manufactured in the CU territory may be subject to certification" and "that only entities registered in the same country as the relevant certification body may apply for certificates".

4.2 MEASURE III AS CHALLENGED BY UKRAINE DOES NOT EXIST

47. Russia would like once again to clarify that no "decision" not to recognize certificates issued by other EAEU Member States has been taken by the Russian authorities. Protocol of the Ministry of Transportation reflects the opinion of the particular government officials present at that particular meeting, with the purpose of engaging with the Belarus colleagues in order to resolve the issue of whether certificates had been issued in compliance with the CU Technical Regulations requirements. As a result of this process, the relevant certification body of the Republic of Belarus, not Russia, terminated the certificates referred thereto.[35]

48. With respect to the letter to [[xxx]], based on the evidence on the record Russia has serious doubts about the existence and credibility of this document, since (1) the Federal Agency failed to find in its database the letter referred to by Ukraine in Exhibit UKR – 49 (BCI)(Corr.); (2) Ukraine failed to explain the discrepancies in the dates (the letter is dated as of 4 February 2015, while the text of the letter states that it is in response to the request as of 2 April 2015).

49. In any event, even if such letter had been issued by the Federal Agency, it is limited to the particular circumstances of that conformity assessment procedure. It could not have constituted or contained any "requirement" or "decision" by the Russian authorities not to recognize certificates

[34] Ukraine's first written submission, para. 304.
[35] Exhibits RUS – 52, RUS – 53.

issued by agencies of other EAEU Members. Furthermore, Russia has provided extensive evidence which conclusively establishes that products duly certified by other EAEU certifying bodies freely circulate in the territory of the Russian Federation. Exhibits RUS – 73(BCI) and 78 (BCI) contain letters from Russian companies confirming that they use the solid rolled wheels manufactured by [[xxx]], which means that these wheels are free to circulate in Russian market and are used by Russian producers. The certificate of conformity on these wheels was issued by certification body of Belarus and is mentioned in the document produced by Ukraine in Exhibit UKR-49(BCI)(Corr.).

50. Moreover, the evidence before the Panel corroborates that the Russian Federation did not take any "decision"not to recognize the certificates issued by the EAEU Member States to Ukrainian producers. In the 2014 – 2017 period, Belarus and Kazakh certification bodies issued 35 certificates of conformity to Ukrainian producers.[36]Products for which these certificates were issued freely circulate in the EAEU market, including the territory of the Russian Federation.

51. Thus, the Protocol and the letter referred to by Ukraine do not establish the existence of a generally applicable "decision" by the Russian authorities not to recognize the validity of certificates issued by the Customs Union Members.

4.3 CLAIM 7 MEASURE III ALLEGEDLY VIOLATES ARTICLE 2.1 OF THE TBT AGREEMENT

52. Firstly, the measure challenged by Ukraine does not deal with a technical regulation, as required by Article 2.1 of the TBT Agreement but rather with the alleged individual decisions not to accept the validity of the conformity assessment certificates. Ukraine cannot seek to circumvent the disciplines of Article 2.1 of the TBT Agreement by arguing that these individual determinations were made "in respect of" a technical regulation. The burden remains to be on Ukraine to establish a *prima facie* case that this purported "decision" exists, and that such "decision" constitutes a technical regulation within the meaning of paragraph 1 of Annex I of the TBT Agreement. Because Ukraine has failed to establish that the relevant documents are mandatory and constitute a technical regulation, its claims under Article 2.1 of the TBT Agreement must fail.

53. Secondly, Ukraine failed to establish the likeness of the goods at issue, as Ukraine repeats the same unlawful shortcut it took for establishing likeness in relation to its claims with respect to Measures I and II.

54. Thirdly, Ukraine failed to provide any evidence that Russia does not accord to the products imported from Ukraine treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

4.4 CLAIM 8 AND 9 MEASURE III ALLEGEDLY VIOLATES ARTICLE 5.1.1 AND 5.1.2 OF THE TBT AGREEMENT

55. With respect to Ukraine's TBT claims, Russia argues that the likeness of the products at issue was not established. With respect to the alleged less favorable conditions granted to Ukrainian suppliers, contrary to what is argued by Ukraine,[37] not only entities registered in the same country as the relevant certification body can apply for certification, as it is clearly evidenced from Article 6(9) of Technical Regulation 001/2011. The Protocol of the Ministry of Transport No. A 4-3 and the decisions listed in Annex III do not contain such a requirement. In any event neither the Ministry of Transport of the Russian Federation, nor the Federal Agency for Railway Transportation has the authority to interpret the scope of the CU Technical Regulation 001/2011 "On the Safety of Railway Rolling Stock". Also, they do not establish any additional requirements for the conformity assessment procedure and are not authorised to do so.

56. In any event, even if there was such a requirement, *quod non*, the TBT Agreement does not contain any prohibition to establish such a requirement. Moreover, this alleged requirement does not change in any way the conditions of competition, as required to establish the violation of Article 5.1.1 of the TBT Agreement. Thus, Measure III is not inconsistent with Russia's obligations under Article 5.1.1 of the TBT Agreement.

[36] See more detailed information in Exhibit RUS – 51 (BCI).
[37] Ukraine's first written submission, para. 338.

57. An alternative measure suggested by Ukraine in response to the alleged violation of Article 5.1.2 of the TBT Agreement i.e., that "the Russian Federation could accept that applicants registered in the territory of other Customs Union countries can apply for certificates",[38] is actually applied by the Russian Federation. In any event, acceptance of the certificates cannot be regarded as an alternative to non-acceptance of those. Thus, Ukraine failed to provide any reasonably available alternative that would ensure the level of protection sought by the Russian Federation.

58. Thus, Measure III is not inconsistent with Russia's obligations under Article 5.1.2 of the TBT Agreement.

4.5 CLAIM 10 AND 11 MEASURE III ALLEGEDLY VIOLATES ARTICLE I:1 AND III:4 OF THE GATT

59. In order to establish inconsistency with Article I:1 and III:4 of the GATT, the likeness of the products that are allegedly treated differently needs to be established. However, as discussed above, Ukraine failed to substantiate the likeness of the products at issue.

60. In any case, as it has been explained above there is no requirement that "only products manufactured in the territory of the CU may be subject to certification" or "that only entities registered in the same EAEU Member State as the relevant certification body can apply for certification." Products certified by Belarus and Kazakh certification bodies freely circulate in the EAEU market, including the territory of the Russian Federation.

61. Therefore, Ukrainian products imported to the Russian Federation are accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any third country. For these reasons Russia argues that Measure III is not inconsistent with Article III:4 of the GATT 1994.

4.6 CLAIM 12 MEASURE III ALLEGEDLY VIOLATES ARTICLE X:3(A) OF THE GATT

62. In order to establish a violation of Article X of the GATT Ukraine is required to show that Measure III is a rule "of general application".[39] Ukraine stated that it "is not challenging the administration of CU Technical Regulation No. 001/2011 but the administration of the third measure".[40] However, the only analysis Ukraine presented is that "Technical Regulation No. 001/2011 …is a measure of general application."[41]Ukraine failed to make any similar analysis with respect to the Protocol of the Ministry of Transport and the letter to [[xxx]]. Thus, Ukraine failed to make a *prima facie* case that Measure III, as challenged by Ukraine, falls within the scope of Article X:3 of the GATT.

63. As Ukraine itself rightly highlighted,[42]in *US – Corrosion-Resistant Steel Sunset Review* the panel pointed out that, "for a Member's action to violate Article X:3(a) that action should have a significant impact on the overall administration of that Member's law and not simply on the outcome of the single case in question".[43]

64. Ukraine's arguments that "the actions taken in those documents [referred to by Ukraine in Annex III of the Panel Request] have a significant impact on the overall administration of the measure towards Ukrainian producers, and not simply on the outcome of a single case" and that the "refusal to recognize is not a one-off situation but has been applied to all Ukrainian producers trying to export to the Russian Federation…"[44] contradict the evidence put before the Panel, as the products certified by Belarus and Kazakh certification bodies freely circulate on Russian market. Thus, Ukraine failed to establish the violation of Article X of the GATT.

[38] Opening Statement of Ukraine, 10 July 2017, para. 102.
[39] Appellate Body Report, *EC – Poultry*, para. 111.
[40] Second Written Submission of Ukraine, para. 438.
[41] Ukraine's first written submission, paras. 389-392.
[42] Second Written Submission of Ukraine, para. 442.
[43] Panel Report, *US – Corrosion-Resistant Steel Sunset Review,* para. 7.310.
[44] Second Written Submission of Ukraine, para. 443.

5. CONCLUSIONS

65. For the reasons set out in the present submission, the Russian Federation requests the Panel to dismiss all Ukraine's claims and to find that the challenged measures are not inconsistent with Russia's obligations under the WTO Agreements.

ANNEX D

ARGUMENTS OF THE THIRD PARTIES

ANNEX D-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. APPLICABILITY OF GATT ARTICLES I:1 AND XI:1

A. The Nature of the Measure at Issue

1. It is settled law that, "in principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings", and that this includes unwritten measures.

2. As the complainant, Ukraine is required to establish that the measure exists and that it is inconsistent with the Russian Federation's WTO obligations. The legal burden in this respect is the same whether the measure is written or unwritten. The specific measure challenged and how it is characterized by a complainant will determine the kind of evidence the complainant needs to submit and the elements that it must prove in order to establish the existence of the measure challenged.

3. While Canada agrees with the panel's statement in *Russia – Tariff Treatment* that demonstrating the systematic application of an unwritten measure is not a general requirement in ascertaining its existence, in the circumstances of this dispute, Ukraine's characterization of the alleged measure has effectively turned it into a requirement.

B. Article I:1

4. The WTO jurisprudence indicates that the phrase "rules and formalities in connection with importation" has been interpreted broadly. There must be a relationship between the measure and some aspect of the importation or an impact on the actual importation in order for it to be in connection with importation. In *Argentina – Financial Services,* the panel determined that "there must be a certain association, link or logical relationship between the measure and the exports".

5. In accordance with the legal standard under Article I:1, the Panel should, in determining whether the measure is in connection with importation, consider evidence regarding the relationship between the measure and some aspect of the importation of the products or its impact on the actual importation of such products. Canada notes that Ukraine's description of the suspension of certificates of producers of Ukrainian railway products and the rejection of the applications by such producers for new certificates appear to be instances of the application of the Russian Federation's conformity assessment procedures (CAPs).

C. Article XI:1

6. The scope of Article XI:1 includes "measures which affect the opportunities for importation…". In *Dominican Republic – Cigarettes*, the panel determined, referring to earlier jurisprudence, that in order to find that a particular measure is a restriction on importation, "it was necessary to identify it as a condition that has a limiting effect on the importation itself". The reasoning of the panel in *Dominican Republic – Cigarettes* indicated that "not every measure affecting the opportunities for entering the market would be covered by Article XI, but only those measures that constitute a prohibition or restriction on the importation of products, i.e. those measures which affect the opportunities for importation itself".

7. In this dispute, Ukraine's position is that the measure characterized as the systematic prevention of the importation of railway products is a measure subject to Article XI:1. Ukraine claims that because the absence of a conformity assessment certificate prevents railway products from being placed on the Russian market, this effectively stops Ukrainian rail products from being imported. Ukraine has not provided evidence of the relationship between the decisions with respect to the CAPs and the importation of railway products. However, such a relationship could be demonstrated if the Russian measure requires, as a condition to be met when importing railway

products, that the importer produce a conformity assessment certificate allowing the products to be sold in the Russian Federation.

8. The GATT 1994 distinguishes between internal measures and border measures. Maintaining this distinction is important since border measures and internal measures are subject to different rules. Article III contains specific obligations (i.e. non-discrimination rules) that apply to internal measures that are different in nature from the obligations that apply to border measures. Note *Ad* Article III indicates that even if measures falling under Article III:4 are enforced at the border, such measures still constitute internal measures that fall with the scope of Article III as long as the measure applies similarly to the imported product and to the like domestic product. This reinforces the need to establish a clear relationship between a measure and the importation of the product in order for the measure to be a border measure that falls within the scope of Article XI:1.

II. THE NON-DISCRIMINATION TEST IN ARTICLE 5.1.1 OF THE TBT AGREEMENT

9. Article 5.1.1 of the TBT Agreement contains a requirement that, in respect of CAPs, Members not grant access to suppliers of imported products under conditions less favourable than those accorded to suppliers of like domestic products or like products originating in any other country, in a "comparable situation."

10. Canada agrees that Article 2.1 provides relevant context for the interpretation of Article 5.1.1. At the same time, there are important textual and contextual differences that must also be taken into account. Similar to Article 2.1, Members are under an obligation with respect to Article 5.1.1 not to apply CAPs in a manner that would constitute arbitrary or unjustifiable discrimination. As under the Article 2.1 analysis, the scope of the test to determine whether there is arbitrary and unjustifiable discrimination is dictated by the particulars of the dispute.

11. In the context of Article 5.1.1, an analysis of arbitrary or unjustifiable discrimination requires assessing whether any detrimental impact to the competitive opportunities of certain suppliers resulting from a decision to accord different access to the CAP can be reconciled with, or is rationally related to, circumstances objectively relevant to the conduct or administration of that CAP. One consideration in this regard is whether the suppliers are in a "comparable situation".

A. "Comparable situation"

12. The situations to be compared under Article 5.1.1 are those that apply to the suppliers in the territories from where the like products originate. Canada notes the similarities between the term "comparable situation" and the phrase "between countries where the same conditions prevail", from the sixth recital of the preamble to the TBT Agreement and the chapeau of Article XX of the GATT. In the context of GATT Article XX, the Appellate Body has stated that "an assessment of whether there is discrimination between countries where the conditions prevailing are 'the same' is both a predicate for, and necessarily informs a panel's examination as to whether such discrimination is 'arbitrary and unjustifiable'". Canada believes that this statement is also applicable in the context of TBT Article 5.1.1.

13. Canada also considers that while the phrase "in a comparable situation" qualifies the scope of the obligation in Article 5.1.1, it should be interpreted in favour of granting access to CAPs to as wide a variety of potential suppliers as is possible, taking into consideration the legitimate policy goals of the importing Member in conducting the CAP. In assessing whether suppliers from the countries in question are "in a comparable situation", a panel should focus its inquiry on factors relevant to the issue of "access" to the relevant CAP. A panel should consider the specific facts of the case that relate to the "situation" of the supplier in the context of the CAP at issue. Relevant situations could include war, civil unrest, or *force majeure* in specific circumstances. If this type of "situation" prevents an importing Member from obtaining assurance of conformity with its technical regulation, it should be taken into account by the panel.

III. INTERPRETATION OF ARTICLE 5.1.2 OF THE TBT AGREEMENT

14. The general legal obligation under Article 5.1.2 is set out in the first sentence. It requires that WTO Members do not prepare, adopt or apply CAPs with a view to or with the effect of creating unnecessary obstacles to international trade. The second sentence of Article 5.1.2

provides an example of how CAPs could be "prepared, adopted or applied" in violation of the legal obligation. It provides that CAPs "shall not be more strict or applied more strictly" than is necessary to give the importing Member "adequate confidence" of conformity. The use of imprecise terms "strict", "applied more strictly" and "adequate confidence" suggests a margin of discretion to the importing Member.

15. Canada believes that the "relational analysis" is relevant to the general legal obligations of Article 5.1.2. The second sentence of Article 5.1.2 serves effectively the same role as the second sentence in Article 2.2. As the Appellate Body has described in the *US – Tuna II (Mexico) and US – COOL*, the words linking the first and second sentences of Article 2.2, "for this purpose", "suggest that the second sentence informs the scope and meaning of the obligation contained in the first sentence". The words "this means, inter alia" suggest that the second sentence serves to explain the legal analysis under the Article as a whole. Thus, the "relational analysis" that the panel in *EC – Seal Products* correctly identified in Article 5.1.2 should be viewed in respect of the general legal obligation set out in the first sentence.

16. Canada understands that the ordinary meaning of the word "strict" is "accurately determined or defined"; "exact, precise"; and "of particulars: enumerated or described in exact detail". The element of the obligation in Article 5.1.2 relating to strictness or strictness of application therefore requires that importing Members not enforce such precise adherence to a process or standard in the conduct of a CAP that results in the exclusion of conforming products. Canada is of the view that the term "strict" in 5.1.2 is meant to cover elements of the procedure itself that might impose an unnecessary burden on the supplier or the product and could result in a "false negative." In contrast, the phrase "strictly applied" refers not to the procedure itself, but to the manner in which it is conducted.

17. An assessment of whether a WTO Member has "adequate confidence" that its technical regulations or standards are complied with is relative to the risk tolerance and legitimate policy goals of the importing Member and may differ between individual Members. In every case, Members must ensure that their chosen measures are applied in a non-discriminatory fashion and that any restrictions on trade are a result of the pursuit of "legitimate" objectives and arise only to the extent necessary.

18. In the circumstances of this dispute, the Panel is required to assess whether the Russian Federation's claim that it is unable to complete its CAP is *bona fide* or whether there are other reasons underlying the Russian Federation’s actions that do not relate to the objective of Article 5.1.2.

IV. THE SCOPE OF ARTICLE 2.1 OF THE TBT AGREEMENT

19. The obligations in respect of the technical regulations in Article 2 apply to a WTO Member's central government body when such bodies prepare, adopt and apply technical regulations. As the Appellate Body in *US – COOL* found, Article 2 of the TBT Agreement "governs" the "Preparation, Adoption and Application of Technical Regulations by Central Government Bodies".

20. In Canada's view, since the words "prepared, adopted or applied" do not appear in Article 2.1, as they do in Article 2.2, the scope of Article 2.1 may not be limited to the preparation, adoption or application of technical regulations. It may include other actions that are taken "in respect of" technical regulations; however, other provisions of the TBT Agreement may limit the scope of measures subject to Article 2.1.

21. Canada is of the view that decisions whether to accept the conformity assessment certificates issued by other Eurasian Customs Union (ECU) countries are not the type of actions subject to Article 2.1 if they are governed by Article 5. Article 5 applies to CAPs which are defined as "[a]ny procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled". More specifically, Article 5.1.1 applies to cases for which a positive assurance of conformity with technical regulations is required.

22. In Canada's view, the Panel should consider whether a decision not to accept the validity of conformity assessment certificates, based on a requirement as to where the products are

manufactured, is subject to Article 2.1, or whether it is more properly characterized as a measure relating to the application of the CAP and therefore subject to the disciplines of Article 5.

V. APPLICATION OF ARTICLE 2 TO THE TECHNICAL REGULATIONS OF SUPRANATIONAL BODIES

23. Article 2 of the TBT Agreement governs technical regulations by central government bodies. Canada notes there is no reference in either the text of the TBT Agreement or in Annex 1 to supranational bodies. Nevertheless, a supranational body could be a central government body as per the definition of the latter if the supranational body is a "body subject to the control of the central government". In that case, the supranational body's technical regulation can be attributed to the WTO Member and therefore the WTO Member would be required to ensure that the supranational government body's technical regulation is consistent with Article 2 of the TBT Agreement.

24. In this case, the application of Article 2.1 of the TBT Agreement does not depend on whether the technical regulation has been prepared, adopted or applied by a supranational body. The Commission of the ECU has adopted the technical regulations but they have direct effect in the Russian Federation, and are applied by the Russian Federation’s national authorities. Article 2.1 requires WTO Members to ensure there is no less favourable treatment accorded to imported like products in respect of technical regulations. Thus, the Russian Federation is required under Article 2.1 to ensure there is no discrimination against imported like products in respect of ECU technical regulations it applies in its territory. In Canada's view, the fact that the technical regulation has been adopted by a body other than a central government body, does not preclude Article 2.1 from applying to such technical regulations when they are being applied by a Member within its territory.

ANNEX D-2

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. MEASURE I

1. As stressed by the Appellate Body, what exactly is needed to ascertain the existence of an overarching measure will depend on how the measure is described and characterized by the complainant.[1] Ukraine characterizes the overarching measure as a systematic prevention of Ukrainian railway products from being imported into Russia. Thus, the elements for the Panel to assess are: (i) whether Ukrainian railway products are prevented from being imported into Russia (through the combined effect of the individual measures), (ii) whether this measure is of a "systematic" nature.

2. The Appellate Body defined the meaning of a measure that has "systematic application" as a measure that does not have "sporadic unrelated applications".[2] In *Russia – Tariff Treatment*, the panel considered that "systematic" meant that something is "done according to a system, plan or organized method or effort".[3]

3. Isolated instances in which Ukrainian products at issue could be placed on the Russian market, should in the view of the EU, not be viewed as evidence that an objective of preventing Ukrainian products at issue from entering the Russian market does not exist.

A. Claim under Article XI:1 of the GATT 1994

4. The EU notes that despite its broad scope, not *any* condition having an impact on importation is capable of falling under Article XI:1[4]. There must be a particular kind of condition, i.e. one which has a limiting effect on the quantity or amount of importation itself. One must distinguish between measures that limit the amount of imports or prevent the importation of products, and those that merely have any negative impact on imports. Only where there is a discernible quantitative dimension of the measure, in the form of a limiting effect on the quantity or value of a product being imported/exported can the measure fall under Article XI:1. This is supported by the title of Article XI which refers to *Quantitative* Restrictions (emphasis added), and was recently confirmed by the Appellate Body[5].

5. The EU considers that in cases where a measure amounts to an internal regulation affecting both domestic and imported product, the mere fact that the measure is enforced at the border does not make it fall within the scope of Article XI. Rather, by virtue of the *Ad* Note to Article, such measure should be examined under the prism of Article III.

B. Claim under Article XIII:1 of the GATT 1994

6. For the same reasons as explained in the context of Article XI:1, *mutatis mutandis*, the EU submits that only those prohibitions or restrictions that are instituted or maintained by any Member "on the importation" (or exportation) of products are concerned by Article XIII:1. Where a measure amounts to an internal regulation affecting both domestic and imported product, the mere fact that the measure is enforced at the border does not make it fall within the scope of Article XIII:1 of the GATT 1994.

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[1] Appellate Body Report, Argentina — Import Measures, para. 5.108.
[2] Appellate Body Report, *Argentina – Import Measures* (2015), paras. 5.142 – 5.143.
[3] Panel Report, *Russia – Tariff Treatment*, paras. 7.307 and 7.311.
[4] Panel Report, *India — Autos*, para. 7.270.
[5] Appellate Body Report, *Argentina — Import Measures*, para. 5.217 (referring to Appellate Body Report, *China — Raw Materials*, para. 320):"The use of the word 'quantitative' in the title of Article XI of the GATT 1994 informs the interpretation of the words 'restriction' and 'prohibition' in Article XI:1, suggesting that the coverage of Article XI includes those prohibitions and restrictions that limit the quantity or amount of a product being imported or exported."

II. MEASURE II

7. Article 5.1.1 of the TBT Agreement, which has not yet been subject to panel or Appellate Body interpretation, contains the national treatment and most-favoured-nation treatment obligations with regard to conformity assessment procedures. The EU agrees with Ukraine that, on the basis of the text of Article 5.1.1, three elements would need to be demonstrated in order to establish a violation of said provision, namely: (i) that the measure at issue is a conformity assessment procedure; (ii) that products of suppliers from the WTO Member concerned are like products of national origin or originating in other countries; and (iii) that those suppliers are granted access under conditions less favourable than those accorded to suppliers of like domestic products and suppliers of like products originating in any other country, in a comparable situation. While there is no contention between the Parties as to the first element, they disagree on the second and third element.

8. First, with respect to the requirement that the products of suppliers from the WTO Member concerned are like products of national origin or originating in other countries, the EU submits that in light of the similarities in its text and structure of Article 2.1 of the TBT Agreement, the requirement under Article 5.1.1 calls for an analysis similar to that applied in Article 2.1.

9. The first step in a likeness examination is to identify the domestic and imported products that must be compared.[6] The products to be compared for the purposes of determining their likeness in the context of this dispute would appear to be Russian railway equipment and parts thereof, Ukrainian railway equipment and parts thereof, as well as railway equipment and parts thereof originating in any other country. As the panel in *US – COOL* confirmed, when distinction between the products at issue is that of origin, they can be considered as "like products".[7]

10. Second, with respect to the requirement that suppliers be granted access under conditions less favourable than those accorded to suppliers of like domestic products and suppliers of like products originating in any other country, when they are in a comparable situation, the EU submits that circumstances such as war or civil unrest may objectively make it impossible for on-site inspections to take place in a given country and on a given moment in time. Such circumstances could entail that the suppliers in the country concerned would not be in a situation comparable to that of the suppliers in other countries, which are not afflicted by war or civil unrest, for the purposes of the analysis under Article 5.1.1. In the alternative, the European Union submits that the difference in treatment in light of a particular security situation will not amount to less favourable treatment, when it constitutes a legitimate regulatory distinction.

III. MEASURE III

A. The scope of Article 2.1 TBT

11. Article 2.1 of the TBT Agreement applies to treatment accorded "in respect of" a technical regulation. It may thus encompass measures which are not, in and of themselves, technical regulations within the meaning of the TBT Agreement. In particular, Article 2.1 of the TBT Agreement does cover *inter alia* measures taken in order to "apply" a technical regulation. At the same time, Article 2.1 of the TBT Agreement cannot be interpreted in an overbroad manner, which would interfere with other, more specific and detailed disciplines stipulated elsewhere in the TBT Agreement. The EU notes in this regard that Article 6 of the TBT Agreement addresses specifically the "recognition of conformity assessment by central government bodies". Reading Article 2.1 of the TBT Agreement as applying to the recognition of certificates of conformity issued by other countries would duplicate unnecessarily the more detailed rules contained in Article 6 and may create conflicts between the two provisions. Therefore, the EU is of the view that Article 6 is *lex specialis* with regard to the recognition of certificates of conformity issued by other countries and excludes the application of Article 2.1.

12. Should the Panel, nevertheless, conclude that Article 2.1 and Article 6 of the TBT Agreement can be applied concurrently, the EU submits in the alternative that the obligations imposed by Article 2.1 must be interpreted harmoniously with the more detailed rules contained in Article 6.

[6] Panel Report, *US – Clove Cigarettes*, para. 7.124.
[7] Panel Report, *US – COOL*, paras 7.253-7.256.

More specifically, a Member cannot be required, pursuant to Article 2.1, to recognise a certificate issued by another Member in circumstances where it would have been permitted to deny such recognition in accordance with the more specific criteria laid down in Article 6.1.

B. Claims under Articles 5.1.1 and 5.1.2 of the TBT Agreement

13. The EU understands that the alleged requirement whereby only the entities registered in a CU country could apply for certification to a certification body located in that CU country would apply indistinctly to all applicants, regardless of the origin of the goods supplied by each of them. In view of that, the alleged requirement would not appear to accord *de iure* less favourable conditions to the suppliers of Ukrainian goods.

14. Ukraine, however, appears to claim that the alleged requirement violates *de facto* Article 5.1.1 because it places an "additional burden"[8] on the suppliers of imported products given that, in practice, the suppliers of domestic goods will already be registered in Russia. The EU considers that, in light of its similarities with the text and structure of Article 2.1 of the TBT Agreement, the determination of *de facto* discrimination under Article 5.1.1 calls for an analysis similar to that applied under Article 2.1. In particular, this means that, in case of *de facto* discrimination, the mere existence of a "detrimental effect", such as the one invoked by Ukraine, would not be sufficient to demonstrate a violation of Article 5.1.1. In addition, it would have to be established that such detrimental impact "does not stem exclusively from a legitimate regulatory distinction", but rather reflects prohibited discrimination.[9]

15. Neither Ukraine nor Russia have addressed the second element of the proposed test for the application of Article 5.1.1 in cases involving *de facto* discrimination. Nevertheless, as noted above, Russia has argued, in response to Ukraine's claim under Article 5.1.2, that the requirement at issue is necessary in order to "ensure compliance with the requirements of this CU technical regulation and to bear responsibility for non-compliance of the products with the requirements of this CU technical regulation"[10]. At first sight, that objective fits within the objective mentioned in the last sentence of Article 5.1.2 (i.e. giving the importing Member "adequate confidence" that products conform with the applicable technical regulations) and must therefore be regarded as a "legitimate" objective. In view of this, the Panel should analyse whether the "additional burden" alleged by Ukraine "stems exclusively" from a requirement designed to achieve that objective or rather reflects prohibited discrimination against imported goods.

C. Article 5.1.2.

16. Ukraine appears to consider that a requirement to the effect that the applicant must be registered in *any* of the CU countries would not be incompatible with Article 5.1.2. Rather, what Ukraine finds objectionable is the alleged requirement that the applicant must be registered in the same CU country where the certification body is based. The EU agrees that the distinction drawn by Ukraine between these two situations may indeed be relevant for the purposes of Article 5.1.2.

17. The EU recalls that Russia has agreed to recognise the certificates of conformity with Technical Regulation No. 0001/2011 issued by the authorities of the other CU countries. In view of this, the requirement alleged by Ukraine could not be regarded as "necessary" for the purposes of Article 5.1.2 unless it could be shown that the mere fact that the certification is applied for in a CU country other than the CU of registration of the applicant would make it more difficult for the authorities of the former CU country to ensure compliance with Technical Regulation No. 0001/2011. Furthermore, it would have to be shown that any such additional difficulties cannot be properly addressed in a less trade-restrictive manner. For example, by ensuring adequate cooperation among the competent authorities of the various CU countries within the framework of the agreement establishing the customs union or its implementing measures. So far, however, there appears to be no evidence or argument in the record that would support such contention.

[8] Ukraine's first written submission, para. 342.
[9] See e.g. Appellate Body Report, *US – Clove Cigarettes*, para. 182.
[10] Russia's first written submission, para. 149.

D. Claims under Articles I:1 and III:4 of the GATT 1994

18. Russia's claims under Article I:1 and Article III:4 of the GATT 1994 based on the alleged requirement that only products manufactured in a CU country can be certified under Technical Regulation No 0001/2011 raise similar issues as Russia's claim under Article 2.1 of the TBT Agreement with regard to the same requirement. Therefore, the EU refers to its previous observations.

19. In turn, Russia's claim under Article III:4 of the GATT 1994 with regard to the alleged requirement that the applicant for certification must be based on the same CU country as the certification body raises similar issues as Ukraine's claim under Article 5.1.1 of the TBT Agreement with regard to the same requirement. Whereas the objective pursued by this requirement does not have to be considered in order to establish a violation of Article III:4 of the GATT, that objective could become relevant in order to determine whether the "additional burden" alleged by Ukraine is justified under one of the exceptions included in Article XX of the GATT 1994 and, in particular, under Article XX(d).

ANNEX D-3

EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA

I. THE REQUEST MUST PROVIDE A BRIEF SUMMARY OF THE LEGAL BASIS OF THE COMPLAINT SUFFICIENT TO PRESENT THE PROBLEM CLEARLY UNDER ARTICLE 6.2 OF THE DSU

1. With respect to the request for the establishment of a panel, Article 6.2 of the DSU requires Members to provide the request in writing, indicate whether consultations were held, identify the specific measures at issue, and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

2. Next, whether the legal basis of the complaint sufficient to present the problem clearly, Indonesia suggested that Panel must conduct case by case analysis in examining the connection of the challenged measures with the provisions of the covered agreements claimed to have been infringed; and whether the ability of the respondent to defend itself was prejudiced.

II. LEGAL STANDARD TO PROVE THE EXISTENCE OF UNWRITTEN MEASURE(S)

3. Finally, Indonesia is of the view that to prove the existence of unwritten measure (Measure I in the current case), the complainant must submit evidence to prove the existence of Measure I by fulfilling the conditions as follow: (i) that the measure is attributable to the respondent; (ii) the precise content of the measure; (iii) how the different components of the alleged measure operate together as a single measure; and (iv) how a single measure exists as distinct from its components.

ANNEX D-4

EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. UKRAINE'S CHARACTERIZATION OF THE MEASURE AS "SYSTEMATIC PREVENTION"

1. Japan considers that the interpretive approach developed by the Appellate Body for unwritten measures consisting of a "systematic application" can provide helpful guidance in this case, particularly for the assessment of whether the alleged measure exists. The Panel should carefully scrutinize whether the alleged "systematic prevention" exists as an unwritten, single measure. This, in turn, requires the Panel to determine whether a complainant has demonstrated that the individual measures operate together as part of a single measure by virtue of the underlying "organized effort" undertaken in support of a particular "aim", and that the "systemic prevention" exists as a single measure that is distinct from its constituent, individual actions in the light of the underlying "organized effort" and its underlying objectives. Japan is of the view that these requirements should be examined through a comprehensive and objective analysis of the structure and application of the alleged measure.

2. Moreover, in Japan's view, it is vitally important for a complainant to describe the challenged measure clearly and identify each of its constituent elements. It is equally important for the panel to confirm whether the complainant has provided sufficient proof of each constituent element and whether those elements are sufficient to establish the existence of the unwritten measure as characterized by the complainant.

3. In the present case, while Japan has no intention to comment on the specific facts of this case, Japan believes that the Panel will at least need to assess whether Ukrainian railway products are "prevented from being imported" into Russia by the domestic, constituent measures, that is, the suspension of certificates, the refusal to issue certificates, and the non-recognition of certificates. The Panel will also need to assess the measure's "systematic" nature in order to ascertain whether Measure I exists as described and characterized by Ukraine.

II. ARTICLE 5.1.1 OF THE TBT AGREEMENT

4. The terms "no less favorable" in Article 5.1.1 of the TBT Agreement have not been interpreted by a panel or the Appellate Body. Japan believes that Article 2.1 of the TBT Agreement provides context and that the elements of context and object and purpose considered by the Appellate Body in relation to Article 2.1 are equally applicable to Article 5.1.1.

5. Similarly to technical regulations, CAPs may give rise to the detrimental impact caused by different conditions of access to CAPs between suppliers of like products of different origins.[1] This suggests that Article 5.1.1 should not be read to mean that any difference in conditions of access to CAPs would *per se* accord less favorable treatment. The sixth recital of the TBT Agreement also provides relevant context regarding the ambit of the "no less favourable" requirement in Article 5.1.1 because the sixth recital applies to "measures" covered by the TBT Agreement in general. The object and purpose of the TBT Agreement, which is to strike a balance between, on the one hand, the objective of trade liberalization and, on the other hand, Members' right to regulate[2], is relevant for understanding the disciplines on CAPs in Article 5.1.1.

6. As the context as well as object and purpose considered in Article 2.1 are equally applicable to Article 5.1.1 which also bears a similarity to Article 2.1 in language and structure, Japan's view is that the rationale for allowing legitimate regulatory distinctions also applies to Article 5.1.1. Nevertheless, apart from the obvious difference in coverage, Japan observes two noteworthy differences between the two provisions which may affect the legal test under Article 5.1.1: (i) while Article 2.1 regulates different treatments between *like products*, the text makes it clear that

[1] For example, depending on the location of an inspection point, CAPs may give rise to a trade restricting effect on products from a particular country.

[2] Appellate Body Report, *US – Clove Cigarettes*, paras. 173-174.

Article 5.1.1 regulates differences in conditions of access to CAPs between *suppliers of like products*;[3] and (ii)Article 5.1.1 ensures no less favourable *conditions* for granting access to CAPs for suppliers of like products, in contrast to no less favourable *treatment* accorded to like products required by Article 2.1.

7. Thus, to the extent that Ukraine is making a claim of *de facto* discriminatory conditions (for granting access to CAPs) rather than alleging that legal instruments relating to the CAPs on their face provide discriminatory conditions (*de jure* discrimination), Japan considers that the Panel should apply the following two-part test:

(i) Whether access to the CAPs concerned is granted to 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 of Russian origin or suppliers of like products originating in any other Member, in a comparable situation, and

(ii) If so, whether the detrimental impact arising from different conditions (for granting access to the CAPs concerned) stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the suppliers of Ukrainian railway products. In applying this test, the Panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the CAPs concerned, and, in particular, whether the procedures are even-handed.

8. Japan notes that Article 5.1.1 only applies when discrimination occurs between suppliers in a "comparable situation." Japan understands a "comparable situation" to be a situation that is capable of being compared, and the term potentially encompasses a relatively broad range of situations. At the same time, the comparison under Article 5.1.1 should not be made between any suppliers in a comparable situation but only suppliers in a comparable situation who provide like products. This means that the subject of the comparison under Article 5.1.1 is limited in two ways; suppliers should be dealing with like products and such suppliers must be in a comparable situation. The requirement of "a comparable situation" should be examined before applying the two-part test described above, which requires the conditions of access for suppliers "in a comparable situation" to be compared.

9. As regards the first prong of the test above, Japan notes that Article 5.1.1 requires an adjudicator to consider whether the "conditions" under which access to the CAPs is granted to suppliers of Ukrainian products are no less favorable than those under which such access is granted to suppliers of like products of Russian origin or originating in any other country. It is insufficient to simply identify suppliers that did not obtain access or instances of denial of access. Instead, the "conditions" that granted or restricted their access must be shown and be compared. Thus, a complaining Member must identify the "conditions" for granting the access to the CAPs and explain how the conditions allegedly differed to the detriment of suppliers of Ukrainian products.[4]

10. Turning to the second prong of the test above, Japan first observes that Article 5.1.1 should examine whether the detrimental impact on suppliers of Ukrainian products caused by the conditions granting access to the CAPs can be reconciled with, or is rationally related to, the CAP's objective of assuring conformity with the relevant technical regulation, rather than reflecting discrimination against suppliers of Ukrainian products. This involves looking at the particular

[3] However, Japan understands Article 5.1.1 of the TBT Agreement ultimately proscribes discriminatory treatment between like products based on their origin. Apart from the fact that the TBT Agreement is an agreement on trade in goods, this reading is confirmed by the text of Article 5.1.1, which compares conditions of access accorded to suppliers of "like products originating in the territories of other Members" and those accorded to suppliers of "like products of national origin or originating in any other country." This view is further buttressed by Article 5.1, which reads that "… their central government bodies apply the following provisions to *products* originating in the territories of other Members". Japan submits that Article 5.1.1 protects the equal condition of competition between like products by ensuring no less favourable conditions of access to CAPs for suppliers of like products because it is suppliers, and not products, that are granted access to CAPs.

[4] Japan notes that due consideration should be given to the fact that a complaining Member may face difficulty in identifying the relevant "conditions" when information provided by the competent body to the applicant under Article 5.2.2 of the TBT Agreement is insufficient or inaccurate.

circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the CAPs at issue, and, in particular, whether they are even-handed, in order to determine whether they discriminate against the suppliers of like products originating from Ukraine.[5]

11. Therefore, in the present case, while Japan has no intention to comment on the specific facts of this case, Japan believes that the Panel should carefully examine whether the conditions allegedly giving rise to restrictions or denial of access to the CAPs for suppliers of Ukrainian products are justified or even-handed, or have legitimate grounds. In this regard, Japan considers that the question of whether the security situation in Ukraine indeed makes it impossible for Russian officials to carry out inspection control and, if so, thus justifies different conditions of access to the CAPs should be addressed under the second step of the two-part test.

12. Second, with regard to the burden of proof, Japan believes the analysis provided by the Appellate Body in *US – Tuna II (Mexico) (Article 21.5 – Mexico)* in the context of Article 2.1 of the TBT Agreement provides useful guidance. Under Article 5.1.1, a complainant would first have to make a *prima facie* case by presenting evidence and arguments sufficient to establish that the challenged CAPs have a detrimental impact and are not even-handed. This burden should not be construed rigidly because the respondent is best situated to explain the challenged CAPs. The burden of proof then should shift to the respondent to rebut the complainant's *prima facie* case by, in particular, explaining why any detrimental impact caused by the conditions for granting access to the CAPs stems exclusively from a legitimate regulatory distinction.

13. Lastly, in evaluating the explanations provided by the importing Member during this panel proceeding, if the Panel finds any inconsistency between the reasons provided in the determination of the competent authority at the time conformity was assessed, which are required under Article 5.2.2 of the TBT Agreement, and an explanation provided *ex post* (i.e. explanation provided during this panel proceeding), such inconsistency would raise doubts about the explanation made *ex post*. Therefore, Japan believes that, when such inconsistency exists, the panel should examine carefully whether the *ex post* explanation is supported by objective evidence.

III. ARTICLE 5.1.2 OF THE TBT AGREEMENT

14. The first sentence of Article 5.1.2 requires Members to ensure that conformity assessment procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. Japan understands that this provision makes operational one of the TBT Agreement's purposes of "ensur[ing] that technical regulations and standards, including … procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade" as set out in the fifth recital of the preamble of the Agreement.

15. The second sentence is connected to the first sentence by the term "inter alia". Based on the ordinary meaning of the term "inter alia", Japan agrees with the interpretation of the panel in *EC — Seal Products* that Article 5.1.2 "consists of general obligations, set out in the first sentence, and an example of the general obligations, set out in the second sentence". Thus, a violation of the general obligation in the first sentence could be established by showing a breach of the second sentence.[6] Moreover, the use of the term "inter alia" suggests that a violation of the second sentence of Article 5.1.2 is only one way in which a breach of the first sentence could be established. This is a notable difference when compared with the legal test under Article 2.2.[7]

16. However, there are "similarities in [the] text and structure" between Article 2.2 and Article 5.1.2, second sentence, as noted by the panel in *EC — Seal Products*.[8] In addition, both Articles 2.2 and 5.1.2 reflect the objective of prohibiting unnecessary obstacles to international trade stated in the fifth recital.[9] For these reasons, Japan submits that the case law relating to Article 2.2 provides pertinent and important guidance for interpreting Article 5.1.2, second sentence. Therefore, Japan considers that the relational analysis applied under Article 2.2 of the

[5] See Appellate Body Report, *US – Clove Cigarettes*, para. 182.
[6] Panel Report, *EC — Seal Products*, paras. 7.512-7.513.
[7] Appellate Body Report, *US — Tuna II (Mexico)*, para. 318.
[8] Panel Report, *EC — Seal Products*, para. 7.539.
[9] Appellate Body Report, *US — Clove Cigarettes*, para. 93.

relevant factors and the comparison of the challenged measure to possible alternative measures, which in most cases is required, should be similarly undertaken under the second sentence of Article 5.1.2.

17. Japan further notes that the second sentence of Article 5.1.2 specifies that the purpose of CAPs is "to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards". Moreover, the sixth recital of the preamble of the TBT Agreement recognizes that a Member shall not be prevented from taking measures necessary to achieve its legitimate objectives "at the levels it considers appropriate". In Japan's view, this language indicates that the importing Member has certain latitude to determine the level of confidence that it considers "adequate" or "appropriate".

18. In particular, while a conformity assessment will generally comprise some combination of testing, inspection and sampling, the specific type of CAPs applied by each Member depends on the degree of confidence in conformity sought by the Member. The degree of confidence pursued, in turn, reflects considerations by each Member of such factors as the nature of the product in question, the level of risk entailed by non-compliance with the applicable regulation, and supporting quality infrastructure. Japan submits that while the importing Member has certain latitude to determine the level of confidence it pursues, based on which the specific type of CAPs is chosen, in order to ensure that this discretion is properly exercised and that it is subject to appropriate review, it is crucial that the regulating Member not only identify the technical regulation or standard with which CAPs are verifying compliance, but also identify, as precisely as possible, the degree of confidence it pursues through its CAPs.

19. Japan considers that a panel adjudicating a claim under Article 5.1.2 should ascertain to what degree the challenged CAPs, as written and applied, contribute to the objective of giving the importing Member adequate confidence that products conform with the applicable technical regulations or standards. In the case of CAPs, the degree of contribution will be closely related to the degree of confidence required by the regulating Member.

20. The second sentence of Article 5.1.2 also uses the comparative "more … than". Accordingly, if the challenged measures are found to be "conformity assessment procedures" within the meaning of Annex 1 to the TBT Agreement, Japan submits that the analysis under the second sentence of Article 5.1.2 would normally require a comparison of the CAPs and a possible alternative measure. In this comparison, the elements to be considered are: (i) whether the alternative measure is less trade restrictive compared to the challenged CAPs; (ii) whether the alternative measure is reasonably available; and (iii) whether the alternative measure would make an equivalent contribution to giving the importing Member adequate confidence that products conform with the applicable technical regulations or standards, (iv) taking account of the risks non-conformity would create.[10]

21. In the present case, while Japan has no intention to comment on the specific facts of this case, Japan believes that one of the key factors to be scrutinized is the degree of contribution that the CAPs at issue make to ensuring that railway products conform with the applicable technical regulation with the degree of confidence pursued by Russia. Then, it must be examined whether Ukraine has demonstrated that the identified measures are less strict (or are less strictly applied), reasonably available alternative measures that make the same contribution to ensuring the products' conformity as the challenged CAPs, taking into account the risks non-conformity would create.

22. As regards the burden of proof under Article 5.1.2, Japan considers that, similar to Article 2.2, a complainant must make a *prima facie* case by presenting evidence and arguments sufficient to establish that the challenged CAPs are applied more strictly than necessary to adequately assure the importing Member that the products at issue conform with the applicable technical regulations, taking account of the risks non-conformity would create. Similar to Article 5.1.1, this burden should not be construed rigidly because the respondent is best situated to explain the challenged CAPs. Once the complainant has identified any alternative CAPs that are applied less strictly, make an equivalent contribution to guaranteeing the products' conformity with

[10] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 318 and 320.

the applicable technical regulations, and are reasonably available, the burden of proof should shift to the respondent to rebut the *prima facie* case.[11]

23. Lastly, similar to the discussion presented in Article 5.1.1, if the Panel finds any inconsistency between the reasons provided in the determination of the competent authority at the time conformity was assessed, which are required under Article 5.2.2 of the TBT Agreement, and an explanation provided *ex post,* the panel should examine carefully whether the *ex post* explanation is supported by objective evidence.

[11] See Appellate Body Reports, *US — Tuna II (Mexico)*, para. 323 and *US — COOL*, para. 379.

ANNEX D-5

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

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.