



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

FINAL REPORT OF THE PANEL

**BCI DELETED, AS INDICATED BY [[XXX]]**

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<i>US – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
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<i>US – Countervailing and Anti-Dumping Measures (China)</i>	Appellate Body Report, <i>United States – Countervailing and Anti-Dumping Measures on Certain Products from China</i> , WT/DS449/AB/R and Corr.1, adopted 22 July 2014, DSR 2014:VIII, p. 3027
<i>US – FSC (Article 21.5 – EC II)</i>	Panel Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/RW2, adopted 14 March 2006, upheld by Appellate Body Report WT/DS108/AB/RW2, DSR 2006:XI, p. 4761
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
<i>US – Gambling (Article 21.5 – Antigua and Barbuda)</i>	Panel Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Article 21.5 of the DSU by Antigua and Barbuda</i> , WT/DS285/RW, adopted 22 May 2007, DSR 2007:VIII, p. 3105
<i>US – Gasoline</i>	Panel Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R, DSR 1996:I, p. 29

Short title	Full case title and citation
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
<i>US – Poultry (China)</i>	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909
<i>US – Shrimp (Thailand) / US – Customs Bond Directive</i>	Appellate Body Report, <i>United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties</i> , WT/DS343/AB/R / WT/DS345/AB/R, adopted 1 August 2008, DSR 2008:VII, p. 2385 / DSR 2008:VIII, p. 2773
<i>US – Steel Safeguards</i>	Panel Reports, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/R and Corr.1 / WT/DS249/R and Corr.1 / WT/DS251/R and Corr.1 / WT/DS252/R and Corr.1 / WT/DS253/R and Corr.1 / WT/DS254/R and Corr.1 / WT/DS258/R and Corr.1 / WT/DS259/R and Corr.1, adopted 10 December 2003, as modified by Appellate Body Report WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, DSR 2003:VIII, p. 3273
<i>US – Tuna II (Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837
<i>US – Tuna II (Mexico) (Article 21.5 – Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico</i> , WT/DS381/AB/RW and Add.1, adopted 3 December 2015
<i>US – Underwear</i>	Panel Report, <i>United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear</i> , WT/DS24/R, adopted 25 February 1997, as modified by Appellate Body Report WT/DS24/AB/R, DSR 1997:I, p. 31
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
<i>US – Upland Cotton</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R, Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
<i>US – Zeroing (EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417
<i>US – Zeroing (Japan) (Article 21.5 – Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441
<i>US – Zeroing (Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, p. 3

## EXHIBITS REFERRED TO IN THIS REPORT

Panel Exhibit	Title	Short Title
UKR-1	Federal Law No. 184-FZ "On Technical Regulation" of 27 December 2002	Law No. 184 "On Technical Regulation"
UKR-2	"Rules of the Certification System for Federal Railway Transport of the Russian Federation. General provisions" approved by the Ministry of Railways of the Russian Federation on 12 November 1996	CS FRT 01-96
UKR-3 (Corr.)	"Rules of the Certification System for Federal Railway Transport. Procedure for organizing and conducting an inspection control." ("CS FRT 12-2003")	CS FRT 12-2003
UKR-5	Treaty on the Eurasian Economic Union	EAEU Treaty
UKR-9 (Corr.)	Technical Regulation 001/2011 "On the safety of railway rolling stock"	CU Technical Regulation 001/2011
UKR-10 (Corr.)	Technical Regulation 002/2011 "On high-speed rail safety"	CU Technical Regulation 002/2011
UKR-11 (Corr.)	Technical Regulation 003/2011 "On the safety of rail transport infrastructure"	CU Technical Regulation 003/2011
UKR-12	Extract of the FBO's Register	
UKR-13	Extract of Unified Register of Issued Certificates of Conformity and Registered Declarations of Conformity	Extract of Unified Register
UKR-14	Export data from International Trade Centre for customs code 86	
UKR-15(BCI)	Letter [[xxx]] from the FBO to PJSC [[xxx]] with instruction [[xxx]] attached, 8 August 2014	Letter [[xxx]] from the FBO of 8 August 2014
UKR-16(BCI)	Letter [[xxx]] from the FBO to PJSC [[xxx]], 2 October 2014	Letter [[xxx]] from the FBO of 2 October 2014
UKR-17(BCI)	Letter [[xxx]] from PJSC [[xxx]] to the FBO, 12 May 2014	
UKR-18(BCI) (Corr.)	Letter [[xxx]] from PJSC [[xxx]] to the FBO	
UKR-19(BCI) (Corr.)	Letter [[xxx]] from the FBO to PJSC [[xxx]] with instruction [[xxx]] attached, 3 October 2014	Letter [[xxx]] from the FBO of 3 October 2014
UKR-20(BCI)	Letter [[xxx]] from the FBO to PJSC [[xxx]] with instruction [[xxx]] attached, 27 February 2015	Letter [[xxx]] from the FBO of 27 February 2015
UKR-21(BCI)	Letter [[xxx]] from PJSC [[xxx]] to the FBO, 13 March 2015	
UKR-22(BCI)	Letter [[xxx]] from the FBO to PJSC [[xxx]], 26 March 2015	
UKR-23(BCI)	Letter [[xxx]] from the FBO to PJSC [[xxx]], 9 February 2015	Letter [[xxx]] from the FBO of 9 February 2015
UKR-25(BCI)	Letter [[xxx]] from the FBO to PJSC [[xxx]] with instruction [[xxx]] attached, 17 July 2014	Letter [[xxx]] from the FBO of 17 July 2014
UKR-28(BCI)	Letter [[xxx]] from the FBO to PJSC [[xxx]], 1 August 2014	
UKR-30(BCI) (Corr.)	Letter from State Border Service of Ukraine to PJSC [[xxx]]	
UKR-31(BCI)	Letter [[xxx]] from the FBO to PJSC [[xxx]] with instruction [[xxx]] attached, 11 February 2015	Letter [[xxx]] from the FBO of 11 February 2015
UKR-32(BCI)	Letter [[xxx]] from the FBO to PJSC [[xxx]], 23 January 2015	Letter [[xxx]] from the FBO of 23 January 2015
UKR-33(BCI)	Letter [[xxx]] from LLC [[xxx]] to the FBO, 14 April 2015	
UKR-34(BCI)	Letter [[xxx]] from PJSC [[xxx]] to the FBO, 30 December 2014	
UKR-35(BCI)	Letter [[xxx]] from PJSC [[xxx]] to the FBO, 22 January 2015	
UKR-36(BCI)	Letter [[xxx]] from the FBO to PJSC [[xxx]] with instruction [[xxx]] attached, 27 January 2015	Letter [[xxx]] from the FBO of 27 January 2015
UKR-37(BCI)	Letter [[xxx]] from the FBO to PJSC [[xxx]] with instruction [[xxx]] attached, 11 February 2015	Letter [[xxx]] from the FBO of 11 February 2015
UKR-39(BCI)	Letter [[xxx]] from the FBO to PJSC [[xxx]] with instruction [[xxx]] attached, 8 October 2014	Letter [[xxx]] from the FBO of 8 October 2014
UKR-40(BCI)	Letter [[xxx]] from the FBO to PJSC [[xxx]] with instruction [[xxx]] attached, 9 October 2014	Letter [[xxx]] from the FBO of 9 October 2014
UKR-41(BCI)	Letter [[xxx]] from PJSC [[xxx]] to the FBO, 10 October 2014	
UKR-42(BCI)	Letter [[xxx]] from the FBO to PJSC [[xxx]] with instruction [[xxx]] attached, 11 February 2015	Letter [[xxx]] from the FBO of 11 February 2015
UKR-43(BCI)	Letter [[xxx]] from the FBO to PJSC [[xxx]] with instruction [[xxx]] attached, 18 May 2015	Letter [[xxx]] from the FBO of 18 May 2015

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UKR-45(BCI) (Corr.)	Letter [[xxx]] from the FBO to PJSC [[xxx]] with instruction [[xxx]] attached, 8 June 2015	Letter [[xxx]] from the FBO of 8 June 2015
UKR-46(BCI)	Letter [[xxx]] from the FBO to PJSC [[xxx]] with instruction [[xxx]] attached, 6 July 2015	Letter [[xxx]] from the FBO of 6 July 2015
UKR-47(BCI)	Letter [[xxx]] from the FBO to PJSC [[xxx]] with instruction [[xxx]] attached, 7 September 2015	Letter [[xxx]] from the FBO of 7 September 2015
UKR-48(BCI)	Letter from the Federal Railway Transport Administration of the Ministry of Transport of the Russian Federation to JSC [[xxx]] accompanied to Protocol No. A 4-3 of 20 January 2015 of the Ministry of Transport of the Russian Federation regarding issuance by the certification authority of the Customs Union of the certificates of conformity for products manufactured by third-countries	Cover letter and Protocol No. A-4-3 of 20 January 2015
UKR-49(BCI) (Corr.)	Letter from the Federal Agency for Railway Transport to company [[xxx]] – on validity of certificates, 4 February 2016	
UKR-50	"Between two stools: Ukraine says EU trade deal certain, Russia-led union also an option", RT, 25 Sep, 2013	
UKR-51	"Minister of the EEC: exports of goods from the Customs Union to Ukraine could be complicated", Chamber of Commerce of the Russian Federation, 30 September 2013	
UKR-52	Irina Ksyanova, "Glazyev: Euromissioners receive good fees for involving Ukraine", Vesti, December 14, 2013	
UKR-53	Extract of the FBO's Register concerning European producers	
UKR-54 (Corr.)	Extract of Unified Register of Issued Certificates of Conformity and Registered Declarations of Conformity concerning European producers	
UKR-55	Extract of the FBO's Register concerning Kazakh producers	
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UKR-59(Corr.)	Resolution of Cabinet of Ministers of Ukraine "On the list of settlements in the territory where anti-terrorist operation is carried out, and declare invalid some orders of the Cabinet of Ministers of Ukraine", No. 1275-p, 2 December 2015	
UKR-60	Extract of the FBO's Register concerning Russian producers	
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UKR-62(BCI)	List of producers holding certificates in 2013 and 2017	
UKR-63(BCI)	Map of Ukraine indicating producers holding certificates in 2017	
UKR-64	Dmytro Kostyuk (First Deputy Director of JSC [[xxx]]), "Results of the year for Ukrainian heavy manufacturing", 29 December 2014	
UKR-65	Olga Levkovich, "Infographics: what's happening to import and export in Ukraine", 1 October 2015	
UKR-66(BCI)	Decision [[xxx]] of the FBO dated 21 January 2015	
UKR-67	Certificate [[xxx]]	
UKR-68	Tehnomashkomplekt's shop webpage	
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UKR-71(BCI)	Screenshots of search engine available at FBO's website	
UKR-72	Letter No. 4422-05/26901-03 from the Administration of State Border Service of Ukraine to the Ministry of Economic Development and Trade of Ukraine, 3 August 2017	
UKR-79	Annex B to CS FRT 01-96	
UKR-80	CS FRT Rules 31/PMG 40-2003, 25 June 2003	CS FRT Rules 31/PMG 40-2003
UKR-81	Extract from the FBO's website	
UKR-82	Extract of the FBO's Register indicating reasons for suspension	
UKR-83	Extract of Unified Register of Issued Certificates of Conformity and Registered Declarations of Conformity concerning Russian producers	
UKR-85	"The real crisis is coming up – Nazarbayev", TENGRI NEWS, 19 October 2015.	

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UKR-87	State Statistics Service of Ukraine "On production of railway products in Ukraine during 2012-2016"	
UKR-88	Letter of the State Border Service of Ukraine dated 29 June 2017; extract from the website of the State Statistics Service of Ukraine	Letter of Ukraine's State Border Service of 29 June 2017
UKR-89 (BCI) (Corr.)	Certificate of compliance [[xxx]] issued to PJSC [[xxx]]	
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UKR-92	Statistics "On the number of Russian citizens that travelled to Ukraine for 'official, business and diplomatic' purposes in 2014-2016"	
UKR-94	Eurasian Economic Commission, Decision No. 20, 28 April 2017	
UKR-95	"Russia's customs service halts all Ukrainian imports, says Ukraine's Employers Federation", Interfax-Ukraine, 14 August 2013	
UKR-96	R. Emmott, "Putin warns Ukraine over Europe ambitions", Reuters, 23 September 2014	
UKR-97	"Russia is getting ready to cease cooperation with Ukraine in production of aircraft", 22 August 2013, Levyi Bereg	
UKR-98	B. Hoyle, "Russia threatens to back Ukraine split", The Times, 23 September 2013	
UKR-99	S. Walker, "Ukraine's EU trade deal will be catastrophic, says Russia", The Guardian, 22 September 2013	
UKR-100	J. Fleming, "Lithuania warns Russia over cheese ban and KGB smears", Euractiv, 6 November 2013	
UKR-101	"More than 500 trucks occupied the Russian-Ukrainian border", Vesti, 31 October 2013	
UKR-102	Russia will strengthen customs control if Kyiv is to sign an agreement with the EU, RIA Novosti Ukraine, 18 August 2013	
UKR-104	Russia's government Order No. 328 "On implementation of state program of Russian Federation 'Development of the manufacturing industry and increase of its competitiveness'", 15 April 2014	
UKR-105	The main results of the work of Russia's Ministry of Industry and Trade in 2016, 19 April 2017	
UKR-106	Russia's government Decree No. 925 Moscow "On the priority of goods of Russian origin, works and services performed by Russian persons in relation to goods originating from a foreign country, work, services performed by foreign Persons", 16 September 2016	
UKR-107	Gazeta.ru, "The most popular foreign city of winter was Kyiv", 1 June 2016.	
UKR-108	RBC, "Russian tourists in 2016 became less likely to travel abroad", 16 March 2016	
UKR-109	LentaRu, "Ukraine enters the top 5 popular foreign country destinations for Russians", 25 July 2016.	
UKR-110	Statistics on most popular destinations for Russian citizens in 2014-2016	
UKR-111(BCI)	Applications submitted by PJSC [[xxx]], 1 October 2014	
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UKR-113(BCI)	Decisions [[xxx]], 20 and 21 January 2015	
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UKR-115	Ukraine's Law "On the legal status of foreigners and stateless persons"	
UKR-116	Ukraine's Law No 1207-VII "On Securing the Rights and Freedoms of Citizens and the Legal Regime on the Temporarily Occupied Territory of Ukraine", 15 April 2014	
UKR-117	Resolution No. 86 of the Cabinet of Ministers of Ukraine "On certain issues of the state border of Ukraine crossing", 4 March 2015	
UKR-118	Resolution No. 884 of the Cabinet of Ministers of Ukraine "On approval of the Procedure of sufficient funds proof for foreigners and apartheids for entry into, stay in, transit through and leaving the territory of Ukraine and of calculation of such funds", 4 December 2013	
UKR-119	Agreement between Ukraine and Russia on visa-free travels	

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UKR-120	for citizens of Russia and Ukraine, 16 January 1997 Resolution of the Cabinet of Ministers of Ukraine No. 23 "On suspension of validity of certain provisions of the Agreement between [Ukraine] and [Russia] on visa-free travels for citizens of [Russia] and Ukraine", 30 January 2015	
UKR-123	Agreement between Ukraine and Russia on the procedure of crossing Ukraine-Russian state border by citizens living in the border regions of Ukraine and Russia	
UKR-124	Commission Implementing Regulation (EU) 2016/90 of 26 January 2016 amending Council Implementing Regulation (EU) No 102/2012 imposing a definitive anti-dumping duty on imports of steel ropes and cables originating, <i>inter alia</i> , in Ukraine following a partial interim review pursuant to Article 11(3) of Council Regulation (EC) No 1225/2009	EU Commission Implementing Regulation 2016/90 imposing an anti-dumping duty on imports of steel ropes and cables from, <i>inter alia</i> , Ukraine
UKR-125	Government of Pakistan National Tariff Commission Report On Final Determination and Levy of Definitive Anti-Dumping Duties on Dumped Imports of Cold Rolled Coils/Sheets into Pakistan Originating in and/or Exported from the People's Republic of China and Ukraine, ADC NO 35/2015/NTC/CRC, January 13, 2017	Pakistan's Tariff Commission Report on anti-dumping duties on cold rolled coils/sheets from China and Ukraine
UKR-126	Final Findings, Anti-dumping investigation concerning imports of "Cold-Rolled flat products of alloy or non-alloy steel" originating in or exported from China PR, Japan, Korea RP and Ukraine-reg, Government of India, Ministry of Commerce & Industry, Department of Commerce (Directorate General of Anti-Dumping & Allied Duties), F.No.14/12/2016-DGAD, 10 April 2017	India's Department of Commerce Final Findings on an anti-dumping investigation concerning "cold-rolled flat products of alloy or non-alloy steel" from, <i>inter alia</i> , Ukraine
UKR-127	Resolution No. 367 of the Cabinet of Ministers of Ukraine "On Approval of the Procedure for Entry into and Exit from the Temporarily Occupied Territory of Ukraine," 4 June 2015	Resolution No. 367
UKR-128	"Russia hits at Ukraine with chocolate war", Euractiv, 14 August 2013	
UKR-129	Customs Union Customs Code (selected provisions)	CU Customs Code
UKR-131	D. Cenusa, M. Emerson, T. Kovziridese & V. Movchan, Russia's Punitive Trade Policy Measures towards Ukraine, Moldova and Georgia, CEPS Working Document, No. 400, September 2014	
UKR-132	"An unfortunate agreement with the anti-Russian nature - Russia's reaction to the ratification of the Ukraine-EU Association Agreement", 24TV, 31 May 2017	
UKR-134(BCI)	Letter [[xxx]] from PJSC [[xxx]], 22 September 2017	
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UKR-136(BCI)	Letter [[xxx]] from PJSC [[xxx]], 7 September 2017	
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UKR-139(BCI)	Letter [[xxx]] from company [[xxx]] to Ukraine's Ministry of Economic Development and Trade, 12 September 2017	
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UKR-141(BCI)	Letter from the Federal Agency for Railway Transport to JSC [[xxx]] – on validity of certificates, 10 August 2016	
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RUS-4	Letter of the FBO No. [[xxx]] of 23 January 2015	
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RUS-12(BCI)	Certificate of Conformity [[xxx]]	
RUS-13	Explanatory letter of the Eurasian Economic Commission	
RUS-14	Protocol of the State Border Service of Ukraine, Border Department of Odessa, 17 April 2014	Border Service Protocol
RUS-15	Facebook post of 10 July 2017	
RUS-16	Facebook post of 11 July 2017	
RUS-17	Official website of Ukraine's Ministry of Economic Development and Trade, "First meeting in the WTO with respect to Russia's ban on imports of Ukrainian railway products", 11 July 2017	
RUS-18	Eurointegration, "Russia's ban on imports of railway products from Ukraine will be considered in the WTO", 10 July 2017	
RUS-19	Facebook post of 9 July 2017	
RUS-22	Abstract from Ukraine's Criminal Code	Ukraine's Criminal Code
RUS-23	Organization Standard CTO PC-FZT 08-2013 "Procedure of organization and implementation of inspection control of certified products"	PC-FZT 08-2013
RUS-25	Certification Rules R CSFRT 31/PMG 40-2003 (P SSFZhT 31/PMG 40-2003) "Procedure of certification of technical equipment of railway transport"	CS FRT 31/PMG 40-2003
RUS-27(BCI)	Report of Financial Results for 2015 of Public Joint-Stock Company [[xxx]]	
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RUS-29(BCI)	Report of Financial Results for 2015 of Public Joint-Stock Company "Public Joint Stock Company [[xxx]]"	
RUS-30(BCI)	Report of Financial Results for 2015 of Public Joint-Stock Company "Public Joint-Stock Company [[xxx]]"	
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RUS-32	Travel advice of the Department of the Situation and Crisis Center of the Ministry of Foreign Affairs of Russia	Russia's Travel Advice
RUS-33	Media report "Chaos grips Odessa, Ukraine's third-largest city", 2 May 2014	Media report, 2 May 2014
RUS-34	Media report "Dozens die in Odessa, rebels down Ukraine helicopters", 2 May 2014	Media report, 2 May 2014
RUS-35	Media report "How did Odessa's fire happen?", 6 May 2014	Media report, 6 May 2014
RUS-36	Media report "Ukrainian protestors vandalise Russian bank", 22 November 2016	Media report, 22 November 2016
RUS-37	Mass media report "Ukraine Political Crisis Update: Russian Banks Attacked On Anniversary Of Revolution", 20 February 2016	Media report, 20 February 2016
RUS-38	Decree of the Cabinet of Ministers of Ukraine "On Approval of the Procedure for Entry into and Exit of the Temporarily Occupied Territory of Ukraine"	
RUS-39(BCI)	Volume of Purchase by the company [[xxx]] of the park of Russia's cargo wagons in 2013-2016	
RUS-40(BCI)	Volume of Purchase by [[xxx]] of Production for Rolling Stock in the Period 2012-2016	
RUS-42	List of the certificates of conformity to the requirements of CU Technical Regulations 001/2011, 002/2011, 003/2011 issued in the period from 02 August 2014 to 31 August 2017 to foreign manufacturers	
RUS-43	Report on the governmental portal of Ukraine "Citizens of the Russian Federation to enter Ukraine on foreign passports, PM on the Government's decision"	
RUS-45	News on the web-site of Russian Ministry of Foreign Affairs "On changing of the order of trips of Russian citizens to Ukraine"	
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RUS-50(BCI)	Certificates of conformity issued on the basis of CU Technical Regulations 001/2011, 002/2011 and 003/2011 during the period from 02 August 2014 to 31 August 2017 to the third countries producers	
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RUS-62 (BCI)	Documents of the FBO providing for the inconsistencies of the certified products of PJSC [[xxx]]	
RUS-63 (BCI)	Documents of the FBO providing for the inconsistencies of the certified products of PJSC [[xxx]]	
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RUS-67(BCI)	Letter from company [[xxx]] to the FBO of 23 May 2016	
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RUS-73(BCI)	Letter from company [[xxx]] to the FBO of 3 November 2017	
RUS-74	Uaprom.info, extract from article	
RUS-75	Center of Transport Strategies, extract from the article, "Second life: How [[xxx]] produces railway wheels from scrap iron", 8 November 2016	
RUS-77(BCI)	Information provided by the FBO on certificates of conformity with the requirements of CU Technical Regulations 001/2011, 002/2011, and 003/2011 issued in the period from 2 August.2014 to 31 August 2017 to foreign manufacturers	
RUS-78(BCI)	Letter from company [[xxx]] to the FBO of 7 November 2017, [[xxx]]	
RUS-79(BCI)	The documents of the FBO providing for the lack of inconsistencies of the certified products of PJSC [[xxx]] under the CU Technical Regulations	
RUS-80(BCI)	The documents of the FBO providing for the lack of inconsistencies of the certified products of PJSC [[xxx]] under the CU Technical Regulations	
RUS-81(BCI)	The documents of the FBO providing for the lack of inconsistencies of the certified products of PrJSC [[xxx]] under the CU Technical Regulations	
RUS-82(BCI)	The documents of the FBO providing for the lack of inconsistencies of the certified products of PJSC [[xxx]] under the CU Technical Regulations	

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<b>Panel Exhibit</b>	<b>Title</b>	<b>Short Title</b>
RUS-85(BCI)	Extract of the FBO's Register with respect to the suspended certificates (dates of suspension and reasons for suspension)	
RUS-89(BCI)	The Decision of the FBO on issuance of the conformity certificate [[xxx]]	
RUS-90(BCI)	The Decision of the FBO on issuance of the conformity certificate [[xxx]]	
RUS-92(BCI)	Order of Federal Agency on Railway Transport as of 27 January 2016 No. 50/k "On temporary assignment of performance of duties"	
RUS-93(BCI)	Extract of the FBO's Register concerning Kazakh producers	
RUS-94(BCI)	Extract of the FBO's Register concerning Belarusian producers	
RUS-95(BCI)	Extract of the FBO's Register concerning European producers	

**ABBREVIATIONS USED IN THIS REPORT**

<b>Abbreviation</b>	<b>Description</b>
BCI	Business Confidential Information
CS FRT Rules	Russia's Regulations governing conformity assessment procedures for railway products that form part of the Certification System for Federal Railway Transport
CU	Eurasian Economic Union as established in accordance with the Treaty on Eurasian Economic Union of 29 May 2014 (former Customs Union of the Republic of Belarus, the Republic of Kazakhstan and the Russian Federation)
CU Technical Regulation	Customs Union Technical Regulation
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EAEU	Eurasian Economic Union
EAEU Treaty	Treaty on the Eurasian Economic Union
FBO	Federal Budgetary Organization "Register of Certification on the Federal Railway Transport"
GATT 1994	General Agreement on Tariffs and Trade 1994
OHCHR	Office of the United Nations High Commissioner on Human Rights
PJSC	Public Joint Stock Company
Russia	Russian Federation
TBT Agreement	Agreement on Technical Barriers to Trade
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization

## 1 INTRODUCTION

### 1.1 Complaint by Ukraine

1.1. On 21 October 2015, Ukraine requested consultations with the Russian Federation (Russia) pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article 14 of the Agreement on Technical Barriers to Trade (TBT Agreement) with respect to the measures and claims set out below.<sup>1</sup>

1.2. Consultations were held on 4 December 2015.<sup>2</sup>

### 1.2 Panel establishment and composition

1.3. On 10 November 2016, Ukraine requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.<sup>3</sup> At its meeting on 16 December 2016, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Ukraine in document WT/DS499/2, in accordance with Article 6 of the DSU.<sup>4</sup>

1.4. The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Ukraine in document WT/DS499/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.<sup>5</sup>

1.5. On 2 March 2017, the parties agreed that the panel would be composed as follows:

Chairperson: Mr Ronald Saborío Soto  
Members: Mr Hugo Cayrús  
Mr Hunter Nottage

1.6. Canada, China, the European Union, India, Indonesia, Japan, Singapore and the United States notified their interest in participating in the Panel proceedings as third parties.

### 1.3 Panel proceedings

#### 1.3.1 General

1.7. After consultation with the parties, the Panel adopted its Working Procedures and timetable on 24 March 2017 and 27 March 2017, respectively. The Panel adopted an amended version of its timetable on 10 April 2017 and 29 March 2018 and of its Working Procedures on 4 October 2017.<sup>6</sup>

1.8. The Panel held a first substantive meeting with the parties on 10 and 11 July 2017. A session with the third parties took place on 10 July 2017. The Panel held a second substantive meeting with the parties on 6 and 7 November 2017. On 18 December 2017, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 19 April 2018. The Panel issued its Final Report to the parties on 25 May 2018.

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<sup>1</sup> See WT/DS499/1.

<sup>2</sup> See Ukraine's request for the establishment of a panel (Ukraine's panel request), WT/DS499/2.

<sup>3</sup> See WT/DS499/2.

<sup>4</sup> See WT/DSB/M/390, para. 5.4.

<sup>5</sup> WT/DS499/3.

<sup>6</sup> See the Panel's Working Procedures in Annex A-1.

### 1.3.2 Working procedures on Business Confidential Information (BCI)

1.9. On 16 March 2017, at the Panel's organizational meeting, Ukraine and Russia requested the Panel to adopt additional working procedures to protect any BCI that the parties might submit to the Panel. On 17 March 2017, the Panel sent the parties its proposed BCI procedures. On 20 March 2017, both parties provided comments on the proposed BCI procedures. In the light of these comments, the Panel on 23 March 2017 adopted Additional Working Procedures Concerning Business Confidential Information.<sup>7</sup>

1.10. Following an invitation from the Panel, on 18 June 2018 Ukraine submitted specific requests for further redaction of BCI from the public version of the Panel Report. Russia did not submit any requests. On the basis of Ukraine's communication, we made appropriate changes to the public version of the Panel Report.

### 1.3.3 Preliminary ruling

1.11. On 3 April 2017, Russia submitted a request for a preliminary ruling to the Panel, in which it claimed that Ukraine's panel request did not meet the requirements of Article 6.2 of the DSU. Ukraine responded to Russia's request on 13 April 2017. Russia commented on Ukraine's response on 18 May 2017. Ukraine commented on Russia's comments on 30 May 2017. The parties were also advised that they could further address Russia's request in their opening oral statements at the Panel's first substantive meeting with the parties. The Panel additionally advised the third parties that they could comment on Russia's request in their written submissions to the Panel, or in their oral statements during the third-party session conducted in the context of the Panel's first substantive meeting. Taking into account Russia's request that the Panel issue a preliminary ruling prior to the first substantive meeting (which the Panel considered not to be feasible), the Panel issued its conclusions on Russia's request for a preliminary ruling on 17 July 2017, shortly after the end of the first substantive meeting.

1.12. In its conclusions on Russia's preliminary ruling request, the Panel indicated that the reasons supporting its conclusions would become an integral part of the Panel's Report. Thus, the Panel's conclusions and supporting reasons appear in section 7.1.1 below.

## 2 FACTUAL ASPECTS

2.1. This dispute concerns certain measures allegedly taken by Russia concerning its conformity assessment procedures for railway products as they relate to suppliers from Ukraine. These products were identified by Ukraine as railway rolling stock, railroad switches, other railroad equipment and parts thereof. Certificates of conformity are required to place such products on Russia's market.

2.2. In its panel request Ukraine challenges the following measures allegedly imposed by Russia. section II of the panel request provides:

Since 2014, the conformity assessment certificates issued by the Federal Budgetary Organization "Register of Certification on the Federal Railway Transport" (FBO "RC FRT") to Ukrainian producers of railway products prior to the entry into force of the Technical Regulations have systematically been suspended.

Moreover, Ukrainian producers have not been able to obtain new conformity assessment certificates based on the Technical Regulations from the certification bodies in the Russian Federation. The applications submitted by Ukrainian producers to the FBO "RC FRT" have systematically been rejected or returned without consideration.

Furthermore, the conformity assessment certificates issued by the authorities in the Republic of Belarus and in the Republic of Kazakhstan have not been recognized by the authorities of the Russian Federation. In fact, the relevant authorities of the

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<sup>7</sup> See the Panel's Additional Working Procedures on BCI in Annex B-2.

Russian Federation, including its Ministry of Transport and the Federal Agency for Railway Transport, decided that Technical Regulation No. 001/2011 is applicable only to goods produced in the CU countries. Consequently, the authorities of the Russian Federation concluded that the conformity assessment certificates issued to Ukrainian producers in other CU countries were not valid in the territory of the Russian Federation and that the railway products of these producers could neither be imported nor registered for operation in the territory of the Russian Federation.

The measures at issue covered in this panel request are:

- 1) The 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 namely the Republic of Belarus and the Republic of Kazakhstan. This practice is evidenced by instructions of the authorities of the Russian Federation listed in Annexes I, II and III.
- 2) 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 as mentioned in Annexes I, II and III.
- 3) Technical Regulation No. 001/2011 "On safety of railway rolling stock", read together with the Protocol of the Ministry of Transport of the Russian Federation regarding issuance by certification authority of the Customs Union of the certificates of conformity for products manufactured by third-countries No. A 4-3 adopted on 20 January 2015 and the instructions mentioned in Annex III.

As a result of the measures described above, certain Ukrainian producers have been effectively banned from exporting railway products to the Russian Federation. Following the implementation of the measures at issue, exports of such products from Ukraine to the Russian Federation, which had reached USD 1.7 billion in 2013, decreased to USD 600 million in 2014 and to only USD 110 million in 2015.<sup>8</sup>

### **3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS**

3.1. Ukraine requests that the Panel find that:

- a. the systematic prevention of Ukrainian railway products from being imported into Russia is inconsistent with Russia's obligations under Articles I:1, XI:1, and XIII:1 of the GATT 1994;
- b. the instructions issued by the competent Russian authority suspending valid certificates of conformity held by Ukrainian producers of railway products as well as several decisions issued by the competent Russian authority rejecting applications for certificates of conformity submitted by Ukrainian producers of railway products are inconsistent with Russia's obligations under Articles 5.1.1, 5.1.2, and 5.2.2 of the TBT Agreement; and
- c. Russia's decision not to accept in its territory the validity of certificates issued to Ukrainian producers in other Customs Union (CU)<sup>9</sup> countries, found in the Protocol of the Ministry of Transport No. A 4-3 and the decisions listed in Annex III to the panel request

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<sup>8</sup> WT/DS499/2, p. 2.

<sup>9</sup> The parties have used the term "Customs Union" in these proceedings to refer to the Eurasian Economic Union established in accordance with the Treaty on Eurasian Economic Union of 29 May 2014, which was formerly the Customs Union of Belarus, Kazakhstan and Russia.

read together with Technical Regulation 001/2011, is inconsistent with Russia's obligations under Articles 2.1, 5.1.1, and 5.1.2 of the TBT Agreement and Articles I:1, III:4, and X:3(a) of the GATT 1994.<sup>10</sup>

3.2. Ukraine further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that Russia bring its measures into conformity with its WTO obligations under the GATT 1994 and the TBT Agreement.

3.3. Russia requests that the Panel find that the measures challenged by Ukraine are not within its terms of reference. Alternatively, Russia requests that the Panel reject Ukraine's claims in this dispute in their entirety and find that the challenged measures are not inconsistent with Russia's WTO obligations.

#### **4 ARGUMENTS OF THE PARTIES**

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annexes B-1, B-2, B-3, and B-4).

#### **5 ARGUMENTS OF THE THIRD PARTIES**

5.1. The arguments of Canada, the European Union, Indonesia, Japan and the United States are reflected in their executive summaries, provided in accordance with paragraph 20 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, C-4, and C-5). China, India and Singapore did not submit written or oral arguments to the Panel.

#### **6 INTERIM REVIEW**

6.1. On 19 April 2018, the Panel issued its Interim Report to the parties. On 3 May 2018, Ukraine and Russia submitted written requests for the Panel to review aspects of the Interim Report. On 14 May 2018, Ukraine and Russia submitted comments on each other's requests for review. Neither party requested an interim review meeting.

6.2. In accordance with Article 15.3 of the DSU, this section of the Report sets out the Panel's response to the parties' requests made at the interim review stage.

6.3. In addition to the changes indicated below, the Panel corrected typographical errors and other non-substantive editorial clarifications in this Report, including those identified by the parties. We have also made, where relevant, certain horizontal changes that Ukraine included under the heading "typographical errors" in its comments of 3 May 2018.

6.4. The numbering of some of the paragraphs and footnotes in the Report has changed from the numbering of the Interim Report. The discussion below refers to the numbering in this Report and, where it differs, includes the corresponding numbering of the Interim Report.

##### **6.1 Panel's preliminary ruling**

6.5. Regarding paragraph 7.16, Ukraine requests that the Panel make changes to fully reflect Ukraine's position regarding Russia's allegation that Ukraine failed to provide the legal basis sufficient to present the problem clearly.

6.6. Russia does not oppose Ukraine's suggestions, provided that it is made clear that the changes suggested by Ukraine reflect Ukraine's position.

6.7. The Panel made appropriate changes to paragraph 7.16.

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<sup>10</sup> Ukraine's first written submission, para. 401; and second written submission, paras. 447-450.

6.8. Regarding paragraph 7.18, Ukraine requests that the Panel make changes to better reflect Ukraine's position on how Ukraine's panel request can be distinguished from those of the complaining parties in *China – Raw Materials*.

6.9. The Panel made appropriate changes to paragraph 7.18.

6.10. Regarding paragraphs 7.32 and 7.33, Ukraine requests that, in order to avoid any doubt as to the Panel's position, the Panel elaborate further on the specific reasons why it takes the view that the first measure is sufficiently connected with the claims under Articles 5.1.1, 5.1.2, and 5.2.2 of the TBT Agreement.

6.11. The Panel made appropriate changes to paragraphs 7.32 and 7.33. In view of Ukraine's comment seeking further clarification, we also elaborated on our position in respect of the link between the suspensions of certificates and Ukraine's claims under Article 5.2.2 of the TBT Agreement.

6.12. Regarding paragraph 7.34, Ukraine requests that the Panel include in paragraph 7.34 the fact that Ukraine abandoned its claims under Article 5.2.3 of the TBT Agreement and add that it is not necessary to inquire into that connection.

6.13. The Panel added footnote 29 to paragraph 7.34 to indicate that Ukraine abandoned its claims under Article 5.2.3. However, we disagree that it is not necessary to enquire into the connection between the measures at issue and Article 5.2.3. Russia's preliminary ruling request concerns whether the panel request satisfies the requirements of Article 6.2 of the DSU and relates, *inter alia*, to Ukraine's claims under Article 5.2.3. We therefore consider it necessary to examine this matter, regardless of Ukraine's decision, long after it had filed its panel request, to abandon its claims under Article 5.2.3.

6.14. Regarding paragraph 7.48, Ukraine requests that the Panel move the footnote from the third to the second sentence of this paragraph. Ukraine submits that its reference to the Appellate Body Report in *EC – Chicken Cuts* refers to the fact that Article 6.2 of the DSU contemplates that the identification of the products at issue must flow from the specific measures identified in the panel request and not to Ukraine's view that it is necessary only for certain WTO obligations to identify the products at issue in order to identify the measures at issue.

6.15. The Panel does not consider this change to be appropriate because the general approach in the Report is to include only one footnote in each paragraph that includes references supporting the statements contained in the entire paragraph.

6.16. Regarding paragraph 7.49, Ukraine requests that the Panel make changes to more accurately reflect Ukraine's position that its panel request properly identified the products at issue.

6.17. Russia objects to Ukraine's request to add, among the changes requested to this paragraph, that Russia accepts that Ukraine's panel request identifies the products at issue. Russia considers this to be contrary to its position in these proceedings.

6.18. The Panel made appropriate changes to paragraph 7.49.

6.19. Regarding paragraph 7.54, Ukraine requests that the Panel add a new paragraph complementing the description of Ukraine's position regarding Ukraine's comments on Russia's preliminary ruling request.

6.20. Russia submits that it does not see any added value in the paragraph suggested by Ukraine, and that, if the Panel were to accept Ukraine's request, to ensure the balance in the presentation of each party's position, Russia would welcome reflection of its position on this matter.

6.21. The Panel considers that the arguments referred to by Ukraine are already appropriately summarized in paragraph 7.49. We have therefore made no changes to paragraph 7.54.



6.22. Regarding paragraph 7.116, Ukraine requests that the Panel make changes to reflect more accurately Ukraine's position with respect to the differences between the identification of the measures at issue in the consultations request and in the panel request.

6.23. The Panel made appropriate changes to paragraph 7.116.

6.24. Regarding paragraph 7.127, Ukraine requests that the Panel specify to which legal instruments listed in the consultations request and in the panel request the Panel is referring.

6.25. The Panel considers that no additional specification is necessary. A comparison between the two documents in the light of our explanation provided in paragraph 7.161 allows identification of the legal instruments that are referred to in paragraph 7.127.

6.26. Regarding paragraph 7.168, Russia requests that the Panel clarify that in its submissions Russia emphasized the fact that the letters in question were issued under another CU Technical Regulation not mentioned in the consultations request.

6.27. Ukraine objects to Russia's request because, in its view, the current wording of this paragraph accurately reflects Russia's arguments.

6.28. The Panel made appropriate changes to paragraph 7.168.

## **6.2 Ruling on a request to exclude two exhibits from the record**

6.29. Regarding paragraph 7.207, Ukraine requests that the Panel add a summary of Ukraine's position regarding Russia's request to exclude two exhibits from the record.

6.30. Russia does not support any additional summary, description, or discussion with respect to the issues raised by Ukraine in this request due to their political nature.

6.31. The Panel considers that Ukraine's request is based on an incorrect premise. Ukraine seems to consider that paragraph 7.207 is a summary of Russia's position. That is not the case. Paragraph 7.207 seeks to set out the basis of Russia's request to exclude two exhibits. We summarized Russia's arguments in paragraph 7.202 and Ukraine's arguments in paragraph 7.203. We therefore consider it unnecessary to repeat the summary of Ukraine's arguments.

6.32. Regarding paragraph 7.210, Russia comments that it takes note of the Panel's conclusion set out in that paragraph, but observes that the Panel's decision does not imply any judgment on the relevance, accuracy or value of the content of the exhibits that Russia requested to be excluded from the record.

6.33. Ukraine notes that Russia's comment does not correspond to the type of requests that can be made in respect of the interim report. Ukraine further objects to the views expressed by Russia.

6.34. The Panel notes that Russia's comments on paragraph 7.210 do not set out a specific request for review. We have taken note of Russia's comments.

## **6.3 Overview of claims and order of the Panel's analysis**

6.35. Regarding paragraph 7.225, Russia requests that the Panel describe the measures at issue as it did in paragraph 3.1 of the Interim Report, i.e. that it quote precisely Ukraine's description of the relevant measures at issue.

6.36. Ukraine objects to Russia's request. In Ukraine's view, paragraph 7.225 accurately reflects the measures at issue as described in several parts of Ukraine's submissions. Ukraine further considers that it would not be appropriate to follow the description in paragraph 3.1 as that paragraph describes specifically Ukraine's request for findings.

6.37. The Panel does not find it appropriate to make the requested change because this paragraph reflects its overview of the claims made and the order in which the Panel considers and analyses Ukraine's claims.

6.38. Regarding paragraph 7.230, Ukraine requests that the Panel modify the last sentence to clarify Ukraine's description of the alleged systematic prevention of imports of Ukrainian railway products into Russia.

6.39. The Panel does not consider it appropriate to make the requested change. However, we made appropriate changes to clarify the text of the paragraph.

## **6.4 Claims concerning the suspension of certificates**

### **6.4.1 Measures at issue**

6.40. Regarding paragraph 7.233, Russia requests that the Panel replace the expression "occupational health and safety" with "labour safety". Russia notes that it is making this request even though it did not challenge the translation that Ukraine provided of Exhibit UKR-2 (CS FRT 01-96).

6.41. Ukraine considers that Russia's suggestion is not appropriate. Ukraine considers that the term "occupational health and safety" used in the English translation of Exhibit UKR-2 is more appropriate in the context of "work environment" and "safety of working conditions", while the term "labour safety" proposed by Russia is more generally used in the context of social protection.

6.42. The Panel considers that there is no essential difference between the two expressions. In the light of this, we accept Russia's preference, noting also that the translation concerns a Russian legal instrument. We therefore made the appropriate change to paragraph 7.233.

6.43. Regarding paragraph 7.236, Russia requests that the Panel correct the information contained in Table 4 regarding the schemes under which certain certificates were suspended through two instructions [[xxx]]. According to Russia, contrary to what is set out in Table 4, not all certificates were issued under scheme 3a. Some were issued under scheme 5, which also requires on-site inspections. In support of its request, Russia submits two new exhibits (Exhibit RUS-100 and Exhibit RUS-101). Russia notes that it fully understands that the new exhibits have been submitted at a late stage of the proceedings, after the opportunity to submit evidence lapsed. However, Russia submits that this evidence is not aimed to reargue the case or to make additional arguments, but rather to correct a factual mistake. Russia further submits that correcting this factual mistake would not change Russia's arguments, nor would it change the Panel's findings.

6.44. Ukraine objects to Russia's request because the interim review is not the appropriate stage to submit new evidence. Moreover, Ukraine considers that Russia had ample opportunity to comment on the content of the exhibits on which the Panel based its findings.

6.45. The Panel recalls that the Appellate Body and previous panels have found that, according to Article 15 of the DSU, interim review is limited to verifying precise aspects of the panel report, and that this does not include assessing new and unanswered evidence.<sup>11</sup> We further observe that requests to correct factual errors in the Interim Report should be supported by reference to the evidence on record, since the Panel must make findings based on the evidence on record.

6.46. As Russia notes, the information contained in Table 4 is based on exhibits submitted by Ukraine. Russia did not challenge the exhibits submitted by Ukraine insofar as they relate to the schemes under which certain certificates were suspended, nor did it submit counter-evidence at an earlier stage of the proceedings. Russia may be correct in pointing to the factual error that appears in Table 4. However, in view of the limited scope of interim review and the late stage at which it takes place, we do not consider it appropriate to take into account new evidence at this late stage. We therefore decline Russia's request.

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<sup>11</sup> Appellate Body Report, *EC – Sardines*, para. 301. See also Appellate Body Report, *EC – Selected Customs Matters*, para. 259; and Panel Report, *Russia – Pigs (EU)*, paras. 6.13-6.16.

#### **6.4.2 Consistency of the suspensions with Article 5.1.1 of the TBT Agreement**

6.47. Regarding footnote 202 (footnote 200 in the Interim Report); paragraphs 7.255 and 7.276; footnote 258 (footnote 255 in the Interim Report); and footnote 260 (footnote 257 in the Interim Report); Ukraine requests that the Panel make certain changes to reflect more accurately Ukraine's position in respect of the matters dealt with in those paragraphs.

6.48. The Panel made appropriate changes to footnote 202 (footnote 200 in the Interim Report) and to paragraphs 7.255 and 7.276. We also made appropriate changes to footnote 258 (footnote 255 in the Interim Report) and to footnote 260 (footnote 257 in the Interim Report).

6.49. Regarding paragraph 7.310, Ukraine requests that the Panel make certain changes to better reflect Russia's position.

6.50. The Panel does not consider it appropriate to make the changes requested by Ukraine, because the summary contained in paragraph 7.310 adequately reflects Russia's position. However, we corrected a linguistic error in paragraph 7.310.

6.51. Regarding paragraph 7.312, Ukraine requests that the Panel include references to the third-party submissions to which Ukraine referred in its second written submission.

6.52. Russia objects to Ukraine's request and considers it inappropriate because the paragraphs to which Ukraine refers to do not support its position.

6.53. The Panel made appropriate changes to footnote 250 (247 in the Interim Report) to reflect that Ukraine, in its submissions, referred to certain third-parties' submissions.

6.54. Regarding paragraph 7.316, Ukraine requests that the Panel make certain changes to better reflect Russia's position. In particular, Ukraine requests that the Panel refer to Russia's view regarding the impossibility of conducting certain forms of inspection control due to the size of the products to be inspected or tested.

6.55. Russia objects to Ukraine's request. Russia considers that it submitted its comments regarding the applicable certification scheme and product size only in the context of discussing the physical characteristics criterion for determining whether two products are "like". Russia considers that the additions suggested by Ukraine are irrelevant for this part of the Report.

6.56. The Panel notes that although in its second written submission Russia referred to the impossibility of conducting certain forms of inspection control due to the size of the products, we understand Russia did not pursue this earlier line of argumentation at later stages of the proceedings. We consider that Russia's more updated view on this matter is reflected in Russia's opening statement at the second meeting, specifically in paragraphs 35 and 43. This is further confirmed by Russia's position in the responses to which Ukraine refers in its request for review. On this basis, we do not consider it necessary to reflect Russia's earlier views on the relevance of the size of the product for the purpose of undertaking off-site inspection. We therefore decline Ukraine's request.

6.57. Regarding paragraph 7.329, Ukraine requests that the Panel reflect more accurately the content of the exhibit referred to by the Panel.

6.58. Russia objects to Ukraine's request because Exhibit RUS-56 properly supports the fact that protesters took control of that city.

6.59. The Panel made appropriate changes to paragraph 7.329.

6.60. Regarding paragraph 7.331, Ukraine requests that the Panel include a reference to demonstrations occurring "for and against" Russian intervention in Ukraine, and not only "against", to reflect more accurately the content of the exhibit referred to by the Panel.

6.61. Russia objects to Ukraine's request because Exhibit RUS-58 demonstrates that rallies and demonstrations were against Russian intervention in Ukraine and there is no evidence supporting the existence of riots, clashes, or demonstrations in support of Russia or calling for Russia's intervention in Ukraine.

6.62. The Panel made appropriate changes to paragraph 7.331.

6.63. Regarding paragraph 7.332, Ukraine requests that the Panel change the reference to there being 42 deaths and replace it with a reference to 31 deaths, to reflect more accurately the content of the exhibits referred to by the Panel.

6.64. Russia objects to Ukraine's request because Exhibit RUS-34 refers to 43 deaths. Russia requests that the Panel replace the number of 42 deaths with 43 deaths.

6.65. The Panel added more details in footnote 268 (footnote 265 in the Interim Report) on the content of the exhibits referred to in that paragraph.

6.66. Regarding paragraph 7.333, Ukraine requests that the Panel refer to "right wing protesters breaking windows and ransacking two Russian banks" rather than to "attacks on two Russian banks" and that the Panel include a reference to peaceful demonstrations occurring at the same time, to reflect more accurately the content of the exhibit referred to by the Panel.

6.67. Russia objects to Ukraine's request because it considers that this request is an attempt to tone down the information contained in the relevant exhibits.

6.68. The Panel made appropriate changes to paragraph 7.333 and added footnote 269.

6.69. Regarding paragraph 7.335, Ukraine requests that the Panel make a change to reflect more accurately the content of the exhibit referred to by the Panel.

6.70. The Panel made appropriate changes to paragraph 7.335.

6.71. Regarding paragraphs 7.329 to 7.336, Ukraine requests that the Panel reconsider its use of the terms "civil unrest", "armed confrontation" and "anti-Russian sentiment", which are terms used in media reports submitted as exhibits by Russia. According to Ukraine, the Panel should take into account that those terms as used by the media might not be an accurate description of the factual circumstances at issue.

6.72. The Panel is mindful of the fact that the sources for using those terms are media reports. We note, however, that throughout these proceedings Ukraine did not contest the content of such media reports, nor did it submit other factual evidence that would cast doubt on the accuracy of the description of events contained in the exhibits submitted by Russia. We therefore made appropriate changes to footnote 264 (footnote 261 in the Interim Report).

6.73. Regarding paragraph 7.336, Ukraine requests that the Panel make various changes concerning the dates covered by the evidence discussed therein, the areas where events described therein took place, and the type of incidents described therein, to better reflect the factual conclusions drawn from the evidence submitted by Russia.

6.74. Russia objects to Ukraine's request because it would lead to unfounded revisions that are not based on the facts of the dispute and would misrepresent the relevant factual situation. Russia refers to relevant evidence in support of its view that the modifications requested by Ukraine are unfounded.

6.75. The Panel made appropriate changes to paragraph 7.336.

6.76. Regarding paragraph 7.338, Ukraine requests that the Panel make certain changes to reflect more accurately the time-frame covered by the information on entry of Russian citizens in 2017.

6.77. The Panel made appropriate changes to paragraph 7.338 and footnote 274 (footnote 270 in the Interim Report).

6.78. Regarding paragraph 7.360, Ukraine requests that the Panel complete the reference to Ukraine's Criminal Code.

6.79. The Panel made the appropriate change to paragraph 7.360.

6.80. Regarding paragraph 7.378, Ukraine requests that the Panel include a reference to the relevant time-period to which the evidence refers, which Ukraine submits is January to May 2014.

6.81. Russia objects to Ukraine's request because the evidence that it has submitted covers the time-period from January 2014 to May 2017. Russia considers that Ukraine's suggested change does not reflect the factual situation.

6.82. The Panel made appropriate changes to paragraph 7.378.

6.83. Regarding paragraph 7.379, Ukraine requests that the Panel clarify that the incidents referred to by the Panel took place in Kyiv, where none of the producers concerned are located. Moreover, Ukraine requests that the Panel clarify that events described in Exhibit RUS-36 refer to attacks against the office of a Ukrainian pro-Russian politician and not against the person.

6.84. Russia objects to Ukraine's request. Russia considers that Ukraine's request is baseless and refers to evidence indicating that the incidents referred to in this paragraph occurred not only in Kyiv, but elsewhere in Ukraine.

6.85. The Panel made appropriate changes to paragraph 7.379.

6.86. Regarding the sections included under headings 7.3.2.2.5 and 7.4.2.3.3 (concerning the "like products" analysis), Ukraine requests that the Panel make the necessary factual findings in these sections that, should this become relevant, would assist the Appellate Body in completing the legal analysis concerning the "like products" issue.

6.87. Russia objects to Ukraine's request. According to Russia, the Panel justifiably decided to exercise judicial economy and the findings requested by Ukraine are not necessary to resolve this dispute. Russia also considers that the interim review stage is not the appropriate opportunity to challenge the Panel's choice to exercise judicial economy.

6.88. The Panel does not consider it necessary to accept Ukraine's request. As we have explained at paragraph 7.251, an inconsistency with Article 5.1.1 of the TBT Agreement can arise only if each of three separate elements is demonstrated. In the present dispute, we found that Ukraine failed to establish one of these three elements both in respect of suspension instructions and in respect of the rejection decisions. In the light of these findings, it was not necessary to proceed with the analysis before reaching a conclusion on Ukraine's claims under Article 5.1.1. Moreover, we note that Ukraine in any event did not identify which specific factual findings it requests that the Panel make. We also observe that were we to make entirely new factual findings at this late stage, Russia would be deprived of an opportunity to request that the Panel review aspects of such findings, if appropriate. For these reasons, we decline Ukraine's request.

#### **6.4.3 Consistency of the suspensions with Article 5.1.2 of the TBT Agreement**

6.89. Regarding paragraph 7.425, Ukraine requests that the Panel amend the summary of Ukraine's position on the allocation of the burden of proof under Article 5.1.2 of the TBT Agreement. Ukraine also requests that the Panel add a reference to the jurisprudence on which it relies in support of its position in footnote 345 (footnote 341 in the Interim Report).

6.90. The Panel made an appropriate change to paragraph 7.425.

6.91. Regarding paragraph 7.445, Ukraine requests that the Panel complement Ukraine's summary of arguments to reflect Ukraine's view on Russia's level of confidence regarding large size products.

6.92. The Panel declines Ukraine's request. We consider that the summary of Ukraine's argument included in this paragraph sufficiently summarizes Ukraine's views on the matter under consideration in that section of the Report and that it is not necessary to add other views expressed by Ukraine on unrelated matters. However, the Panel made editorial changes to this paragraph.

6.93. Regarding paragraphs 7.454 and the last sentence of paragraph 7.539, Ukraine requests that the Panel delete the statement that suspension of certificates is not the strictest manner in which the FBO could apply its conformity assessment procedure. According to Ukraine, the FBO could not have withdrawn the certificates in the circumstances of this dispute because withdrawal of certificates would be possible only if the FBO determines that the product does not comply with the relevant requirements and any non-conformities cannot be remedied within an acceptable time-period. Ukraine argues that Ukraine's claims concern a situation where the FBO did not make any determinations regarding conformity of the relevant products. Ukraine considers that suspension of certificates was therefore the strictest manner in which the FBO could apply its conformity assessment procedure.

6.94. Russia objects to Ukraine's request and notes that the FBO could have withdrawn the relevant certificates and, therefore, the suspension of certificates was a less strict manner in which the FBO applied its conformity assessment procedure.

6.95. The Panel disagrees with Ukraine's view, because, as explained in footnote 366 (footnote 362 in the Interim Report), under Russia's relevant legal framework the FBO had the power to suspend or withdraw certificates. Moreover, paragraph 7.454 is not concerned with whether in the relevant cases the FBO could have justifiably withdrawn the certificates under Russian law. Rather, in keeping with its duty to make an objective assessment, the Panel at paragraph 7.454 simply provides an indication of the relative strictness of the FBO's chosen manner of application by comparing it to the strictness of another manner of application (withdrawal of certificates) that Russia's relevant legislation provides for. We therefore decline Ukraine's request.

6.96. Regarding paragraph 7.455, Ukraine requests that the Panel add to its summary of Ukraine's arguments references to Ukraine's views on the level of confidence sought by Russia.

6.97. The Panel declines Ukraine's request because the suggested additions do not relate to the issue discussed in that section of the Report, which concerns the risks that non-conformity would create.

6.98. Regarding paragraph 7.494, Ukraine requests that the Panel delete the reference to the letter of 1 August 2014 in which the FBO refers to relevant conditions for the conduct of remote inspections. Ukraine notes that the letter of 1 August 2014 makes no reference to Article 7.4.1.

6.99. Russia considers that the letter of 1 August 2014 specifically listed the conditions for remote inspections. Therefore, Russia suggests a change to that sentence to clarify that the conditions set out in Article 7.4.1 were quoted but not cited.

6.100. The Panel made appropriate changes to paragraph 7.494.

6.101. Regarding paragraph 7.506, Russia requests that the Panel amend the third sentence of the paragraph to better reflect Russia's views on the meaning of Article 7.4.1 of PC-FZT 08-2013.

6.102. The Panel made appropriate changes to paragraph 7.506. In view of these changes, we also made consequential changes to the next paragraph (paragraph 7.507 in the Interim Report), which we deleted.

6.103. Regarding paragraphs 7.509 and 7.518 (paragraphs 7.510 and 7.519 in the Interim Report), Russia requests that the Panel not attribute to Russia the view expressed therein regarding the availability of off-site inspections.

6.104. Ukraine objects to Russia's request because paragraph 7.509 (paragraph 7.510 in the Interim Report) is not a summary of parties' arguments, but sets out a possible interpretation of Article 7.4.1 as part of the reasoning of the Panel. Ukraine suggests deletion of the second sentence in paragraph 7.510 to address the concern raised by Russia.

6.105. The Panel made appropriate changes to paragraphs 7.509 and 7.518 (paragraphs 7.510 and 7.519 in the Interim Report).

6.106. Regarding paragraph 7.516 (paragraph 7.517 in the Interim Report), Ukraine requests that the Panel address an imbalance in the presentation of each party's position by adding to footnote 406 (footnote 402 in the Interim Report) the arguments and evidence submitted by Ukraine in relation to the availability of off-site inspections.

6.107. The Panel made appropriate changes to footnote 406 (footnote 402 in the Interim Report).

6.108. Regarding paragraph 7.521 (paragraph 7.522 in the Interim Report), Ukraine requests that the Panel provide additional clarification in relation to the basis for its conclusion in the last sentence of that paragraph.

6.109. The Panel made appropriate changes to paragraph 7.521 (paragraph 7.522 in the Interim Report).

6.110. Also regarding paragraph 7.521 (paragraph 7.522 in the Interim Report), Russia requests that the Panel change its reasoning with regard to one certificate [[xxx]]. Russia comments that Exhibit RUS-62(BCI) shows that inconsistencies had been identified in respect of the quality management system for the product at issue.

6.111. Ukraine objects to Russia's request, noting that the inspection act of 18 April 2013 contained in Exhibit RUS-62(BCI) refers to a certificate for the quality management system different from the one on the basis of which the relevant certificate [[xxx]] was issued. Moreover, Ukraine considers that the inconsistencies identified in the inspection act of 18 April 2013 concern quality management, and that no explanation is provided in the document as to which products are affected by such inconsistencies. Ukraine further notes that the reports contained in Exhibit RUS-62(BCI) show that the relevant producer is noted to generally function effectively and that the inconsistencies had been eliminated.

6.112. The Panel made appropriate changes to paragraph 7.521 (paragraph 7.522 in the Interim Report). We note that, as explained in footnote 410 (406 in the Interim Report), the inspection act dated 18 April 2013 contained in Exhibit RUS-62(BCI) is incomplete. We therefore cannot verify whether the inconsistencies referred to therein concern the products covered by the relevant certificates.

6.113. Regarding paragraphs 7.528 to 7.534 (paragraphs 7.529 to 7.535 in the Interim Report), Russia requests that the Panel amend these paragraphs to reflect Russia's arguments and evidence regarding consumer complaints with respect to the products of the producers mentioned in Exhibit RUS-66(BCI), Exhibit RUS-69(BCI) and Exhibit RUS-70(BCI).

6.114. Ukraine objects to Russia's request. Ukraine notes that the Panel has summarized Russia's arguments that off-site inspections were not available under Article 7.4.1 and that Russia's exhibits and their content are mentioned in two footnotes.

6.115. The Panel declines Russia's request because the arguments referred to by Russia are reflected in the summary of Russia's arguments in paragraph 7.493. In addition, we assess the evidence cited by Russia in paragraphs 7.528 to 7.534 (paragraphs 7.529 to 7.535 in the Interim Report), including in footnotes 406 and 419 to 421 (paragraphs 402 and 415 to 417 in the Interim Report).

#### **6.4.4 Consistency of the suspensions with Article 5.2.2 of the TBT Agreement**

6.116. Regarding the heading of section 7.3.4.2, Ukraine requests that the Panel delete an unnecessary reference to the second obligation in Article 5.2.2.

6.117. The Panel made the requested deletion.

#### **6.5 Claims concerning the rejections of applications for new certificates**

##### **6.5.1 Consistency of the rejections with Article 5.1.2 of the TBT Agreement**

6.118. Regarding paragraph 7.592 (paragraph 7.593 in the Interim Report), Ukraine requests that the Panel make a change to reflect the actual date of entry into force of the CU Technical Regulations, 2 August 2014.

6.119. Russia agrees with Ukraine's request.

6.120. The Panel made the requested change.

6.121. Regarding paragraph 7.596 (paragraph 7.597 in the Interim Report), concerning application A3 [[xxx]], Russia requests that the Panel amend Table 6 to more accurately reflect the goods that are the subject of that application.

6.122. The Panel made the requested changes to Table 6.

6.123. Regarding paragraph 7.647 (paragraph 7.648 in the Interim Report), Russia requests that the Panel amend the summary of Russia's arguments to clarify its position on the need to undertake inspection of production and testing of samples, in respect of certain Ukrainian producers, at the producer's facilities in Ukraine.

6.124. The Panel made appropriate changes to paragraph 7.647 (paragraph 7.648 in the Interim Report).

6.125. Regarding paragraph 7.648 (paragraph 7.649 in the Interim Report), Ukraine requests that the Panel complement the summary of Ukraine's arguments with arguments included in paragraph 7.445 but not included in paragraph 7.648 (paragraph 7.649 in the Interim Report).

6.126. The Panel does not consider it necessary to repeat what Ukraine said in the context of its claims regarding suspensions in the context of its claims regarding rejections. However, we made editorial changes to this paragraph and added a cross-reference to Ukraine's arguments in footnote 513 (footnote 509 in the Interim Report).

6.127. Regarding paragraph 7.668 (paragraph 7.669 in the Interim Report), Ukraine requests that the Panel amend the paragraph to better reflect Ukraine's position on the alternative measure of entrusting the on-site inspection of relevant Ukrainian producers to a certification body of another CU country.

6.128. The Panel made appropriate changes to paragraph 7.668 (paragraph 7.669 in the Interim Report).

6.129. Regarding paragraph 7.670 (paragraph 7.671 in the Interim Report), Ukraine requests that the Panel explicitly indicate that CU Technical Regulations enjoy direct effect in the CU countries.

6.130. The Panel made appropriate changes to paragraph 7.670 (paragraph 7.671 in the Interim Report).

6.131. Regarding paragraph 7.696 (paragraph 7.697 in the Interim Report), Ukraine requests that the Panel delete the reference to the letter of 1 August 2014 in which the FBO refers to relevant conditions for the conduct of remote inspections. Ukraine notes that the letter of 1 August 2014 makes no reference to Article 7.4.1.



6.132. Russia considers that the letter of 1 August 2014 specifically listed the conditions for remote inspections. Therefore, Russia suggests a change to that sentence to clarify that the conditions set out in Article 7.4.1 were quoted, but not cited.

6.133. The Panel made appropriate changes to paragraph 7.696 (paragraph 7.697 in the Interim Report).

6.134. Regarding paragraph 7.705 (paragraph 7.706 in the Interim Report), Russia requests that the Panel amend the paragraph to reflect the fact that it submitted evidence (Exhibit RUS-62(BCI)) showing that the identified non-conformities were eliminated after the most recent inspection control took place. Russia considers this to demonstrate that the condition that there be no non-conformity during the previous inspection control is not satisfied in respect of applications A1 and A2.

6.135. Ukraine rejects Russia's request. According to Ukraine, the inspection act contained in Exhibit RUS-62(BCI) does not explain what the rectified non-conformities were or to which products they relate. Ukraine also argues that the documents contained in Exhibit RUS-62(BCI), or any other evidence on record, fail to show a link between the non-conformities identified in Exhibit RUS-62(BCI) and the products covered by applications A1 and A2.

6.136. The Panel made appropriate changes to footnote 556 (footnote 552 in the Interim Report), to clarify that although the non-conformities were eliminated after the most recent inspection control, the text of the inspection act contained in Exhibit RUS-62(BCI) is incomplete and that there is therefore no evidence on the basis of which the Panel could determine whether such non-conformities related to the products covered by applications A1 and A2.

6.137. Regarding paragraphs 7.727, 7.728 and 7.764 (paragraphs 7.728, 7.729, and 7.765 in the Interim Report), Ukraine requests that the Panel refer to both sentences of Article 5.1.2 of the TBT Agreement.

6.138. The Panel made appropriate changes to paragraphs 7.727, 7.728 and 7.764 (paragraphs 7.728, 7.729, and 7.765 in the Interim Report).

## **6.6 Claims concerning the non-recognition of CU certificates issued in other CU countries under CU Technical Regulation 001/2011**

6.139. Regarding paragraph 7.808 (paragraph 7.809 in the Interim Report), Ukraine requests that the Panel add a reference to an additional paragraph of its first written submission in the footnote.

6.140. The Panel made the requested change.

6.141. Regarding paragraph 7.814, Russia suggests that the Panel insert two abbreviations used later in the Interim Report.

6.142. The Panel does not find it appropriate to introduce these abbreviations at paragraph 7.814, as that paragraph refers to Ukraine's arguments. Moreover, the Panel's use of the terms "production condition" and "registration condition" is already addressed in footnotes 632 and 633 and at paragraphs 7.823 and 7.824.

6.143. Regarding paragraph 7.842 (paragraph 7.843 in the Interim Report), Russia requests that the Panel add a reference to paragraph 136 of its second written submission and Exhibit RUS-52(BCI) as well as Exhibit RUS-53(BCI).

6.144. Ukraine considers that paragraph 7.842 (paragraph 7.843 in the Interim Report) appropriately reflects Russia's arguments.

6.145. The Panel does not find it necessary to make the requested change. Paragraphs 135-136 of Russia's second written submission are already referred to in footnote 647 (footnote 643 in the Interim Report). Moreover, paragraph 7.835 and footnote 645 (paragraph 7.836 and footnote 641 in the Interim Report) already address the content of, or refer to, Exhibit RUS-52(BCI) and

Exhibit RUS-53(BCI). Nevertheless, in the light of Russia's comment, the Panel added footnote 654 to reference the exhibits once more.

6.146. Regarding paragraph 7.844 (paragraph 7.845 in the Interim Report), Russia requests that the Panel make a change to reflect that Russia does not accept the existence or authenticity of the February 2016 letter.

6.147. Ukraine notes that Russia's position is already indicated in paragraph 7.844 (paragraph 7.845 in the Interim Report). Ukraine further argues that the changes that Russia proposes to make do not concern the authenticity of the letter, but its translations.

6.148. The Panel made appropriate changes to paragraph 7.844 (paragraph 7.845 in the Interim Report) and consequential changes to footnote 653 (footnote 649 in the Interim Report).

6.149. Regarding paragraph 7.855 (paragraph 7.856 in the Interim Report), Russia requests that the Panel include a reference to Exhibit RUS-73(BCI) and Exhibit RUS-78(BCI) and Russia's arguments based on these exhibits, as reflected in Russia's response to Panel question No. 128.

6.150. Ukraine considers that the Panel should reject Russia's request. Ukraine notes that the relevant exhibits are already discussed at paragraph 7.859 (paragraph 7.860 in the Interim Report).

6.151. The Panel does not find it necessary to refer to Exhibit RUS-73(BCI) and Exhibit RUS-78(BCI) in paragraph 7.855 (paragraph 7.856 in the Interim Report). As Russia notes in its comments on the interim report, we address the relevant evidence at paragraph 7.859 (paragraph 7.860 in the Interim Report). As this evidence relates to the situation after the Panel's establishment, we address it together with all such evidence submitted by the parties. Also, Russia's response to Panel question No. 128 is already referenced in footnote 664 (footnote 659 in the Interim Report). For completeness, however, we included a further reference to it in footnote 660 (footnote 655 in the Interim Report). Also, we made appropriate changes to paragraphs 7.855 and 7.859 (paragraphs 7.856 and 7.860 in the Interim Report) to further clarify the structure of the analysis.

6.152. Regarding paragraph 7.868 (paragraph 7.869 in the Interim Report), Ukraine requests that the Panel supplement the summary of its arguments.

6.153. The Panel supplemented Ukraine's argument summary.

6.154. Regarding paragraph 7.880 in the Interim Report, Ukraine requests that the Panel make a change to reflect more accurately one of Ukraine's arguments. Ukraine contends that it did not make a general statement, but focused on the relation between CU Technical Regulation 001/2011 and the third measure at issue.

6.155. The Panel notes that paragraph 85 of Ukraine's opening statement at the first meeting of the Panel is worded in a way that suggests a general proposition. Nevertheless, in the light of Ukraine's comment, we deleted paragraph 7.880 of the Interim Report.

6.156. Regarding paragraph 7.904 (paragraph 7.906 in the Interim Report), Ukraine requests that the Panel clarify to which specific sources of evidence submitted by Ukraine the Panel refers.

6.157. The Panel made an appropriate clarification.

6.158. Regarding paragraph 7.932 (paragraph 7.934 in the Interim Report), Russia requests that the Panel supplement its summary of Russia's arguments.

6.159. Ukraine considers that the current wording of the paragraph accurately reflects Russia's arguments.

6.160. The Panel made appropriate changes to paragraph 7.932 (paragraph 7.934 in the Interim Report).

## 6.7 Claims concerning the alleged systematic import prevention

6.161. Regarding paragraph 7.952 (paragraph 7.954 in the Interim Report), Russia requests that the Panel make certain changes to better reflect the parties' divergent views on the number of certificates suspended and rejected.

6.162. Ukraine objects to Russia's request. According to Ukraine, this change is unnecessary as the parties' disagreement on the specific number of certificates suspended and rejected is reflected in the footnotes to Table 8.

6.163. The Panel made appropriate changes to paragraph 7.952 (paragraph 7.954 in the Interim Report).

6.164. Regarding paragraph 7.956 (paragraph 7.958 in the Interim Report), Ukraine requests that the Panel change Ukraine's description of the challenged measure. In particular, Ukraine requests changing the Panel's reference to the measure being applied "by way of three components" to the measure being "achieved by different means". Ukraine also requests that the Panel list the evidence submitted by Ukraine in support of the existence of the challenged measure.

6.165. The Panel notes that paragraph 7.956 (paragraph 7.958 in the Interim Report) provides our understanding of how Ukraine described the challenged measure. We recall that Ukraine, in its panel request and in various places in its submissions, referred to this measure as "the systematic prevention of Ukrainian producers from exporting their railway products to [Russia] 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[,], namely the Republic of Belarus and the Republic of Kazakhstan". Moreover, the evidence submitted by Ukraine is assessed in subsequent paragraphs in that section of the Report. Finally, we note that paragraphs 7.950 and 7.951 (paragraphs 7.952 and 7.953 in the Interim Report) provide a summary of Ukraine's arguments. Having said this, we made appropriate changes to paragraphs 7.950 and 7.956 (paragraphs 7.952 and 7.958 in the Interim Report).

6.166. Regarding paragraphs 7.957 and 7.958 (paragraphs 7.959 and 7.960 in the Interim Report), Ukraine requests that the Panel make certain changes to clarify Ukraine's position that the alleged systematic import prevention took place not only through the individual FBO instructions and decisions. Ukraine also requests that the Panel make it clear that Ukraine did not use the word components when referring to the evidence that it provided in support of the alleged systematic import prevention.

6.167. The Panel made appropriate changes to paragraphs 7.957, 7.958, 7.964, 7.990 and 7.991 (paragraphs 7.959, 7.960, 7.966, 7.991, and 7.992 in the Interim Report), as well as to heading 7.6.1.2.1, and added paragraph 7.989.

6.168. Regarding paragraph 7.960 (paragraph 7.962 in the Interim Report), Russia requests that the Panel make certain changes to complement Russia's arguments that the FBO issued certificates under CU Technical Regulations to certain producers located in eastern Ukraine because in those cases there were no non-conformities identified with regard to the products at issue in the course of the previous inspection control.

6.169. Ukraine considers that paragraph 7.960 (paragraph 7.962 in the Interim Report) sufficiently reflects Russia's arguments and suggests that the Panel, instead of making the change proposed by Russia, add a reference to the responses to Panel question No. 156 in footnote 743 (footnote 739 in the Interim Report). Ukraine further requests that the Panel reflect Ukraine's position that the evidence provided by Russia is insufficient to establish that there has been no issue of non-conformity regarding the quality of the certified products.

6.170. The Panel made appropriate changes to paragraph 7.960 (paragraph 7.962 in the Interim Report).

6.171. Regarding paragraph 7.966 (paragraph 7.968 in the Interim Report), Ukraine requests that the Panel change the reference to the location of the producer referred therein, to clarify that it is located in central Ukraine. Moreover, Ukraine requests that the Panel include Ukraine's explanation concerning the limitation on the use of the certificates held by the producer between 2014 and 2016.

6.172. Russia objects to Ukraine's request. According to Russia, Ukraine is attempting to re-argue its case. Russia considers that it has fully addressed Ukraine's views in its comments on Ukraine's response to Panel question No. 115 and paragraph 28 of Russia's opening statement at the second meeting of the Panel.

6.173. The Panel made appropriate changes to paragraph 7.966 (paragraph 7.968 in the Interim Report).

6.174. Regarding paragraph 7.967 (paragraph 7.969 in the Interim Report), Ukraine requests that the Panel make certain changes to clarify that Ukraine's argument regarding substantial repetition as evidence of the systematic nature of the challenged measure is based on the panel's findings in *Russia – Tariff Treatment* and that Ukraine also relied on the substantial decrease in the number of producers holding certificates.

6.175. The Panel made appropriate changes to paragraph 7.967 (paragraph 7.969 in the Interim Report).

6.176. Regarding Table 8 in paragraph 7.968 (paragraph 7.970 in the Interim Report), Ukraine requests that the Panel change the figure in the column corresponding to the certificates held by Ukrainian producers in April 2017. According to Ukraine, the correct figure is 30 and not 40, as it appears in Table 8.

6.177. The Panel added footnote 760 in Table 8 to explain Ukraine's position in this respect.

6.178. Regarding paragraph 7.970 (paragraph 7.972 in the Interim Report), Ukraine requests that the Panel make changes to complement Ukraine's view that the existence of a system is shown by the fact that the reason invoked by the FBO for suspending certificates and rejecting applications for new certificates is repetitively the same. Ukraine also requests that the Panel further elaborate on the scope and purpose of the last sentence of this paragraph.

6.179. Russia objects to Ukraine's request because contrary to Ukraine's view, the fact that the basis for most of the suspensions and rejections is the same (i.e. that FBO employees were not in a position to conduct inspections in Ukraine) is not proof of Russia undertaking an organized effort to prevent the importation of Ukrainian railway products. Moreover, Russia submits that not all the suspensions and rejections were based on the same reason; at least one rejection is based on the fact that the application was submitted without the required documents.

6.180. The Panel considers that it is unnecessary to address this argument raised by Ukraine because, as indicated in paragraphs 7.959 and 7.970 (paragraphs 7.961 and 7.972 in the Interim Report), we found that the FBO had justified reasons to suspend certificates. However, we made appropriate changes to clarify the last sentence of paragraph 7.970 (paragraph 7.972 in the Interim Report).

6.181. Regarding paragraph 7.985 (paragraph 7.987 in the Interim Report), Ukraine requests that the Panel add Ukraine's explanation on why the imports of Ukrainian railway products into Kazakhstan and Belarus decreased.

6.182. The Panel made appropriate changes to paragraphs 7.979 and 7.985 (paragraphs 7.981 and 7.987 in the Interim Report).

## 7 FINDINGS

### 7.1 Preliminary matters

#### 7.1.1 Panel's preliminary ruling

7.1. On 3 April 2017, Russia submitted to the Panel a preliminary ruling request concerning the consistency of Ukraine's panel request with Article 6.2 of the DSU.

7.2. Russia's preliminary ruling request raises two main issues. As explained in more detail below, these concern whether the panel request fails to provide the legal basis of Ukraine's complaint to present the problem clearly and whether the panel request expands the scope of the dispute.

7.3. Article 6.2 provides as follows:

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

7.4. On 13 April 2017, Ukraine submitted to the Panel a response to Russia's preliminary ruling request. On 18 May 2017, Russia submitted to the Panel its comments on Ukraine's response. On 30 May 2017, Ukraine commented on Russia's comments. On 8 June 2017, the third parties submitted their views on Russia's preliminary ruling request.

7.5. On 30 June 2017, the Panel sent questions on Russia's preliminary ruling request in advance of the first meeting. The Panel invited both parties to provide oral answers to those questions during the meeting. At the end of the first substantive meeting the Panel indicated that the parties could submit written answers to the questions concerning Russia's preliminary ruling request by 14 July 2017. On 14 July 2017, Ukraine and Russia provided written answers to the Panel's advance questions concerning Russia's preliminary ruling request.

7.6. The Panel issued its conclusions on Russia's request to the parties on 17 July 2017.<sup>12</sup> The Panel concluded that Ukraine's panel request was not inconsistent with Article 6.2 and therefore it rejected Russia's claims in this respect. The Panel indicated that it would provide detailed reasons in support of its conclusions at a later date, and at the latest in the Interim Report.

7.7. The Panel's conclusions as sent to the parties (and the third parties for information) are reproduced in Annex A to this Report. As foreseen in those conclusions, this Report contains the Panel's detailed reasons for its conclusions on Russia's request. The conclusions circulated to the parties on 17 July 2017 are an integral part of this Report.

7.8. In preparing these detailed reasons, the Panel has followed, to the extent possible, the structure used in its conclusions. Consequently, reasons are given in support of two separate conclusions. Where the conclusions were subdivided, we provide an explanation of our detailed reasoning in respect of each sub-issue.

#### **7.1.1.1 Issue 1: Whether Ukraine's panel request fails to "present the problem clearly"**

7.9. Issue 1 comprises six independent claims. According to Russia, Ukraine's panel request fails to present the problem clearly by:

- a. Failing to provide the legal basis sufficient to present the problem clearly (i.e. in section IV of the panel request);

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<sup>12</sup> On 17 July 2017, the Panel's conclusions were also circulated to third parties, for their information.

- b. failing to identify the specific measures at issue;
- c. failing to identify the like domestic products or the like products from any other country 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.

7.10. Russia included under issue 1, three additional claims concerning aspects of the panel request that do not refer to whether it presents the problem clearly:

- d. The panel request calls upon the Panel to look beyond the covered agreements;
- e. in describing the measure that appears in point three of section II, the panel request fails to identify the specific measure at issue;
- f. only section II of the panel request contains the measures challenged.

#### **7.1.1.1.1 Issue 1(a)**

7.11. As noted above, the essence of Russia's first claim is that the panel request does not meet the requirements of Article 6.2 because section IV, which lists the claims, falls short of providing a summary of the legal basis to present the problem clearly. Russia's claim concerns all the measures and all the claims identified in the panel request.

7.12. Russia argues that a panel request must identify the legal basis of the complaint, by plainly connecting the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the responding party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits. According to Russia, Ukraine's panel request fails to meet this requirement insofar as "the covered agreements allegedly being violated are listed in Section IV 'Legal Basis for the Complaint' without any reference to the measures challenged".<sup>13</sup>

7.13. Russia considers that the measures identified in the subparagraphs of section II of Ukraine's panel request are "different in their nature" as well as "distinct and absolutely different from each other". In Russia's view, even taking account of the differences amongst the challenged measures, the panel request lacks a link between each distinct measure described in section II of the panel request and the corresponding provision of the covered agreement being challenged. Russia considers that "mere listing of the legal bases in Section IV" of the panel request without any explanation of how each challenged measure is allegedly inconsistent with the relevant WTO provisions precludes Russia from understanding the case it has to answer.<sup>14</sup>

7.14. Ukraine agrees with Russia that Article 6.2 of the DSU requires a panel request to provide a brief summary of the legal basis of the complaint in a manner that presents the problem clearly. However, Ukraine argues that its panel request plainly connects the challenged measures with the WTO provisions allegedly infringed.<sup>15</sup>

7.15. Ukraine considers that section IV of the panel request lists the specific WTO provisions allegedly infringed and provides an explanation on why the measures at issue breach the relevant WTO provision. Ukraine argues this clearly indicates what case Russia must answer. Moreover, Ukraine considers Russia to be reading section IV in isolation of the rest of the panel request, which runs against a panel's obligation to examine the panel request as a whole.<sup>16</sup>

7.16. Ukraine further considers that the reference to section II in the introductory paragraph of section IV of the panel request is clear in indicating that those two sections should be read together in determining the link between each measure at issue and the WTO provision allegedly

<sup>13</sup> Russia's preliminary ruling request, paras. 12 (citing Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162) and 15.

<sup>14</sup> Russia's preliminary ruling request, paras. 16 and 17.

<sup>15</sup> Ukraine's response to Russia's preliminary ruling request, paras. 38-44 and 64.

<sup>16</sup> Ukraine's response to Russia's preliminary ruling request, paras. 65-68.

infringed. Ukraine submits that the description of the measures at issue in section II of the panel request consists of both the narrative paragraphs and the identification of the measures at issue in the three numbered points in section II. In particular, Ukraine considers that (a) claims raised under Articles 5.1.1 and 5.1.2 of the TBT Agreement refer to the application of conformity assessment procedures and thus concern the specific measures affecting the application of the conformity assessment procedures identified in the second and third numbered points of section II of the panel request, (b) claims raised under Article 5.2.2 of the TBT Agreement focus on the completeness of documentation and the prompt transmission of the results of a conformity assessment procedure, which refer to the application of conformity assessment procedures, and thus concern also the measures described in points two and three of section II of the panel request, (c) while the claim under Article 5.2.3 of the TBT Agreement is limited to information requirements for conformity assessment procedures, which concern only the measure described in point three of section II of the panel request, Ukraine abandoned the claim made under Article 5.2.3, (d) claims under Article 2.1 of the TBT Agreement, which relates to the preparation, adoption, and application of technical regulations, refer to the non-discrimination obligation in respect of technical regulations and thus concern the measure described in point three of section II of the panel request (whereas the measures identified in points one and two concern, respectively, restrictions on importation and conformity assessment procedures), (e) claims under Article I:1 of the GATT 1994 refer to the broad scope of application of this provision and there is nothing in the text of Article I:1 to suggest that one or more of the measures identified in points one to three of section II of the panel request would fall outside the scope of that provision, (f) claims under Article III:4 of the GATT 1994 refer to laws, regulations and requirements affecting the internal sale of imported products and thus can concern only measures described in points two and three of section II of the panel request taking into account that point one expressly refers to restrictions on importation and thus would appear to fall outside the scope of Article III:4, (g) claims under Article X:3(a) of the GATT 1994 refer broadly to the administration of all laws, regulations, decisions and rulings and thus concern the measures described in section II of the panel request, and (h) claims under Articles XI:1 and XIII:1 of the GATT 1994 refer to, respectively, quantitative restrictions and their non-discriminatory administration and thus concern only the measure described in point one of section II of the panel request taking into account that there is nothing in the wording of the identification of the other specific measures at issue to suggest that those measures concern Russia's acts or omissions regarding importation. Ukraine also rejects Russia's argument that the fact that Ukraine did not challenge certain measures under certain provisions confirms the panel request's lack of clarity.<sup>17</sup>

7.17. Russia further argues that the situation with Ukraine's panel request is very similar to that in *China – Raw Materials*, where the Appellate Body found that section III of the complaining parties' panel requests failed to satisfy the requirement in Article 6.2 of the DSU to provide a "brief summary of the legal basis of the complaint sufficient to present the problem clearly". In support of this view, Russia considers that like in *China – Raw Materials* (a) from the wording of section IV of the panel request it is impossible to discern which measure caused which alleged violation, (b) the WTO provisions listed in section IV of the panel request contain a wide array of dissimilar obligations, and (c) the narrative paragraphs in section IV of the panel request fail to explain how each of the challenged measures allegedly violate specific provisions of the WTO agreements.<sup>18</sup>

7.18. Ukraine rejects the parallels drawn by Russia between Ukraine's panel request and the complaining parties' panel request in *China – Raw Materials*. In particular, Ukraine considers that (a) unlike section III of the panel requests in *China – Raw Materials*, the specific measures at issue identified in Ukraine's panel request have a precise and well-defined scope and all concern directly or indirectly conformity assessment procedures for railway products; moreover, unlike the complaining parties in *China – Raw Materials*, Ukraine does not challenge an entire code or charter regulating all foreign trade between Russia and third countries, (b) Ukraine's panel request identifies the specific measures at issue, describing both the acts and omissions attributable to Russia and the sources and evidence of those measures and with respect to each of the covered agreements that it claims to have been violated, and (c) with respect to each of the specific measures at issue, Ukraine has offered an explanation in section IV of the legal basis for the

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<sup>17</sup> Ukraine's response to Russia's preliminary ruling request, paras. 68-85; and comments on Russia's comments on Ukraine's response to Russia's preliminary ruling request, paras. 17-26.

<sup>18</sup> Russia's comments on Ukraine's response to Russia's preliminary ruling request, paras. 8-12.

complaint and reading the panel request as a whole shows that the panel request links the legal claims with the specific measures at issue.<sup>19</sup>

7.19. Russia disagrees with the explanations provided in Ukraine's response to Russia's preliminary ruling request, on how the panel request could be read to demonstrate the link between the challenged measures and the WTO provisions allegedly infringed. In particular, Russia considers that (a) measures II and III do not constitute conformity assessment procedures and thus do not relate to Articles 5.1.1 and 5.1.2 of the TBT Agreement, (b) Ukraine did not raise in its first written submission claims under Article 5.2.2 of the TBT Agreement against measures II and III and the panel request does not include a reference to problems with the completeness of documentation, (c) Ukraine argues that measure III concerns the application of conformity assessment procedures and also a technical regulation subject to Article 2.1 of the TBT Agreement, thus making it impossible to understand which is the challenged measure, (d) in its first written submission Ukraine raises claims under Article I:1 of the GATT 1994 only in respect of measures I and III, thus confirming the lack of clarity in the panel request, (e) despite Ukraine's assertion that all measures could be subject to Article III:4 of the GATT 1994, it is unclear how import restrictions described in the first element of measure II and measure I could fall under Article III:4 and Ukraine only challenged measure III under this provision, (f) similarly it is unclear how all challenged measures could be subject to Article X:3 of the GATT 1994 and Ukraine only raises claims under this provisions with respect to measure III, and (g) despite Ukraine's assertion that all measures could be subject to Articles XI:1 and XIII:1 of the GATT 1994, the description of measure I in the panel request does not deal with matters covered by this provision. Russia notes that its references to Ukraine raising claims only with respect to certain measures, is not directed at questioning Ukraine's ability to abandon claims but rather to the lack of clarity in Ukraine's panel request.<sup>20</sup> Moreover, Russia considers that failures in the panel request cannot be cured through the explanations provided by Ukraine in subsequent communications.<sup>21</sup>

7.20. Russia therefore requests the Panel to "adjudge and declare that [measures] listed in Section II of the Panel Request challenged by Ukraine are outside the Panels terms of reference and to dismiss Ukraine's claims".<sup>22</sup>

7.21. The Panel recalls that pursuant to Article 6.2 of the DSU, a panel request must "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

7.22. According to the Appellate Body, "Article 6.2 of the DSU calls for sufficient clarity with respect to the legal basis of the complaint ... [because a] defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defence".<sup>23</sup> More specifically, the legal basis of a claim must be set out in a way that is "sufficient to present the problem clearly".<sup>24</sup> The Appellate Body has explained that "in order to 'present the problem clearly', within the meaning of Article 6.2, a panel request must 'plainly connect' the challenged measure(s) with the provision(s) claimed to have been infringed so that a respondent can 'know what case it has to answer, and ... begin preparing its defence'".<sup>25</sup>

7.23. In the light of the broad nature of Russia's first claim, we begin with a detailed examination of Ukraine's panel request.

7.24. Ukraine's panel request is structured in four sections. The first provides an overview of the background of the dispute. The second describes the measures at issue. The third describes

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<sup>19</sup> Ukraine's comments on Russia's comments on Ukraine's response to Russia's preliminary ruling request, paras. 8-15.

<sup>20</sup> Russia's comments on Ukraine's response to Russia's preliminary ruling request, para. 21.

<sup>21</sup> Russia's comments on Ukraine's response to Russia's preliminary ruling request, para. 13-22.

<sup>22</sup> Russia's preliminary ruling request, para. 18.

<sup>23</sup> Appellate Body Report, *Thailand – H-Beams*, para. 88.

<sup>24</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 168.

<sup>25</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.39 (quoting Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8 (in turn quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162)).



Russia's relevant legal framework. The fourth provides the legal basis of the complaint.<sup>26</sup>

7.25. Section II of the panel request contains three narrative paragraphs describing the measures at issue, followed by a numbered list of the measures, which includes references to Annexes I-III of the panel request. This section ends with a concluding paragraph describing the trade effects of the challenged measures.<sup>27</sup>

7.26. Section II of the panel request describes three measures. To have the appropriate basis to provide our analysis of Russia's first objection, we briefly refer to our understanding on each of the challenged measures. We provide additional explanations on why we consider these to be the measures identified in the panel request when assessing Russia's objections concerning the identification of the measures.

7.27. Measure one is described as the "systematic prevention of Ukrainian producers from exporting their railway products" to Russia by way of the suspensions of valid certificates of conformity held by Ukrainian producers of railway products, the rejections of applications for new certificates of conformity submitted by Ukrainian producers of railway products, and the non-recognition of certificates of conformity issued in other CU countries. This measure is described in the first numbered point of section II.

7.28. Measure two refers to three separate components that concern Ukrainian producers. First, to "suspensions of conformity assessment certificates" as mentioned in Annex I. Second, to "rejections of new applications for conformity assessment certificates" as mentioned in Annex II. Third, to "refusals to recognize valid conformity assessment certificates issued by other CU countries" as mentioned in Annex III. The description of measure two, through its components, appears in the first two narrative paragraphs and in the second numbered point of section II.

7.29. The third measure is described in the third narrative paragraph and in the third numbered point of section II. Measure three relates to the non-recognition by Russia of certificates issued in other CU countries if the certified products were not produced in a CU country.

7.30. Section IV of the panel request begins with an introductory paragraph that reads: "the measures described in section II are inconsistent with [Russia's] obligations under the following provisions of the GATT 1994 and the TBT Agreement." This introductory paragraph is followed by a list of 10 provisions, five of the TBT Agreement and five of the GATT 1994, each of which contains a brief description of how that provision is being breached.<sup>28</sup>

7.31. We turn to examine each point of section IV of the panel request, bearing in mind the description of the three measures at issue in section II of the panel request, to determine whether the panel request links the challenged measures with the ten WTO provisions allegedly infringed. In pursuing this task, we note that we are not adjudicating on the merits of the claims raised by Ukraine. Our focus is on whether the links are sufficient for Russia to have understood what problem Ukraine raised and what case it had to defend.

7.32. Points one and two of section IV of the panel request contain Ukraine's claims on application of Russia's conformity assessment procedure under Articles 5.1.1 and 5.1.2 of the TBT Agreement. These claims concern, on the one hand, the discriminatory application of conformity assessment procedures, and on the other hand, the unnecessary trade restrictiveness of their application. The three measures described above could relate both to the alleged discriminatory application of Russia's conformity assessment procedures and its unnecessary trade restrictiveness, because the three of them could concern the application of Russia's conformity assessment procedures for railway products. This includes the general import prevention, inasmuch as the two other measures, which concern the application of Russia's conformity assessment procedures for railway products, appear to serve as evidence of the latter's existence. We thus consider that the general import prevention could relate to the application of Russia's conformity assessment procedures for

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<sup>26</sup> WT/DS499/2.

<sup>27</sup> WT/DS499/2, p. 2.

<sup>28</sup> WT/DS499/2, p. 3.

railway products. We thus consider that there is a link between Ukraine's claims under Articles 5.1.1 and 5.1.2 and the challenged measures.

7.33. Point three of section IV of the panel request contains Ukraine's claims under Article 5.2.2 of the TBT Agreement. These claims concern the manner in which Russian authorities processed the conformity assessment procedures. In particular, Ukraine's claims relate to (a) the prompt examination of the completeness of applicants' documentation, (b) informing applicants of all deficiencies in the applications, and (c) transmitting the results of the conformity assessment as soon as possible and in a precise and complete manner. The wording of the explanation provided in point three refers to two situations. One concerns "producers applying for conformity assessment certificates", and the other concerns the transmissions of results of conformity assessment to applicants. Thus, a measure that concerns an application for a conformity assessment certificate or the transmission of results of conformity assessment is excluded from this claim. The suspensions of valid certificates of conformity held by Ukrainian producers, a component of measure two, is described in section II of the panel request as referring to the verification of the conditions of conformity for a certificate already issued. This measure thus entails the assessment of conformity, but not the request for a conformity assessment certificate. Therefore, this component of measure two is linked to letter (c) above, and not to letters (a) and (b). In contrast, the other components of measure two (rejections of new applications and refusals to recognize valid conformity assessment certificates issued by other CU countries) relate to an application triggering a conformity assessment procedure. The rejections of the new applications could relate to the three aspects ((a) through (c) above) of the claims raised under Article 5.2.2. The refusals to recognize certificates of conformity issued by other CU countries could relate to point (a) above, because section II of the panel request suggests that the reason to refuse to recognize the CU certificates could relate to the lack of examination of the relevant documents. However, this component of measure two does not seem to relate to points (b) and (c) above, because the panel request appears to acknowledge that the refusals were communicated to the applicants within a reasonable period of time. We thus consider that there is a link between Ukraine's claims under Article 5.2.2 and the suspensions of valid certificates, the rejections of application for certificates of conformity, the non-recognition of certificates issued by other CU countries (only regarding the prompt examination of the completeness of documentation), and the general import prevention, inasmuch as the suspensions, the rejections and the non-recognition appear to serve as evidence of the latter's existence.

7.34. Point four of section IV of the panel request contains Ukraine's claims under Article 5.2.3 of the TBT Agreement. These claims concern unnecessary information requirements throughout the conformity assessment procedure. The suspensions of valid certificates of conformity held by Ukrainian producers do not seem to be linked to this claim because the panel request does not provide an indication that the assessment of the continued conformity of the products was somehow related to the request of unnecessary information. The problem presented by this component of measure two seems linked to the reasons supporting the inability to perform on-site inspections. The rejections of applications for certificates of conformity could relate to the imposition by Russian authorities of additional requirements, as such rejections could have been the result of unnecessary information requirements. However, this claim could not extend to those applications that, as described in section II of the panel request, were "returned without consideration"; because this would imply that the Russian authorities did not make any information requirement. The refusals to recognize certificates of conformity issued by other CU countries could relate to unnecessary information requirements, because the Russian authorities could be asking for additional information than that considered sufficient by the relevant authorities of other CU countries. However, this would not be the case in respect of measures one and three, due to their nature of a systematic measure and a general requirement. We thus consider that there is a link between Ukraine's claims under Article 5.2.3 and two components of measure two, the rejections of applications for certificates of conformity (excluding the applications returned without consideration) and the refusals to recognize conformity assessment certificates issued by other CU countries. We do not consider there is a link between Ukraine's claims under Article 5.2.3 and measure one, a component of measure two (the

suspensions of valid certificates of conformity held by Ukrainian producers), and measure three.<sup>29</sup>

7.35. Point five of section IV of the panel request contains Ukraine's claims under Article 2.1 of the TBT Agreement. These claims concern the discriminatory effects of the application of technical regulations. The panel request challenges the discriminatory application of certain technical requirements through the three measures at issue. Therefore, the three measures could relate to this alleged discrimination. We thus consider that there is a link between Ukraine's claims under Article 2.1 and the challenged measures.

7.36. Points six and seven of section IV of the panel request contain Ukraine's claims under Articles I:1 and III:4 of the GATT 1994. These claims concern alleged discriminatory treatment against Ukrainian railway products as compared, on the one hand, with the treatment provided to products from other countries, and, on the other hand, with the treatment provided to domestic products. The panel request underlines that the challenged measures are only applied to Ukrainian railway products, which could lead to discriminatory treatment in favour of railway products from other countries and in favour of domestic products. We thus consider that there is a link between Ukraine's claims under Articles I:1 and III:4 and the challenged measures.

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

7.38. Points nine and ten of section IV of the panel request contains Ukraine's claims under Articles XI:1 and XIII:1 of the GATT 1994. These claims concern the imposition and administration of import restrictions or prohibitions on the imports of Ukrainian railway products. The challenged measures could be alleged to constitute an import restriction. In particular, it is clear that measure one would fall under this category. Moreover, measure one could have been administered in a discriminatory manner. We thus consider that there is a link between Ukraine's claims under Articles XI:1 and XIII:1 and the challenged measures.

7.39. On the basis of the foregoing, we consider that Ukraine's claims, as described in section IV of the panel request, read together with section II, pertain to the following measures:

**Table 1 - Link between the claims raised by Ukraine and the measures at issue**

Measures		Related claims
One:	Systematic prevention of exports	Articles 5.1.1, 5.1.2, and 2.1 of the TBT Agreement. Articles I:1, III:4, X:3(a), XI:1, and XIII:1 of the GATT 1994.
Two:	Suspensions of valid certificates of conformity held by Ukrainian producers	Articles 5.1.1, 5.1.2, 5.2.2, and 2.1 of the TBT Agreement. Articles I:1, III:4, XI:1, and XIII:1 of the GATT 1994.
	Rejections of applications for certificates of conformity	Articles 5.1.1, 5.1.2, 5.2.2, 5.2.3 (excluding applications returned without consideration), and 2.1 of the TBT Agreement. Articles I:1, III:4, XI:1, and XIII:1 of the GATT 1994.
	Refusals to recognize certificates of conformity issued by other CU countries	Articles 5.1.1, 5.1.2, 5.2.2, and 2.1 of the TBT Agreement. Articles I:1, III:4, XI:1, and XIII:1 of the GATT 1994.

<sup>29</sup> We note that, subsequently in these proceedings, Ukraine did not raise claims under Article 5.2.3 of the TBT Agreement.

Measures	Related claims
Three: non-recognition of certificates of conformity issued by other CU countries	Articles 5.1.1, 5.1.2, and 2.1 of the TBT Agreement. Articles I:1, III:4, X:3(a), XI:1, and XIII:1 of the GATT 1994.

7.40. We disagree with the so-called parallels drawn by Russia between the panel request at issue and the panel requests in *China – Raw Materials*. The Appellate Body in *China – Raw Materials* was confronted with whether section III of the panel requests in that dispute provided a "brief summary of the legal basis of the complaint sufficient to present the problem clearly."<sup>30</sup> After examining the relevant aspects of the consultations requests in *China – Raw Materials*, the Appellate Body concluded that they violated Article 6.2 because "the complainants did not, in either the narrative paragraphs or in the final listing of the provisions of the covered agreements alleged to have been violated, provide the basis on which the Panel and China could determine with sufficient clarity what 'problem' or 'problems' were alleged to have been caused by which measures".<sup>31</sup>

7.41. There are two differences between the panel requests in *China – Raw Materials* and the panel request at issue. First, the narrative paragraphs of section II of the panel requests in *China – Raw Materials* referred to several distinct types of measures (other restraints on the exportation of the materials; administers its measures in a manner that is not uniform, impartial, and reasonable; imposes excessive fees and formalities on exportation; and does not publish certain measures pertaining to requirements, restrictions, or prohibitions on exports) and to several allegations of violations (relating to the administration of export quotas; allocation of export quotas; publication of export quota amounts and application procedures; export licensing requirements; minimum export price requirements; and fees and formalities).<sup>32</sup> Following the narrative paragraphs, the panel requests include a list of at least 37 legal instruments that range from entire codes or charters to specific administrative measures, without referring to specific sections or provisions of any of the listed instruments.<sup>33</sup> In brief, the narrative paragraphs include a brief description of different allegations of violation relating to different types of restraints but they do not link them to the myriad of legal instruments listed in the subsequent section. In contrast, the narrative paragraphs in section II of Ukraine's panel request identify three measures at issue and provide a description that allows the nature of each to be discerned. In particular, the third narrative paragraph of section II, where the non-recognition of other CU certificates is described, provides a clear indication of the legal instruments concerned by that measure (e.g. CU Technical Regulation 001/2011). In addition, the legal instruments described in section III of the panel request is limited to nine instruments, the first five of which clearly relate to the challenged measures described in section II, and the other four refer to the background on the legal framework applicable to Russia's CAPs.<sup>34</sup>

7.42. Second, the final paragraph of section III of the panel requests in *China – Raw Materials* provides a list of 13 WTO provisions allegedly infringed, without indicating how any of the measures at issue caused any of the alleged violations. The narrative paragraphs, however, did provide explanations.<sup>35</sup> In contrast, as explained above, section IV of Ukraine's panel request contains a list of the ten WTO provisions allegedly infringed, together with an explanation of why Ukraine deems each provision inconsistent with the measures at issue.<sup>36</sup>

7.43. We consider that Ukraine's panel request, as explained above and when read as a whole, provides sufficient clarity as to plainly connect the WTO provisions allegedly infringed with the measures at issue. Such connection is sufficient for Russia to have known which case it had to defend. We therefore reject Russia's request.

<sup>30</sup> Appellate Body Reports, *China – Raw Materials*, para. 226.

<sup>31</sup> Appellate Body Reports, *China – Raw Materials*, para. 231.

<sup>32</sup> Appellate Body Reports, *China – Raw Materials*, paras. 222-223.

<sup>33</sup> Appellate Body Reports, *China – Raw Materials*, para. 224.

<sup>34</sup> See WT/DS499/2, pp. 2-3.

<sup>35</sup> See WT/DS394/7, pp. 6-9; WT/DS395/7, pp. 6-9; and, WT/DS398/6, pp. 6-9.

<sup>36</sup> See WT/DS499/2, pp. 3-4.

#### 7.1.1.1.2 Issue 1(b)

7.44. The essence of Russia's second claim is that the panel request fails to present the problem clearly by failing to identify the specific measures at issue. Russia argues that Ukraine's panel request fails to identify the specific measures at issue because it fails to identify the specific products at issue, and thus it is impossible for Russia to discern the specific measures at issue.

7.45. Russia submits that Article 6.2 of the DSU does not require a panel request to identify the products to which the specific measure at issue applies. However, Russia considers that for certain WTO obligations, it may be necessary to identify the products subject to the measures in dispute to be able to identify the specific measures at issue. In Russia's view, it was necessary for Ukraine to identify the products at issue so that Russia could identify the specific measures at issue.<sup>37</sup>

7.46. According to Russia, the reference in Ukraine's panel request to "railway products" fails to identify the products at issue in a manner that provides certainty of the measures being challenged, thus preventing Russia from understanding the product coverage of the dispute. Russia considers that the reference to "railway products" is too vague. In support of this view Russia indicates that the harmonized system of nomenclature of goods does not refer to any goods or group of goods as "railway products", but rather to specific types of products (e.g. railway or tramway locomotives, rolling stock and part thereof, etc.). Russia further argues that there is no dictionary definition of the term "railway products" and that this term is not a commercial term readily understandable in the trade.<sup>38</sup>

7.47. Moreover, Russia considers that the definition of railway products provided in the first paragraph of the panel request does not add any clarity. First, Russia considers that the term "other railroad equipment" is equally vague as to what qualifies as railway products. Russia considers that "other railroad equipment" is similarly not listed as a type of product in the harmonized system nor is it a commercial term. Second, this is also true of the term "parts thereof". Russia also considers that this definition provides an open-ended list of products at issue, which runs counter to the security and predictability of the WTO dispute settlement system as required by Article 3.2 of the DSU.<sup>39</sup>

7.48. Ukraine also states that the DSU does not require the identification of the products at issue in the panel request. Ukraine considers that Article 6.2 contemplates that the identification of the products must flow from the specific measures identified in the panel request. Ukraine considers that it is only necessary for certain WTO obligations to identify the products at issue in order to identify the measures at issue.<sup>40</sup>

7.49. Ukraine argues that Russia failed to explain why, pursuant to Article 6.2, Ukraine was required, because of the WTO obligations at issue, to identify the products at issue in order to identify the challenged measures. Ukraine considers that this reason alone is sufficient for rejecting Russia's claim. In any event, Ukraine argues that its panel request has identified and defined the products at issue.<sup>41</sup>

7.50. Ukraine claims that Russia is asking the Panel to find that the products at issue not only need to be identified in the panel request, but that they must also be defined using headings under the harmonized system, definitions used in authoritative dictionaries, and commercial terms readily understandable in trade. According to Ukraine the definition of the products at issue in the

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<sup>37</sup> Russia's preliminary ruling request, para. 19 (citing to Appellate Body Report, *EC – Computer Equipment*, paras. 67-68, 70); and comments on Ukraine's response to Russia's preliminary ruling request, paras. 25, 26 and 28.

<sup>38</sup> Russia's preliminary ruling request, paras. 20-24; and comments on Ukraine's response to Russia's preliminary ruling request, para. 24 and 27.

<sup>39</sup> Russia's preliminary ruling request, paras. 25-27; and comments on Ukraine's response to Russia's preliminary ruling request, paras. 30-31.

<sup>40</sup> Ukraine's response to Russia's preliminary ruling request, para. 90 (citing Appellate Body Report, *EC – Chicken Cuts*, para. 165).

<sup>41</sup> Ukraine's response to Russia's preliminary ruling request, paras. 91-92; and comments on Russia's comments on Ukraine's response to Russia's preliminary ruling request, paras. 29-37.

panel request is not open ended and does not permit an expansion of the list of products at issue.<sup>42</sup>

7.51. With reference to Ukraine's first written submission, Russia further submits that Ukraine inadmissibly expands the scope of the dispute by providing a new definition of railway products. Russia refers to the inclusion of the phrase, "that are subject to mandatory certification under the relevant applicable legislation in the Russian Federation", to the definition of railway products. Russia considers that this addition demonstrates the lack of clarity in the definition provided in the panel request, and that the panel request cannot be cured through subsequent submissions. Russia thus requests the Panel to disregard this new definition of the products at issue.<sup>43</sup>

7.52. In addition, Russia submits, *arguendo*, that if this new definition is accepted it fails to add sufficient clarity for the identification of the products at issue. First, because under the relevant regulations there are dozens of railway products subject to mandatory certification. Second, not all products subject to mandatory certification are mentioned in the panel request, and therefore this addition would expand the scope of the dispute. Third, Ukraine's first written submission contains references to products not included in the definition of railway product, e.g. pickers and fastening elements, railway freight wagons, side frames and bolsters, railway tank cars, capacitor equipment and tanks for liquid gas, and railway transport.<sup>44</sup>

7.53. Ukraine rejects Russia's argument that in its first written submission Ukraine expands the scope of the dispute by providing a new definition of the products at issue. Ukraine argues that the definition of the products at issue provided in its first written submission mirrors that included in the first paragraph of the panel request as developed in the subsequent sections of the panel request. Ukraine considers that the reference to products subject to mandatory certification in Russia is present in the panel request, as the measures at issue, the relevant legal instruments, and the WTO provisions included in the panel request, make it clear that the problem raised by Ukraine concerns the mandatory conformity assessment procedures.<sup>45</sup>

7.54. Ukraine also rejects Russia's argument that Ukraine's references in its first written submission to pickers and fastening elements, railway freight wagons, side frames and bolsters, railway tank cars, capacitor equipment and tanks for liquid gas, and railway transport expand the scope of the dispute. Ukraine considers that Russia has not explained why those products do not fall within the description of the products at issue.<sup>46</sup>

7.55. On the basis of the foregoing, Russia submits that the panel request failed to identify the specific measures at issue and requests the Panel to find that the measures listed in section II of the panel request are outside the Panel's terms of reference.<sup>47</sup> Ukraine asks the Panel to reject Russia's claim.<sup>48</sup>

7.56. The Panel considers that Russia is alleging that the definition of the products at issue, i.e. railway products, in the first paragraph of the panel request is too vague. According to Russia the consequence of this vagueness is that Russia cannot discern the measures at issue and therefore the panel request fails to present the problem clearly. However, this challenge relates to the

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<sup>42</sup> Ukraine's response to Russia's preliminary ruling request, paras. 93-97; and comments on Russia's comments on Ukraine's response to Russia's preliminary ruling request, paras. 38-40.

<sup>43</sup> Russia's comments on Ukraine's response to Russia's preliminary ruling request, para. 32 (citing Ukraine's first written submission, para. 24).

<sup>44</sup> Russia's comments on Ukraine's response to Russia's preliminary ruling request, paras. 33-37 (referring to Ukraine's first written submission, paras. 82, 92, 102, 105, and 113).

<sup>45</sup> Ukraine's comments on Russia's comments on Ukraine's response to Russia's preliminary ruling request, paras. 41-44.

<sup>46</sup> Ukraine's comments on Russia's comments on Ukraine's response to Russia's preliminary ruling request, para. 45.

<sup>47</sup> Russia's preliminary ruling request, paras. 28-30; and comments on Ukraine's response to Russia's preliminary ruling request, para. 38.

<sup>48</sup> Ukraine's response to Russia's preliminary ruling request, para. 98; and comments on Russia's comments on Ukraine's response to Russia's preliminary ruling request, para. 46.

requirement set out in Article 6.2 of the DSU that the panel request must identify the specific measure or measures at issue, rather than to the requirement to present the problem clearly.<sup>49</sup>

7.57. The Appellate Body found that for a panel request to satisfy this requirement, such measures must be identified with sufficient precision so that what is referred to adjudication may be discerned from the panel request.<sup>50</sup> According to the Appellate Body this could be achieved by identifying the measure(s) at issue "with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue".<sup>51</sup>

7.58. The requirement imposed by Article 6.2 is to identify the specific measure at issue, and not the products governed or affected by that measure.<sup>52</sup> However, there may be cases where the nature of the allegedly infringed WTO provision (e.g. a claim that a tariff binding has been exceeded) may require the identification of the products at issue to identify the measure at issue.<sup>53</sup>

7.59. We thus need to determine whether Russia has demonstrated that because of the nature of the claims raised by Ukraine, the definition of the products at issue in the panel request is insufficient to identify the measures at issue. Paragraph 1 of the panel request indicates that this dispute concerns certain measures imposed on the importation of "railway rolling stock, railroad switches, other railroad equipment, and parts thereof ('railway products') from Ukraine". Sections I, II, and III of the panel request include references to "railway products" when discussing the background, the measures at issue, and the underlying legal instruments. Despite being general, this definition provides a specific group of products that the challenged measures affected. This is further reinforced, through the references in section II of the panel request to Annexes I, II and III, which list a series of instructions and decisions from Russian authorities. Those instructions and decisions, through which conformity assessment certificates were suspended, applications for new certificates were rejected, or other CU certificates were not recognized, concern specific railway products.

7.60. As already noted above, section II of the panel request provides a clear description of the challenged measures, which comprise measure one (the systematic prevention of exports), measure two and its three components (the suspensions of valid certificates of conformity held by Ukrainian producers, the rejections of applications for certificates of conformity, and the refusals to recognize valid certificates of conformity issued by other CU countries), and measure three (the non-recognition of certificates of conformity issued by other CU countries). From the description provided in section II of the panel request it is clear that those measures apply to railway products. It is thus unclear how the panel request fails, by virtue of the definition of the products at issue, to identify the specific measures at issue.

7.61. Moreover, we consider that Russia did not develop arguments explaining why the claims raised by Ukraine, which concern ten different WTO provisions, required a more detailed identification of the products at issue. In this regard we note that Russia raises an alternative claim concerning the impact of the definition of the products at issue on presenting the problem clearly with respect to certain WTO provisions allegedly infringed, which we understand to be separate from this general claim.

7.62. We recall that according to Russia the general nature of the definition of the products at issue amounts to an open-ended list which is contrary to Article 3.2 of the DSU. Russia relies on

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<sup>49</sup> Regarding the requirement in Article 6.2 that the panel request must identify the specific measures at issue, see: Appellate Body Reports, *Dominican Republic – Import and Sale of Cigarettes*, para. 120; and *EC and certain member States – Large Civil Aircraft*, para. 790.

<sup>50</sup> Appellate Body Report, *US – Continued Zeroing*, para. 168.

<sup>51</sup> Appellate Body Report, *US – Continued Zeroing*, para. 169.

<sup>52</sup> Appellate Body Reports, *EC – Computer Equipment*, para. 67; and *EC – Chicken Cuts*, para. 165.

<sup>53</sup> Appellate Body Report, *EC – Computer Equipment*, para. 67 (where the Appellate Body concluded that Article 6.2 does not explicitly require the identification of the products at issue, and went on to find that the general reference to "LAN equipment" and "PCs with multimedia capacity" did not affect the European Communities' rights of defence). See also Appellate Body Report, *EC – Chicken Cuts*, para. 167 (where the Appellate Body found that in circumstances where a series of decisions of customs authorities are under challenge, it may be necessary to identify the products at issue in order to identify the measures at issue).

the preliminary ruling of the panel in *China – Raw Materials*, where the panel found that the complaining parties were barred from including additional measures other than those listed and identified in the bullet points in the panel request. This finding related to the reference to "among others" in the section of the panel requests where measures at issue were described.<sup>54</sup> We agree with Ukraine that Russia's reliance on the decision of the panel in *China – Raw Materials* is misplaced, as it concerns a textual reference to "among others", which is not included in Ukraine's panel request.

7.63. We are not persuaded by Russia's position that Ukraine expands the scope of the dispute by the manner in which it describes the products at issue in its first written submission. It is clear that the products at issue are railway products, as defined in the panel request. Ukraine's description of the products at issue in its first written submission, as those subject to mandatory certification pursuant to the relevant laws in Russia, refers to the specific situation that concerns Ukraine. Such a reference can therefore not be interpreted as an expansion of the scope of the dispute. Moreover, the references to pickers and fastening elements, railway freight wagons, side frames and bolsters, railway tank cars, capacitor equipment and tanks for liquid gas, and railway transport, were made in explaining what type of products each of the Ukrainian producers concerned produced. Russia has not linked those descriptions to Ukraine's legal claims or to any of the specific measures at issue, which suggests that Ukraine is not expanding the dispute through those references. In addition, as Ukraine notes, Russia has not explained how any of those products is not within the definition of railway products provided in the panel request.

7.64. We consider that the manner in which the products at issue are defined in the panel request does not affect Russia's ability to discern the measures at issue. We therefore reject Russia's request.

#### **7.1.1.1.3 Issue 1(c)**

7.65. The essence of Russia's third claim is that the panel request fails to provide a brief summary of the legal basis sufficient to present the problem clearly with respect to 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, because it fails to identify the like domestic products or the like products from any other country. This claim concerns all the measures identified in the panel request. Russia raises this claim in the alternative in the event that the Panel rejects Russia's second claim. Having rejected Russia's second claim, we turn to assess the parties' arguments in respect of Russia's third claim.

7.66. Russia argues that the identification of the specific products in a panel request, including the imported and the domestic products, may be necessary, in certain instances, to provide a brief summary of the legal basis of the complaint. In support of this view, Russia relies on the panel's findings in *US – Clove Cigarettes*.<sup>55</sup>

7.67. Russia argues that Ukraine's panel request should have identified the like domestic and like imported products against which Ukrainian railway products would be compared. Russia considers that by not indicating the relevant like domestic products and like imported products with respect to 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, the panel request fails to provide a brief summary sufficient to present the problem clearly. Russia further considers that Ukraine's responses to its claim demonstrate that this requirement is clearly not fulfilled in the panel request.<sup>56</sup>

7.68. As a consequence, Russia requests the Panel to find that the panel request failed to present the problem clearly with respect to claims regarding measures described in section II of the panel

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<sup>54</sup> See WT/DS394/9, WT/DS395/9, and WT/DS398/8, paras. 10-13.

<sup>55</sup> Russia's preliminary ruling request, para. 31 (citing Panel Report, *US – Clove Cigarettes*, para. 7.139).

<sup>56</sup> Russia's preliminary ruling request, paras. 32-38; and comments on Ukraine's response to Russia's preliminary ruling request, paras. 39-43.



request under Articles 2.1 and 5.1.1 of the TBT Agreement and Articles I:1, III:4, X:3(a), XIII:1 of the GATT 1994, and that these claims consequently fall outside the Panel's terms of reference.<sup>57</sup>

7.69. Ukraine asks the Panel to reject Russia's claim. Ukraine argues that Russia misunderstood the panel report in *US – Clove Cigarettes*. Ukraine considers that the panel in *US – Clove Cigarettes* addressed the impact of limiting the products at issue in the panel request in the likeness analysis, concluding that although there is no requirement for a panel request to identify the products at issue, when the panel request specifies the products at issue, this indication should not be devoid of meaning. Ukraine refers to the Appellate Body's conclusion in *US – Clove Cigarettes* that in determining the relevant like products, a panel is not bound by its terms of reference to limit its analysis to those products identified by the complaining Member in the panel request. Ukraine argues that on this basis, Russia's claim lacks any legal ground.<sup>58</sup>

7.70. Ukraine also argues that, when read as a whole, the panel request identifies the products at issue. In particular, Ukraine considers that the references throughout sections II and IV of the panel request to railway products should be understood in the light of the definition of that term in the first paragraph of the panel request. On that basis, Ukraine considers that the products at issue are railway rolling stock, railroad switches, other railroad equipment, and parts thereof, generally referred to as railway products. In addition, Ukraine considers that by identifying the products at issue as railway products in its panel request, Ukraine informed Russia that Ukraine's claims that required assessing the likeness of imported and domestic products with those of different WTO Members pertained to such products of Russian origin and those originating in other WTO Members.<sup>59</sup>

7.71. The Panel recalls that Article 6.2 requires a panel request to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". To satisfy this requirement a panel request must plainly connect the challenged measures with the allegedly infringed WTO provisions.

7.72. Russia's argument implies that for a panel request to present the problem clearly when raising claims of discrimination, it should indicate the specific like domestic products and like imported products with which the products from the complaining party should be compared. Russia supports this argument by reference to the panel's findings in *US – Clove Cigarettes*.

7.73. We consider that Russia's reading of the panel's findings in *US – Clove Cigarettes* is misplaced. We agree with Ukraine that the panel in *US – Clove Cigarettes* was not discussing whether the identification of the like domestic products in the panel request was necessary to fulfil the requirements of Article 6.2. Rather, that panel was assessing whether its "like products" assessment should be limited to considering the like domestic products identified by the complaining party in its panel request.<sup>60</sup>

7.74. In an analogous situation to the one raised by Russia, the panel in *India – Agricultural Products* examined whether the complaining party ought to have identified in its panel request the legal instrument that it later challenged (in the first written submission) as providing better treatment to like domestic products, when raising a claim of discrimination under Article 2.3 of the SPS Agreement. That panel, drawing on the distinction between *claims* and *arguments*, found that Article 6.2 did not require the identification of the legal instrument that provided the more favourable treatment to like domestic products, especially when the complaining party did not consider the instrument providing more favourable treatment as a challenged measure, but rather as evidence of the alleged discriminatory treatment to imported products.<sup>61</sup>

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<sup>57</sup> Russia's preliminary ruling request, para. 39; and comments on Ukraine's response to Russia's preliminary ruling request, para. 44.

<sup>58</sup> Ukraine's response to Russia's preliminary ruling request, paras. 104-107 (citing Panel Report, *US – Clove Cigarettes*, paras. 7.137 and 7.141; and Appellate Body Report, *US – Clove Cigarettes*, para. 191); and comments on Russia's comments on Ukraine's response to Russia's preliminary ruling request, paras. 49-51.

<sup>59</sup> Ukraine's response to Russia's preliminary ruling request, paras. 108-122; and comments on Russia's comments on Ukraine's response to Russia's preliminary ruling request, para. 50.

<sup>60</sup> Panel Report, *US – Clove Cigarettes*, paras. 7.134-7.148.

<sup>61</sup> Panel Report, *India – Agricultural Products*, paras. 7.45-7.55.

7.75. We do not find support in previous panel or Appellate Body reports for Russia's position that Ukraine's panel request should have identified the like domestic products and the like imported products to have presented the problem clearly. As explained in detail in section 1.2.1 above, we consider that Ukraine's panel request provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly. We consider that the lack of identification of the products of Russian origin and the products from other WTO Members alleged to be like Ukrainian railway products does not prevent the panel request from presenting the problem clearly and does not affect Russia's ability to know which case it had to defend. We therefore reject Russia's request.

#### **7.1.1.1.4 Issue 1(d)**

7.76. Russia's fourth claim is that the claims raised in the panel request with respect to measure three are outside the Panel's terms of reference, because they require the Panel to rule on issues that go beyond the covered agreements.

7.77. Russia first asks the Panel to confirm that the scope of the measures described in point three of section II is limited to "Technical Regulation No. 001/2011 'On safety of railway rolling stock'". Russia argues that the reference to "when read together" in point three of section II means that the other documents referred to therein are not measures but rather evidence or arguments raised by Ukraine in the panel request.<sup>62</sup>

7.78. Russia argues that, if the Panel disagrees with this understanding, the measure described in point three is outside the Panel's terms of reference. Russia considers that a challenge against a decision by the Russian authorities that Technical Regulation 001/2011 is applicable only to goods produced in the CU countries is one against the manner in which Russia applied the provisions of the CU Technical Regulation. Russia argues that this raises a claim of the consistency of Russia's actions with the relevant CU regulation.<sup>63</sup>

7.79. Ukraine argues that there is no basis for Russia's limited reading of point three of section II of the panel request and that the challenged measure, as set out in point three and the third narrative paragraph of section II of the panel request, is Russia's decision not to accept in its territory the validity of the conformity assessment certificates issued to Ukrainian producers in other CU countries and not to register such producers for operation in its territory.<sup>64</sup>

7.80. Ukraine considers that Russia wrongly argues that through its challenge to measure three Ukraine is requesting the Panel to make findings on the consistency of this measure with relevant CU regulations. Ukraine argues that Russia does not identify any obligation under the CU legal framework with respect to which Ukraine requests the Panel to make findings and recommendations.<sup>65</sup>

7.81. Russia argues that in its response to Russia's preliminary ruling request Ukraine changes the nature of the measure challenged. Russia considers that in the panel request, Ukraine only referred to Technical Regulation 001/2011 and not to actions of Russian authorities. In contrast, according to Russia, in its response to Russia's preliminary ruling request Ukraine describes the measure at issue as Russia's decision not to accept in its territory the validity of conformity assessment certificates issued to Ukrainian producers in other CU countries and not to register such producers for operation in its territory.<sup>66</sup>

7.82. Ukraine rejects Russia's argument that in its response to Russia's preliminary ruling request Ukraine changed the nature of the challenged measures. According to Ukraine, its response to Russia's preliminary ruling request is limited to explaining how section II of the panel request describes the challenged measure as Russia's decision not to recognize the validity of other CU certificates issued to Ukrainian producers. Ukraine also rejects Russia's reading of section II of

<sup>62</sup> Russia's preliminary ruling request, paras. 41-43.

<sup>63</sup> Russia's preliminary ruling request, paras. 44-48; and comments on Ukraine's response to Russia's preliminary ruling request, paras. 52-54.

<sup>64</sup> Ukraine's response to Russia's preliminary ruling request, paras. 125-131.

<sup>65</sup> Ukraine's response to Russia's preliminary ruling request, paras. 132-134; and comments on Russia's comments on Ukraine's response to Russia's preliminary ruling request, para. 65.

<sup>66</sup> Russia's comments on Ukraine's response to Russia's preliminary ruling request, paras. 45-50.

the panel request, according to which the challenged measure is only CU Technical Regulation 001/2011.<sup>67</sup>

7.83. Russia accordingly requests that the Panel find that measure three is outside the Panel's terms of reference.<sup>68</sup> In contrast, Ukraine opposes Russia's request.<sup>69</sup>

7.84. The Panel notes that Russia's claim is twofold. First, Russia requests the Panel to confirm its understanding of the challenged measure. Second, Russia requests the Panel to find that, if the measure includes anything beyond Technical Regulation 001/2011, it is outside the Panel's terms of reference because it calls on the Panel to make findings on issues that go beyond the covered agreements.

7.85. In our view, the first aspect of Russia's claim is not about Ukraine's panel request being inconsistent with Article 6.2 of the DSU. Russia does not seek a ruling that any measure or measures identified in the panel request are *outside* the Panel's terms of reference. Rather, Russia seeks the Panel's confirmation that measure three is circumscribed to what Russia understands it to be, namely, CU Technical Regulation 001/2011. Russia seems to present this request as the basis for the second part of its claim. In the light of the fact that Russia is not raising a challenge under Article 6.2, we cannot, and do not, make any findings in respect of this aspect of Russia's request.

7.86. Regarding the second aspect of Russia's claim, we note that it is correct that a panel would not have jurisdiction to make findings on the consistency of Russia's measures with CU law. However, Ukraine's panel request does not include claims concerning Russia's non-compliance with provisions of the Treaty on the establishment of the Eurasian Economic Union (EAEU) or EAEU secondary law. In other words, the panel request does not identify the EAEU Treaty or the identified CU Technical Regulations as the legal basis for its claims. The panel request, in section II, appears to suggest that Ukraine disagrees with Russia's interpretation of the relevant CU Technical Regulations. However, section IV of the panel request also indicates that the measures at issue give rise to an inconsistency with Russia's obligations under specific WTO provisions. Ukraine's panel request is thus limited to claims under the covered agreements. We therefore reject Russia's request.

#### 7.1.1.1.5 Issue 1(e)

7.87. Russia's fifth claim is that in respect of measure three, Ukraine's panel request does not satisfy the requirement of Article 6.2 to identify the specific measure at issue.

7.88. Russia argues that Article 6.2 requires a panel request to identify the specific measures with sufficient particularity, so as to indicate the nature of the measure and the gist of what is at issue. Russia considers that the reference to Technical Regulation 001/2011 and to other documents in point three of section II of the panel request is too broad and fails to clearly identify the measure at issue. Russia argues that the documents mentioned in point three are lengthy and cover several issues, thus making it impossible to identify the challenged measures. Russia considers that Ukraine also failed to specify the particular parts of the instructions mentioned in Annex III that pertain to measure three. Russia bases its claim on the findings of the panel report in *Australia – Apples*, where the panel found that the broad reference in New Zealand's panel request to certain measures failed to satisfy the requirement of sufficient clarity in the identification of the measures at issue set forth in Article 6.2 of the DSU. In consequence, Russia requests the Panel to find that measure three is outside the Panel's terms of reference.<sup>70</sup>

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<sup>67</sup> Ukraine's comments on Russia's comments on Ukraine's response to Russia's preliminary ruling request, paras. 55-64.

<sup>68</sup> Russia's preliminary ruling request, para. 49; and comments on Ukraine's response to Russia's preliminary ruling request, para. 55.

<sup>69</sup> Ukraine's response to Russia's preliminary ruling request, para. 135; and comments on Russia's comments on Ukraine's response to Russia's preliminary ruling request, para. 66.

<sup>70</sup> Russia's preliminary ruling request, paras. 50-55; and comments on Ukraine's response to Russia's preliminary ruling request, para. 58 (citing Panel Report, *Australia – Apples*, para. 7.1449).

7.89. Ukraine rejects Russia's request in respect of Issue 1(e). Ukraine argues that Article 6.2 does not require a panel request to identify the specific provisions of specific legal instruments through which the measures at issue operate or are applied. Ukraine considers that Russia fails to distinguish between the concept of measures at issue and the legal instrument through which those measures operate or are applied. Moreover, Ukraine considers that the measure at issue is sufficiently identified in section II of the panel request. Ukraine also argues that the panel's findings in *Australia – Apples* do not support the view that a panel request must identify the articles in the legal instruments underlying the challenged measures, because that panel found that 17 measures identified in New Zealand's panel request were within its terms of reference.<sup>71</sup>

7.90. The Panel begins by recalling that the text of Article 6.2 makes clear that a panel request must, *inter alia*, identify the specific measure or measures at issue. Measures not properly identified fall outside a panel's terms of reference, and cannot be the subject of panel findings or recommendations.<sup>72</sup>

7.91. According to the Appellate Body, "the determination of whether a panel request satisfies the requirements of Articles [*sic*] 6.2 must be based on an examination of the panel request on its face as it existed at the time of its filing".<sup>73</sup> Previous disputes also indicate that "[t]he task of assessing the sufficiency of a panel request for the purposes of Article 6.2 may be undertaken on a case-by-case basis, in consideration of the panel request as a whole, and in the light of the attendant circumstances".<sup>74</sup> In respect of the requirement to identify the specific measures at issue, the Appellate Body has explained that "the measures at issue must be identified with sufficient precision so that what is referred to adjudication may be discerned from the panel request".<sup>75</sup> A panel request will satisfy this requirement where it identifies the measure(s) at issue "with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue".<sup>76</sup>

7.92. We also recall that, according to the Appellate Body, "there may be circumstances in which a party describes a measure in a more generic way, which nonetheless allows the measure to be discerned"<sup>77</sup>, and "[a]n assessment of whether a complaining party has identified the specific measures at issue may depend on the particular context in which those measures exist and operate".<sup>78</sup> These statements suggest to us that there is no single way in which a challenged measure must invariably be identified.

7.93. As explained above, section II of the panel request provides a narrative description of the measures at issue, followed by a numbered list of the measures at issue. Section II also contains references to Annexes I-III to the panel request. A careful reading of the panel request reveals that the third measure at issue is addressed in the third narrative paragraph, the three numbered points and Annex III. These various references must be read together.<sup>79</sup>

7.94. The third narrative paragraph indicates that Ukraine is challenging Russia's alleged non-recognition of certificates issued to Ukrainian producers in other CU countries (Belarus and Kazakhstan). It further clarifies that the non-recognition is the "consequence" of, or is based on, a "decision" by Russia, including its Ministry of Transport, that CU Technical Regulation 001/2011 is applicable only to goods produced in CU countries.

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<sup>71</sup> Ukraine's response to Russia's preliminary ruling request, paras. 138-142; and comments on Russia's comments on Ukraine's response to Russia's preliminary ruling request, paras. 68-75.

<sup>72</sup> Appellate Body Reports, *Dominican Republic – Import and Sale of Cigarettes*, para. 120; and *EC and certain member States – Large Civil Aircraft*, para. 790.

<sup>73</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.48.

<sup>74</sup> Panel Report, *US – FSC (Article 21.5 – EC II)*, para. 7.74. See also Appellate Body Reports, *Canada – Wheat Exports and Grain Imports*, para. 206; *EC and certain member States – Large Civil Aircraft*, para. 787; and Panel Report, *China – Publications and Audiovisual Products*, para. 7.104.

<sup>75</sup> Appellate Body Report, *US – Continued Zeroing*, para. 168.

<sup>76</sup> Appellate Body Report, *US – Continued Zeroing*, para. 169.

<sup>77</sup> Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 116.

<sup>78</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 641.

<sup>79</sup> See the text of section II of the panel request in Table 2 below.

7.95. The first numbered point concerns the first measure. It identifies "non-recognition" of certificates as one of several ways in which Russia allegedly prevented imports of Ukrainian railway products.

7.96. The second numbered point refers to the second measure and its components. The second point of section II contains a reference to the "refusals to recognize" valid certificates issued to Ukrainian producers as mentioned in Annex III. It also refers to suspensions of certificates and rejections of new applications, which are mentioned in Annexes I and II. As these three categories (refusals to recognize, suspensions and rejections) are grouped together in the second point and reference is made to "refusals", in the plural, and to Annex III containing "instructions", it can be inferred that Ukraine seeks to identify these individual instructions as separate components of measure two, in the same way that individual suspensions and rejections are separate components of measure two, in respect of which Ukraine has raised claims.<sup>80</sup>

7.97. The third numbered point identifies CU Technical Regulation 001/2011, read together with the Protocol of the Ministry of Transport and instructions mentioned in Annex III. Reading the third point together with the narrative description of the measures at issue, it can be seen that CU Technical Regulation 001/2011 and the Ministry of Transport are identified only once, in the third narrative paragraph, which deals with the non-recognition of certificates. This indicates that, like the second numbered point, the third point relates to the non-recognition of certificates. As the third point is separate from, and comes after, the second point, this suggests that the third point is not about individual non-recognition instructions.

7.98. To better understand the third measure, it is instructive to look to the third narrative paragraph in section II. It says that the relevant Russian authorities concluded that certificates issued in other CU countries were not valid in Russia's territory and that the products concerned could not be imported or registered. In other words, according to Ukraine, Russia's authorities concluded that these certificates could not be recognized. The third narrative paragraph further says that this conclusion resulted from the authorities' view that CU Technical Regulation 001/2011 was applicable only to products produced in CU countries.

7.99. Thus, contextual interpretation supports the view that Ukraine's third measure seeks to challenge an alleged requirement that Russia's authorities consider to flow from CU Technical Regulation 001/2011. Under that alleged requirement, Russia's authorities must not recognize certificates issued to Ukrainian producers in other CU countries if the certified products were not produced in a CU country. This understanding is consistent with the description of the relevant component of the second measure, which is about the individual "refusals" mentioned in Annex III that result from the application of the alleged non-recognition requirement. The third numbered point indicates the source of the non-recognition requirement, i.e. CU Technical Regulation 001/2011 as read and applied by Russia in the Protocol of the Ministry of Transport and the instructions mentioned in Annex III.

7.100. Moreover, we disagree with Russia's position that it could not understand the problem at issue without precise references to the relevant sections of the documents listed in point three of section II of the panel request. We recall that the panel in *EC – Trademarks and Geographical Indications (Australia)* found that provided that the measure at issue is adequately identified, Article 6.2 of the DSU does not require an identification of specific aspects of the specific measures at issue.<sup>81</sup> We agree with this view and consider that Ukraine's panel request sufficiently identifies the measure at issue as the alleged requirement that Russia's authorities must not recognize certificates issued in other CU countries if the certified railway products were not produced in a CU country.

7.101. We are also not persuaded by Russia's argument that the panel report in *Australia – Apples* supports its conclusion that the panel request failed to sufficiently identify measure three.

<sup>80</sup> See the first and third numbered points of section II of the panel request, WT/DS499/2, p. 2. It should be noted, however, that, during the panel proceedings, Ukraine has stated that while it seeks findings from the Panel on each of the individual instructions and decisions contained in Annexes I and II to the panel request, it does not seek findings on the individual refusals mentioned in Annex III to the panel request. Ukraine's response to Panel question No. 7(a), (b), and (c).

<sup>81</sup> Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.2.26.

Russia fails to explain the relevance of the differences between the situation examined by the panel in *Australia – Apples* and the alleged flaws in Ukraine's panel request. In *Australia – Apples*, New Zealand's panel request contained a broad reference to the measures as specified in the Final import risk analysis report for apples from New Zealand of November 2006 (the FIRA) and then a list of 17 specific measures listed in the FIRA.<sup>82</sup> In that panel's view, the identification of the 17 items of the FIRA was sufficiently precise in identifying the specific measures at issue, with respect to those 17 items, pursuant to Article 6.2 of the DSU. The panel further found that due to the length and complexity of the FIRA, the broad reference to it as a measure at issue did not satisfy the requirement for specific identification of the measure in Article 6.2.<sup>83</sup>

7.102. We see important differences between Ukraine's panel request in this dispute and New Zealand's panel request in *Australia – Apples*. As already explained, Ukraine's panel request identifies the measure at issue, in different parts of section II. The panel request does so with sufficiently clarity to allow a reader to discern that the measure is the alleged requirement that Russia's authorities must not recognize certificates issued in other CU countries if the certified products were not produced in a CU country. In contrast, New Zealand attempted to describe the measure at issue as the FIRA, a complex and lengthy legal instrument. As explained above, Ukraine's references to CU Technical Regulation 001/2011 and the Protocol of the Ministry of Transport in certain parts of the panel request seem intended to signal the legal instruments from which the challenged measure flows. This again is an important difference with New Zealand's panel request.

7.103. It follows from our analysis of the panel request that the measure at issue identified in the panel request as measure three is the alleged requirement that Russia's authorities must not recognize certificates issued in other CU countries if the certified railway products were not produced in a CU country.

7.104. In brief, we consider that Ukraine's panel request identifies the challenged measure in a manner that satisfies the requirements of Article 6.2 of the DSU. We therefore reject Russia's request.

#### **7.1.1.1.6 Issue 1(f)**

7.105. Russia's sixth claim is that the measures at issue are contained only in section II of the panel request.

7.106. Russia requests the Panel to confirm that only the numbered points in section II of the panel request contain the measures at issue. Russia considers that section I, section II and the narrative paragraphs in section II of the panel request do not contain measures challenged by Ukraine. Moreover, Russia argues that any attempt to expand or alter the scope of the challenged measures through references to sections other than section II of the panel request, would be inconsistent with Article 6.2 of the DSU.<sup>84</sup>

7.107. Ukraine asks the Panel to reject Russia's request. Ukraine considers that the purpose of a preliminary ruling request is to seek a panel decision, preliminary to the issuance of the panel report, on the alleged inconsistency of the panel request with the requirements of Article 6.2 of the DSU. According to Ukraine, neither Article 6.2 of the DSU nor any other provision of the DSU offers a legal basis to seek a decision from a panel on the interpretation of a panel request in the absence of a dispute.<sup>85</sup>

7.108. The Panel considers that this aspect of Russia's preliminary ruling request does not raise a claim that Ukraine's panel request is inconsistent with Article 6.2 of the DSU. Indeed, Russia does not seek a ruling that any measure or measures identified in the panel request are *outside* the

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<sup>82</sup> Panel Report, *Australia – Apples*, para. 7.1446.

<sup>83</sup> Panel Report, *Australia – Apples*, para. 7.1449.

<sup>84</sup> Russia's preliminary ruling request, para. 56; and comments on Ukraine's response to Russia's preliminary ruling request, para. 60.

<sup>85</sup> Ukraine's response to Russia's preliminary ruling request, paras. 143-147; and comments on Russia's comments on Ukraine's response to Russia's preliminary ruling request, paras. 76-77.

Panel's terms of reference. We recall that pursuant to Article 11 of the DSU our task is to make an objective assessment of the matter before us. In our view, this does not encompass confirming, in response to a preliminary ruling request, the parties' understanding of a panel request.

7.109. Moreover, Russia's argument that any attempt to expand or alter the scope of the challenged measures through references to sections other than section II of the panel request would be inconsistent with Article 6.2 of the DSU is misplaced. As explained above, an examination of the consistency of a panel request with the requirements set out in Article 6.2 of the DSU demands a panel to undertake an examination of the panel request as a whole. Russia's argument is in direct contradiction of this guideline.

7.110. In the light of this, we cannot, and do not, make any findings under Article 6.2 in respect of this aspect of Russia's request.

#### **7.1.1.2 Issue 2: Whether Ukraine's panel request expands the scope of the dispute**

7.111. Issue 2 comprises three independent claims. According to Russia, Ukraine's panel request expands the scope of the dispute because:

- a. Measures one and two expand the scope of the dispute;
- b. Measure one, taken alone, expands the scope of the dispute;
- c. Certain aspects of measure two, taken alone, expand the scope of the dispute.

##### **7.1.1.2.1 Issue 2(a)**

7.112. The essence of Russia's claim is that measures one and two expand the scope of the dispute by changing the essence of the dispute, as set out in the request for consultations.

7.113. Russia argues that a complaining party must refrain from expanding the scope of, or changing the essence of a dispute in its panel request as compared to its consultations request. Russia considers that this requirement prevents a complaining party from including in a panel request measures that were not referred to in the consultations request, where such measures are separate and legally distinct from those referred to in the consultations request. Moreover, Russia considers that a complaining party may only add to the panel request those new provisions that may reasonably be said to have evolved from the legal basis of the measure(s) that formed the subject of consultations.<sup>86</sup>

7.114. Russia argues that the structure and text of Ukraine's consultations request reveals that the measures at issue are identified only in section II, entitled "measures at issue". According to Russia, that section contains a list of 11 documents that encompass the measures at issue. Russia argues that, in contrast, the measures at issue are identified in paragraph 4 of section II of Ukraine's panel request. Russia considers that only three (CU Technical Regulation 001/2011, Protocol No. A-4-3 of 20 January 2015 and Letter [[xxx]] of 9 February 2015) of the 11 documents listed in section II of the consultations request are included in the panel request. Russia argues that measures one and two are distinct in nature and substance from any other documents set out in section II of the consultations request. Moreover, Russia considers that it entered into consultations with the understanding that the measures at issue are the legal instruments listed in section II of the consultations request.<sup>87</sup>

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<sup>86</sup> Russia's preliminary ruling request, paras. 61-64 (referring to Appellate Body Reports, *US – Upland Cotton*, para. 293; *Argentina – Import Measures*, para. 5.13; and *Mexico – Anti-Dumping Measures on Rice*, paras. 137 and 138).

<sup>87</sup> Russia's preliminary ruling request, paras. 66-72; and comments on Ukraine's response to Russia's preliminary ruling request, paras. 62-66.

7.115. In consequence, Russia considers that the panel request expanded the scope of the dispute and dramatically changed its essence and therefore requests the Panel to find that measures one and two are outside the Panel's terms of reference.<sup>88</sup>

7.116. Ukraine rejects Russia's request in respect of Issue 2(a). Ukraine argues that Russia wrongly considers that the measures at issue are the legal instruments described in section II of the consultations request. Ukraine argues that Russia improperly describes the content of the consultations request, because, despite the confusion that could arise from the fact that the headings of the consultations request do not reflect the distinction made in the panel request between section II ("the measures at issue") and section III ("legal framework in [Russia]"), the measures at issue are not only described in section II of the consultations request. Ukraine considers that the acts and omissions of Russian authorities described in section I of the consultations request, entitled "background", reflect the measures at issue. Ukraine considers that section II of the consultations request provides an indication of the legal instruments through which the measures at issue described in section I were imposed and administered. According to Ukraine, the inclusion of the legal instruments in section II of the consultations request is aimed at providing the source of the measures at issue, and is thus an integral part of their description.<sup>89</sup>

7.117. Moreover, Ukraine considers that the measures at issue described in section I of the consultations request are identical to those included, albeit through a different presentation, in section II of the panel request. Ukraine argues that a careful comparison of the section II of the consultations request with section III, entitled "legal framework in the Russian Federation", and the Annexes to the panel request shows that the 11 legal instruments identified in the consultations request are contained in the panel request.<sup>90</sup>

7.118. The Panel begins its analysis by noting that Article 6.2 of the DSU requires that a Member indicate in its request for the establishment of a panel "whether consultations were held". However, the DSU does not explicitly address the issue presented by Russia's preliminary ruling request, which is whether, and to what extent, the scope of a dispute is limited to the measures explicitly referred to in the request for consultations.<sup>91</sup>

7.119. We find guidance on this issue in the Appellate Body's jurisprudence. In particular, we note the Appellate Body's clarification that Article 6.2 does not "require a *precise and exact* identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel".<sup>92</sup> The Appellate Body has thus cautioned panels against imposing "too rigid a standard for the 'precise and exact identity' between the scope of consultations and the request for the establishment of a panel".<sup>93</sup> According to the Appellate Body, "the requirement under Article 4.4 to identify the measure at issue cannot be too onerous at this initial step in the proceedings"<sup>94</sup>, because "this would substitute the request for consultations for the panel request"<sup>95</sup>, and give undue emphasis to what is "but the first step in the WTO dispute settlement process".<sup>96</sup> The Appellate Body also noted that replacing the panel request with the consultations request "would also undermine the stipulation in Article 7 of the DSU that, unless the parties agree otherwise, it is the request for the establishment of a panel that governs the panel's terms of reference."<sup>97</sup>

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<sup>88</sup> Russia's preliminary ruling request, para. 73; and comments on Ukraine's response to Russia's preliminary ruling request, para. 67.

<sup>89</sup> Ukraine's response to Russia's preliminary ruling request, paras. 149-165.

<sup>90</sup> Ukraine's response to Russia's preliminary ruling request, paras. 155 and 161-164.

<sup>91</sup> We refer to the consultations request because the Appellate Body indicated that in determining the scope of consultations held in a dispute, panels should look to the text of the consultations request and need not seek to establish what was actually discussed during any consultations meetings between the parties. Appellate Body Report, *US – Upland Cotton*, para. 287.

<sup>92</sup> Appellate Body Report, *Brazil – Aircraft*, para. 132 (emphasis original).

<sup>93</sup> Appellate Body Report, *US – Upland Cotton*, para. 293.

<sup>94</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.12.

<sup>95</sup> Appellate Body Report, *US – Upland Cotton*, para. 293.

<sup>96</sup> Appellate Body Report, *US – Upland Cotton*, para. 293.

<sup>97</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.13



7.120. Having said that, the Appellate Body has also made clear that the language used in a consultations request should "sufficiently alert[]"<sup>98</sup> the responding party to the "nature and object of the challenge raised by the complainant".<sup>99</sup> In addition, according to the Appellate Body, provided that a complaining party does not "expand the scope"<sup>100</sup> or "change the essence" of the dispute<sup>101</sup> in its panel request, the panel request governs the panel's terms of reference.<sup>102</sup> Whether the inclusion of a measure in a panel request has expanded the scope of a dispute must be determined "on a case-by-case basis"<sup>103</sup> and "involves scrutinizing the extent to which the identified measure at issue ... ha[s] evolved or changed from the consultations request to the panel request".<sup>104</sup> A measure identified in a panel request may fall outside a panel's terms of reference if it "is separate and legally distinct" from the measures identified in the consultations request.<sup>105</sup>

7.121. In addition, the Appellate Body has provided guidance on the extent to which the "legal basis" of a complaint, as distinct from the identified measure(s), must be consistent across a complaining party's consultations and panel requests. According to the Appellate Body, "it is not necessary that the provisions [of the covered agreements] referred to in the request for consultations be identical to those set out in the panel request", provided that the inclusion of any additional provisions in the panel request "may reasonably be said to have evolved from ... the subject of consultations"<sup>106</sup>, and provided also that the addition of new legal claims does not "change the essence" of the dispute.<sup>107</sup> We note that subsequently the Appellate Body has applied the "change the essence" test also in cases where the inclusion of additional measures in a panel request has been challenged under Article 6.2.<sup>108</sup>

7.122. With these considerations in mind we turn to examine Russia's claim. Russia's arguments focus on the lack of correspondence between the measures at issue as described in Ukraine's consultations request and in Ukraine's panel request. We thus turn to examine Ukraine's consultations request so as to compare it against the panel request.

7.123. Ukraine's consultations request begins with an introductory paragraph and continues with three sections. The first, entitled "background", contains nine narrative paragraphs, which provide a description of the problems raised by Ukraine. The second, entitled "measures at issue", begins with an introductory paragraph stating that the section contains the legal instruments through which Russia imposes and administers the above-mentioned measures, which are subsequently listed. The second section concludes with a final paragraph stating that the consultations request covers certain instruments concerning the challenged measures. The third section, entitled "legal basis for the complaint", lists the WTO provisions allegedly infringed together with a brief explanation of why the measures appear to be inconsistent with each of those provisions.

7.124. We recall that a panel should examine a panel request as a whole when assessing its compliance with the requirements of Article 6.2 of the DSU. In our view, a panel should do the same when examining a consultations request.

7.125. We agree with Ukraine that, when read as a whole, it is clear that sections I and II of the consultations request describe the measures at issue. Ukraine chose to use "Background" as the heading for section I while using "Measures at issue" as the heading for section II. This could lead to confusion, if each section is examined in isolation. However, when scrutinized, it becomes clear that the nine narrative paragraphs in section I do describe the different measures giving rise to the problems Ukraine complains about. Despite being labelled "measures at issue", section II provides

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<sup>98</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 95.

<sup>99</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.12.

<sup>100</sup> Appellate Body Report, *US – Upland Cotton*, para. 293.

<sup>101</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 137 and 138.

<sup>102</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.13.

<sup>103</sup> Appellate Body Reports, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 293.

<sup>104</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.13.

<sup>105</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.13.

<sup>106</sup> Appellate Body Report, *Mexico – Anti-dumping Measures on Rice*, para. 138.

<sup>107</sup> Appellate Body Report, *Mexico – Anti-dumping Measures on Rice*, para. 138.

<sup>108</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.30; and *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 293.

a list of certain legal instruments through which Russia imposes and administers the measures described in section I. This conclusion is also supported from the text of the introductory paragraph of section II, which reads "[t]he legal instruments through which the Russian Federation imposes and administers the above-mentioned measures in a manner that affects Ukraine's rights under the WTO are the following".

7.126. On this basis, we disagree with Russia's assertion that the measures at issue are described only in section II of the consultations request. We consider the measures at issue to be described in sections I and II of the consultations request. Accordingly, Russia's first claim that the panel request expands the scope or changes the nature of the dispute by describing measures not identified as such in the consultations request is misplaced.

7.127. Moreover, we note that nine of the 11 legal instruments described in section II of the consultations request are listed either in section II or in Annexes I, II and III of the panel request. This further confirms that the panel request, read as a whole, does not expand or change the essence of the consultations request, also read as a whole.

7.128. We therefore reject Russia's claim that section II of the panel request expands the scope of the consultations request by identifying measures different from those described in section II of the consultations request.

#### **7.1.1.2.2 Issue 2(b)**

7.129. The essence of Russia's claim is that if the Panel considers that measure one is within the scope of the dispute then, in the alternative, that measure is outside the panel's terms of reference. Russia's main argument in support of this claim is that the discrepancies between how this measure is described in the consultations request as compared to the panel request are such that the latter expands the scope of the dispute.

7.130. Russia argues that the description of measure one in point one of section II of the panel request includes references to measures not described in the consultations request. In particular, Russia considers this to be the case with the reference to the "refusal to issue new conformity assessment certificates".<sup>109</sup>

7.131. Russia also considers that the reference to a "systematic prevention of Ukrainian producers from exporting their railway products to" Russia by way of suspension of certificates, refusal to issue new certificates and the non-recognition of certificates is not referred to in the consultations request. According to Russia, the consultations request refers to specific suspensions of valid certificates of conformity held by Ukrainian producers and rejections of applications for certificates of conformity submitted by Ukrainian producers, and does not include a general reference to such type of actions by Russian authorities.<sup>110</sup>

7.132. Ukraine argues that Russia's interpretation of Articles 4.4 and 6.2 of the DSU risks substituting the requirements for consultations requests with those for panel requests. Ukraine considers that it is well established that there does not need to be a precise and exact identity between the measures identified in the consultations request and in the panel request.<sup>111</sup>

7.133. Ukraine argues that the seventh and eighth narrative paragraphs of section I of the consultations request refer to applications for conformity assessment certificates being rejected by Russia and the impediment to apply for new certificates. Ukraine considers that these references, although worded differently, were made to Russia's refusal to issue new certificates, described in the panel request.<sup>112</sup>

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<sup>109</sup> Russia's preliminary ruling request, paras. 76-77; and comments on Ukraine's response to Russia's preliminary ruling request, paras. 68-70.

<sup>110</sup> Russia's preliminary ruling request, paras. 78-80.

<sup>111</sup> Ukraine's response to Russia's preliminary ruling request, para. 172.

<sup>112</sup> Ukraine's response to Russia's preliminary ruling request, paras. 167-168; and comments on Russia's comments on Ukraine's response to Russia's preliminary ruling request, paras. 85-86.

7.134. Ukraine submits that both the consultations request and the panel request refer to the refusal to issue new certificates, the suspension of valid certificates for conformity held by Ukrainian producers, and to the non-recognition of CU certificates operating to the effect of restricting exports of Ukrainian railway products to Russia. According to Ukraine, the addition of the adjective "systematic" to the description of this measure in the panel request, as compared to the consultations request, is insufficient to conclude that the panel request impermissibly expands the scope of the dispute, because the measure is clearly identified in both documents. Ukraine considers that the addition of the adjective "systematic" is a natural evolution of the consultations process.<sup>113</sup>

7.135. In response, Russia submits that the addition of the adjective "systematic" to the description of the challenged measure is not merely a natural evolution of the consultations process, because this adjective has a particular meaning in WTO dispute settlement for a particular type of measure.<sup>114</sup>

7.136. However, according to Ukraine, the use of the adjective "systematic" concerns the description of the measure and not the claims raised in respect of that measure. Moreover, Ukraine argues that whether a panel request expands the consultations request does not depend on the findings and recommendations that may be made by a panel in the exercise of its jurisdiction.<sup>115</sup>

7.137. Russia requests the Panel to find that the measure described in the first numbered point of section II of the panel request impermissibly expands the scope of the dispute and is therefore outside the Panel's terms of reference.<sup>116</sup> Ukraine rejects Russia's request in respect of Issue 2(b).<sup>117</sup>

7.138. The Panel considers that the question raised by Russia's claim is whether the description of the alleged general import prevention in the panel request impermissibly expands the scope of the dispute. We turn to examine Russia's claim, bearing in mind the Appellate Body's guidance on the required correspondence between the consultations request and the panel request.

7.139. To compare the text of the consultations request against the panel request, we find it helpful to reproduce the relevant sections of each document. The following table contains the wording of the narrative paragraphs of section I of the consultations request, in the left column, and the wording of section II of the panel request, in the right column.

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<sup>113</sup> Ukraine's response to Russia's preliminary ruling request, paras. 169-171.

<sup>114</sup> Russia's comments on Ukraine's response to Russia's preliminary ruling request, paras. 71-72.

<sup>115</sup> Ukraine's comments on Russia's comments on Ukraine's response to Russia's preliminary ruling request, paras. 91-92.

<sup>116</sup> Russia's preliminary ruling request, paras. 75 and 80.

<sup>117</sup> Ukraine's response to Russia's preliminary ruling request, para. 173; and comments on Russia's comments on Ukraine's response to Russia's preliminary ruling request, para. 93.

**Table 2 - Text of the relevant parts of the consultations and the panel request<sup>118</sup>**

Consultations request	Panel request
<p><b>I. Background</b></p> <p>1. As a result of several measures undertaken by the Russian Federation with regard to importation of certain railway products, Ukrainian producers have been effectively banned from exporting to the Russian Federation. Consequently, exports of railway products from Ukraine to the Russian Federation reached USD 1,7 billion in 2013, decreased significantly in 2014 (USD 600 million) and continue to decrease further: the value of exports amounted to only USD 51 million during the first half of 2015.</p> <p>2. On 15 July 2011 the Commission of the Customs Union of Belarus, Kazakhstan and Russian Federation ("CU") adopted Decision No.710 concerning Technical Regulations No.01/2011, No.002/2011, and No.003/2011 ("Technical Regulations") setting safety and technical requirements for placing into the market of "railway rolling stock", "high-speed railway" and "rail transportation infrastructure" (the "Decision No.710"). According to the Decision No.710, the new Technical Regulations entered into force 3 years after their adoption, i.e. on 2 August 2014, and since that date all conformity assessment certificates for railway products have to be registered with the Federal Budgetary Organization "Register of Certification on the Federal Railway Transport" (FBO "RC FRT") in accordance with the new procedures set forth in the Technical Regulations.</p> <p>3. The Decision No.710 was then amended by Decision of the CU No.285 of 2 December 2013 "On Amendment of the Decision of the Commission of the CU No.710 of 15 July 2011" allowing for a transitional period of application, i.e. until 1 August 2016, of the conformity assessment certificates issued to producers of railway products prior to entry into force of the above-mentioned Technical Regulations. The amendment also established a transitional period until 1 August 2016 for the railway products which were not previously subject to mandatory conformity assessment procedures.</p> <p>4. Importantly, the conformity assessment certificates previously registered with the FBO "RCFRT" to Ukrainian producers of railway products started being suspended as of late 2013. The suspension was justified by the</p>	<p><b>II. The measures at issue</b></p> <p>1. Since 2014, the conformity assessment certificates issued by the Federal Budgetary Organization "Register of Certification on the Federal Railway Transport" (FBO "RC FRT") to Ukrainian producers of railway products prior to the entry into force of the Technical Regulations have systematically been suspended.</p> <p>2. Moreover, Ukrainian producers have not been able to obtain new conformity assessment certificates based on the Technical Regulations from the certification bodies in the Russian Federation. The applications submitted by Ukrainian producers to the FBO "RC FRT" have systematically been rejected or returned without consideration.</p> <p>3. Furthermore, the conformity assessment certificates issued by the authorities in the Republic of Belarus and in the Republic of Kazakhstan have not been recognized by the authorities of the Russian Federation. In fact, the relevant authorities of the Russian Federation, including its Ministry of Transport and the Federal Agency for Railway Transport, decided that Technical Regulation No. 001/2011 is applicable only to goods produced in the CU countries. Consequently, the authorities of the Russian Federation concluded that the conformity assessment certificates issued to Ukrainian producers in other CU countries were not valid in the territory of the Russian Federation and that the railway products of these producers could neither be imported nor registered for operation in the territory of the Russian Federation.</p> <p>4. The measures at issue covered in this panel request are:</p> <p style="padding-left: 20px;">1) The 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 namely the Republic of Belarus and the Republic of Kazakhstan. This practice is</p>

<sup>118</sup> For the benefit of the reader this table includes paragraph numbers before each paragraph, which do not appear in the original documents. Footnotes are omitted from the originals.

Consultations request	Panel request
<p>Russian Federation authorities as "technical issues" and "absence of appropriate conditions for the performance of [the required yearly] inspections" of the production facilities of the Ukrainian producers. In spite of the repeated requests, no reasonable explanations for these unwarranted suspensions of the certificates have been provided by the Russian Federation authorities to Ukrainian exporters and to the Ukrainian authorities.</p> <p>5. It is further submitted that the difficulties with obtaining the certificates does not occur in other countries of the CU. Indeed, with respect to the railway rolling stock products, the conformity assessment bodies of the CU located in the Republic of Belarus and in the Republic of Kazakhstan have already issued the conformity assessment certificates based on the CU Technical Regulation 001/2011 to Ukrainian producers of railway rolling stock products.</p> <p>6. However, these certificates were considered not valid by the authorities of the Russian Federation. These authorities also determined that the product at stake could not be registered for operation in the territory of the Russian Federation.</p> <p>7. As far as the railway transport infrastructure products are concerned, the Ukrainian producers of railroad switches affected by the suspension of their conformity assessment certificates, have submitted in December 2014 new applications for certificates pursuant to the new procedures set forth in the CU Technical Regulation 003/2011. However, in February 2015 these applications of the Ukrainian producers have been rejected by the Russian Federation authorities also without any reasonable explanation for the grounds of the rejection.</p> <p>8. As a result of the above-mentioned suspensions of conformity assessment certificates and the impediment to apply for new certificates pursuant to the newly adopted CU Technical Regulations, the Ukrainian producers can no longer export their railroad products to the Russian Federation.</p> <p>9. Ukraine has addressed on several occasions its concerns with regard to this matter in the WTO Committee of Technical Barriers to Trade as well as bilaterally with the Russian Federation. However, its efforts to resolve this matter failed to reach a mutually agreed solution.</p>	<p>evidenced by instructions of the authorities of the Russian Federation listed in Annexes I, II and III.</p> <p>2) 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 as mentioned in Annexes I, II and III.</p> <p>3) Technical Regulation No. 001/2011 "On safety of railway rolling stock", read together with the Protocol of the Ministry of Transport of the Russian Federation regarding issuance by certification authority of the Customs Union of the certificates of conformity for products manufactured by third-countries No. A 4-3 adopted on 20 January 2015 and the instructions mentioned in Annex III.</p> <p>5. As a result of the measures described above, certain Ukrainian producers have been effectively banned from exporting railway products to the Russian Federation. Following the implementation of the measures at issue, exports of such products from Ukraine to the Russian Federation, which had reached USD 1.7 billion in 2013, decreased to USD 600 million in 2014 and to only USD 110 million in 2015.</p>

7.140. We consider that, on its face, Ukraine's consultations request describes four different measures. The first is described in the fourth paragraph of the consultations request as the suspensions of conformity assessment certificates previously granted to Ukrainian producers of railway products. The second is described in the fifth and sixth paragraphs as Russia's authorities not considering the validity of certificates issued in other CU countries (e.g. Belarus and Kazakhstan) to Ukrainian producers of railway products in Russia's territory. The third is described in the seventh paragraph as Russia's rejections of applications for new certificates submitted by Ukrainian producers of railway products. The fourth is described in the eighth paragraph as Ukrainian producers no longer being able to export their railroad products to the Russian Federation as a result of the suspensions of existing certificates and the impediment to apply for new certificates pursuant to the newly adopted CU Technical Regulations.

7.141. These measures are similarly described in section II of the panel request. As explained above, section II of the panel request describes three distinct measures. First, the systematic prevention of Ukrainian producers from exporting their railway products to Russia by way of the components of the second measure. Second, the suspension of conformity assessment certificates held by Ukrainian producers, the rejection of new applications for conformity assessment certificates, and the refusal to recognize valid conformity assessment certificates issued by other CU countries. Third, the alleged requirement that Russia's authorities must not recognize certificates issued in other CU countries if the certified products were not produced in a CU country.

7.142. As explained above, Russia raises two grounds in support of its claim that the measure described in point one of section II of the panel request expands the scope of the dispute. We first address Russia's argument that the consultations request did not refer to the "refusal to issue new conformity assessment certificates", and that this part of the measure described in point one of section II of the panel request therefore expands the scope of the dispute.

7.143. Comparing the consultations request and the panel request, the panel request does not contain the exact wording used in the consultations request, i.e. "refusal to issue new conformity assessment certificates". We recall the Appellate Body's conclusion that a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel *is not required*.<sup>119</sup> We agree with Ukraine that the seventh and eighth paragraphs of the consultations request describe what is referred to in the panel request as the "refusal to issue new conformity assessment certificates".

7.144. The second paragraph in section II of the panel request closely resembles the description contained in the seventh paragraph of section I of the consultations request, summarized in the eighth paragraph of the consultations request. The gist of the measure described in those paragraphs is that Russian authorities have "rejected" applications for new certificates made pursuant to the relevant CU Technical Regulations. Ukraine could have used the same wording in point one of section II of the panel request, as it did in point two of section II of the panel request. However, we consider that changing the description of the measure from using the verb "rejected" to the noun "refusal" does not make any significant change in the measure being described. "Refusal" is defined in the dictionary as "the action or act of refusing; a denial or rejection of something demanded, or offered"<sup>120</sup>, whereas "reject" is defined as to "refuse to recognize, acquiesce in, or adopt (a command, practice, etc.)".<sup>121</sup> It is thus clear that in this context, these terms are synonyms. We thus disagree with Russia's view that the use of "refusal to issue new conformity assessment certificates" was a reference to a measure different from applications of Ukrainian producers having been "rejected by" Russia's authorities.

7.145. We now turn to Russia's second ground, i.e. that the reference to a "systematic prevention of Ukrainian producers from exporting their railway products to" Russia (measure one) in point one of section II of the panel request expands the scope of the dispute.

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<sup>119</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.13. (emphasis added)

<sup>120</sup> *The Shorter Oxford English Dictionary*, 6th edn, A Stevenson (ed) (Oxford University Press, 2007), Vol. 2, p. 2509.

<sup>121</sup> *The Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2517.

7.146. We disagree with Russia that the systematic import prevention is a new measure, not described in the consultations request. In our view, a version of this measure is described in the eighth paragraph of the consultations request. This paragraph refers to Ukrainian producers no longer being able to export their railroad products to Russia as a result of the "above-mentioned suspensions of the conformity assessment certificates and the impediment to apply for new certificates pursuant to the newly adopted CU Technical Regulations". This paragraph is describing a measure, rather than the effect of the other measures it refers to. The effect of the different measures challenged by Ukraine is described in paragraph 1 of the consultations request, which contains a reference to the monetary impact of the challenged measures on Ukrainian exports.

7.147. We now turn to compare the description of this measure in the consultations request with the panel request. We acknowledge that the panel request contains additional language that does not appear in the consultations request, i.e. "systematic prevention". The question, however, is whether this difference is such that the panel request expands the scope of or changes the essence of the measure described in the consultations request. We consider that this is not the case. The eighth paragraph of section I of the consultations request, when read together with the other paragraphs of that section, makes it clear that Ukraine is referring to Russia imposing a number of measures, since 2013, which led to a significant decrease in the exports of railway products from Ukraine to Russia. Moreover, the legal instruments described in section II of the consultations request support the view that Ukraine is referring both to individual decisions and instructions that support the existence of the measure that prevents Ukrainian railroad producers from exporting to Russia. The fact that Ukraine did not include the phrasing "systematic prevention" in the eighth paragraph of the consultations request could be explained by such terms evolving from the consultations request. The additional language in the panel request is a refined description of the measure at issue, rather than an expansion of the scope of the dispute.

7.148. We therefore reject Russia's claim that point one of section II of the panel request expands the scope of the consultations request by identifying a measure not described in section II of the consultations request.

#### **7.1.1.2.3 Issue 2(c)**

7.149. The essence of Russia's claim is that if the Panel considers that measure two is within the scope of the dispute then, in the alternative, certain aspects of this measure expand the scope of the dispute.

7.150. Russia argues that certain aspects of measure two expand the scope of the dispute and are therefore outside the Panel's terms of reference. Russia divides its observations between (a) documents dealing with suspension of valid certificates of conformity, (b) documents dealing with rejection of certificates issued in other CU countries, and (c) documents dealing with rejection of applications.<sup>122</sup>

7.151. Regarding documents dealing with suspension of certificates of conformity, Russia argues that the consultations request does not refer to specific instructions, thus Russia is denied an opportunity to prepare for the consultations and prejudicing its ability to defend itself. Russia considers that due to the volume of instructions of Russia's FBO, Russia could not have been reasonably expected to deduce either from the consultations request or from the consultations the 16 instructions listed in the panel request, which therefore expand the scope of the dispute.<sup>123</sup>

7.152. Ukraine rejects Russia's request in respect of Issue 2(c). According to Ukraine, Russia is confusing the concepts of measures at issue and their underlying legal instruments. Ukraine considers Russia's argument to require a precise identification of the legal instruments at issue in the consultations request, which Ukraine argues is not required by Article 4.4 of the DSU. Ukraine argues that the measures described in the consultations request correspond to those identified in the panel request, and therefore, references to different legal instrument cannot be considered to

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<sup>122</sup> Russia's preliminary ruling request, para. 82; and comments on Ukraine's response to Russia's preliminary ruling request, para. 82.

<sup>123</sup> Russia's preliminary ruling request, paras. 83-84; comments on Ukraine's response to Russia's preliminary ruling request, paras. 78-79; and response to Panel question No. 1.

expand the scope of the dispute. In particular, Ukraine considers that because of the general reference in section II of the consultations request refers to "Instructions of the [FBO] concerning the suspensions of certificates of Ukrainian producers", the reference to 16 specific instructions narrows, rather than expands, the scope of the dispute. Ukraine considers that the more specific references are a natural evolution of the consultation process, rather than the identification of a new measure.<sup>124</sup>

7.153. The Panel begins by recalling that the panel's terms of reference will be determined by the panel request, unless such request expands the scope or changes the essence of the dispute. We recall that determining whether a panel request expands the scope or changes the essence of a dispute concerns (a) the identification of the challenged measures, and (b) the identification of the legal basis of the complaint. Russia's claims concern (a), that is, whether the measures identified in the consultations request correspond with those identified in the panel request.

7.154. In comparing the consultations request and the panel request, we acknowledge that the consultations request does not include a reference to any instruction issued by the relevant Russian authorities suspending conformity assessment certificates held by Ukrainian producers of railway products. However, when the fourth paragraph of section I and the ninth point of section II of the consultations request are read together, it becomes clear that the measures at issue are the "Instructions of the [FBO] concerning the suspensions of certificates of Ukrainian producers." The measure identified in the panel request corresponds, in similar terms, to this measure. This measure is described in the first paragraph and in points one and two of section II of the panel request as the suspensions of conformity assessment certificates issued by the FBO to Ukrainian producers of railway products. This suggests that the panel request is not expanding or changing the essence of the dispute.

7.155. Moreover, as explained by Ukraine in response to a Panel question Russia's Register for Certificates for the Federal Railway Transportation works as a data base of all certificates and declarations issued by the FBO. Ukraine has provided convincing evidence that Russia was in a position to identify the instructions at issue through this database, on the basis of the information provided in the consultations request, i.e. the (a) author of the instruction (Russia's FBO), (b) subject matter of the instructions (suspension of certificates of conformity), (c) nationality of the producers (Ukrainian producers), (d) products at issue (railway products), and (e) period during which those decisions were adopted (as of late 2013).<sup>125</sup>

7.156. In addition, we do not consider that the 16 instructions included in Annex I to the panel request are separate and legally distinct from the measure identified in the consultations request. As explained above, the consultations request provides a broad reference to instructions issued by the FBO. Such reference is clearly limited to a category of legal instruments, that is, the instructions issued by the FBO through which certificates of conformity held by Ukrainian producers of railway products were suspended.

7.157. Although it would be desirable for a consultations request to provide the most comprehensive information available to a Member when preparing it, for the reasons set out above, we disagree with Russia that the reference to 16 specific instructions in the panel request expands the scope of the dispute.

7.158. Regarding documents dealing with rejection of certificates issued in other CU countries, Russia argues that the consultations request did not include a reference to the Protocol of the 61st Meeting of the Commission of the Rolling Stock of 22-24 March 2016 and the annexed Dissenting opinion, and including it in the Panel's terms of reference would prejudice Russia's right to know the case it has to answer. Russia also considers that this protocol does not contain any reference to the rejection of the validity of certificates issued in other CU countries. Moreover, Russia considers that the second document listed in Annex III to the panel request is not sufficiently identified, it lacks a date and letter number, thus making it impossible for Russia to identify and locate the challenged communication. Russia therefore considers that the inclusion of these two

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<sup>124</sup> Ukraine's response to Russia's preliminary ruling request, paras. 184-191; and comments on Russia's comments on Ukraine's response to Russia's preliminary ruling request, paras. 100-102.

<sup>125</sup> Ukraine's response to Panel question No. 1.



documents in the panel request expands the scope of the dispute and that the second document in Annex III fails to meet the requirement of Article 6.2 of the DSU to identify the specific measure at issue.<sup>126</sup>

7.159. Ukraine rejects Russia's argument. Ukraine argues that the description of the second document listed in Annex III to the panel request was sufficient to identify the relevant communication. Ukraine considers that Russia's argument that not including the number and date of the letter prevented Russia from identifying it lacks any credibility. Ukraine refers to Exhibit UKR-48(BCI) as evidence of the letter listed under item two in Annex III being the cover letter of Protocol No. A 4-3, which is listed both in the consultations request and in the panel request. Moreover, Ukraine considers that by including the Protocol of the 61st Meeting of the Commission of the Rolling Stock of 22-24 March 2016 in the panel request it is narrowing down the specific legal instruments underlying the challenged measure identified in the consultations request. Lastly, Ukraine considers that whether the Protocol of the 61st Meeting relates to the non-recognition of certificates from other CU countries is not a matter to be considered under Article 6.2 of the DSU.<sup>127</sup>

7.160. The Panel notes that a comparison of the consultations request and the panel request shows that the consultations request contains no reference to the three documents listed in Annex III to the panel request. However, when the fifth and sixth paragraphs of section I and the tenth point of section II of the consultations request are read together, it becomes clear that the measures at issue are the decisions of the relevant Russian authorities not to acknowledge the validity in Russia's territory of conformity assessment certificates issued by other CU countries to Ukrainian producers of railway products. The measures identified in the panel request correspond, in similar terms, to this measure. Point two of section II of the panel request refers to the refusals to recognize valid certificates of conformity issued by other CU countries as mentioned in Annex III.

7.161. Moreover, the tenth point of section II of the consultations request refers to the "Protocol of the Ministry of Transport of the Russian Federation No. ATS-3 adopted on 20 January 2015 concerning invalidation of the certificates issued to certain railroad products of Ukrainian origin". In their response to Panel question No. 2 both parties confirmed that the reference to No. ATS-3 should be understood as made to Protocol No. A-4-3.<sup>128</sup> Similarly, Annex III contains a reference to the letter through which Protocol No. A-4-3 was transmitted to the company seeking recognition of the validity of a certificate issued to a Ukrainian producer in Belarus. This suggests that the panel request is not expanding or changing the essence of the dispute.

7.162. Protocol No. A-4-3 of 20 January 2015, referred to in the consultations request, contains the minutes of "the meeting of the Deputy Minister of Transport of the Russian Federation Tsydenov A.S. regarding issuance by certification authority of the Customs Union of the certificates of conformity for products manufactured by third-countries". These minutes concern the application of a company [[xxx]] for the registration and operation in Russia of certain Ukrainian railway products ,hopper car for grain transportation manufactured by the Ukrainian PJSC [[xxx]]. This application sought the recognition of a conformity assessment certificate issued to a Ukrainian company, PJSC [[xxx]] on 30 December 2014 by the Belarusian certification authority. The conclusion of the Deputy Minister reflected in Protocol No. A-4-3 is that the certificates issued by the Belarusian certification entity are not valid in Russia because CU Technical Regulation 001/2011 only applies to products manufactured in the customs territory of the CU. The Protocol indicates that the requirements and conformity assessment procedures for products produced by third countries, not members of the CU, are established in accordance with national laws.<sup>129</sup>

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<sup>126</sup> Russia's preliminary ruling request, paras. 85-87; and comments on Ukraine's response to Russia's preliminary ruling request, paras. 74-77.

<sup>127</sup> Ukraine's response to Russia's preliminary ruling request, paras. 176-182 and 192-194; and comments on Russia's comments on Ukraine's response to Russia's preliminary ruling, paras. 95-99.

<sup>128</sup> Ukraine's response to Panel question No. 2 (where Ukraine explains that this resulted from lack of clarity in the numbering on the original document); and Russia's response to Panel question No. 2.

<sup>129</sup> Letter from the Federal Railway Transport Administration of the Ministry of Transport of the Russian Federation to JSC [[xxx]] accompanied to Protocol No. A-4-3 of 20 January 2015 of the Ministry of Transport of

7.163. We recall that Russia's claim concerns the three documents included in Annex III to the panel request. We turn to examine each of them.

7.164. The first document listed in Annex III to the panel request is a letter from Russia's Ministry of Transport dated 4 February 2016, concerning an application submitted by a company [[xxx]] seeking recognition of the validity in Russia of the certificate issued by the Belarusian certification body for a Ukrainian railway product, solid-rolled wheels. Through this letter, the Ministry of Transport informed the applicant that the certificates issued by the Belarusian authority were not recognized as valid in Russia because CU Technical Regulation 001/2011 only applies to products produced within the customs territory of the Customs Union.<sup>130</sup> This letter is related to Protocol No. A-4-3, because although it refers to a producer different than the one concerned by Protocol No. A-4-3, it provides the same legal reasons to reject the recognition of the certificate issued in Belarus as those set out in Protocol No. A-4-3 to reject the recognition of a different certificate also issued in Belarus. Moreover, although this letter concerns a different product (solid-rolled wheels), it is clear that the products covered by this letter and by Protocol No. A-4-3 (hopper car for grain transportation) fall under the category of the products at issue, i.e. railway products. With these considerations in mind, it is our view that including this letter in Annex III to the panel request does not expand the scope or change the essence of the dispute, because the nature and the type of legal instrument underlying the challenged measure remains the same.

7.165. The second document listed in Annex III is a "Letter from Federal Railway Transport Administration of the Ministry of Transport of the Russian Federation to JSC 'Russian Railways' accompanied to Protocol No. A-4-3 of 20.01.2015 of the Ministry of Transport of the Russian Federation regarding issuance by the certification authority of the Customs Union of the certificates of conformity for products manufactured by third-countries." Contrary to Russia's argument, we do not consider that this reference is insufficient to properly identify the letter in question. Certain identifying elements of the letter are sufficiently clear, such as the addressee ([[xxx]]), the author of the letter (Federal Railway Transport Administration of Russia's Ministry of Transport), and the document to which the letter is accompanied (Protocol No. A-4-3 of 20 January 2015). This information seems sufficient to understand what the letter in question is. Moreover, this letter is the cover letter of the Protocol No. A-4-3, as it clearly indicates that it is providing the results of the application of a company, [[xxx]] seeking registration and operation in Russia of certain Ukrainian railway products, hopper car for grain transportation produced by the Ukrainian PJSC [[xxx]].<sup>131</sup> To that extent, this is not a new measure, but rather a letter that complements the specific example that was already mentioned in the consultations request. With these considerations in mind, it is our view that including this letter in Annex III to the panel request does not expand the scope or change the essence of the dispute, because the nature and the type of legal instrument underlying the challenged measure remains the same.

7.166. The third document is the Protocol of the 61st Meeting of the Commission of the Rolling Stock of 22-24 March 2016 and the annexed Dissenting Opinion.<sup>132</sup> The link between this document and the challenged measure is unclear. However, as explained above, this is a document mentioned by Ukraine in its panel request as evidence of the challenged measure. To that extent, this document cannot be construed as a separate measure that is expanding the scope or changing the essence of the dispute.

7.167. For the reasons set out above, we disagree with Russia that including the three documents listed in Annex III to the panel request expands the scope or changes the essence of the dispute. Moreover, we disagree with Russia that the panel request failed to identify the specific measure at issue in respect of the second letter listed in Annex III to the panel request.

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the Russian Federation regarding issuance by the certification authority of the Customs Union of the certificates of conformity for products manufactured by third-countries (Cover letter and Protocol No. A-4-3 of 20 January 2015), (Exhibit UKR-48)(BCI), pp. 3-4.

<sup>130</sup> Letter from the Federal Agency for Railway Transport to company [[xxx]] – on validity of certificates, 4 February 2016, (Exhibit UKR-49)(BCI)(Corr.).

<sup>131</sup> Cover letter and Protocol No. A-4-3 of 20 January 2015, (Exhibit UKR-48)(BCI), p. 2.

<sup>132</sup> Protocol of the 61st Meeting of the Commission of the Rolling Stock of 22-24 March 2016 and the annexed Dissenting opinion; The Railway Administration of the Russian Federation, (Exhibit RUS-2).

7.168. Regarding documents dealing with rejections of applications, Russia argues that while the letter [[xxx]] dated 9 February 2015 is referred to both in the consultations request and in the panel request, the other two documents listed in Annex II to the panel request were not included in the consultations request. Russia considers that those two letters ([[xxx]] of 10 February 2014 and [[xxx]] of 23 January 2015) are new measures that impermissibly expand the scope of the dispute. In particular, Russia considers that the consultations request specifically referred to letters dealing with applications for certificates of conformity submitted pursuant to CU Technical Regulation 003/2011, while the other two letters ([[xxx]] of 10 February 2014 and [[xxx]] of 23 January 2015) deal with goods, certification of which is governed by a different regulation, namely, CU Technical Regulation 001/2011. Thus, Russia argues that Ukraine, in the course of the consultations, did not intend to challenge these measures and that they were not referred to in the consultations request.<sup>133</sup>

7.169. Ukraine however argues that the measures described in the consultations request correspond to those identified in the panel request, and therefore, references to different legal instruments cannot be considered to expand the scope of the dispute. In particular, Ukraine considers that the two letters included in Annex II to the panel request and not mentioned in the consultations request are legal instruments through which the measure identified in the consultations request is enforced. Ukraine argues that, thus, the reference to such letters narrows rather than expands the scope of the dispute.<sup>134</sup>

7.170. The Panel finds that comparing the consultations request and the panel request shows that the consultations request does not include a reference to two of the three decisions listed in Annex II to the panel request. However, when the seventh paragraph of section I and the eleventh point of section II of the consultations request are read together, it becomes clear that the measures at issue are the Russian authorities' rejections of applications for new conformity assessment certificates submitted pursuant to CU Technical Regulation 003/2011 by Ukrainian producers of railway switches affected by the suspensions of their valid conformity assessment certificates. The measure identified in the panel request corresponds, in similar terms, to this measure. This measure is described in the second narrative paragraph and in points one and two of section II of the panel request as the rejections of new applications for conformity assessment certificates submitted pursuant to the relevant Technical Regulations by Ukrainian producers of railway products. This suggests that the panel request provides a more general description of the challenged measure. We thus turn to examine whether such difference results from a natural evolution of the consultations request.

7.171. Both the panel request and the consultations request refer to the FBO's letter of 9 February 2015 informing of its decision to annul the applications for certification of track switching equipment submitted by a Ukrainian producer [[xxx]] pursuant to CU Technical Regulation 003/2011.<sup>135</sup> As explained in the consultations request, this letter concerns applications for new conformity assessment certificates submitted by Ukrainian producers for track switching equipment whose previously valid certificates had been suspended. The two new documents listed in Annex II refer to the same matter. The FBO's letter of 2 October 2014 informs a Ukrainian producer [[xxx]] that its applications for conformity assessment certificates for certain railway products (two-axle bogies) submitted pursuant to CU Technical Regulation 001/2011 were returned without consideration.<sup>136</sup> Similarly, The FBO's letter of 23 January 2015 informs a Ukrainian producer [[xxx]] that its applications for conformity assessment certificates for certain railway products (solebars and other railway products) submitted pursuant to CU Technical Regulation 001/2011 were returned without consideration.<sup>137</sup>

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<sup>133</sup> Russia's preliminary ruling request, paras. 88-90; and comments on Ukraine's response to Russia's preliminary ruling request, para. 81.

<sup>134</sup> Ukraine's response to Russia's preliminary ruling request, para. 184-190 and 193.

<sup>135</sup> Letter [[xxx]] from the FBO to PJSC [[xxx]], 9 February 2015 (Letter [[xxx]] from the FBO of 9 February 2015), (Exhibit UKR-23)(BCI).

<sup>136</sup> Letter [[xxx]] from the FBO to PJSC [[xxx]], 2 October 2014, (Exhibit UKR-16(BCI) and Exhibit RUS-3).

<sup>137</sup> Letter [[xxx]] from the FBO to PJSC [[xxx]], 23 January 2015 (BCI), (Exhibit UKR-32(BCI) and Exhibit RUS-4).

7.172. The three letters mentioned above share a number of elements. First, they all reject the applications for certificates of conformity submitted by Ukrainian producers. Second, all applications concern different products that are part of the products at issue, i.e. railway rolling stock and railroad products. Third, they were issued in response to applications for conformity assessment certificates pursuant to CU Technical Regulations identified both in the consultations request and in the panel request. These similarities suggest that the letters of 2 October 2014 and of 23 January 2015 listed only in the panel request are not of a different nature or type from the letter of 9 February 2015 listed in the consultations request. We therefore consider that the reformulation of the measures at issue in the panel request results from a natural evolution of the consultations request. In addition, the similarities in the letters support our finding that these are not separate and legally distinct from the measure identified in the consultations request.

7.173. Although it would be desirable for a consultations request to provide the most comprehensive information available to a Member when preparing it, for the reasons set out above, we disagree with Russia that the reference to the letters of 2 October 2014 and 23 January 2015 in Annex II to the panel request expands the scope of the dispute.

7.174. We therefore reject Russia's claim that certain aspects of the measures described in the second numbered point of section II of the panel request expand the scope of the consultations request by identifying measures not described in section II of the consultations request. We also reject Russia's claim that the panel request failed to identify the specific measure at issue in respect of the second letter listed in Annex III to the panel request.

### **7.1.2 Ruling on the breach of confidentiality**

7.175. On 14 July 2017, Russia informed the Panel that, in Russia's view, members of Ukraine's delegation had breached the confidentiality of the proceedings. Russia asked the Panel to request that Ukraine delete all publicly available statements disclosing confidential information and refrain from making any such statements in the future.

7.176. On 18 July, the Panel invited Ukraine to submit its comments on Russia's request and promptly to take the necessary steps to prevent any continued or further disclosure of confidential information. The Panel recalled the Panel's and parties' duty to maintain the confidentiality of these proceedings.

7.177. Ukraine provided its comments on Russia's request on 20 July 2017.

7.178. On 1 August 2017, the Panel ruled on Russia's request. The Panel informed the parties that it would reflect the incidents denounced by Russia in its Final Report. For the sake of brevity, this section contains an abridged version of the Panel's ruling on Russia's request. The Panel first referred to the obligations in WTO dispute settlement concerning the confidentiality of the proceedings and then turned to assess the breaches of confidentiality alleged by Russia.

#### **7.1.2.1 Confidentiality of information submitted to and by the Panel**

7.179. Article 18.2 of the DSU establishes, in relevant part, that:

Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential.

7.180. The obligations set out in Article 18.2 are also contained in paragraph 2 of the Panel's Working Procedures. In addition, paragraph 4 of the Panel's Working Procedures provides, in relevant part, that:

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.

7.181. Article 18.2 and paragraph 2 of the Working Procedures do not state expressly that information provided to parties or third parties by a panel during the course of the panel proceedings is to be treated as confidential. However, panel communications may refer, directly or indirectly, to confidential information submitted by a Member to the panel. Such panel communications would fall within the scope of Article 18.2 and paragraph 2. Moreover, paragraph 23 of the Panel's Working Procedures makes explicit that the Interim Report and the Report are confidential prior to their official circulation. Furthermore, it is clear from Article 12.1 of the DSU read together with paragraph 2 of Appendix 3 of the DSU that "[t]he panel shall meet in closed session". Substantive panel meetings, including any statements and announcements made by a panel during such meetings, are therefore confidential. Furthermore, Rule VII:1 of the WTO Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (Rules of Conduct) (WT/DSB/RC/1) stipulates that covered persons "shall at all times *maintain the confidentiality of dispute settlement* deliberations and *proceedings* together with any information identified by a party as confidential" (emphasis added). Rule IV:1 of the Rules of Conduct indicates that covered persons include persons serving on a panel and members of the Secretariat assisting them. It would be incongruous to impose an obligation of confidentiality on covered persons, including in respect of confidential information provided by a panel to parties or third parties, if the same obligation did not extend to parties and third parties. Finally, WTO dispute settlement practice indicates that information provided by a panel to parties or third parties has been generally understood to be, and been treated as, confidential. With regard to the obligation to protect the confidentiality of WTO dispute settlement proceedings, it should be recalled that confidentiality protection may of course be foregone by the parties at their own initiative, as in the case of open Appellate Body hearings, for instance.<sup>138</sup>

7.182. Thus, the parties are required to treat as confidential information provided by a panel to parties or third parties, all the more so where such information is marked as confidential.

7.183. In the specific circumstances of the present panel proceedings, the parties' obligations in respect of confidentiality protection are also governed by the Additional Working Procedures concerning Business Confidential Information (BCI Working Procedures) adopted by the Panel on 23 March 2017. The BCI Working Procedures apply to BCI submitted by a party to the Panel. According to paragraph 2 of the BCI Working Procedures, BCI is defined as:

[A]ny 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.

7.184. Access to BCI is limited to the authorized persons listed in paragraph 3 of the BCI Working Procedures. Paragraph 4 of the BCI Working Procedures sets out the confidentiality obligations of the parties and third-parties in respect of BCI:

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.

7.185. The Appellate Body and previous panels have been confronted with exceptional instances of breach of confidentiality (e.g. unauthorized disclosure of a party's submissions<sup>139</sup> or

<sup>138</sup> See Appellate Body Report, *US – Continued Suspension*, Annex IV, para. 11.

<sup>139</sup> See Appellate Body Report, *Thailand H-Beams*, para. 74. See also Panel Report, *Brazil – Aircraft (Article 21.5 – Canada II)*, paras. 3.1-3.15.

unauthorized disclosure of the content of an interim report<sup>140</sup>). In most of these instances, the Appellate Body and panels have reflected the incident in their reports and reminded the parties of the importance of the confidentiality of the proceedings. In at least one previous dispute, the panel also reported the incident to the DSB.<sup>141</sup>

### 7.1.2.2 Alleged breaches of confidentiality

7.186. Russia's request concerns two kinds of disclosure of confidential information, namely (a) disclosure of certain items of the Panel's timetable, and (b) disclosure of aspects of Russia's position.

#### 7.1.2.2.1 Disclosure of parts of the Panel's timetable

7.187. Regarding the disclosure of certain items of the Panel's timetable, the Panel notes that Russia has provided evidence that the head of Ukraine's delegation to the Panel's first substantive meeting with the parties disclosed through her Facebook and her Twitter account information concerning: (a) the first substantive meeting (the precise dates of the two days of the meeting), (b) the second substantive meeting of the Panel with the parties (the month and year when the meeting was scheduled to take place), and (c) the issuance to parties of the Panel's Final Report (the month and year when the Panel is scheduled to issue its Final Report).<sup>142</sup> In addition, Russia submitted evidence showing that those dates were also disclosed on the website of Ukraine's Ministry of Economic Development and Trade and in the publication "Eurointegration", which quoted from the Facebook page of the head of Ukraine's delegation to the Panel's first meeting with the parties.<sup>143</sup>

7.188. In its communication of 20 July 2017, Ukraine acknowledges that the information in the Panel's timetable is confidential. Indeed, the revised timetable adopted by the Panel on 10 April 2017, uploaded into the E-docket in the DDSR, is marked "confidential". The cover letter through which the timetable and the Working Procedures were transmitted to the parties was also marked "confidential". It should therefore have been clear to the parties that the information contained in the timetable was to be treated as confidential, except for any information that became publicly available as a result of an official communication by the Panel that was circulated to Members (e.g. notices of delay under Article 12.9 of the DSU or the Report). In this regard, the Panel circulated a communication under Article 12.9 of the DSU on 20 July 2017, as document WT/DS499/4. However, that document was circulated by the Panel after Ukraine had disclosed the target date for the issuance of the Report to the parties.<sup>144</sup>

7.189. In the Panel's view, it does not matter that the information made available through Facebook and Twitter could be accessed only by persons with an account with these services, since many people have such accounts and these services are commonly used to disseminate information. Moreover, neither party has suggested that access to the relevant information was restricted to, for instance, persons who were part of Ukraine's delegation attending the substantive Panel meeting.

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<sup>140</sup> See Panel Reports, *India – Solar Cells*, para. 6.4; *EC – Approval and Marketing of Biotech Products*, paras. 6.183-6.196; *US – Gambling (Article 21.5 – Antigua and Barbuda)*, paras. 5.3-5.10; *EC – Export Subsidies on Sugar (Australia)*, paras. 7.86-7.100; *EC – Export Subsidies on Sugar (Brazil)*, paras. 7.86-7.100; *EC – Export Subsidies on Sugar (Thailand)*, para. 7.86-7.100; *US – Upland Cotton*, paras. 6.3-6.5; *US – Steel Safeguards*, para. 9.41; and *US – Underwear*, para. 6.3.

<sup>141</sup> Panel Reports, *EC – Export Subsidies on Sugar (Australia)*, para. 7.99; *EC – Export Subsidies on Sugar (Brazil)*, para. 7.99; and *EC – Export Subsidies on Sugar (Thailand)*, para. 7.99.

<sup>142</sup> Facebook post of 10 July 2017, (Exhibit RUS-15); Facebook post of 11 July 2017, (Exhibit RUS-16); and Facebook post of 9 July 2017, (Exhibit RUS-19).

<sup>143</sup> Official website of Ukraine's Ministry of Economic Development and Trade, "First meeting in the WTO with respect to Russia's ban on imports of Ukrainian railway products", 11 July 2017, (Exhibit RUS-17); and Eurointegration, "Russia's ban on imports of railway products from Ukraine will be considered in the WTO", 10 July 2017, (Exhibit RUS-18).

<sup>144</sup> Ukraine's disclosure occurred already on 11 July 2017, as indicated in Facebook post of 11 July 2017, (Exhibit RUS-16); and Official website of Ukraine's Ministry of Economic Development and Trade, "First meeting in the WTO with respect to Russia's ban on imports of Ukrainian railway products", 11 July 2017, (Exhibit RUS-17).

7.190. Additionally, Ukraine did not seek leave from the Panel to authorize the disclosure of the dates of the first substantive meeting, the second substantive meeting or the estimated date of issuance of the Report to the parties.

7.191. For these reasons, we consider that the unauthorized publication by Ukraine of such confidential information amounts to a breach by Ukraine of the obligation to maintain the confidentiality of information that a panel provides to the parties.

#### **7.1.2.2.2 Disclosure of aspects of Russia's position**

7.192. Regarding the disclosure of Russia's position on the quality of Ukrainian railway products, Russia provided evidence that the head of Ukraine's delegation to the Panel's first substantive meeting with the parties disclosed on Facebook an aspect of Russia's position on the issues before the Panel, specifically an assertion relating to the "poor quality and non-compliance with safety standards" of Ukrainian railway products.<sup>145</sup> Russia provided evidence that this position was also made publicly available on the website of Ukraine's Ministry of Economic Development and Trade.<sup>146</sup>

7.193. In its communication of 20 July 2017, Ukraine indicates that "the exhibits filed by the Russian Federation express mostly the position of Ukraine and expectations regarding the case (which may be made available by Ukraine) as well as other information already in the public domain". Ukraine did not specify which of the information disclosed corresponds to each category of information.

7.194. Neither Ukraine nor Russia have argued or provided evidence indicating that Russia disclosed to the public its position in relation to quality of Ukrainian railway products.

7.195. As mentioned above, Article 18.2 of the DSU, paragraph 2 of the Panel's Working Procedures and paragraph 4 of the Panel's BCI Working Procedures require that parties treat as confidential information submitted by another Member to the Panel and designated by that Member as confidential or as BCI. However, by virtue of Article 18.2, parties may disclose "statements of [their] own positions to the public". In addition, paragraph 4 of Panel's BCI Working Procedures, permits parties to use BCI information only for the purposes of litigating the dispute.

7.196. In paragraph 97 of its first written submission, Russia made an assertion regarding the quality of Ukrainian rolling stock, referring to derailments of trains during 2010-2014 and providing a numerical analysis of the incidence of Ukrainian rolling stock in those derailments. Russia marked the entire paragraph as containing BCI. Paragraph 29 of Russia's opening statement at the first meeting with the Panel has the same content and again is marked in its entirety as containing BCI.

7.197. Ukraine disclosed Russia's assertion regarding the quality of Ukrainian rolling stock in quite general terms. It did not disclose the time-period or any other specific information contained in paragraphs 97 and 29. In the Panel's view, the general information that Ukraine disclosed does not meet the definition of BCI as set out in paragraph 2 of the BCI Working Procedures. However, this does not detract from Ukraine's obligation to maintain the confidentiality of Russia's position as expressed in its written submission and oral statement, as required under Article 18.2, and paragraphs 2 and 4 of the Panel's Working Procedures.

7.198. For these reasons, by disclosing aspects of Russia's position, specifically with respect to the quality of Ukrainian rolling stock, through the Facebook and Twitter accounts of the head of Ukraine's delegation and the website of Ukraine's Ministry of Economic Development and Trade, Ukraine has breached its confidentiality obligations under Article 18.2, and paragraphs 2 and 4 of the Panel's Working Procedures.

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<sup>145</sup> Facebook post of 10 July 2017, (Exhibit RUS-15).

<sup>146</sup> Official website of Ukraine's Ministry of Economic Development and Trade, "First meeting in the WTO with respect to Russia's ban on imports of Ukrainian railway products", 11 July 2017, (Exhibit RUS-17).

7.199. On the basis of the foregoing, the Panel concluded in its communication of 1 August 2017 as follows:

22. The Panel is concerned about, and deplores, these breaches of confidentiality and the disregard of a central requirement imposed by the DSU and the Panel's Working Procedures.

23. The Panel acknowledges and appreciates Ukraine's commitment, expressed in its communication of 20 July 2017, to take the necessary measures to ensure that the relevant information is removed from the websites appearing in Exhibits RUS-15, RUS-16, RUS-17 and RUS-19.

24. The Panel is concerned, however, about Ukraine's statement in the same communication that "to the extent that such information has also been published by private media outlets falling outside the control of the Government of Ukraine, as Exhibit RUS-18 suggests, Ukraine is precluded from compelling such private entities to remove published information from their websites". It may well be true that a government cannot compel private media outlets to remove published information. However, this does not mean that Ukraine cannot take measures directed at safeguarding the confidentiality of the disclosed information. Such measures could, for instance, include (i) advising the relevant media outlets that the published information was improperly released by the government and (ii) requesting them to follow the government's lead and assist it in safeguarding the confidentiality of the information by refraining from continued publication of the relevant information.

25. The Panel trusts that Ukraine will promptly take such reasonable measures as are available to it to ensure that the confidentiality of information provided to or by the Panel, including any information that will be provided during the remainder of these proceedings, is safeguarded.

26. The Panel will reflect the occurrence of these breaches of confidentiality in the [...] Panel Report.

### **7.1.3 Ruling on a request to exclude two exhibits from the record**

7.200. On 20 July 2017, Russia requested the Panel to exclude from the record Exhibits UKR-62(BCI) and UKR-63(BCI). On 25 July 2017, Ukraine provided its comments on Russia's request.

7.201. On 11 September 2017, the Panel ruled on Russia's request. This section contains an abridged version of the Panel's ruling.

#### **7.1.3.1 Main arguments of the parties**

7.202. Russia claims that Exhibits UKR-62(BCI) and UKR-63(BCI) contain factual errors because they reflect the view that Crimea is part of the territory of Ukraine. According to Russia, Crimea is part of Russia's territory. In Russia's view, Ukraine submitted these exhibits with the sole purpose of creating controversy and damaging the WTO dispute settlement process. Moreover, Russia states that questions of a political nature, including those concerning state sovereignty over certain territories, cannot be the subject matter of these proceedings. On this basis, Russia requests that the Panel exclude Exhibits UKR-62(BCI) and UKR-63(BCI) from the record.

7.203. Ukraine requests that the Panel reject Russia's request. Ukraine submits that both Exhibits UKR-62(BCI) and UKR-63(BCI) were submitted for the sole purpose of substantiating Ukraine's arguments and responding to Russia's allegations. Ukraine agrees with Russia that WTO panels are precluded from resolving territorial disputes between WTO Members. Nevertheless, in Ukraine's view, Crimea is a temporarily occupied part of the territory of Ukraine. Ukraine refers to United Nations General Assembly Resolutions Nos. 68/262 and 71/205.



### 7.1.3.2 Exclusion of evidence in WTO dispute settlement on procedural and other grounds

7.204. The DSU and the Panel's Working Procedures are silent in respect of exclusion of evidence submitted by a party. According to the Appellate Body, panels in their role as triers of facts must review and consider all the evidence that they receive from the parties.<sup>147</sup> However, as explained below, the Appellate Body has confirmed that panels may exclude evidence on procedural grounds. In addition, panels have rejected evidence on other grounds.

7.205. The Appellate Body has in some circumstances supported the rejection of evidence by panels on procedural grounds. This ground was found in cases where a party submitted new evidence at a late stage of the proceedings, after the opportunity to submit evidence, as provided in the Working Procedures, had lapsed. In particular, this was the case where a party submitted new evidence during the interim review stage, the purpose of which is to permit a review of precise aspects of the interim report and not the submission of new evidence.<sup>148</sup>

7.206. Furthermore, in *EC – Seal Products*, the panel issued a preliminary ruling addressing a request from the European Union to remove certain exhibits from the record of those proceedings. The European Union's request was based on the fact that these exhibits contained documents classified under European Union rules to which Canada should not have had access.<sup>149</sup> The panel granted the European Union's request.

### 7.1.3.3 Assessment of Russia's request

7.207. Russia requests that the Panel exclude from the record "the information submitted by Ukraine in Exhibit UKR-62[(BCI)] and Exhibit UKR-63[(BCI)]". Russia considers that these exhibits reflect "factual errors" that Ukraine made "intentionally and with [the] sole purpose of creating controversy and damaging the dispute settlement process." Moreover, Russia "firmly stands on the position that questions of [a] political nature, including those concerning state sovereignty over certain territories, are outside the mandate of the WTO, are not and cannot be governed by the WTO agreements and thus cannot be [the] subject matter of the present proceedings."

7.208. The grounds submitted by Russia in support of its request do not fall within the above-mentioned grounds accepted by the Appellate Body and previous panels for rejecting evidence. Russia does not argue that the two exhibits were filed late in the proceedings, or that they contain classified information to which Ukraine should not have had access. Rather, Russia's arguments, including that the information was filed "with the sole purpose of creating controversy and damaging the dispute settlement process", suggest that Russia objects to the two exhibits because, in its view, they contain certain information that is of no relevance to the matter before the Panel.

7.209. Russia's request therefore appears to raise an issue as to whether a lack of relevance of certain information submitted to the Panel could constitute a valid basis for a panel to reject these exhibits. The Panel notes that WTO dispute settlement proceedings will often be characterised by highly divergent views between disputing parties as to the relevance, accuracy and value of evidence submitted by each side. While recognizing the disagreement between Russia and Ukraine in this regard, the Panel considers it unnecessary to rule on the "relevance" of Exhibits UKR-62(BCI) and UKR-63(BCI) to the issues before it as a preliminary matter. The relevance of these exhibits is more easily analysed as part of the Panel's overall objective assessment of the case, which is reflected in the findings section of this Report.

7.210. Based on the foregoing considerations, the Panel rules that Exhibits UKR-62(BCI) and UKR-63(BCI) can remain on the record. In taking this decision, the Panel emphasizes that the mere fact that exhibits submitted by parties may form part of the panel record in no way implies

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<sup>147</sup> Appellate Body Report, *Australia – Apples*, para. 275.

<sup>148</sup> Appellate Body Report, *EC – Sardines*, para. 301. See Panel Report, *Russia – Pigs (EU)*, paras. 6.12-6.20.

<sup>149</sup> WT/DS400/6 and WT/DS401/7, para. 2.1. In its ruling, the panel noted that the complaining parties had indicated their willingness to withdraw the exhibits in question from the record (para. 3.1).

any judgment by the Panel on the relevance, accuracy or value of their contents to the issues before the Panel. It is useful to recall in this regard the specific terms of reference of this Panel, which are to:

[E]xamine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Ukraine in document WT/DS499/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.<sup>150</sup>

#### **7.1.4 Designation of information as Business Confidential Information (BCI)**

7.211. On 23 March 2017, the Panel adopted Additional Working Procedures Concerning Business Confidential Information (Additional Working Procedures on BCI). On 18 October 2017, we invited the parties to express their views on the designation of information as BCI in their various submissions to the Panel and to propose, where appropriate, alternative terms or approaches that would avoid the need for redactions in the public version of the Report. The parties provided their written comments on 23 November 2017.

7.212. We recall that our Additional Working Procedures on BCI define business confidential information (BCI) as:

[A]ny 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.<sup>151</sup>

7.213. The parties in their submissions have designated various types of information as BCI. In the confidential version of the Report, we refer to the following information designated by the parties as BCI: the security and safety situation in Ukraine; the producers concerned; the products concerned; the number and date of the FBO instructions and decisions at issue; the total number of applications filed by the companies concerned; and parts of the content of certain exhibits marked as containing BCI. As explained below, the public version of the Report discloses some of the information designated by the parties as BCI, because that information does not meet the definition of BCI set out in the Additional Working Procedures on BCI.

7.214. Ukraine submits that (a) the names of companies, (b) the location and address of a company, (c) the date and number of letters, (d) the date and number of instructions, and (e) the specific number of each of the certificates held by an individual company, alone or taken together, constitute BCI. Ukraine justifies its view on the grounds that the release of such information would allow the identification of the Ukrainian companies concerned and would seriously prejudice the essential interests of those companies. Similarly, Ukraine considers that the total number of applications filed by a company constitutes BCI because releasing such information would seriously prejudice the essential interests of that company. Ukraine also asks the Panel to designate as BCI all information directly quoted from exhibits designated as BCI.<sup>152</sup>

7.215. In addition, Ukraine states that it has marked certain regions of the territory of Ukraine as well as actions in those areas as BCI on the grounds that the release of information regarding those regions and actions would seriously prejudice Ukraine's essential interests.<sup>153</sup>

7.216. Russia submits that some of the information that the parties initially designated as BCI may not constitute BCI. Russia considers that it is appropriate to find a solution to avoid unnecessary or harmful expansion of information designated as BCI. Russia considers that information on production, purchases and sales of particular companies, their shares on relevant markets, including statistical information, should be marked as BCI, unless such information was in the public domain. In Russia's view, such information constitutes BCI under the definition of

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<sup>150</sup> WT/DS499/3.

<sup>151</sup> Paragraph 2 of the Additional Working Procedures on BCI.

<sup>152</sup> Ukraine's comments on BCI designation dated 23 November 2017, paras. 5-6, 10 and 19.

<sup>153</sup> Ukraine's comments on BCI designation dated 23 November 2017, paras. 13-15.

paragraph 2 of the Additional Working Procedures on BCI, and the disclosure of such information could seriously prejudice the essential interest of the entities that provided the information to the Russian government.<sup>154</sup>

7.217. Regarding other types of information designated as BCI in this dispute, Russia submits that some information designated as BCI by the parties in this dispute does not meet the definition of BCI, in most cases because relevant facts, materials, and data are already publicly available.<sup>155</sup>

7.218. The Panel notes that in keeping with the Appellate Body's guidance, in considering the parties' views on what information should be designated as BCI in the public version of the Report, it will strike a balance between, on the one hand, the need for protection of BCI and, on the other hand, the rights of third parties and other WTO Members under the DSU and the need to prepare a public version of the Report that is understandable.<sup>156</sup>

7.219. The definition of BCI applicable in these proceedings has the following elements: (a) a party has designated the information as BCI; (b) the designated information is not available in the public domain; and (c) the release of the information would prejudice an essential interest of the Member supplying the information or the entity that supplied it to the Member. Information satisfying these three elements is entitled to the special confidentiality protection afforded under the Additional Working Procedures on BCI.

7.220. The information contained in the confidential version of this Report regarding specific companies consists of the name of the producers; the products concerned; the location of the producers; the number and date of the FBO instructions and decisions concerning products of these producers; the dates of letters exchanged between the FBO and the producers; the number of applications filed by certain producers; information about non-conformities with applicable technical regulations and consumer complaints about the quality of products; and certain information concerning the foregoing elements and contained in exhibits designated in their entirety as BCI. We understand that some of this information is publicly available on the FBO's website, such as the name of the producer, the products concerned, the producer's address, the number of the certificate, the date of issuance of the certificate, the date of any suspension of the certificate, and the date of the expiry of the certificate.<sup>157</sup> As this information is in the public domain, it could not, alone, satisfy the definition of BCI as defined in these proceedings.

7.221. For the public version of this Report to be understandable, it is appropriate, in our view, to disclose at least some of the information that is already publicly available, such as the products concerned. We also need to disclose part of the content and dates of some of the FBO instructions and decisions at issue; part of the content and dates of some of the letters exchanged between the producers and the FBO; and the number of applications for new certificates filed by certain Ukrainian producers that the FBO rejected.

7.222. Nevertheless, to protect the confidentiality of information that constitutes BCI and prevent identification of individual producers, we do not disclose in the public version of the Report the names of the producers and the specific number of the instructions and decisions at issue. With that safeguard, we consider that the disclosure of the information referred to in the preceding paragraph would not prejudice an essential interest of any of the entities that provided BCI to the parties, or of a party.

7.223. The Report also contains information regarding the security and safety situation in Ukraine as well as references to specific regions in Ukraine. All such information is in the public domain, as it is based on published media reports and a report of the Office of the United Nations High Commissioner on Human Rights (OHCHR) submitted as evidence by Russia.<sup>158</sup> Moreover, we note

<sup>154</sup> Russia's comments on BCI designation dated 23 November 2017.

<sup>155</sup> Russia's comments on BCI designation dated 23 November 2017.

<sup>156</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.3.

<sup>157</sup> See Screenshots of search engine available at FBO's website, (Exhibit UKR-71)(BCI); and Extract of the FBO's Register, November 2017, (Exhibit UKR-150). See also Ukraine's comments on BCI designation dated 23 November 2017, para. 11.

<sup>158</sup> Media report "Chaos grips Odessa, Ukraine's third-largest city", 2 May 2014, (Exhibit RUS-33); Media report "Dozens die in Odessa, rebels down Ukraine helicopters", 2 May 2014, (Exhibit RUS-34); Media report

that our Additional Working Procedures concern the protection of business confidential information. Neither party has substantiated that this information regarding the security and safety situation in Ukraine and specific regions in Ukraine is relevant to the protection of commercial or business interests of companies and hence is "business confidential". As this information does not meet the definition of BCI applicable in these proceedings, we cannot accept Ukraine's request to redact this information from the public version of our Report.

7.224. Finally, we observe that the analysis set out in certain sections of the Report requires references to the content of certain exhibits that the submitting party has designated in their entirety as BCI. We do not disclose specific content of those exhibits, except if we consider that the relevant content does not satisfy the three definitional elements of BCI. Indeed, a document is not automatically BCI in its entirety merely because it has some specific content that constitutes BCI. Were it otherwise, a party could prevent the disclosure of information that is important to the understanding of a panel report merely by reference to one discrete piece of information that is business confidential.

## 7.2 Overview of claims and order of the Panel's analysis

7.225. Before the Panel, Ukraine challenges the following three categories of measures:

- a. Systematic prevention of Ukrainian railway products from being imported into Russia by suspending valid certificates issued for railway products, by refusing to issue new certificates for railway products and by not recognizing certificates issued by the competent authorities of CU countries other than Russia, which Ukraine submits are evidenced by the instructions and decisions listed in Annexes I, II and III to the panel request (systematic import prevention);
- b. the suspensions of certificates and the rejections of applications for new certificates with regard to Ukrainian producers of railway products, as listed in Annexes I and II to the panel request (suspensions and rejections); and
- c. Russia's non-recognition of certificates issued under CU Technical Regulation 001/2011 to Ukrainian suppliers of railway products in other CU countries found in the Protocol of the Ministry of Transport of the Russian Federation regarding the issuance by a certification authority of the Customs Union of certificates of conformity for products manufactured by third countries No. A 4-3 of 20 January 2015 and the individual decisions of the Federal Agency for Railway Transport listed in Annex III to the panel request.

7.226. Ukraine makes claims in relation to the TBT Agreement and the GATT 1994 in respect of each of the alleged three categories of measures, as follows<sup>159</sup>:

- a. With respect to the systematic import prevention, Ukraine asks the Panel to find that Russia acts inconsistently with its obligations under:
  - i. Article I:1 of the GATT 1994 because Russia fails to immediately and unconditionally grant to Ukrainian railway products the advantage it grants to like products from other countries;
  - ii. Article XI:1 of the GATT 1994 because Russia has instituted and maintains a restriction on the importation of Ukrainian railway products; and

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"How did Odessa's fire happen?", 6 May 2014, (Exhibit RUS-35); Media report "Ukrainian protestors vandalise Russian bank", 22 November 2016, (Exhibit RUS-36); Mass media report "Ukraine Political Crisis Update: Russian Banks Attacked On Anniversary Of Revolution", 20 February 2016, (Exhibit RUS-37); Media report, 20 February 2014, (Exhibit RUS-55); Media report, 29 January 2014, (Exhibit RUS-56); Media report, 2 March 2014, (Exhibit RUS-57); Media report, 2 March 2014, (Exhibit RUS-58); Media report, 3 February 2014, (Exhibit RUS-59); Media report, 10 May 2017, (Exhibit RUS-60); and Abstract from "Report on the human rights situation in Ukraine: 16 November 2016 to 15 February 2017" (2017 OHCHR Report), (Exhibit RUS-61).

<sup>159</sup> Ukraine's panel request, WT/DS499/2, p. 2; Ukraine's first written submission, para. 401; and second written submission's, paras. 447-449.

- iii. Article XIII:1 of the GATT 1994 because Russia applies a restriction on the importation of Ukrainian railway products while the importation of like products from other countries is not similarly restricted.
- b. With respect to the suspensions and the rejections, Ukraine asks the Panel to find that Russia acts inconsistently with its obligations under:
    - i. Article 5.1.1 of the TBT Agreement because Russia applied and applies its conformity assessment procedures so as to grant access for suppliers of Ukrainian railway products under conditions less favourable than those accorded to suppliers of like Russian products and like products originating in any other country, in a comparable situation;
    - ii. Article 5.1.2 of the TBT Agreement because Russia 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 Ukrainian railway products conform with the applicable technical regulations, in the light of the risk that non-conformity would create; and
    - iii. Article 5.2.2 of the TBT Agreement because Russia (a) 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 (b) did not transmit as soon as possible the results of the assessment in a precise and complete manner, so that corrective actions could be taken, if necessary.
  - c. With respect to non-recognition of certificates issued in other CU countries, Ukraine asks the Panel to find that Russia acted inconsistently with its obligations under:
    - i. Article 2.1 of the TBT Agreement because in respect of CU Technical Regulation 001/2011, Russia accords to Ukrainian railway products less favourable treatment than the treatment accorded to like Russian products and to like products originating in any other country;
    - ii. Article 5.1.1 of the TBT Agreement because Russia applies its conformity assessment procedures so as to grant access for suppliers of Ukrainian railway products under conditions less favourable than those accorded to suppliers of like Russian products and like products originating in any other country, in a comparable situation;
    - iii. Article 5.1.2 of the TBT Agreement because Russia 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 Ukrainian railway products conform with the applicable technical regulations, in the light of the risk that non-conformity would create;
    - iv. Article I:1 of the GATT 1994 because by not accepting in its territory the validity of certificates issued to Ukrainian producers in other CU countries, Russia fails to immediately and unconditionally grant to Ukrainian railway products the advantage it grants to like products originating in other countries;
    - v. Article III:4 of the GATT 1994 because by not accepting in its territory the validity of certificates issued to Ukrainian producers in other CU countries, Russia accords to Ukrainian railway products treatment less favourable than that accorded to like Russian products; and
    - vi. Article X:3(a) of the GATT 1994 because Russia fails to administer the non-recognition "decision"<sup>160</sup> in a uniform, impartial and reasonable manner.

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<sup>160</sup> Ukraine's second written submission, para. 449.

7.227. Ukraine asks the Panel to recommend, pursuant to Article 19.1 of the DSU, that the DSB requests that Russia bring the contested measures into conformity with its obligations under the TBT Agreement and the GATT 1994.<sup>161</sup>

7.228. As noted in paragraph 1.10 above, Russia made a request for a preliminary ruling pursuant to Article 6.2 of the DSU. Russia challenged a number of aspects of Ukraine's panel request. Russia requested the Panel to find that Ukraine's panel request fails to present the problem clearly, fails to properly identify some of the challenged measures, and expands the scope of the dispute because in certain respects the panel request does not correspond to Ukraine's consultations request. On this basis, Russia requested that the Panel find that all the measures described in the panel request and Ukraine's associated claims are outside its terms of reference.<sup>162</sup> The Panel's preliminary ruling is contained in section 7.1.1 above. As indicated therein, and communicated to the parties on 17 July 2017, we concluded that none of the measures or claims identified by Ukraine in its panel request falls outside the Panel's terms of reference. The Panel also noted that this conclusion does not bear on the separate question whether the measures at issue are inconsistent with Russia's obligations under the WTO agreements.

7.229. As regards the merits of Ukraine's claims, Russia requests that the Panel dismiss all of Ukraine's claims and find that the challenged measures are not inconsistent with Russia's obligations under the WTO agreements.<sup>163</sup>

7.230. The Panel will first examine Ukraine's claims in relation to the suspensions and the rejections. It will then assess the claims concerning non-recognition of certificates, before examining the alleged systematic import prevention. We address the alleged systematic import prevention last because it incorporates the other two categories of measures.

7.231. In addressing Ukraine's claims concerning the various measures, we will make use, as appropriate, of the principle of judicial economy.<sup>164</sup> Accordingly, we will not necessarily make findings on all the claims put forward by Ukraine in this dispute.

### 7.3 Claims concerning the suspension of certificates

#### 7.3.1 Measures at issue

##### 7.3.1.1 Overview of Russia's legal framework on conformity assessment procedures

7.232. Prior to the entry into force of CU Technical Regulations 001/2011, 002/2011 and 003/2011, Russia's conformity assessment procedures for railway products were set out in the Certification System for Federal Railway Transport (CS FRT Rules).<sup>165</sup> The CS FRT Rules established procedures for both mandatory and voluntary certification.<sup>166</sup> The issues raised in this dispute, and the subsequent discussion and analysis, concern mandatory certification only.<sup>167</sup>

7.233. In order to be placed on the Russian market, railway products were required to undergo mandatory certification according to the CS FRT Rules and receive a valid certificate that attested to conformity with requirements pertaining to safety of operation, labour safety and environmental

<sup>161</sup> Ukraine's first written submission, para. 402; and second written submission, para. 450.

<sup>162</sup> Russia's preliminary ruling request, paras. 91-92.

<sup>163</sup> Russia's first written submission, paras. 186-190; and second written submission, paras. 195-198.

<sup>164</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.190 (quoting Appellate Body Reports, *Canada – Wheat Exports and Grain Imports*, para. 133; *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, p. 340; *US – Tuna II (Mexico)*, paras. 403-404; *US – Upland Cotton*, para. 732; *Australia – Salmon*, para. 223).

<sup>165</sup> "Rules of the Certification System for Federal Railway Transport of the Russian Federation. General provisions" approved by the Ministry of Railways of the Russian Federation on 12 November 1996 (CS FRT 01-96), (Exhibit UKR-2). See also "Rules of the Certification System for Federal Railway Transport. Procedure for organizing and conducting an inspection control" (CS FRT 12-2003), (Exhibit UKR-3)(Corr.); and CS FRT 31/PMG 40-2003, 25 June 2013 (CS FRT Rules 31/PMG 40-2003), (Exhibit UKR-80).

<sup>166</sup> See generally Articles 6.5 and 3.10 of CS FRT 01-96, (Exhibit UKR-2).

<sup>167</sup> Ukraine's response to Panel question No. 121, para. 26; and second written submission, footnote 354.

safety established by Russia's technical regulations and standards for railway products.<sup>168</sup> The stages of mandatory certification were set out in the CS FRT Rules, including the stages before (certification procedure) and after a certificate had been issued (inspection control). The procedure started with an applicant submitting an application for mandatory certification and the FBO accepting such application. The certification procedure could include both testing of samples and inspection of production, on the basis of which a certificate could be issued.<sup>169</sup>

7.234. Inspection control (control assessment of conformity) was carried out after a certificate had been issued, and established that the products being sold were still in conformity with the requirements confirmed during certification.<sup>170</sup> Inspection control was required to be carried out at least once a year throughout the period of validity of the certificate and could include both testing of samples and inspection of production.<sup>171</sup> Inspection control was required to be carried out through *on-site* inspection (at the facilities of the certified manufacturer), or through *remote* inspection (elsewhere).<sup>172</sup> These two modalities of inspection control were carried out by FBO employees<sup>173</sup> according to an inspection programme that would set out the grounds, main tasks and facilities of the inspection.<sup>174</sup>

7.235. The specific procedures of mandatory certification depended on the applicable certification scheme. The CS FRT Rules had thirteen different certification schemes, depending on the *type of production* and the *characteristics of products and manufacturers* subject to certification.<sup>175</sup> The FBO determined the certification scheme under which an application was considered.<sup>176</sup> The certificates issued to Ukrainian producers that were subsequently suspended by the FBO were issued under three of these thirteen different certification schemes, namely, schemes 3a, 4a, and 5. The following table provides an overview of these three certification schemes.

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<sup>168</sup> Article 4.1 of CS FRT 01-96, (Exhibit UKR-2). See also Articles 3.9 and 9.1 of CS FRT 01-96, (Exhibit UKR-2), where mandatory certification is referred to as statutory certification.

<sup>169</sup> Article 9 of CS FRT 01-96, (Exhibit UKR-2).

<sup>170</sup> Articles 3.36 and 13.1 of CS FRT 01-96, (Exhibit UKR-2). See also Articles 3.2 and 5.3 CS FRT 12-2003, (Exhibit UKR-3), where inspection control is referred to as supervisory control (see Russia's response to Panel question No. 39(a)).

<sup>171</sup> Article 13 of CS FRT 01-96, (Exhibit UKR-2) and Article 5 of CS FRT 12-2003, (Exhibit UKR-3). Inspection control includes both scheduled and unscheduled inspection (see Articles 5.1-5.4 of CS FRT 12-2003, (Exhibit UKR-3)). Scheduled inspection must be carried out at least once a year throughout the period of validity of the certificate. Unscheduled inspection may be carried out, in response to claims and information about non-compliance, without prior notice to the inspected facility. Hereafter, we use inspection control to refer to scheduled inspection control.

<sup>172</sup> Article 5.3 of CS FRT 12-2003, (Exhibit UKR-3).

<sup>173</sup> Articles 9.6, 13.4 and 13.6 of CS FRT 01-96, (Exhibit UKR-2); Articles 4.1 and 4.3 of CS FRT 12-2003, (Exhibit UKR-3); Articles 4.3 and 6.5 of CS FRT 31/PMG 40-2003, (Exhibit UKR-80); and Articles 5.3 and 7.1 of Organization Standard CTO PC-FZT 08-2013 "Procedure of organization and implementation of inspection control of certified products" (PC-FZT 08-2013), (Exhibit RUS-23). See also Documents of the FBO providing for the inconsistencies of the certified products of PJSC [[xxx]], (Exhibit RUS-62)(BCI), where it is mentioned that "an inspection team of [the FBO] " conducted a scheduled inspection control".

<sup>174</sup> Article 5.6 of CS FRT 12-2003, (Exhibit UKR-3).

<sup>175</sup> See Annex B to CS FRT 01-96, (Exhibit UKR-79); and Appendix A to CS FRT 31/PMG 40-2003, (Exhibit UKR-80).

<sup>176</sup> Article 9.17 of CS FRT 01-96, (Exhibit UKR-2).

**Table 3 - CS FRT certification schemes relevant for the 14 instructions challenged by Ukraine<sup>177</sup>**

<b>Scheme</b>	<b>Applicability</b>	<b>Certification procedure</b>	<b>Inspection control</b>
3a	Used for certification of (i) products; (ii) stability of serial production which does not cast doubt; and (iii) products for which the collection of samples at the seller (consumer) is hindered or impossible.	(i) type testing (test of samples) and (ii) analysis of condition of production (inspection of production).	(i) periodical test of samples at manufacturer and (ii) inspection of production.
4a	Used when strict supervisory control over commercial products is required.	(i) type testing (test of samples) and (ii) analysis of condition of production (inspection of production).	(i) periodical tests of samples taken from consumer (seller) and manufacturer (before sending to the consumer), with the same frequency and (ii) inspection of production.
5	Used for certification of products, for which: (i) sample size for testing is insufficient for an objective assessment of compliance with the established requirements; (ii) increased requirements for stability of characteristics are established; (iii) technological manufacturing processes are sensitive to external factors; (iv) manufacturing subject to frequent change or modifications; and (v) tests can only be carried out after installation at the consumer.	(i) type testing (test of samples) and (ii) certification of production or quality management system (inspection of production).	(i) test of production stability or operation of the quality management system (inspection of production); and (ii) periodical tests of samples taken from manufacturer or seller before sending to consumer (test of samples at manufacturer or seller).

### 7.3.1.2 Challenged FBO instructions

7.236. The following table compiles information on the 14 instructions that Ukraine challenged, through which the FBO suspended valid certificates. The first column contains the number of the instruction and an indication of the number of certificates suspended through the instruction. The second column contains the date of the instruction. The third column contains the products covered by the instruction. The fourth column refers to the scheme under which the FBO issued the certificate for the relevant conformity assessment procedure, as required by the applicable Russian legislation.<sup>178</sup> Each scheme is accompanied by an indication of the type of inspection control required. The last column reproduces the reasons provided in the accompanying cover letter and in each instruction, as relevant, to suspend the certificate. Suspension instructions 1 and 2 below concern producer 1 [[xxx]]. Suspension instruction 3 below concerns producer 2 [[xxx]]. Suspension instructions 4 and 5 concern producer 3 [[xxx]]. Suspension instructions 6 and 7 concern producer 4 [[xxx]]. The remaining suspension instructions (8 to 14) concern producer 5 [[xxx]].

<sup>177</sup> Annex B to CS FRT 01-96, (Exhibit UKR-79); and Appendix A to CS FRT 31/PMG 40-2003 (Exhibit UKR-80).

<sup>178</sup> See Annex B to CS FRT 01-96, (Exhibit UKR-79); and Appendix A to CS FRT Rules 31/PMG 40-2003, (Exhibit UKR-80).



**Table 4 - Instructions through which valid certificates were suspended**

Suspension instruction	Date	Products covered	Scheme and type of Inspection	Reasons provided to suspend as given in the corresponding exhibits
Suspension instruction 1 - [[xxx]] <sup>179</sup>  Concerns seven certificates	8.8.2014	(a) transversal brake bar; (b) four wheel bogie of [[xxx]] rail car; (c) coil spring suspension; (d) wheel-pairs of [[xxx]] wagon type; (e) finishing axis of [[xxx]] wagon type; (f) air reservoir of [[xxx]] type; and (g) covered hopper cars.	Scheme 5 (for the seven certificates), which requires: (a) test of production stability or operation of the quality system (inspection of production); and (b) periodical tests of samples taken from manufacturer before sending to consumer (test of samples at manufacturer).	<b>Cover Letter:</b> "Due to military operation with involvement of Armed Forces on the territory of Donetsk and Lugansk regions conducted by the Ukrainian government, departure of our employees to Ukraine for inspection entails a threat to their life and health safety. In addition, the State Border Guard Service of Ukraine restricted the entry to the country for male citizens of Russian Federation in the age of 16 to 60 years. Such force majeure circumstances caused the lack of conditions for inspection.  Inspection of certificated products is possible only in case of termination of military operations on the territory of Ukraine as well as upon removal of entry restrictions for the Russian Federation citizens."  <b>Instruction:</b> "According to the [CS FRT] rules, certificated products are subject to an inspection control as it is recorded in the conformity certificate. A deadline for the inspection control is April 2014. There are no conditions for inspection control up to the present moment."
Suspension instruction 2 - [[xxx]] <sup>180</sup>  Concerns seven certificates	3.10.2014	(a) and (b) two models of open-top cars; (c) cars for technical carbon; (d) covered hopper cars for grain and other foods; (e) cars-platforms for ultra-large container; (f) covered hopper cars for cement; and (g) cars for bitumen.	Scheme 5 (for the seven certificates), which requires: (a) inspection of production; and (b) test of samples at manufacturer.	<b>Cover Letter:</b> "Due to a substantial change of circumstances, preventing the performance by [the FBO] of the work on inspection control over the certified products, the conditions for its performance are not met. Such works may be performed only after termination of the aforementioned circumstances".  <b>Instruction:</b> "According to the [CS FRT] rules, certificated products are subject to an inspection control as it is recorded in the conformity certificate. A deadline for the inspection control is September 2014. There are no conditions for inspection control up to the present moment."

<sup>179</sup> Letter [[xxx]] from the FBO to PJSC [[xxx]] with instruction [[xxx]] attached, 8 August 2014 (Letter [[xxx]] from the FBO of 8 August 2014), (Exhibit UKR-15)(BCI). See also Letter [[xxx]] from PJSC [[xxx]], 22 September 2017, (Exhibit UKR-134)(BCI) for the applicable schemes.

<sup>180</sup> Letter [[xxx]] from the FBO to PJSC [[xxx]] with instruction [[xxx]] attached, 3 October 2014 (Letter [[xxx]] from the FBO of 3 October 2014), (Exhibit UKR-19)(BCI)(Corr.). See also Letter [[xxx]] from PJSC [[xxx]], 22 September 2017, (Exhibit UKR-134)(BCI) for the applicable schemes.

Suspension instruction	Date	Products covered	Scheme and type of Inspection	Reasons provided to suspend as given in the corresponding exhibits
Suspension instruction 3 - [[xxx]] <sup>181</sup> Concerns 22 certificates	27.2.2015	Railroad switches	Scheme 3a (for the 22 certificates), which requires: (a) inspection of production; and (b) test of samples at manufacturer.	<b>Instruction:</b> "Pursuant to the Rules of [CS FRT] the certified products are subject to inspection, which is mentioned in the certificates of conformity. The planned period for performance of the next inspection is January 2015. As of today, there are no facilities for holding the inspection. "
Suspension instruction 4 - [[xxx]] <sup>182</sup> Concerns three certificates	16.7.2014	(a) No-turn car pads; (b) freight-car truck sole bars; and (c) truck bolsters.	Scheme 3a (for two certificates), which requires: (a) inspection of production; and (b) test of samples at manufacturer.  Scheme 4a (for one certificate for truck bolsters), which requires: (a) inspection of production; and (b) periodical tests of samples taken from consumer (seller) and manufacturer, with the same frequency.	<b>Cover Letter:</b> "Due to significant changes of circumstances so that they prevent the performance by [the FBO] of its obligations under the agreements made between our organizations, conditions for conduct of inspectorial supervision of certified products are lacking. Inspection supervision operations may be conducted when the above-mentioned circumstances terminate."  <b>Instruction:</b> "According to rules of [CS FRT], certified products are subject to inspectorial supervision, which fact is recorded in the conformity assessment certificates. The scheduled date for the inspectorial supervision is May 2014. Conditions for conduct of the inspectorial supervision are lacking up to date. "
Suspension instruction 5 - [[xxx]] <sup>183</sup> Concerns two certificates	11.2.2015	(a) rear draft lugs (coping units) of automatic coupler; and (b) front draft lugs (copings) of automatic coupler.	Scheme 3a (for both certificates), which requires: (a) inspection of production; and (b) test of samples at manufacturer.	<b>Instruction:</b> "According to rules of [CS FRT], certified products are subject to inspectorial supervision, which fact is recorded in the conformity assessment certificates. The scheduled date for the inspectorial supervision is December 2014. Conditions for conduct of the inspectorial supervision are lacking up to date."

<sup>181</sup> Letter [[xxx]] from the FBO to PJSC [[xxx]] with instruction [[xxx]] attached, 27 February 2015 (Letter [[xxx]] from the FBO of 27 February 2015), (Exhibit UKR-20)(BCI). See also Letter [[xxx]] from PJSC [[xxx]], 21 September 2017, (Exhibit UKR-135)(BCI) for the applicable schemes.

<sup>182</sup> Letter [[xxx]] from the FBO to PJSC [[xxx]] with instruction [[xxx]] attached, 17 July 2014 (Letter [[xxx]] from the FBO of 17 July 2014), (Exhibit UKR-25)(BCI). See also Letter [[xxx]] from PJSC [[xxx]], 7 September 2017, (Exhibit UKR-136)(BCI) for the applicable schemes.

<sup>183</sup> Letter [[xxx]] from the FBO to PJSC [[xxx]] with instruction [[xxx]] attached, 11 February 2015 (Letter [[xxx]] from the FBO of 11 February 2015), (Exhibit UKR-31)(BCI). See also Letter [[xxx]] from PJSC [[xxx]], 7 September 2017, (Exhibit UKR-136)(BCI) for the applicable schemes.

Suspension instruction	Date	Products covered	Scheme and type of Inspection	Reasons provided to suspend as given in the corresponding exhibits
Suspension instruction 6 - [[xxx]] <sup>184</sup>  Concerns one certificate	27.1.2015	Oil-tank railcars for oil products	Scheme 3a, which requires: (a) inspection of production; and (b) test of samples at manufacturer.	<b>Instruction:</b> "According to the [CS FRT] rules, certificated products are subject to an inspection control as it is recorded in the conformity certificate. A deadline for the inspection control is November 2014. There are no conditions for inspection control up to the present moment. "
Suspension instruction 7 - [[xxx]] <sup>185</sup>  Concerns four certificates	11.2.2015	Four types of oil-tank railcars for oil products	Scheme 3a (for the four certificates), which requires: (a) inspection of production; and (b) test of samples at manufacturer.	<b>Instruction:</b> "According to the [CS FRT] rules, certificated products are subject to an inspection control as it is recorded in the conformity certificate. A deadline for the inspection control is December 2014. There are no conditions for inspection control up to the present moment. "
Suspension instruction 8 - [[xxx]] <sup>186</sup>  Concerns six certificates	8.10.2014	(a) passenger-car truck bolsters; (b) passenger cars; (c) freight-car hour-wheeled trucks; (d) shock absorbers; (e) no-turn car pads; (f) finished car axles; and (g) wheel sets.	Scheme 3a (for the six certificates), which requires: (a) inspection of production; and (b) test of samples at manufacturer.	<b>Cover Letter:</b> "Due to significant changes of circumstances so that they prevent the performance by [the FBO] of its obligations under the agreement made between our organizations, conditions for conduct of inspectorial supervision of certified products are lacking. Inspection supervision operations may be conducted when the above-mentioned circumstances terminate."  <b>Instruction:</b> "According to rules of [CS FRT], certified products are subject to inspectorial supervision, which fact is recorded in the conformity assessment certificates. The scheduled date for the inspectorial supervision is August 2014. Conditions for conduct of the inspectorial supervision are lacking up to date."

<sup>184</sup> Letter [[xxx]] from the FBO to PJSC [[xxx]] with instruction [[xxx]] attached, 27 January 2015 (Letter [[xxx]] from the FBO of 27 January 2015), (Exhibit UKR-36)(BCI). See also Letter [[xxx]] from PJSC [[xxx]], 25 September 2017, (Exhibit UKR-137)(BCI) for the applicable schemes.

<sup>185</sup> Letter [[xxx]] from the FBO to PJSC [[xxx]] with instruction [[xxx]] attached, 11 February 2015 (Letter [[xxx]] from the FBO of 11 February 2015), (Exhibit UKR-37)(BCI). See also Letter [[xxx]] from PJSC [[xxx]], 25 September 2017, (Exhibit UKR-137)(BCI) for the applicable schemes.

<sup>186</sup> Letter [[xxx]] from the FBO to PJSC [[xxx]] with instruction [[xxx]] attached, 8 October 2014 (BCI) (Letter [[xxx]] from the FBO of 8 October 2014), (Exhibit UKR-39)(BCI). See also Letter [[xxx]] from PJSC [[xxx]], 22 September 2017, (Exhibit UKR-138)(BCI) for the applicable schemes.

Suspension instruction	Date	Products covered	Scheme and type of Inspection	Reasons provided to suspend as given in the corresponding exhibits
Suspension instruction 9 - [[xxx]] <sup>187</sup>  Concerns seven certificates	9.10.2014	(a) rain cars; (b) bulk cars; (c) flat-deck cars; and (d) cement tankers.	Scheme 3a (for the seven certificates), which requires: (a) inspection of production; and (b) test of samples at manufacturer.	<b>Cover Letter:</b> "Due to significant changes of circumstances so that they prevent the performance by [the FBO] of its obligations under the agreement made between our organizations, conditions for conduct of inspectorial supervision of certified products are lacking. Inspection supervision operations may be conducted when the above-mentioned circumstances terminate."  <b>Instruction:</b> "According to rules of [CS FRT], certified products are subject to inspectorial supervision, which fact is recorded in the conformity assessment certificates. The scheduled date for the inspectorial supervision is September 2014. Conditions for conduct of the inspectorial supervision are lacking up to date."
Suspension instruction 10 - [[xxx]] <sup>188</sup>  Concerns two certificates	11.2.2015	Bogie suspension spiral coil springs for railway rolling stock	Scheme 3a (for both certificates), which requires: (a) inspection of production; and (b) test of samples at manufacturer.	<b>Instruction:</b> "According to rules of [CS FRT], certified products are subject to inspectorial supervision, which fact is recorded in the conformity assessment certificates. The scheduled date for the inspectorial supervision is December 2014. Conditions for conduct of the inspectorial supervision are lacking up to date."
Suspension instruction 11 - [[xxx]] <sup>189</sup>  Concerns seven certificates	18.5.2015	(a) air reservoir; (b) coil spring suspension; (c) finishing axis of [[xxx]] wagon type; (d) wheel-pairs of [[xxx]] wagon type; (e) passenger cars [[xxx]]; (f) finishing axis of [[xxx]] wagon type; and (g) open-top cars.	Scheme 3a (for the seven certificates), which requires: (a) inspection of production; and (b) test of samples at manufacturer.	<b>Instruction:</b> "According to the [CS FRT] rules, certificated products are subject to an inspection control as it is recorded in the conformity certificate. A deadline for the inspection control is April 2015. There are no conditions for inspection control up to the present moment."

<sup>187</sup> Letter [[xxx]] from the FBO to PJSC [[xxx]] with instruction [[xxx]] attached, 9 October 2014 (Letter [[xxx]] from the FBO of 9 October 2014), (Exhibit UKR-40)(BCI). See also Letter [[xxx]] from PJSC [[xxx]], 22 September 2017, (Exhibit UKR-138)(BCI) for the applicable schemes.

<sup>188</sup> Letter [[xxx]] from the FBO to PJSC [[xxx]] with instruction [[xxx]] attached, 11 February 2015 (Letter [[xxx]] from the FBO of 11 February 2015), (Exhibit UKR-42)(BCI). See also Letter [[xxx]] from PJSC [[xxx]], 22 September 2017, (Exhibit UKR-138)(BCI) for the applicable schemes.

<sup>189</sup> Letter [[xxx]] from the FBO to PJSC [[xxx]] with instruction [[xxx]] attached, 18 May 2015 (Letter [[xxx]] from the FBO of 18 May 2015), (Exhibit UKR-43)(BCI). See also Letter [[xxx]] from PJSC [[xxx]], 22 September 2017, (Exhibit UKR-138)(BCI) for the applicable schemes.

Suspension instruction	Date	Products covered	Scheme and type of Inspection	Reasons provided to suspend as given in the corresponding exhibits
Suspension instruction 12 - [[xxx]] <sup>190</sup> Concerns three certificates	8.6.2015	(a) tank cars; (b) boxcars; (c) freight bogie transversal brakes.	Scheme 3a (for the three certificates), which requires: (a) inspection of production; and (b) test of samples at manufacturer.	<b>Instruction:</b> "According to rules of [CS FRT], certified products are subject to inspectorial supervision, which fact is recorded in the conformity assessment certificates. The scheduled date for the inspectorial supervision is May 2015. Conditions for conduct of the inspectorial supervision are lacking up to date."
Suspension instruction 13 - [[xxx]] <sup>191</sup> Concerns one certificate	6.7.2015	Boxcars	Scheme 3a, which requires: (a) inspection of production; and (b) test of samples at manufacturer.	<b>Instruction:</b> "According to rules of [CS FRT], certified products are subject to inspectorial supervision, which fact is recorded in the conformity assessment certificates. The scheduled date for the inspectorial supervision is June 2015. Conditions for conduct of the inspectorial supervision are lacking up to date. "
Suspension instruction 14 - [[xxx]] <sup>192</sup> Concerns one certificate	7.9.2015	Cars for cement	Scheme 3a, which requires: (a) inspection of production; and (b) test of samples at manufacturer.	<b>Instruction:</b> "According to the [CS FRT] rules, certificated products are subject to an inspection control as it is recorded in the conformity certificate. A deadline for the inspection control is August 2015. There are no conditions for inspection control up to the present moment. "

<sup>190</sup> Letter [[xxx]] from the FBO to PJSC [[xxx]] with instruction [[xxx]] attached, 8 June 2015 (Letter [[xxx]] from the FBO of 8 June 2015), (Exhibit UKR-45)(BCI)(Corr.). See also Letter [[xxx]] from PJSC [[xxx]], 22 September 2017, (Exhibit UKR-138)(BCI) for the applicable schemes.

<sup>191</sup> Letter [[xxx]] from the FBO to PJSC [[xxx]] with instruction [[xxx]] attached, 6 July 2015 (Letter [[xxx]] from the FBO of 6 July 2015), (Exhibit UKR-46)(BCI). See also Letter [[xxx]] from PJSC [[xxx]], 22 September 2017, (Exhibit UKR-138)(BCI) for the applicable schemes.

<sup>192</sup> Letter [[xxx]] from the FBO to PJSC [[xxx]] with instruction [[xxx]] attached, 7 September 2015 (Letter [[xxx]] from the FBO of 7 September 2015), (Exhibit UKR-47)(BCI). See also Letter [[xxx]] from PJSC [[xxx]], 22 September 2017, (Exhibit UKR-138)(BCI) for the applicable schemes.

### 7.3.1.3 Panel's terms of reference

7.237. Ukraine challenges, under Articles 5.1.1, 5.1.2, and 5.2.2, 14 instructions through which the FBO suspended valid certificates of conformity held by Ukrainian producers of railway products. Ukraine requests findings from the Panel on each of the 14 instructions.<sup>193</sup>

7.238. Russia submits that in the relevant parts of Ukraine's panel request there is no indication that Ukraine requests findings from the Panel on each of the 14 instructions by Russia's authorities. Russia argues that in the absence of such request, findings by the Panel on the 14 instructions by Russia's authorities would be outside the terms of reference.<sup>194</sup>

7.239. The Panel considers that contrary to Russia's view, the terms of the panel request indicate that each of the instructions through which the FBO suspended valid certificates of conformity held by Ukrainian producers of railway products is a measure at issue. Point two of section II of the panel request describes the measure at issue as the "suspensions of conformity assessment certificates ... as mentioned in Annex I".<sup>195</sup> In turn, Annex I includes a list of 16 instructions through which the FBO suspended certificates of conformity held by Ukrainian producers of railway products. It is thus clear that Ukraine's panel request identifies, as challenged measures, 16 instructions issued by the FBO. We note that in subsequent communications Ukraine clarified that it had narrowed its challenge to only 14 of those 16 instructions.<sup>196</sup> On this basis, we consider that the 14 instructions challenged by Ukraine are properly within our terms of reference and that we can, and indeed must, make specific findings in respect of each.

### 7.3.2 Consistency of the suspensions with Article 5.1.1 of the TBT Agreement

7.240. We now turn to examine Ukraine's claims of violation under Article 5.1.1 of the TBT Agreement. The heading and the text of Articles 5.1 and 5.1.1 provide as follows:

Article 5: Procedures for Assessment of Conformity by Central Government Bodies

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

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

7.241. In addition, Annex 1.3 of the TBT Agreement defines conformity assessment procedures as follows:

Any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.

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<sup>193</sup> Ukraine's first written submission, para. 181; responses to Panel question Nos. 7(a) and 10(a), paras. 1 and 7-8; and opening statement at the first meeting of the Panel, para. 37.

<sup>194</sup> Russia's opening statement at the first meeting of the Panel, para. 21.

<sup>195</sup> WT/DS499/2, p. 2.

<sup>196</sup> Ukraine's first written submission, para. 181; responses to Panel question Nos. 7(a) and 10(a), paras. 1 and 7-8; and opening statement at the first meeting of the Panel, para. 38.

### Explanatory note

Conformity assessment procedures include, *inter alia*, procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval as well as their combinations.

7.242. Ukraine requests that the Panel find that each of the 14 instructions through which the FBO suspended valid certificates of conformity held by Ukrainian producers of railway products are inconsistent with Article 5.1.1. Ukraine argues that Russia suspended certificates held by Ukrainian producers of railway products without conducting inspection control of the products concerned, while maintaining the validity of certificates held by Russian producers of railway products and by producers of railway products from other countries after having conducted inspection controls. Ukraine considers that Russia has thus applied its conformity assessment procedure on railway products so as to grant access for suppliers of Ukrainian railway products under conditions less favourable than those granted to suppliers of Russian railway products and suppliers of railway products from other countries, in a comparable situation.<sup>197</sup>

7.243. Russia argues that the 14 instructions challenged by Ukraine are not inconsistent with Article 5.1.1. Russia submits that it was for Ukraine to demonstrate that the Ukrainian products at issue are like Russian products or products from other countries. Russia also maintains that, due to the security situation in Ukraine, the situation of suppliers of Ukrainian railway products cannot be compared with the situation of suppliers of Russian railway products and of railway products from other countries.<sup>198</sup>

#### 7.3.2.1 Interpretation

7.244. The Panel will first address the interpretation of Article 5.1.1. We note that this provision has not been interpreted by the Appellate Body or previous panels.

7.245. Ukraine submits that the introductory paragraph of Article 5.1 sets out the general scope of the obligations contained therein, which refer to "cases where a positive assurance of conformity with technical regulations or standards is required".<sup>199</sup>

7.246. Ukraine considers that three elements need to be demonstrated to establish a violation of Article 5.1.1, namely, (a) that the measure at issue is a conformity assessment procedure, as defined in Annex 1.3; (b) that the products of suppliers concerned are like domestic products or products from other countries, and (c) 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.<sup>200</sup>

7.247. Russia agrees with Ukraine that those three elements need to be demonstrated to establish a violation of Article 5.1.1.<sup>201</sup>

7.248. The Panel notes that Article 5.1.1 establishes obligations to provide national treatment and most favoured nation treatment (hereafter, for simplicity, non-discrimination obligations) with regard to access for suppliers from other Members to covered conformity assessment procedures of importing Members.

7.249. There are two requirements for a conformity assessment procedure to fall within the scope of Article 5.1.1. The first is found in the title and in the introductory paragraph of Article 5.1. They make clear that this provision concerns procedures for the assessment of conformity *by central government bodies*. The second requirement, which is also found in the introductory paragraph of

<sup>197</sup> Ukraine's first written submission, paras. 253-256; and second written submission, para. 149.

<sup>198</sup> Russia's first written submission, paras. 73-78; and second written submission, para. 87.

<sup>199</sup> Ukraine's first written submission, para. 250; and second written submission, para. 84.

<sup>200</sup> Ukraine's first written submission, paras. 251; and second written submission, paras. 85-87. See also Ukraine's first written submission, paras. 241-242, referring to the definition of a conformity assessment procedure.

<sup>201</sup> Russia's first written submission, para. 72.

Article 5.1, is that this provision applies in cases where a *positive assurance of conformity* with technical regulations or standards is required. Thus, Article 5.1.1 applies to mandatory conformity assessment procedures and not voluntary conformity assessment procedures.<sup>202</sup>

7.250. Article 5.1.1 provides that importing Members must "prepare", "adopt" and "apply" its conformity assessment procedures "so as to" grant no less favourable access conditions for suppliers of like products originating in other Members, in a comparable situation. It is therefore clear that a violation of Article 5.1.1 may result from the preparation or adoption of a conformity assessment procedure, as such, or from its application.

7.251. In our view, an importing Member acts inconsistently with one of the non-discrimination obligations in Article 5.1.1 in respect of a covered conformity assessment procedure if three elements are established:

- a. The suppliers of another Member who have been granted less favourable access are suppliers of products that are *like* the products of domestic suppliers or suppliers from any other country who have been granted more favourable access;
- b. the importing Member (through the preparation, adoption or application of a covered conformity assessment procedure) *grants access* for suppliers of products from another Member *under conditions less favourable* than those accorded to suppliers of domestic products or products from any other country<sup>203</sup>; and
- c. the importing Member grants access under conditions less favourable for suppliers of like products *in a comparable situation*.

7.252. We turn to examine each of these elements in more detail.

#### **7.3.2.1.1 Like products**

7.253. Regarding the first element, the "like products" analysis, the parties and certain third parties agree that for a measure to be inconsistent with Article 5.1.1, it has to apply to suppliers of products originating in the territory of another Member that are like domestic products or like products originating in any other country.<sup>204</sup>

7.254. The Panel notes that the text of Article 5.1.1 defines the product scope of the non-discrimination obligations in Article 5.1.1. The obligation to grant access under conditions no less favourable is limited to suppliers of such products originating in the territories of other Members as are "like" domestic products or "like" products originating in any other country. In our view, the same criteria that are applied for determining whether products are "like" in the context of Article 2.1 of the TBT Agreement are applicable in the context of Article 5.1.1. As discussed below, when addressing Ukraine's claims under Article 5.1.1, the parties have different views on how to establish that products are "like" in this dispute.

#### **7.3.2.1.2 The importing Member grants access for suppliers of products from another Member under conditions less favourable**

7.255. Regarding the second element, Ukraine argues that access is defined, *inter alia*, as the "the right or opportunity to benefit from or use a system or service".<sup>205</sup> Ukraine also refers to the fact that the second sentence of Article 5.1.1 confirms that access entails the suppliers' right to an assessment of conformity under the rules of the procedure which includes, where foreseen by that

<sup>202</sup> Along similar lines, Ukraine submits that mandatory certification means that a positive assurance of conformity with technical regulations is required. Ukraine's second written submission, paras. 84 and 106. See also United States' third-party submission, paras. 19-21.

<sup>203</sup> We recall that pursuant to the text of Article 5.1.1 of the TBT Agreement the relevant treatment concerns the "conditions" of access granted to suppliers from Members.

<sup>204</sup> Ukraine's first written submission, para. 251; Ukraine's second written submission, para. 87; Russia's first written submission, para. 72; European Union's third-party submission, paras. 37-41; and United States' third-party submission, paras. 27 and 29.

<sup>205</sup> Ukraine's second written submission, para. 87.



procedure, the possibility to have conformity assessment activities undertaken at the site of facilities and receive the mark of the system.<sup>206</sup>

7.256. Ukraine also submits that Article 5.1.1 is concerned with the "conditions" of "access" granted to suppliers of like products that are in a comparable situation and not with the modification of the conditions of competition *vis-à-vis* like products. In Ukraine's view, Article 5.1.1 prevents Members from imposing conditions, e.g. limitations or restrictions, on access to a conformity assessment procedure that are detrimental to suppliers of products from one or more WTO Members.<sup>207</sup>

7.257. The Panel notes that the second sentence of Article 5.1.1 clarifies the meaning of the term "access". Thus, access entails "suppliers' right to an assessment of conformity under the rules of the procedure, including, when foreseen by this procedure, the possibility to have conformity assessment activities undertaken at the site of facilities and to receive the mark of the system". This clarification indicates that the access to be examined in an Article 5.1.1 analysis relates to the conditions under which suppliers have been given the right to have the conformity of their products assessed under the rules of the relevant conformity assessment procedure.<sup>208</sup>

7.258. We next turn to the phrase "conditions no less favourable". To us, this phrase indicates that there is a need to undertake a comparative analysis of the conditions of access granted to suppliers of products from the complaining Member, on the one hand, and suppliers of like domestic products, or of like products from any other country, on the other hand. If this assessment reveals a difference in the access conditions granted to suppliers of the complaining Member, the issue arises whether that difference amounts to granting access under "less favourable" conditions.<sup>209</sup>

7.259. The Appellate Body and panels have interpreted the phrase "less favourable treatment" in the context of other provisions of the covered agreements governing trade in goods. Under those provisions, measures are considered to accord "less favourable treatment" if they adversely modify the conditions of competition of products imported from the complaining Member *vis-à-vis* like products of domestic origin or like products originating in any other country.<sup>210</sup>

7.260. Article 5.1.1 does not concern the manner in which a Member treats imported products from another Member. Rather, Article 5.1.1 focuses on suppliers and their conditions of access to a conformity assessment procedure. In our view, this is an important difference. However, similar to the situation in the context of less favourable treatment regarding imported products, it is clear to us that a mere difference in access conditions granted to suppliers of the complaining Member and other suppliers is not necessarily sufficient to conclude that access was granted under conditions less favourable.<sup>211</sup> In our view, differential access conditions are relevant under Article 5.1.1 if they modify the conditions of competition, or competitive opportunities, among relevant suppliers of like products to the detriment of suppliers of the complaining Member. We note in this regard that suppliers of like products compete for prompt and unconditional access to the importing Member's market and that Article 5.1 applies in cases where the importing Member requires a positive assurance of conformity with technical regulations or standards before the product can be placed on the importing Member's market.

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<sup>206</sup> Ukraine's first written submission, paras. 241-242 and 251; and second written submission, paras. 87-88.

<sup>207</sup> Ukraine's second written submission, paras. 95-98.

<sup>208</sup> An analysis under Article 5.1.1 also includes assessing whether suppliers have been given the possibility to have the conformity of their products assessed under the rules of the relevant conformity assessment procedure. Also relevant to an analysis under Article 5.1.1 is whether suppliers are able to exercise the right or possibility to have the conformity of their products assessed under the rules of the relevant conformity assessment procedure. United States' third-party submission, para. 30.

<sup>209</sup> Japan's third-party submission, para. 25.

<sup>210</sup> Appellate Body Reports, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.26 (regarding Article 2.1 of the TBT Agreement) and 7.278 (regarding Articles I:1 and III:4 of the GATT 1994); and *EC – Seal Products*, para. 5.116.

<sup>211</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 137. See Japan's third-party submission, para. 25.

7.261. We recall that Ukraine is challenging in this dispute, not the preparation or adoption of a conformity assessment procedure (i.e. not a conformity assessment procedure as such), but the application of a conformity assessment procedure to particular Ukrainian suppliers (i.e. individual instances of application of the procedure). In the case of a challenge to the application of a conformity assessment procedure, less favourable access conditions would in our view exist where the importing Member denies or limits the right or possibility of a supplier of another Member to have conformity assessment activities undertaken under the rules of the applicable conformity assessment procedure, either in respect of the entire conformity assessment procedure or any of its relevant parts, but does not deny or limit the right or possibility of access of another supplier of a like product from the importing Member or any other country.<sup>212</sup> Where the importing Member limits the right or possibility of two suppliers of like products to have conformity assessment activities undertaken, but in different ways, it would need to be examined further whether the difference confers a competitive advantage to one or other supplier. If that were the case, the disadvantaged supplier would have been granted access under conditions less favourable.

7.262. We note that the parties and certain third parties provided additional views on how a panel should determine whether a Member grants access under conditions less favourable. Those additional views concern whether in the context of Article 5.1.1 it is necessary to apply the test developed by the Appellate Body for determining the existence of less favourable treatment under Article 2.1 of the TBT Agreement.

7.263. Article 2 of the TBT Agreement concerns the preparation, adoption and application of technical regulations by central government bodies. Article 2.1 establishes Members' obligation to:

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

7.264. A complaining party must demonstrate three elements to establish that a measure is inconsistent with Article 2.1: (a) that the measure at issue is a "technical regulation"; (b) that the relevant products are "like products"; and (c) that the measure at issue accords less favourable treatment to the imported products than to the relevant group of like products.<sup>213</sup>

7.265. The Appellate Body identified a two-step analysis to be followed in examining the third element, that is, whether a technical regulation accords less favourable treatment to imported products under Article 2.1 of the TBT Agreement. The first step focuses on whether the technical regulation at issue modifies the conditions of competition to the detriment of such imported products *vis-à-vis* like products of domestic origin or like products originating in any other country. According to the Appellate Body, a finding that the measure at issue modifies the conditions of competition to the detriment of imported products is not sufficient to demonstrate less favourable treatment under Article 2.1. Hence, the second step focuses on whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products. The Appellate Body determined that where the detrimental impact caused by a technical regulation stems exclusively from a legitimate regulatory distinction, such technical regulation does not accord less favourable treatment to imported products within the meaning of Article 2.1.<sup>214</sup>

7.266. Ukraine argues that the second step of the non-discrimination test developed by the Appellate Body in the context of Article 2.1, i.e. whether the detrimental impact stems from a legitimate regulatory distinction, should be adjusted to the particularities of Article 5.1.1. Ukraine considers that unlike technical regulations, conformity assessment procedures do not, by their nature, establish distinctions between products. Rather, conformity assessment procedures seek to

<sup>212</sup> As Ukraine has not put forward an "as such" challenge, we do not need to address in this dispute whether in the case of a challenge to a conformity assessment procedure as such it would be necessary to undertake an analysis of the access granted for suppliers of the group of like products originating in the territory of the complaining Member compared to the access granted for suppliers of the group of like products originating in the territory of the importing Member or any other countries. See Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.281, which involved a challenge under Articles I:1 and III:4 of the GATT 1994 to the amended United States tuna measure as such.

<sup>213</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.25.

<sup>214</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.26.

ensure that products conform to technical regulations or standards. Ukraine submits that while technical regulations may pursue legitimate objectives including those identified in Article 2.2 of the TBT Agreement and the sixth recital of the TBT Agreement, conformity assessment procedures have the sole objective of determining "that relevant requirements in technical regulations or standards are fulfilled". Ukraine therefore considers that an assessment of whether any difference in the conditions of access stems from a legitimate regulatory distinction should be limited to claims of *de facto* discrimination and should be limited to the objective pursued by conformity assessment procedures. Ukraine suggests that this assessment would require establishing a rational connection between the difference in the access conditions and the objective of ensuring conformity with the technical regulation.<sup>215</sup>

7.267. Russia considers that there should be no automatic transposition of the legal test developed under Article 2.1 into the context of Article 5.1.1. In Russia's view, account must be taken of the differences in the text of these provisions and their object and purpose. Russia submits that the terms "in a comparable situation" in Article 5.1.1 are functionally equivalent to the terms "between countries where the same conditions prevail" in the *chapeau* of Article XX of the GATT 1994, and to the legitimate regulatory distinction prong of the less favourable treatment test under Article 2.1. Russia argues that the purpose of each of these clauses is to clarify that the existence of differences in treatment is not sufficient for there to be less favourable treatment, because a Member is only required to provide treatment no less favourable where a situation is comparable.<sup>216</sup> However, Russia considers that in cases of claims of *de facto* discrimination under Article 5.1.1, a complaining party needs to demonstrate that the different treatment of a Member's producers in comparison to those of other origin does not stem from a legitimate regulatory distinction.<sup>217</sup>

7.268. Canada, the European Union and Japan consider that claims of *de facto* discrimination under Article 5.1.1 require an assessment of whether the detrimental impact stems from a legitimate regulatory distinction.<sup>218</sup> The United States, however, considers that such an analysis is inappropriate, given the significant differences in text and structure between Article 5.1.1 and Article 2.1.<sup>219</sup>

7.269. The question therefore arises whether before reaching a conclusion on whether the importing Member has granted access under less favourable conditions, a panel must examine whether the identified difference in the conditions of access to a conformity assessment procedure stems from a legitimate regulatory distinction.

7.270. The Appellate Body has stated that the specific context provided by other provisions of the TBT Agreement is instructive in understanding the expression "treatment no less favourable" in Article 2.1. According to the Appellate Body, the specific context provided by, in particular, Annex 1.1, Article 2.2 and the second, fifth and sixth recitals of the preamble, supports a reading that Article 2.1 does not operate to prohibit *a priori* any restriction on international trade. On this basis, the Appellate Body concluded that a detrimental impact may not constitute less favourable treatment under Article 2.1 where it stems exclusively from a legitimate regulatory distinction.<sup>220</sup>

7.271. At the outset, we note that there are textual differences between Articles 2.1 and 5.1.1. The first sentence of Article 5.1.1 provides for most-favoured nation and national treatment obligations regarding the access for suppliers of like products to the importing Member's conformity assessment procedure. Unlike Article 2.1, the text of Article 5.1.1 qualifies these obligations by including the phrase "in a comparable situation".

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<sup>215</sup> Ukraine's second written submission, paras. 89-105. See also response to Panel question No. 28; and opening statement at the second meeting of the Panel, para. 57.

<sup>216</sup> Russia's first written submission, para. 72; response to Panel question No. 28; and opening statement at the second meeting of the Panel, para. 34.

<sup>217</sup> Russia's second written submission, para. 102.

<sup>218</sup> Canada's third-party statement, paras. 11-13; Canada's third-party response to Panel question No. 14, paras. 54-60; European Union's third-party submission, para. 66; European Union's third-party statement, para. 5; European Union's third-party response to Panel question No. 14 (referred to by the European Union as question No. 12), paras. 30-32; Japan's third-party submission, paras. 21-22 and 28-34; and Japan's third-party statement, paras. 12-17.

<sup>219</sup> United States' third-party statement, paras. 6-9; and third-party response to Panel question No. 14.

<sup>220</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para.7.30.

7.272. The inclusion of the phrase "in a comparable situation" confirms that Article 5.1.1 permits differential access conditions where they concern situations that are not comparable. Herein lies an important difference with Article 2.1, which does not contain the phrase "in a comparable situation". The phrase "in a comparable situation" preserves a degree of flexibility for the importing Member to design and apply its conformity assessment procedures in a situation-appropriate manner.

7.273. We are therefore not persuaded that there is a need to import into Article 5.1.1 the test developed by the Appellate Body in the different context of Article 2.1.

7.274. On the basis of the foregoing, we consider that it is not necessary to determine whether any differential conditions of access stem from a legitimate regulatory distinction, before reaching a conclusion on whether the differential access conditions amount to granting access under "less favourable" conditions. However, as indicated in the text of Article 5.1.1, even where the conclusion is that less favourable access conditions have been granted, it would still be necessary to go on to determine whether less favourable access was granted in a comparable situation.

### **7.3.2.1.3 The importing Member grants less favourable access conditions for suppliers of like products, "in a comparable situation"**

7.275. Regarding the third element, both the parties and certain third parties have submitted arguments regarding the qualifier "in a comparable situation".

7.276. Ukraine submits that the phrase "in a comparable situation" was included in Article 5.1.1 because the comparison under that provision is to be made between "suppliers" of like products. Ukraine considers that the terms "in a comparable situation" reflect the idea that the non-discrimination test can only be carried out when things are comparable. In Ukraine's view, previous Appellate Body findings made in the context of other agreements are useful to interpret the term "comparable" in Article 5.1.1. Ukraine considers those findings to support the view that if the situation of suppliers in one country presents common elements and is not "totally" different from the situation of suppliers in another country, they are to be regarded as "comparable" under Article 5.1.1. Ukraine further submits that the term "situation" is defined as "the condition or state of a thing", and that under Article 5.1.1 the relevant situation is that of the suppliers as it relates to the conformity assessment procedure. Ukraine also argues that the assessment of such "comparability" needs to be supplier-specific.<sup>221</sup>

7.277. Russia likewise underscores that the obligation in Article 5.1.1 applies in a comparable situation. Russia considers that circumstances such as war or civil unrest may objectively make it impossible, for example, for on-site inspection to take place in a given country and moment in time. Russia submits that such circumstances could entail that the country concerned would not be in a situation "comparable" to that of other countries that are not afflicted by war or civil unrest. Russia argues that the term "in a comparable situation" should be interpreted by reference to the phrase "countries where the same conditions prevail" in the preamble of the TBT Agreement.<sup>222</sup>

7.278. Canada considers that although 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 conformity assessment procedures to as wide a variety of potential suppliers as is possible, taking into consideration the legitimate policy goals of the importing Member. Canada submits that in assessing whether suppliers from the countries in question are "in a comparable situation", the Panel should thus focus its inquiry on factors relevant to the issue of "access" to the relevant conformity assessment procedure. According to Canada, there may be many situational differences between countries that do not pertain to access to conformity assessment procedures. Canada

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<sup>221</sup> Ukraine's opening statement at the first meeting of the Panel, paras. 44-45; second written submission, paras. 90-93 (citing Appellate Body Reports, *EC – Tariff Preferences*, para. 153, *US – Anti-Dumping and Countervailing Duties (China)*, para. 476; and *EC – Hormones*, para. 217) and 94 (citing from the online version of the Oxford English Dictionary).

<sup>222</sup> Russia's opening statement at the first meeting of the Panel, para. 26; second written submission, paras. 95-96 (referring to European Union's third-party submission, para. 42; European Union's third-party response to Panel question No. 4; Canada's third-party response to Panel question No. 14; and Japan's third-party response to Panel question No. 4); and opening statement at the second meeting of the Panel, para. 34.

submits that the extent to which, for instance, the security "conditions" in the country where a product is produced are relevant to the "situation" of a supplier depends on the particular product and the specific requirements of the conformity assessment procedure at issue. Moreover, Canada considers that the term "situation" may include the security situation in the relevant Member; however, such considerations are relevant only to the extent that the "supplier" or the conduct of a conformity assessment procedure is affected by that situation.<sup>223</sup>

7.279. Japan submits that Article 5.1.1 only applies when discrimination occurs between suppliers "in a comparable situation". According to Japan, a "comparable situation" under Article 5.1.1 is one that is capable of being compared, and thus covers a broad range of situations. Japan considers that suppliers need not have to be in an identical situation for the situations to be "comparable".<sup>224</sup>

7.280. The European Union considers that the terms "in a comparable situation" refer to the suppliers and perform a similar role as the term "like" in respect of products, in that they circumscribe the scope of the comparison to be performed under Article 5.1.1. The European Union submits that circumstances such as war or civil unrest could entail that the country concerned would not be in a situation comparable to that of other countries which are not afflicted by war or civil unrest.<sup>225</sup>

7.281. The United States submits that Article 5.1.1 requires an assessment of whether the "conditions" are "comparable" between the suppliers of products of different Members accorded different access to the conformity assessment procedure. According to the United States, the definition of the word "comparable" suggests that two things are of the same type, such that they can be compared, and that they are "similar" or equal. The United States considers that the question whether there is "a comparable situation" should not be posed as a free-standing assessment of whether suppliers of like products are in a comparable situation. Rather, the United States argues that such question should be framed as whether the suppliers of foreign products are given equal rights to access to a conformity assessment procedure as suppliers of products of other Members, in a comparable situation.<sup>226</sup>

7.282. The Panel notes that the phrase "in a comparable situation" qualifies the preceding part of the first sentence of Article 5.1.1, that is, the requirement to grant access under no less favourable conditions.<sup>227</sup> Thus, this phrase warrants a comparison of differential conditions of access with a view to determining whether the less favourable conditions of access are being granted despite the situation being comparable.

7.283. To determine whether the situation is comparable, such that no less favourable access conditions must be granted, it is necessary to identify relevant factors that render a situation comparable or not.<sup>228</sup> The relevant context, as is clear from the second sentence of Article 5.1.1, is that of assessing conformity under the rules of the procedure and conducting conformity assessment activities. We also consider that Articles 5.1.2 and 5.2.7 of the TBT Agreement provide useful context in this regard. They indicate that conformity assessment procedures must not be applied more strictly than necessary to give "the importing Member adequate confidence that products conform with the applicable technical regulations or standards" (Article 5.1.2) and that they serve to "determine whether adequate confidence exists that the product ... meets the

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<sup>223</sup> Canada's third-party statement, paras. 14-15; and third-party responses to Panel question Nos. 4, 14 and 15, paras. 15-17, 53, 63 and 69.

<sup>224</sup> Japan's third-party submission, paras. 26-27; third-party statement, para. 15; and response to Panel question No. 4, para. 7.

<sup>225</sup> European Union's third-party submission, para. 42; third-party statement, para. 5; and third-party responses to Panel question Nos. 4, 14 (referred to by the European Union as question 12) and 15 (referred to by the European Union as question 13), paras. 6-7, 31 and 35.

<sup>226</sup> United States' third-party submission, para. 31; third party statement, para. 8; and third-party responses to Panel question Nos. 4 and 15, paras. 11-13 and 34-35.

<sup>227</sup> We note that the equivalent phrase to "in a comparable situation" in the Spanish ("*en una situación comparable*") and the French ("*dans une situation comparable*") versions of Article 5.1.1, qualify the preceding part of the sentence that refers to the obligation not to prepare, adopt, or apply conformity assessment procedures so as to grant access under less favourable conditions.

<sup>228</sup> The adjective "comparable" is defined in the dictionary as "[a]ble to be compared " or "[w]orthy of comparison; fit to be compared". *The Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 469.

[applicable] technical regulations or standards concerned" (Article 5.2.7). This is confirmed by the definition of conformity assessment procedures in Annex 1.3 to the TBT Agreement. A conformity assessment procedure is "any procedure used directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled". Accordingly, aspects of a situation that have a bearing on, for instance, the ability of the importing Member to undertake such activities under the rules of the procedure with adequate confidence would, in principle, seem to be relevant. In our view, the relevant aspects of a situation would include aspects specific to the suppliers who are claimed to have been granted access under less favourable conditions or to the location of the suppliers' facilities. In all events, whether a situation is comparable must be assessed on a case-by-case basis and in the light of the relevant rules of the conformity assessment procedure and other evidence on record.

7.284. Article 5.1.1 does not specify what might render a situation no longer comparable. We need not, and do not, opine on that in the abstract. In this dispute, Russia has argued that the security situation in Ukraine and restrictions on the entry of Russian citizens to Ukraine rendered the situation no longer comparable for the purposes of on-site inspection control. This was allegedly due to the risk to life or health of Russian inspectors and is the focus of our assessment.

7.285. On the basis of these considerations, we now turn to examine Ukraine's claims that the 14 instructions through which the FBO suspended previously valid certificates issued to Ukrainian producers of railway products are inconsistent with Article 5.1.1.

### **7.3.2.2 Application**

#### **7.3.2.2.1 Nature of the claims**

7.286. Ukraine challenges, under Article 5.1.1, 14 instructions through which the FBO suspended valid certificates of conformity held by Ukrainian producers of railway products. Ukraine frames its claims as claims concerning the discriminatory application of a conformity assessment procedure in the 14 instructions.<sup>229</sup>

7.287. The Panel considers that Ukraine therefore has the burden of demonstrating that Russia applied its conformity assessment procedure for railway products so as to grant access for suppliers of like products originating in Ukraine under conditions less favourable than those accorded to suppliers of like Russian products or like products from other countries, in a comparable situation. Thus, we will focus our assessment on the manner in which Russia applied its conformity assessment procedure for railway products in the 14 instructions through which the FBO suspended valid certificates held by Ukrainian producers of railway products.

7.288. Ukraine has submitted general arguments in support of its claims of violation of Article 5.1.1 for the 14 instructions, without providing specific arguments in respect of each of those instructions. Similarly, Russia responds to Ukraine's claims without addressing each of the 14 instructions suspending valid certificates of conformity challenged by Ukraine. We therefore conduct our analysis at the general level of the arguments advanced by the parties, bearing in mind that Ukraine is challenging the 14 instructions individually. Moreover, we will make specific findings in respect of the 14 instructions challenged by Ukraine.

#### **7.3.2.2.2 Applicability of Article 5.1.1 and order of analysis**

7.289. It is uncontested between the parties that the 14 instructions challenged by Ukraine concern (a) conformity assessment by a central government body and (b) a mandatory conformity assessment procedure.<sup>230</sup> We consider that the evidence on record confirms that Article 5.1.1 is applicable to the 14 instructions.

7.290. First, the 14 instructions were issued by the FBO. According to the evidence on record, the FBO is the entity in charge of certification of railway transport in Russia. The FBO acts under the

<sup>229</sup> Ukraine's first written submission, paras. 181, 238 and 248; responses to Panel question Nos. 7(a) and 10(a), paras. 1 and 7-8; and opening statement at the first meeting of the Panel, para. 37.

<sup>230</sup> Ukraine's response to Panel question No. 64, paras. 129-130; and Ukraine's second written submission, para. 106. Russia's first written submission, para. 73.

jurisdiction of the Federal Agency of Railway Transport of Russia's Ministry of Transport.<sup>231</sup> It is thus clear that the FBO is a central government entity. Moreover, the instructions were based on Russia's conformity assessment procedure for railway products, the CS FRT Rules, which were adopted by the Directive of the Russian Ministry of Railways, a central government body of Russia.<sup>232</sup> We, therefore, consider that the instructions at issue concern conformity assessment by a central government body.

7.291. Second, the 14 instructions were issued to suspend certificates of conformity for railway products held by Ukrainian producers. Conformity certificates are defined as documents "issued under the Rules of [CS FRT] to confirm the conformity of the certified [railway transport facility] with the applicable requirements".<sup>233</sup> Railway products can only be circulated within Russia if they have obtained a certificate.<sup>234</sup> Thus, it is clear that the challenged instructions concern a mandatory conformity assessment procedure.

7.292. We now turn to examine the elements necessary to demonstrate an inconsistency with Article 5.1.1. We will first examine whether through the application of its conformity assessment procedure, Russia has granted access to such conformity assessment procedure to each of the five relevant suppliers of Ukrainian railway products (to whom the 14 instructions were addressed) under conditions less favourable than those accorded to suppliers of Russian railway products or to suppliers of railway products from any other country. For the purposes of that examination, we will assume that the relevant Ukrainian suppliers are suppliers of railway products "like" those of the Russian and other foreign suppliers whom Ukraine alleges to enjoy better access conditions. We will then examine whether each of the relevant suppliers of Ukrainian railway products have been granted differential access conditions to Russia's conformity assessment procedures, "in a comparable situation", before turning to whether the products of the suppliers compared are "like".

### **7.3.2.2.3 Whether Russia has granted access for specific suppliers of products from another Member under conditions less favourable**

7.293. Ukraine submits that the FBO suspended 73 certificates held by five Ukrainian producers of railway products based on the alleged impossibility to carry out inspection control of the certified products. Ukraine further argues that the instructions through which those certificates were suspended did not adequately specify the reasons behind the alleged "impossibility", nor did they indicate what steps should be taken by the affected producers to allow or facilitate the inspections. Ukraine further submits that the FBO rejected or ignored the suggestions submitted by some of the affected producers to provide arrangements for conducting inspection control visits in Ukraine. On this basis, Ukraine argues that the FBO refused access to the conformity assessment procedure for railway products, in the form of inspection control, to Ukrainian producers of railway products.<sup>235</sup>

7.294. Ukraine argues that the FBO did not take similar decisions regarding Russian suppliers or suppliers from other Members, which, according to Ukraine, have continued to enjoy unrestricted access to Russia's conformity assessment procedure for railway products. Ukraine supports this statement with evidence of certificates issued under CS FRT Rules. Ukraine asserts that producers in Russia and in the European Union still hold, 609 and 190 such certificates, respectively. According to Ukraine, given that CS FRT Rules require a yearly inspection control of the certified products, the fact that products in those countries still hold valid certificates demonstrates that inspections took place with regard to those producers. Ukraine further argues that this demonstrates that while certain Ukrainian producers of railway products have been denied access to Russia's conformity assessment procedure for railway products, this has not been the case for suppliers of Russian railway products and suppliers of railway products from other countries.<sup>236</sup>

<sup>231</sup> Extract from the FBO's website, (Exhibit UKR-81).

<sup>232</sup> CS FRT 01-96, (Exhibit UKR-2).

<sup>233</sup> Article 3.6 of CS FRT 01-96, (Exhibit UKR-2).

<sup>234</sup> Article 9.1 of CS FRT 01-96, (Exhibit UKR-2); and Article 29 of the Federal Law No. 184-FZ "On Technical Regulation" of 27 December 2002 (Law No. 184 "On Technical Regulation"), (Exhibit UKR-1).

<sup>235</sup> Ukraine's first written submission, paras. 253-254.

<sup>236</sup> Ukraine's first written submission, para. 255; and response to Panel question No. 85.

7.295. Ukraine submits that it follows that by refusing to carry out the inspections and by suspending the certificates on this basis, Russia applied its conformity assessment procedure for railway products to suppliers of Ukrainian railway products in a less favourable manner than that accorded to suppliers of Russian railway products and of railway products from other countries.<sup>237</sup>

7.296. Russia submits that the access conditions to Russia's conformity assessment procedure for railway products for suppliers of railway products are the same, irrespective of their origin and Ukraine failed to prove the contrary. Russia argues that the access conditions are established in the relevant technical regulations.<sup>238</sup>

7.297. Russia further submits that, contrary to what Ukraine argues, the FBO suspended certificates issued to Ukrainian producers as well as certificates issued to other Members. Russia also submits that there are certificates issued to Ukrainian producers which have not been suspended. Moreover, Russia argues that the conduct of the conformity assessment procedure may depend on the characteristics of the products subject to the instructions challenged by Ukraine. In Russia's view, the foregoing demonstrates that the suspension of certificates does not reflect discrimination against Ukrainian products.<sup>239</sup>

7.298. The Panel observes that Russia's conformity assessment procedure for railway products includes, amongst its different stages, the conduct of inspection control.<sup>240</sup> Inspection control is defined as the "control assessment of conformity" that is carried out in order to establish that the products being sold are still in conformity with the requirements confirmed during certification. Inspection control is to be carried out at least once a year throughout the period of validity of the certificate.<sup>241</sup> In our view, although inspection control happens after products have been issued certificates, it is part of a conformity assessment procedure for the purposes of the TBT Agreement. Inspection control is a requirement for verifying the continued conformity of the products at issue with the applicable technical requirements. We consider that it falls within the definition of "conformity assessment procedures" in Annex 1.3 to the TBT Agreement, which in the explanatory note refers, *inter alia*, to "inspection" and "verification and assurance of conformity".

7.299. Ukraine's claims concern Russia's alleged denial of access for five identified Ukrainian suppliers to one specific part of Russia's conformity assessment procedure, inspection control. In support of its claims, Ukraine provides compilations of publicly available information from the FBO's public register and from the CU's Unified Register. Ukraine submits this information as indirect evidence of the fact that the FBO conducted inspection control in respect of certificates of conformity for railway products held by Russian and European producers. Ukraine's argument is that if those certificates remained valid, the FBO must have conducted inspection control. Ukraine considers that suppliers of Russian and European railway products had access to a part of Russia's conformity assessment procedure for railway products, while the relevant suppliers of Ukrainian railway products did not.<sup>242</sup>

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<sup>237</sup> Ukraine's first written submission, para. 256.

<sup>238</sup> Russia's first written submission, para. 76; and second written submission, para. 92.

<sup>239</sup> Russia's second written submission, paras. 90-91; and opening statement at the second meeting of the Panel, para. 32.

<sup>240</sup> Article 13 of CS FRT 01-96, (Exhibit UKR-2).

<sup>241</sup> Articles 3.36 and 13.1 of CS FRT 01-96, (Exhibit UKR-2). See also Articles 3.2 and 5.3 CS FRT 12-2003, (Exhibit UKR-3), where inspection control is referred to as supervisory control (see Russia's response to Panel question No. 39(a)).

<sup>242</sup> Ukraine's first written submission, para. 255 (referring to Extract of the FBO's Register, (Exhibit UKR-12), concerning Ukrainian producers; Extract of Unified Register of Issued Certificates of Conformity and Registered Declarations of Conformity (Extract of Unified Register), (Exhibit UKR-13), concerning applications submitted by Russian companies on behalf of Ukrainian producers; Extract of the FBO's Register concerning European producers, (Exhibit UKR-53); and Extract of the FBO's Register concerning Russian producers, (Exhibit UKR-60)). In subsequent submissions, Ukraine provided additional evidence concerning the suspension of certificates held by Ukrainian producers through the following exhibits: List of producers holding certificates in 2013 and 2017, (Exhibit UKR-62)(BCI); and Extract of the FBO's Register indicating reasons for suspension, (Exhibit UKR-82).



7.300. Russia submits evidence demonstrating that the FBO suspended certificates held by Ukrainian producers as well as by European, Russian, Kazakh, and Swiss producers. Russia also submits evidence that the FBO did not suspend certificates held by certain Ukrainian producers.<sup>243</sup>

7.301. We note that the evidence demonstrates that, through the 14 instructions, the FBO suspended valid certificates held by the five affected suppliers of Ukrainian railway products. The evidence also demonstrates that the reason given for why the 14 instructions at issue suspended valid certificates was that the conditions for inspection control were not present at the time of issuance of the corresponding instruction.<sup>244</sup> In our view, this evidence proves that, in the case of the 14 instructions at issue, the FBO did not grant the affected suppliers of Ukrainian railway products access to inspection control, which is part of Russia's conformity assessment procedure for railway products.

7.302. Ukraine submits evidence demonstrating that suppliers of Russian and European railway products held certificates issued by the FBO under the CS FRT Rules.<sup>245</sup> As discussed above, certificates subject to yearly inspection control would remain valid only if the FBO examined their continued conformity. The fact that yearly inspection control had been carried out could be demonstrated directly through copies of the certificates or the inspection control acts. Ukraine instead relies on the FBO's Register, which indicates that certain producers hold valid certificates. We note that the evidence that Ukraine submits is not direct evidence that suppliers of European or Russian railway products had access to inspection control in order to maintain the validity of the certificates. However, we agree with Ukraine that a presumption arises from the continued validity of these certificates that the certificates held by suppliers of Russian and European railway products that were subject to yearly inspection control remained valid because the FBO conducted the necessary yearly inspection control. The evidence submitted by Ukraine includes certificates that remain valid and were issued to Russian and European suppliers who were subject to yearly inspection control. We consider this evidence to be sufficient to demonstrate that the FBO granted suppliers of Russian and European railway products access to inspection control, which is part of Russia's conformity assessment procedure for railway products.

7.303. There is also evidence on record indicating that the FBO suspended certificates held by suppliers of European, Belarusian, Kazakh, and Swiss railway products. It appears that these certificates were suspended for reasons other than the FBO's inability to conduct the inspection control, such as the failure of a holder of a certificate to conclude a contract with the certification body to conduct an inspection.<sup>246</sup> The evidence on record thus supports the view that the FBO denied only Ukrainian suppliers of railway products access to an assessment of continued conformity due to the impossibility to conduct inspection control. Also, we note that the fact that some European suppliers' certificates were also suspended does not alter the fact that other Russian and European suppliers' certificates were not suspended, as Ukraine notes. Ukraine does not need to show that all suppliers of like products from Russia or any other country were granted more favourable access conditions.

7.304. On the basis of the evidence on record, we consider that Ukraine has demonstrated that, through each of the 14 instructions, the FBO denied suppliers of Ukrainian railway products access to a part of Russia's conformity assessment procedure for railway products (inspection control)

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<sup>243</sup> Russia's second written submission, para. 90 (referring to Extract of the FBO's Register with respect to the suspended certificates, (Exhibit RUS-5); and Extract of the FBO's Register, (Exhibit UKR-12). See also Extract of the FBO's Register with respect to the suspended certificates (dates of suspension and reasons for suspension), (Exhibit RUS-85)(BCI).

<sup>244</sup> This is evidenced in each of the 14 instructions challenged by Ukraine (see Table 4 above). See also Extract of the FBO's Register, (Exhibit UKR-12); and Extract of the FBO's Register indicating reasons for suspension, (Exhibit UKR-82).

<sup>245</sup> Extract of the FBO's Register concerning European producers, (Exhibit UKR-53); and Extract of the FBO's Register concerning Russian producers, (Exhibit UKR-60). See also the following exhibits regarding certificates held by producers from Belarus and Kazakhstan: Extract of the FBO's Register concerning Belarusian producers, (Exhibit UKR-57); and Extract of the FBO's Register concerning Kazakh producers, (Exhibit UKR-55).

<sup>246</sup> Extract of the FBO's Register with respect to the suspended certificates (dates of suspension and reasons for suspension), (Exhibit RUS-85)(BCI). See Russia's responses to Panel question Nos. 16, 134(a) and 160.

while at the same time granting some suppliers of Russian and European railway products access to that same part of Russia's conformity assessment procedure for railway products.

7.305. The FBO's denial of access to inspection control resulted in the five relevant suppliers of Ukrainian railway products not being able to have access to an assessment of continued conformity under Russia's conformity assessment procedure for railway products. This prevented these suppliers of Ukrainian railway products from maintaining valid certificates, which, in turn, prevented them from entering the Russian market. The same has not been true for suppliers of Russian and European railway products that maintained valid certificates, as a result of their products maintaining access to inspection control. Consequently, this is a case where the Ukrainian suppliers affected by the 14 instructions have not been given the possibility to have certain conformity assessment activities (inspection control) undertaken, whereas Russian and European suppliers have been given that possibility. It is clear to us, therefore, that this difference modifies the conditions of competition for access to Russia's conformity assessment procedure for railway products to the detriment of each of the affected Ukrainian suppliers. We consider that this difference in access to a part of Russia's conformity assessment procedure amounts to Russia applying its conformity assessment procedure to the five relevant suppliers of Ukrainian railway products under conditions less favourable than those accorded to suppliers of Russian and European railway products. We consider that this conclusion is not affected by the fact that the FBO did not suspend all certificates held by suppliers of Ukrainian railway products. Ukraine is challenging each of the 14 identified instances of application of Russia's conformity assessment procedure (the 14 instructions through which the FBO suspended valid certificates), not the conformity assessment procedure as such. The fact that some suppliers of Ukrainian railway products did not have their certificates suspended does not alter the fact that Russia applied its conformity assessment procedure to deny access for the five Ukrainian suppliers to whom the 14 instructions are addressed.<sup>247</sup>

7.306. On the basis of the foregoing, we find that Russia, by issuing the 14 challenged instructions, applied its conformity assessment procedure so as to grant access for the relevant suppliers of Ukrainian railway products under conditions less favourable than those accorded to suppliers of Russian and European railway products. We now turn to examine whether Russia granted these Ukrainian suppliers access under less favourable conditions "in a comparable situation", before turning to assess whether the affected Ukrainian suppliers are suppliers of railway products that are "like" those of the Russian and European suppliers who enjoy better access conditions.

#### **7.3.2.2.4 Whether Russia has granted less favourable access conditions for specific suppliers of products, "in a comparable situation"**

7.307. Ukraine submits that suppliers of Ukrainian railway products are in a comparable situation to suppliers of Russian and European railway products.

7.308. Russia argues that the security and safety situation in Ukraine and the existence of entry restrictions on Russian nationals imposed by Ukraine places suppliers of Ukrainian railway products in a situation that is not comparable to that of suppliers of Russian and European railway products.

7.309. The Panel will examine the parties' arguments with a view to determining whether access was granted under less favourable conditions, despite the situation being "comparable".

##### **7.3.2.2.4.1 Horizontal considerations**

7.310. Russia submits that Ukraine failed to address the element of "in a comparable situation" under Article 5.1.1. Russia argues that the situation in Ukraine can hardly be compared to the situation in any other country supplying railway products to Russia. Russia considers that the FBO issued the 14 instructions suspending the certificates held by suppliers of Ukrainian railway products because it was impossible to carry out the inspection control of the certified products. Russia contends that this was due to certain activities in Ukraine, in particular, military actions within the territory of Ukraine that posed a threat to the lives and health of FBO employees. Russia

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<sup>247</sup> See also Panel Reports, *Argentina – Hides and Leather*, para. 11.260; and *US – Gasoline*, para. 6.14.

also indicated that FBO employees could not conduct inspections in Ukraine due to the existence of restrictions on the entry of Russian citizens into Ukraine.<sup>248</sup>

7.311. Ukraine argues that Russia's arguments on this matter have been a moving target. According to Ukraine, Russia first argued that the situation was not comparable because of the security situation in Ukraine, which posed a threat to the lives and health of FBO employees, and later added that it was also due to travel related requirements introduced by Ukraine that precluded FBO employees entering Ukraine to conduct inspections there. According to Ukraine, Russia has not been clear in indicating why the situation in Ukraine is not comparable.<sup>249</sup>

7.312. Ukraine submits that the explanations provided by Russia to support that the situation of suppliers of Ukrainian railway products was not comparable to that of suppliers of railway products from other countries have been provided *ex post*, in the course of these proceedings. Ukraine notes that only one of the 14 instructions referred explicitly to the security situation in Ukraine and to entry restrictions on Russian citizens entering Ukraine. According to Ukraine, the *ex post* nature of such explanations casts doubts on whether the FBO's instructions were truly motivated by those concerns.<sup>250</sup> Ukraine considers that the standard of review applicable under Article 5.1.1 requires the Panel to make an objective assessment of the facts presented by both parties.<sup>251</sup>

7.313. Russia submits that the evidence on record on the security and safety concerns is contemporaneous and originates from independent sources. Russia thus submits that the evidence is highly relevant for the Panel's disposition of Ukraine's claims.<sup>252</sup>

7.314. The Panel will examine the reasons provided by Russia in support of its view that the situation of suppliers of Ukrainian railway products is not comparable to that of suppliers of Russian railway products and of suppliers of railway products from other countries. In our view, conducting an objective assessment of the matter entails reviewing the explanations provided both in the challenged instructions and by Russia in these proceedings. We will conduct such an assessment on the basis of the evidence on record.

7.315. Ukraine considers that if the reason for the failure to carry out inspection control is the alleged general unsafe and insecure situation in Ukraine, such considerations should affect all suppliers in Ukraine. However, as recognized by Russia, nine Ukrainian producers located in the eastern part of the country were allowed to keep their certificates as a result of inspection control being conducted without on-site inspection. Ukraine considers that this fact demonstrates that security is not the true reason for refusing to complete the conformity assessment procedure, since the FBO could have similarly used a method other than on-site inspection to complete the certification procedure rather than invoking the impossibility of carrying out inspection control.<sup>253</sup>

7.316. Russia argues that the absence of inspections carried out in Ukraine is the consequence of the low safety conditions in Ukraine, additional travel-related requirements for Russian citizens introduced by Ukraine, and measures imposed by Ukraine concerning the possibility of prosecution of Russian citizens due to their prior entry into Crimea. According to Russia, these factors precluded employees from Russian certification bodies from travelling to Ukraine to conduct inspections there. Russia also refers to the existence of anti-Russian movements promoting an anti-Russian sentiment in Ukraine as a reason affecting the safety and security of FBO employees traveling to Ukraine. Moreover, Russia argues that it was possible to conduct inspection control without visiting the production site for some producers in eastern Ukraine because the conditions

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<sup>248</sup> Russia's first written submission, paras. 77-79 and 81; opening statement at the first meeting of the Panel, para. 23 and 25; and opening statement at the second meeting of the Panel, para. 35.

<sup>249</sup> Ukraine's second written submission, para. 119.

<sup>250</sup> Ukraine's second written submission, para. 120 (referring to Letter [[xxx]] from the FBO of 8 August 2014, (Exhibit UKR-15)(BCI); and also to the European Union's third-party submission (para. 43); and Japan's third-party submission (para. 17)).

<sup>251</sup> Ukraine's second written submission, paras. 123-127.

<sup>252</sup> Russia's opening statement at the second meeting of the Panel, para. 36.

<sup>253</sup> Ukraine's second written submission, para. 121. See Ukraine's opening statement at the first meeting of the Panel, paras. 49 and 51.

for off-site inspection were satisfied in respect of those producers, but not for those Ukrainian producers whose certificates were suspended.<sup>254</sup>

7.317. In view of the diametrically opposed positions of the parties, we must examine in detail the evidence that both parties have submitted. We will first examine the evidence related to the alleged uncertainty with respect to safety and security conditions in Ukraine, including the alleged anti-Russian sentiment. We then turn to examine the evidence regarding the alleged restrictions on the entry of Russian citizens to Ukraine. We will then conduct an examination of the totality of the evidence with a view to making an overall assessment of the situation.

#### **7.3.2.2.4.2 Uncertainty with respect to the safety and security of FBO employees travelling to Ukraine to conduct inspections**

7.318. Russia submits that the suspensions of certificates are due to uncertainty with respect to safety and security conditions within the territory of Ukraine that make it impossible for Russian inspectors to conduct conformity assessment procedures at the site of Ukrainian producers' facilities. Russia submits that such safety and security conditions include anti-Russian sentiment in Ukraine. Russia argues that the unsafe and dangerous conditions in Ukraine are evidenced by multiple publicly available sources.<sup>255</sup>

7.319. Ukraine considers that Russia's assertions about an alleged unsafe and insecure situation in Ukraine lack any basis. Ukraine argues that there is no evidence that the situation in Ukraine, as a whole, was dangerous for Russian citizens. Ukraine submits that it was safe for Russian inspectors to travel to Ukraine to conduct the required inspections between 2014 and 2017.<sup>256</sup>

7.320. The Panel notes that the parties provided evidence with respect to several aspects that they consider relevant for the Panel's assessment of the situation in Ukraine. We turn to examine the parties' arguments and evidence submitted in support of their assertions regarding the safety and security situation in Ukraine.

#### ***Incidents in several places in Ukraine and anti-Russian sentiment***

7.321. Russia submits that beginning in 2014 several incidents occurred in Ukraine based on the attitude towards Russian nationals. Russia refers the Panel to press articles indicating that such incidents included demonstrations that led to street fights and riots, violent confrontations in streets between "pro- and anti-Russian groups" that led to the death of dozens of people, and attacks against Russian banks in Kyiv.<sup>257</sup>

7.322. Ukraine argues that the press articles on which Russia relies concern events taking place in the Ukrainian city of Odessa, where none of the producers affected by the 14 instructions are located. Moreover, Ukraine considers that there is no evidence that the situation in the whole of Ukraine was dangerous for Russian citizens.<sup>258</sup>

7.323. Russia further argues that incidents also occurred throughout different regions of Ukraine, including those where the producers whose certificates were suspended are located.<sup>259</sup>

7.324. Ukraine responds that the evidence submitted by Russia referring to incidents in places other than Odessa does not correspond to the relevant time-frame for this dispute. According to Ukraine such time-frame corresponds to the dates during which the FBO adopted the instructions

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<sup>254</sup> Russia's first written submission, paras. 78-84; and responses to Panel question Nos. 15, 102, and 156.

<sup>255</sup> Russia's first written submission, para. 80; responses to Panel question Nos. 15 and 102; and opening statement at the second meeting, para. 32.

<sup>256</sup> Ukraine's opening statement at the first meeting of the Panel, para. 47; response to Panel question No. 53; and second written submission, paras. 128-129.

<sup>257</sup> Russia's first written submission, para. 80. See Russia's response to Panel question No. 46.

<sup>258</sup> Ukraine's opening statement at the first meeting of the Panel, para. 47; and second written submission, paras. 129 and 132.

<sup>259</sup> Russia's opening statement at the second meeting of the Panel, para. 38.

suspending certificates and the decisions rejecting applications for new certificates, that is, between 17 July 2014 and 7 September 2015.<sup>260</sup>

7.325. Ukraine also considers that the existence of anti-Russian sentiment would not be relevant to the issue of inspection controls, because these are requested by companies that wish to obtain the certificate and would seek to ensure a smooth and peaceful conduct of the inspection. Ukraine further argues that Russian inspectors are not required to perform publicly any of their functions and, thus, Ukraine fails to see how they could be exposed to anti-Russian sentiment while inspecting Ukrainian companies.<sup>261</sup>

7.326. Ukraine further submits that an assessment of "comparability" under Article 5.1.1 must be supplier-specific, meaning that authorities cannot generally refer to the alleged political situation of the country where suppliers are located without examining the situation of each specific supplier.<sup>262</sup>

7.327. Russia counters that it did not refer to the "political situation" to justify the challenged suspensions, but rather to the security situation in Ukraine.<sup>263</sup>

7.328. The Panel notes that Russia submitted various exhibits as evidence of the safety and security situation in Ukraine. We understand that through some of these exhibits Russia purports to demonstrate the existence of anti-Russian sentiment in Ukraine that affects the security of Russian citizens visiting Ukraine. Moreover, Russia submitted these exhibits as evidence of uncertainty about the safety of FBO employees visiting Ukraine to conduct inspections. The exhibits submitted by Russia consist mainly of news reports from international and national media outlets and refer to events that took place in Ukraine in January, February, March, and May 2014; February and November 2016; and May 2017.<sup>264</sup>

7.329. The January 2014 exhibit is a news report from online media regarding an incident in Ukraine. The report, dated 29 January 2014, refers to protesters occupying a city in Ukraine where one of the producers whose certificate was suspended by the FBO is located.<sup>265</sup>

7.330. Russia submitted two exhibits regarding incidents in Ukraine during February 2014. One is an international news report. That report refers to incidents that took place during the first half of February, which included the taking of government offices by protesters, actions against government officials, and manifestations of anti-government sentiment, in different cities around Ukraine, including one where one of the producers whose certificate was suspended by the FBO is located. The other exhibit is a monitoring report on the human rights situation in Ukraine published by an NGO. This report, dated 3 February 2014, refers to demonstrations taking place in different regions of Ukraine, including two where producers affected by the suspensions of certificates are located. The report indicates that the rallies and demonstrations were sometimes accompanied by acts of violence, which led to arrests and prosecution of people allegedly involved in the protests.<sup>266</sup>

7.331. The two exhibits regarding incidents in Ukraine during March 2014 are news reports. Both exhibits reported that there were rallies and demonstrations for and against Russian "intervention

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<sup>260</sup> Ukraine's opening statement at the first meeting of the Panel, para. 47; second written submission, para. 132; response to Panel question No. 114; and comments on Russia's responses to Panel question Nos. 116, 124, and 131. See also Ukraine's first written submission, paras. 70, 82, 92, 105 and 113 (regarding the location of the companies whose certificates were suspended by the FBO).

<sup>261</sup> Ukraine's response to Panel question No. 63, para. 127.

<sup>262</sup> Ukraine's opening statement at the first meeting of the Panel, para. 45.

<sup>263</sup> Russia's second written submission, paras. 94-97.

<sup>264</sup> We note that in its submissions and statements Ukraine has not commented on the accuracy of the information reported in the evidence submitted by Russia. We further note that Ukraine has not provided additional evidence that would cast doubt on the description of the events reported in the exhibits submitted by Russia.

<sup>265</sup> Media report, 29 January 2014, (Exhibit RUS-56).

<sup>266</sup> Media report, 20 February 2014, (Exhibit RUS-55); and Media report, 3 February 2014, (Exhibit RUS-59).

in Ukraine" in certain cities throughout Ukraine. At least one of those incidents occurred in a city where some of the producers affected by the suspensions are located.<sup>267</sup>

7.332. The three exhibits from May 2014 are international news reports referring to incidents in Odessa that month. One of the reports referred to an incident where pro-Russian activists died in a fire resulting from a confrontation with anti-Russian groups. The reports also referred to confrontation between pro- and anti-Russian groups in Ukraine.<sup>268</sup>

7.333. The exhibit referring to an incident in Ukraine during February 2016 is an international news report. This report states that "groups of protesters ... attacked two major Russian banks in Central Kiev as thousands of others marked the second anniversary of one of the most violent days of Ukraine's 2014 revolution".<sup>269</sup> The report also referred to continued conflict in the east of Ukraine, 9,000 deaths since the beginning of the conflict in March 2014, and 1.4 million displaced people as a result of the confrontation between the Ukrainian government and rebels in the eastern parts of the country.<sup>270</sup>

7.334. The exhibit referring to an incident taking place in Ukraine during November 2016 is an international press report. This report referred to attacks in Kyiv against a Russian bank in Kyiv, which had been subject to attacks in February 2016, and the office of a Ukrainian politician. The Ukrainian politician is reported to be known for having ties with senior officials in the Russian government.<sup>271</sup>

7.335. The exhibit referring to an incident taking place on 9 May 2017 in a city of Ukraine is a press report from a Ukrainian media outlet. This report referred to confrontations between representatives of Ukraine's Socialist Party and activists. At least one producer affected by the FBO's suspensions of certificates is located in the city where the events took place.<sup>272</sup>

7.336. We consider that the above-mentioned evidence is probative of the following aspects. First, starting in January 2014, civil unrest broke out in various areas of Ukraine, and this continued during the rest of that year. As part of that civil unrest, during the first half of 2014, there were incidents where people and police officers were injured and property was damaged, including in areas close to the location of producers whose certificates of conformity the FBO suspended. Second, subsequent to the first half of 2014, an armed confrontation erupted in the eastern regions of Ukraine. Third, from the beginning of 2014, anti-Russian sentiment was expressed at rallies and during protests in various places in Ukraine, until at least (based on the evidence before us) early May 2017.

### ***Russian citizens visiting Ukraine between 2013 and 2016***

7.337. Ukraine submits in rebuttal that millions of Russian citizens visited Ukraine between 2013 and 2016. Ukraine argues that Russian visitors to Ukraine included Russian citizens travelling for "official, business and diplomatic" purposes. Ukraine also argues that Ukraine remained amongst the favourite destinations for Russian travellers.<sup>273</sup>

7.338. The Panel notes that Ukraine submitted evidence in respect of (a) the number of Russian visitors that entered Ukraine between 2013 and 2016 and (b) Ukraine as a top destination for

<sup>267</sup> Media report, 2 March 2014, (Exhibit RUS-57); and Media report, 2 March 2014, (Exhibit RUS-58).

<sup>268</sup> Media report, 2 May 2014, (Exhibit RUS-33); Media report, 2 May 2014, (Exhibit RUS-34); and Media report, 6 May 2014, (Exhibit RUS-35). The Media report of 6 May 2014 (Exhibit RUS-35) refers to "forty-two people trapped by a fire ... suffocated or jumped to their deaths". According to the Media report of 2 May 2014 (Exhibit RUS-33) "police said at least 31 people were dead". The Media Report of 2 May 2014 (Exhibit RUS-34) states that "[p]olice said three people were shot dead and dozens of others wounded in running battles between people backing Kiev and pro-Russian activists in the port city [of Odessa]. Another man died later and a further 31 people were killed when a trade union building was set on fire as fighting continued into the evening, police said. ... The total death toll in Odessa later reached 43, Interfax-Ukraine reported".

<sup>269</sup> Media report, 20 February 2016, (Exhibit RUS-37).

<sup>270</sup> Media report, 20 February 2016, (Exhibit RUS-37).

<sup>271</sup> Media report, 22 November 2016, (Exhibit RUS-36).

<sup>272</sup> Media report, 10 May 2017, (Exhibit RUS-60).

<sup>273</sup> Ukraine's second written submission, para. 137. See also Ukraine's responses to Panel question Nos. 52, 91, and 114 (para. 15).

Russian travellers. The statistics submitted by Ukraine concerning Russian visitors to Ukraine shows that there is a stark decline in the number of Russian citizens who entered Ukraine annually between 2013 and 2017. In 2013, a total of 10,284,782 Russian citizens entered Ukraine. The total number of Russian citizens visiting Ukraine fell to 2,349,736 in 2014 and to 1,196,029 in 2015. It then rose to 1,401,889 in 2016 and by the end of June 2017 fell to its lowest level at 695,575.<sup>274</sup> Similarly, the number of Russian citizens visiting Ukraine for "official, diplomatic and business" purposes fell from 55,224 in 2013 to 8,196 in 2014, 3,823 in 2015 and 3,622 in 2016.<sup>275</sup> In absolute terms, it is clear that between 2013 and 2017 a large number of Russian citizens entered Ukraine each year. However, the decline in the number of Russian citizens travelling to Ukraine between 2013 and 2017 is significant. Moreover, there was a very steep decline in 2014, after which the yearly visitor numbers declined further and began fluctuating at a sustained low level. The numbers for official, diplomatic and business Russian travellers followed a very similar path.

7.339. The evidence submitted by Ukraine in support of its statement that Ukraine is among the top destinations for Russian travellers shows the following. First, for Russian customers of two private Russian travel agents the most popular foreign destination, during the winter of 2016, was Kyiv.<sup>276</sup> Second, there was a general decline in the number of Russian travellers abroad between 2014 and 2016; however, the number of trips by Russian citizens to Ukraine increased by about 150,000 in 2016 as compared to 2015.<sup>277</sup> Third, between 2014 and 2016 Ukraine was among the top ten destinations for Russian citizens travelling abroad.<sup>278</sup> This evidence suggests that Russian tourists continued travelling to Ukraine between 2014 and 2016. However, we understand that the statistics provided by Ukraine on Russian visitors to Ukraine include tourists. If so, this would suggest that the numbers of Russian tourists travelling to Ukraine before the year 2014 were likely much higher.

#### ***Report of the Office of the United Nations High Commissioner for Human Rights***

7.340. Russia for its part refers the Panel to a report by the OHCHR concerning the human rights situation in Ukraine between 16 November 2016 and 15 February 2017. According to that report, between mid-April 2014 and 15 February 2017, "OHCHR recorded 33,146 casualties in the conflict area in eastern Ukraine, among civilians, Ukrainian armed forces and members of the armed groups".<sup>279</sup> Russia submits that in total there were 9,900 people killed and 23,246 injured.<sup>280</sup>

7.341. Ukraine responds that Russia has failed to submit evidence supporting the number of casualties in Ukraine referred to in the report of the OHCHR. Moreover, Ukraine argues that the number of casualties among Ukraine's population cannot be used as evidence of a safety risk for Russian nationals, including FBO employees.<sup>281</sup>

7.342. The Panel considers that the information contained in the abstract of the report on the human rights situation in Ukraine from the OHCHR, submitted by Russia, is relevant to understanding the overall context of the security situation in Ukraine. The report highlights the negative effect of the "ongoing conflict"<sup>282</sup> in the eastern parts of Ukraine on the human rights of the population. In addition, the report refers to the number of Ukrainian casualties among civilians

<sup>274</sup> The latest numbers provided to the Panel are from the end of June 2017. Letter of the State Border Service of Ukraine dated 29 June 2017; extract from the website of the State Statistics Service of Ukraine (Letter of Ukraine's State Border Service of 29 June 2017), (Exhibit UKR-88).

<sup>275</sup> Statistics "On the number of Russian citizens that travelled to Ukraine for 'official, business and diplomatic' purposes in 2014-2016", (Exhibit UKR-92); and Letter of Ukraine's State Border Service of 29 June 2017, (Exhibit UKR-88).

<sup>276</sup> Gazeta.ru, "The most popular foreign city of winter was Kyiv", 1 June 2016, (Exhibit UKR-107); and LentaRu, "Ukraine enters the top 5 popular foreign country destinations for Russians", 25 July 2016, (Exhibit UKR-109).

<sup>277</sup> RBC, "Russian tourists in 2016 became less likely to travel abroad", 16 March 2016, (Exhibit UKR-108).

<sup>278</sup> Statistics on most popular destinations for Russian citizens in 2014-2016, (Exhibit UKR-110).

<sup>279</sup> 2017 OHCHR Report, (Exhibit RUS-61) para. 3.

<sup>280</sup> Russia's first written submission, para. 80; opening statement at the first meeting of the Panel, para. 23; and opening statement at the second meeting of the Panel, para. 39, (referring to 2017 OHCHR Report, (Exhibit RUS-61) para. 6).

<sup>281</sup> Ukraine's second written submission, para. 139.

<sup>282</sup> 2017 OHCHR Report, (Exhibit RUS-61), para. 5.

and armed forces and groups in the conflict area in eastern Ukraine between mid-April 2014 and 15 February 2017.<sup>283</sup> According to the report, "[s]pikes in hostilities in November and December 2016, and the drastic escalation over a very short time span at the end of January through the beginning of February 2017 caused damage to critical civilian infrastructure, including schools and medical facilities, further endangering civilians".<sup>284</sup> Thus, the report evidences the continued existence of a conflict in eastern parts of Ukraine, which has had a serious impact on the population of those areas.

### ***Visits to Ukraine by inspectors from other countries between 2014 and 2017***

7.343. Ukraine submits, in addition, that between 2014 and 2017 inspectors from other countries visited Ukraine and successfully conducted relevant inspections, both in respect of conformity assessment of railway products and data verification for anti-dumping investigations.<sup>285</sup> Specifically, Ukraine submitted two certificates of conformity issued to Ukrainian producers of railway products: one issued by a Belarusian certification body on the basis of an inspection conducted in Ukraine on 6 November 2014, and another issued by a Kazakh certification body on the basis of an inspection conducted in Ukraine on 12 January 2015.<sup>286</sup> Ukraine also submitted evidence of verification actions conducted in Ukraine, as part of anti-dumping investigations. These verifications were carried out by officials from (a) the European Union in Odessa in March 2015 and in Zaporizhstal and Kyiv in September 2016; (b) Pakistan in July 2016; and (c) India in the first quarter of 2017.<sup>287</sup>

7.344. Russia dismisses Ukraine's argument about on-site verification conducted by anti-dumping authorities of third countries in Ukraine, saying these visits are irrelevant. Russia considers that, between 2014 and 2016, government officials from other countries, including from Belarus and Kazakhstan, were not subject to the specific entry restrictions and general uncertainty with respect to safety conditions within the territory of Ukraine that affected Russian nationals.<sup>288</sup>

7.345. The Panel considers that the evidence submitted by Ukraine demonstrates that officials from Belarus, Kazakhstan, the European Union, Pakistan and India carried out inspections in different locations in Ukraine, including Kyiv and Odessa, between November 2014 and the first quarter of 2017. They did so despite the above-noted evidence of unrest, rallies and protests in various parts of Ukraine, and despite the armed conflict in eastern Ukraine. It must be noted, however, that there is no evidence on the record indicating that there was any hostile sentiment against nationals of these countries.

### ***Russia's Ministry of Foreign Affairs travel advice on Ukraine***

7.346. Russia submits as additional relevant evidence about the unsafe situation in Ukraine the travel advice issued by Russia's Ministry of Foreign Affairs. According to the travel advice provided by Russia, "[d]ue to the internal political crisis in Ukraine the risks associated with armed confrontations in the southern-eastern regions of the country shall be taken into account... Stay in the most regions of Ukraine can be very unsafe due to the anti-Russian attitude of the population encouraged by the present government, as well as increased initiative of ultranationalists".<sup>289</sup> Russia also asserts that other governments issued recommendations to exercise a high degree of

<sup>283</sup> 2017 OHCHR Report, (Exhibit RUS-61), paras. 3, 5, and 6.

<sup>284</sup> 2017 OHCHR Report, (Exhibit RUS-61), para. 4.

<sup>285</sup> Ukraine's response to Panel question No. 53; second written submission, para. 138; and responses to Panel question Nos. 114 and 147.

<sup>286</sup> Certificate of compliance [[xxx]] issued to PJSC [[xxx]], (Exhibit UKR-89)(BCI)(Corr.); and Certificate of compliance [[xxx]] issued to PJSC [[xxx]], (Exhibit UKR-90)(BCI).

<sup>287</sup> EU Commission Implementing Regulation 2016/90 imposing an anti-dumping duty on imports of steel ropes and cables from, *inter alia*, Ukraine, (Exhibit UKR-124) recital 12; Pakistan's Tariff Commission Report on anti-dumping duties on cold rolled coils/sheets from China and Ukraine, (Exhibit UKR-125) para. 16.3; and India's Department of Commerce Final Findings on an anti-dumping investigation concerning "cold-rolled flat products of alloy or non-alloy steel" from, *inter alia*, Ukraine, (Exhibit UKR-126) para. 4(q). See also Ukraine's response to Panel question No. 53.

<sup>288</sup> Russia's comments on Ukraine's response to Panel question No. 114.

<sup>289</sup> Direct quote from the English version submitted by Russia of the Travel advice of the Department of the Situation and Crisis Center of the Ministry of Foreign Affairs of Russia (Russia's Travel Advice), (Exhibit RUS-32).



caution when traveling to Ukraine; however, Russia did not submit any such recommendations from other governments to the Panel.<sup>290</sup>

7.347. Ukraine questions the probative value of the travel advice issued by the Russian Ministry of Foreign Affairs, on the basis that it may constitute a self-serving comment by a government attempting to justify a measure.<sup>291</sup>

7.348. The Panel notes that Russia has submitted evidence of the Russian Ministry of Foreign Affairs' position with respect to the safety of travelling to Ukraine. According to Russia, this evidence provides the Ministry's view from mid-2014 until early 2017. The information that Russia submits as reflecting the Ministry's view in mid-2014 was published on the Ministry's website. We note, however, that this document refers to events occurring in the first half of 2015.<sup>292</sup>

7.349. Between the second half of 2015 and early 2017, the Ministry of Foreign Affairs published information concerning different aspects of the security situation in Ukraine. The information provided related to: (a) risks associated with armed confrontation in the south eastern part of Ukraine; (b) potentially "very unsafe" conditions for Russian citizens staying in Ukraine "due to the anti-Russian attitude of the population encouraged by the present government, as well as the increased initiative of ultranationalists"; and (c) the frequent commission of "robbery, theft, extortion (in some cases by representatives of local law enforcement agencies), various financial frauds". The Ministry also issued a recommendation to avoid "places where military actions have been or are being conducted" as well as being present at "various kinds of demonstrations, in places of mass concentrations of people, where riots and clashes are possible".<sup>293</sup>

7.350. We note that governments around the world issue travel advice to warn their citizens against risks they may incur by travelling to different parts of the world, and citizens rely on such advice in organizing their travel. We therefore cannot accept Ukraine's assertion that the travel advice that Russia issued was self-serving and that it therefore lacks probative value. We further observe that the official advice that a government gives to its citizens should, in principle, also apply to its government officials. There are, however, certain caveats. For instance, in the case of some government employees who need to travel abroad, including but not limited to members of search and rescue forces, health experts or peacekeeping forces, their professional duties may expose them to greater risks than ordinary citizens would typically be willing to incur. Also, governments may be able to prepare or assist their employees for their missions abroad in a way that substantially mitigates any risks. Thus, there is not necessarily a contradiction if a government advises against citizen travel to certain countries or regions, even as it sends some of its own officials to those countries or regions.

#### ***Declaration from FBO employees refusing to visit Ukraine***

7.351. Russia submits a document from May 2017 in which 12 FBO employees confirm that they refused a request by the FBO's management to visit Ukraine to conduct inspections, citing concerns about risks to the life and health of government officials of Russia visiting Ukraine, possible inability to perform their duties due to intimidation, and the risk of criminal prosecution

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<sup>290</sup> Russia's first written submission, para. 80. See Russia's Travel Advice, (Exhibit RUS-32), which according to Russia was issued in mid-2014 (Russia's response to Panel question No. 60). See also News on the web-site of Russian Ministry of Foreign Affairs "On changing of the order of trips of Russian citizens to Ukraine", (Exhibit RUS-45); News on the web-site of Russian Ministry of Foreign Affairs "On changing of the order of trips of Russian citizens to Ukraine", (Exhibit RUS-46), and News on the web-site of Russian Ministry of Foreign Affairs "Statement of the Russian Ministry of Foreign Affairs in connection with the new restrictions of the Ukrainian authorities against Russian citizens", (Exhibit RUS-47).

<sup>291</sup> Ukraine's opening statement at the first meeting of the Panel, para. 47; second written submission, para. 131 (citing Panel Report, *Chile – Alcoholic Beverages*, para. 7.119); and response to Panel question No. 114.

<sup>292</sup> Russia's Travel Advice, (Exhibit RUS-32).

<sup>293</sup> Russia's Travel Advice, (Exhibit RUS-32); News on the web-site of Russian Ministry of Foreign Affairs "On changing of the order of trips of Russian citizens to Ukraine", (Exhibit UKR-45)(BCI); News on the web-site of Russian Ministry of Foreign Affairs "On changing of the order of trips of Russian citizens to Ukraine", (Exhibit UKR-46)(BCI); and News on the web-site of Russian Ministry of Foreign Affairs "Statement of the Russian Ministry of Foreign Affairs in connection with the new restrictions of the Ukrainian authorities against Russian citizens", (Exhibit UKR-47)(BCI).

linked to the status of being Russian government officials. Russia states that there was no consequence resulting from the employees' decision not to travel. Russia further states that under Russia's Labour Code, it is the employer's responsibility to ensure the safety of its employees, and that where an employee refuses to perform duties due to a threat to life or health, the employer must confer on the employee other duties until the threat has been eliminated.<sup>294</sup>

7.352. Ukraine questions the probative value of the declaration of FBO employees. Ukraine considers that this declaration is an unreliable *ex post* explanation that offers unsubstantiated speculation as to what could have happened to FBO employees in Ukraine. Moreover, according to Ukraine, this evidence actually confirms that the FBO's management deemed it safe to visit Ukraine in order to carry out inspections there.<sup>295</sup>

7.353. The Panel considers that the declaration of FBO employees has limited probative value. The declaration addresses the internal FBO decision-making process prior to issuance of the instructions challenged by Ukraine. It suggests that the FBO's management at least initially requested its inspectors to travel to Ukraine. It is submitted to indicate the sentiment shared by 12 FBO employees that certain conditions in Ukraine created uncertainty as to their safety and ability to perform their duties if they had to conduct inspections in Ukraine. However, we observe that the FBO's final and official position is reflected in the various instructions at issue.

#### ***Communications from Ukrainian producers to the FBO offering enhanced security conditions***

7.354. Russia submits, finally, that Ukrainian producers seeking inspections sent letters to the FBO offering to ensure the safety of FBO employees are evidence that there was uncertainty with respect to the safety of FBO employees when travelling to Ukraine.<sup>296</sup>

7.355. Ukraine submits that the fact that Ukrainian companies sent letters offering to ensure the safety of FBO employees does not prove, as Russia claims, that those producers recognized that there was uncertainty with respect to the safety of FBO employees. Ukraine considers that those letters were sent in response to the instructions suspending the certificates and, therefore, they do not constitute evidence of the recognition of risks to the safety of FBO inspectors.<sup>297</sup>

7.356. The Panel considers that, contrary to Russia's argument, the letters sent by Ukrainian producers to the FBO offering enhanced security arrangements are not probative of uncertainty about the safety of FBO employees visiting Ukraine. Such letters were an attempt by Ukrainian producers to convince the FBO to send its employees to their production sites for inspection control. Faced with the possibility of being unable to continue serving the Russian market, it was in the Ukrainian producers' commercial interest to offer special arrangements even if they were of the view that such arrangements were objectively unwarranted.<sup>298</sup>

#### **7.3.2.2.4.3 Restrictions on Russian citizens entering Ukraine**

7.357. Russia asserts that there are two restrictions on the entry of Russian citizens into Ukraine.

<sup>294</sup> Declaration of FBO employees, (Exhibit RUS-6)(BCI); Russia's first written submission, para. 82; opening statement at the first meeting of the Panel, para. 24; response to Panel question No. 61; and comments on Ukraine's response to Panel question No. 147.

<sup>295</sup> Ukraine's opening statement at the first meeting of the Panel, para. 48; second written submission, para. 133; and response to Panel question No. 114.

<sup>296</sup> Russia's first written submission, para. 82.

<sup>297</sup> Ukraine's opening statement at the first meeting of the Panel, para. 52; response to Panel question Nos. 51 and 54; second written submission, para. 135; and response to Panel question No. 114.

<sup>298</sup> Letter [[xxx]] from PJSC [[xxx]] to the FBO, 13 March 2015, (Exhibit UKR-21)(BCI); and Letter [[xxx]] from PJSC [[xxx]] to the FBO, 10 October 2014, (Exhibit UKR-41)(BCI). See also Letter [[xxx]] from PJSC [[xxx]] to the FBO, 12 May 2014, (Exhibit UKR-17)(BCI); and Letter [[xxx]] from PJSC [[xxx]] to the FBO, (Exhibit UKR-18)(BCI)(Corr.).

***Automatic prosecution in Ukraine of Russian citizens who visited Crimea after April 2014***

7.358. First, Russia argues that, according to Ukrainian legislation, persons who visited Crimea after April 2014 without following the procedure established by Ukraine in June 2015 shall be prosecuted by Ukrainian authorities. Russia argues that this poses a threat of unjustified prosecution to Russian citizens attempting to enter Ukraine, including FBO employees, if they have travelled to Crimea not in accordance with Ukrainian legislation adopted in June 2015.<sup>299</sup>

7.359. Ukraine submits that Russia has failed to demonstrate that, as a result of Resolution No. 367 of the Cabinet of Ministers of Ukraine, Russian citizens who travelled to Crimea after March 2014 would face up to 8 years of imprisonment, practically automatically. According to Ukraine, Resolution No. 367 does not concern the conditions for imprisonment, but rather the conditions for crossing the administrative border with Crimea.<sup>300</sup> Moreover, Ukraine argues that it has demonstrated that Resolution No. 367, read together with Ukraine's Criminal Code, does not provide for prosecution by Ukrainian authorities of persons visiting Crimea.<sup>301</sup>

7.360. The Panel considers that the evidence submitted by the parties demonstrates that Ukraine has in place a regulation governing the "Approval of the Procedure for Entry into and Exit from the Temporarily Occupied Territory of Ukraine". In addition, Article 332-1 of Ukraine's Criminal Code establishes three criminal offences linked to "violating the procedure of entry in the temporarily occupied territory of Ukraine and exit therefrom". The first offence is violating the procedure with "the aim of causing damage to interests of the state". Whoever commits this offence shall be "restricted of liberty" or imprisoned for up to three years. The second offence is violating the procedure "repeatedly or by a group of people in prior conspiracy, or by an official person using his or her official position". Whoever commits this offence shall be imprisoned for a term of three to five years and "debarred from holding certain office or engaging in certain activity" for a term of up to three years. The third offence arises where either of the two other offences is committed by "an organized group". Whoever commits this offence shall be imprisoned for a term of five to eight years and "debarred from holding certain office or engaging in certain activity" for a term of up to three years.<sup>302</sup>

7.361. The existence of the above-mentioned criminal offences in Ukraine's Criminal Code confirms that there is a possibility of prosecution if a Russian citizen commits any of those criminal offences. However, there is no evidence demonstrating that a simple violation of the procedure to enter and exit the territory in question, that is, a violation that does not meet the conditions for any of the three aforementioned criminal offences, would lead to an automatic prosecution, or even any prosecution.

***Restriction on the entry to Ukraine of Russian male citizens aged between 16 and 60***

7.362. Second, Russia submits that Ukraine imposed a restriction on the entry into Ukraine of Russian male citizens aged between 16 and 60. Russia asserts the existence of this restriction on the basis of, *inter alia*, a Protocol of the State Border Service of Ukraine, Border Department of Odessa, dated 17 April 2014. According to Russia, FBO employees considered those restrictions to constitute a prohibition on the entry of Russian male citizens into Ukraine. Russia considers that this is also confirmed by the fact that 15,000 Russian citizens were denied entry into Ukraine in

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<sup>299</sup> Russia's first written submission, para. 81. See Russia's responses to Panel question Nos. 15 and 46; and opening statement at the second meeting of the Panel, para. 37.

<sup>300</sup> These conditions include submitting the required documentation and crossing through specific check points (Resolution No. 367 of the Cabinet of Ministers of Ukraine "On Approval of the Procedure for Entry into and Exit from the Temporarily Occupied Territory of Ukraine," 4 June 2015 (Resolution No. 367), (Exhibit UKR-127 and Exhibit RUS-38). See Ukraine's response to Panel question No. 55; and second written submission, para. 134.

<sup>301</sup> Ukraine's opening statement at the first meeting of the Panel, para. 50; response to Panel question No. 55; second written submission, paras. 134 and 143; and responses to Panel question Nos. 114 and 148.

<sup>302</sup> Abstract from the Criminal Code of Ukraine (Ukraine's Criminal Code), (Exhibit RUS-22).

2014 and that Ukrainian border authorities regularly report the denial of entry into Ukraine to Russian citizens.<sup>303</sup>

7.363. Ukraine submits that it has demonstrated that the Administration of State Border Service of Ukraine did not send any orders to the Border Department of Odessa regarding the restrictions on the entry of male Russian citizens between 16 and 60. Ukraine further submits that FBO employees could in any event have entered Ukraine by presenting notarized originals of invitations, which are typically granted to inspectors at the request of the producer to be inspected. Moreover, Ukraine considers that the number of Russian citizens who were refused entry represents 0.7% of the total number of Russian citizens who entered Ukraine in 2014.<sup>304</sup>

7.364. The Panel considers that Russia submitted evidence that suggests that officials of the State border service for Odessa airport considered, in April 2014, that the Administration of State Border Service of Ukraine and the head of the Border Department of Odessa had put in place a restriction on the entry of certain Russian citizens into Ukraine; with the aim of preventing entry of "extremists"<sup>305</sup> into Ukraine. Such restriction notably included a suspension of the entry of Russian male citizens between 16 and 60 through the state border. The evidence also indicates that entry of this category of Russians into Ukraine could exceptionally be allowed in urgent situations. This evidence consists of a protocol of a meeting of 17 April 2014 between local State border service officials, airport administrators and representatives of various international and Russian airlines. The protocol indicates that it was decided, *inter alia*, that the competent services and airlines would implement measures aimed at providing timely and reliable information about international flights and passengers travelling on those flights.<sup>306</sup> The Russian Ministry of Foreign Affairs published a statement on this meeting, referring to information provided by the Odessa border service to Russian air carriers about "new" restrictions that Ukraine was imposing on Russian citizens. The statement also refers to similar information being provided to Russian air carriers in other airports, including Kyiv, Donetsk, Dnepropetrovsk and Kharkov.<sup>307</sup>

7.365. Ukraine seeks to rebut this evidence through the submission of different types of evidence. First, Ukraine submitted a communication from Ukraine's Administration of State Border Service to a Ukrainian producer seeking "clarification of the existing restrictions on entry of male nationals of the Russian Federation aged 16 to 60 into Ukraine", dated 8 August 2014. The communication advises the producer that "the law does not provide for restrictions on crossing the border of Ukraine by the male citizens aged 16 to 60".<sup>308</sup> Second, Ukraine submitted communications from Ukraine's Administration of State Border Service and Odessa's Border Department to Ukraine's Ministry of Economic Development and Trade that were prepared for the purposes of these proceedings. Through those communications, Ukrainian authorities deny the existence of entry restrictions and refer to the requirements applicable to foreigners seeking to enter Ukraine.<sup>309</sup> Third, Ukraine submitted certain regulations governing the entry into Ukraine of foreigners, including Russian citizens.<sup>310</sup> Ukraine also refers to the number of Russian visitors having entered

<sup>303</sup> Russia's second written submission, paras. 98-99; and responses to Panel question Nos. 15 and 118. See also Russia's comments on Ukraine's response to Panel question No. 114; and Protocol of the State Border Service of Ukraine, Border Department of Odessa, 17 April 2014 (Border Service Protocol), (Exhibit RUS-14).

<sup>304</sup> Ukraine's responses to Panel question Nos. 15, 98, 99 and 100; second written submission, paras. 141 and 144-145 and 147; opening statement at the second meeting of the Panel, para. 51; and responses to Panel question Nos. 114 and 153. See also response to Panel question No. 52; and comments on Russia's response to Panel question No. 118.

<sup>305</sup> Border Service Protocol, (Exhibit RUS-14).

<sup>306</sup> Border Service Protocol, (Exhibit RUS-14).

<sup>307</sup> News on the web-site of Russian Ministry of Foreign Affairs "Statement of the Russian Ministry of Foreign Affairs in connection with the new restrictions of the Ukrainian authorities against Russian citizens", (Exhibit RUS-47a and b).

<sup>308</sup> Letter from State Border Service of Ukraine to PJSC [[xxx]], (Exhibit UKR-30)(BCI)(Corr.).

<sup>309</sup> Letter No. 4422-05/26901-03 from the Administration of State Border Service of Ukraine to the Ministry of Economic Development and Trade of Ukraine, 3 August 2017, (Exhibit UKR-72); and Letter from Border Department of Odessa, 13 December 2017 (Exhibit UKR-147).

<sup>310</sup> The following exhibits contain regulations governing requirements for entry into Ukraine of foreigners: Ukraine's Law "On Border Control", (Exhibit UKR-114); Ukraine's Law "On the legal status of foreigners and stateless persons", (Exhibit UKR-115); Ukraine's Law No 1207-VII "On Securing the Rights and Freedoms of Citizens and the Legal Regime on the Temporarily Occupied Territory of Ukraine", 15 April 2014, (Exhibit UKR-116); Resolution No. 86 of the Cabinet of Ministers of Ukraine "On certain issues of the state border of Ukraine crossing", 4 March 2015, (Exhibit UKR-117); Resolution No. 884 of the Cabinet of Ministers

Ukraine between 2013 and 2017 as evidence of the non-existence of the alleged entry restrictions.<sup>311</sup>

7.366. We note that the communications from Ukraine's Administration of State Border Service indicate that Ukraine's legal framework does not provide for entry restrictions of Russian male citizens between 16 and 60. These communications refer to the requirements, prescribed in Ukraine's law, applicable to foreigners, including Russian citizens, who wish to enter into Ukraine. These include: (a) holding a valid passport; (b) absence of a previous decision prohibiting the entry into the country; (c) indicating and submitting evidence (e.g. an invitation letter) of the purpose of the visit; and (d) demonstrating sufficiency of funds. The regulations governing the entry of foreigners submitted by Ukraine also suggest that there are no entry restrictions on Russian males. Additionally, the letters sent to the Ministry of Economic Development and Trade indicate that Ukraine's Administration of State Border Service did not issue any orders restricting the entry of Russian citizens into Ukraine. Moreover, the Odessa Border Guard indicated that it did not have in its records the minutes of the meeting of 17 April 2014, submitted by Russia as Exhibit RUS-14.

7.367. We find it difficult to reconcile the parties' contrasting views and conflicting evidence on this matter. As mentioned, there is no indication in the official regulations submitted by Ukraine that Ukraine imposed a general prohibition or restriction on the entry of Russian male citizens aged between 16 and 60 into Ukraine.<sup>312</sup> And as we have seen above, many Russians continued to travel to Ukraine between 2014 and 2017. It is implausible, given the absolute figures involved and the fact that they cover tourism and thus families, that no Russian males aged between 16 and 60 were part of the Russian travellers visiting Ukraine. At the same time, it is also undisputed that Ukraine refused entry to some Russian citizens, even if the percentage of those affected may have been small. Russia argues that 15,500 Russian citizens were refused entry in 2014<sup>313</sup>, which compares to over two million Russian citizens who entered Ukraine during that same year. We also note in this respect that we lack evidence of the reasons for refusing entry. It is therefore not clear that these refusals targeted Russian males aged between 16 and 60.

7.368. As regards the protocol of the April 2014 meeting convened by the State border service at Odessa airport, and the Russian Ministry of Foreign Affairs' statement suggesting that the entry of Russian males would be suspended also at other airports, we note that there is no evidence before us indicating that the measures that were announced were implemented, or if they were, whether they remained in place. The travel advice of the Russian Foreign Ministry from sometime after February 2015 referred to Ukraine having announced, in April 2014, restrictions on entry for Russian males from 16 to 60 years of age.<sup>314</sup> In contrast, in a statement about conditions for entry into Ukraine from February 2015, Russia's Ministry of Foreign Affairs made no mention of any restrictions for Russian males aged between 16 and 60.

7.369. In sum, the evidence before us does not support the conclusion that Ukraine ever enforced, or systematically enforced, a general restriction on entry for males aged between 16 and

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of Ukraine "On approval of the Procedure of sufficient funds proof for foreigners and apartheid for entry into, stay in, transit through and leaving the territory of Ukraine and of calculation of such funds", 4 December 2013, (Exhibit UKR-118); and The Order of Administration of the State Border Service of Ukraine "On approval of Regulation on the State Border Protection Agency of the State Border Service of Ukraine, (Exhibit UKR-155) (Corr.). The following exhibits contain regulations on the entry into Ukraine of Russian citizens: Agreement between Ukraine and Russia on visa-free travels for citizens of Russia and Ukraine, 16 January 1997, (Exhibit UKR-119); Resolution of the Cabinet of Ministers of Ukraine No. 23 "On suspension of validity of certain provisions of the Agreement between the Government of Ukraine and Government of the Russian Federation on visa-free travels for citizens of the Russian Federation and Ukraine", 30 January 2015, (Exhibit UKR-120); and Agreement between Ukraine and Russia on the procedure of crossing Ukraine-Russian state border by citizens living in the border regions of Ukraine and Russia, (Exhibit UKR-123).

<sup>311</sup> Ukraine's comments on Russia's responses to Panel question No. 118.

<sup>312</sup> Resolution No. 86 of the Cabinet of Ministers of Ukraine "On certain issues of the state border of Ukraine crossing", 4 March 2015, (Exhibit UKR-117) suggests that Ukraine restricted the entry of Russian citizens residing in border areas through certain crossing points since 4 March 2015. See News on the web-site of Russian Ministry of Foreign Affairs "On changing of the order of trips of Russian citizens to Ukraine", (Exhibit RUS-46).

<sup>313</sup> Report on the governmental portal of Ukraine "Citizens of the Russian Federation to enter Ukraine on foreign passports, PM on the Government's decision", (Exhibit RUS-43).

<sup>314</sup> Russia's Travel Advice (Exhibit RUS-32).

60. However, the Odessa meeting protocol, as well as the communication from the Administration of State Border Service to a Ukrainian producer seeking clarification, confirm that in 2014 Ukraine created uncertainty on the part of Russia regarding the existence of any entry restrictions. It is not clear from the evidence before us whether this uncertainty persisted in the following years.

7.370. On the basis of the evidence examined above, we now turn to make an overall assessment of the evidence submitted by the parties.

#### **7.3.2.2.4.4 Overall assessment of the evidence submitted by the parties**

7.371. We recall that according to Russia, entry restrictions and uncertainty with respect to safety and security conditions in Ukraine, including anti-Russian sentiment, made it impossible for Russian inspectors to conduct conformity assessment procedures at the site of Ukrainian producers' facilities. Russia also submits that no similar entry restrictions or uncertainty with respect to safety conditions exist in Russia or in other countries.

7.372. Russia's arguments require us to examine whether the situation in which it is denying access to inspection control to suppliers of Ukrainian railway products is comparable to those situations in which it is granting access to inspection control to suppliers of Russian railway products and suppliers of railway products from other countries. Russia has identified the uncertainty of the safety and security situation as being the relevant aspect distinguishing these situations.

7.373. As we have noted, assessing whether the situation of Ukrainian suppliers is or is not comparable due to the safety and security conditions in Ukraine must be done on a case-by-case basis, through an examination of the totality of the evidence on record.<sup>315</sup>

7.374. We also note that Article 5.1.1 is to be applied by the competent body of the importing Member. The certification body of the importing Member must make a determination whether the situation is comparable, such that no less favourable access conditions must be extended to suppliers of like imported products. We underscore in this respect the importance of importing Members complying with their WTO obligations as a fundamental condition for the proper functioning of the multilateral trading system.<sup>316</sup> As is clear from the facts of this dispute, if FBO inspectors did not conduct inspections in Ukraine, suppliers of Ukrainian railway products sooner or later lost access to Russia's market, because the FBO proceeded to suspend their certificates of conformity. In our view, importing Members should not be lightly allowed to invoke an inability to carry out parts of their conformity assessment procedure, as this could undermine market access commitments.

7.375. Equally, however, we note that this dispute illustrates that inspections are often carried out abroad by government officials of the importing Member. In some situations, their life or health may be at risk if they had to carry out inspections regardless of the situation prevailing abroad. We think that responsive and responsible governments can and may take such vital interests of their citizens into account when determining whether their government officials can carry out inspections abroad. We recall that the Appellate Body and previous panels have acknowledged the importance of protecting human life and health.<sup>317</sup>

7.376. It thus emerges that, in the specific circumstances of a dispute such as ours, the importing Member in applying Article 5.1.1 may confront the need to weigh and balance the interests of suppliers of products originating in the territories of other Members in an assessment of conformity against its interest in safeguarding the life or health of its employees when undertaking conformity assessment activities, such as inspections, abroad. As noted, the protection of human life and health is a vital interest. However, there must be a rational relationship between the need to protect the life and health of inspectors travelling abroad and the situation prevailing in the

<sup>315</sup> See paragraph 7.283 above.

<sup>316</sup> See Article XVI:4 of the Marrakesh Agreement Establishing the WTO; and Appellate Body Report, *EC – Sardines*, para. 213.

<sup>317</sup> For instance, in the context of Article XX(b) of the GATT 1994, the Appellate Body has found that the preservation of human life and health is a vital value and important in the highest degree (Appellate Body Report, *EC – Asbestos*, para. 172).

country where inspections are to be carried out. In our view, the importing Member in principle benefits from a margin of discretion in carrying out such a weighing and balancing of interests, as appropriate to the circumstances, which include the importance of the interests at stake.

7.377. In our overall assessment of the evidence before us, we need to bear in mind the relevant time-period. The beginning of the relevant time-period is determined by the dates on which inspections were scheduled, as referred to in the 14 instructions suspending the certificates, that is April 2014 to August 2015.<sup>318</sup> Moreover, we note that there is no evidence before us that up until the date of the Panel's establishment on 16 December 2016, the FBO issued instructions determining that the conditions for suspending the certificates were no longer present. We infer from this that in the FBO's view continued suspension of certificates held by Ukrainian producers was warranted because the conditions for conducting inspection control in Ukraine were still not satisfied.<sup>319</sup> As the challenged suspensions were still in place on the date of the Panel's establishment, we consider that the time-period relevant to our assessment ends on 16 December 2016.

7.378. Looking at the evidence on record with that time-period in mind, we note that there was indeed uncertainty as to the security situation in Ukraine. There were protests and demonstrations against the Ukrainian government taking place in different parts of the country, including civil unrest, during the initial part of the relevant time-period. Moreover, there were reports that during the relevant time-period there had been armed confrontations between Ukraine's armed forces and rebels in the east of Ukraine.

7.379. The evidence on record also shows that there existed anti-Russian sentiment in several places in Ukraine, including areas where the suppliers affected by the 14 instructions challenged by Ukraine are located. In those areas, anti-Russian sentiment manifested itself during demonstrations against Russian intervention in Ukraine in March 2014 and in confrontations between the Ukrainian Socialist Party and activists in May 2017. In other areas, anti-Russian sentiment manifested itself through instances of violence against the property of Russian companies, and the office of a pro-Russian Ukrainian politician.

7.380. Based on the evidence before us, we consider that the FBO could be justifiably concerned about the life or health of any employees that it would send to Ukraine to carry out inspections. It is not clear that FBO employees were necessarily likely to go to places where protests or demonstrations were held or where civil unrest erupted. But the situation during the relevant time-period was marked by instability and unpredictability, and this was also reflected in the travel advice that Russia's Ministry of Foreign Affairs issued for the benefit of its own citizens. From the FBO's vantage point, it was therefore not readily apparent whether a given area of the country was sufficiently safe, or would remain so, to proceed with an inspection visit. Moreover, we believe that the evidence about anti-Russian sentiment supports the FBO's concerns about the life or health of its employees.

7.381. Against this background, we find it relevant and instructive to take into account the sharp drop in 2014, and the subsequent sustained low level up until 2016, both in the number of Russian citizens travelling to Ukraine and Russian citizens visiting Ukraine for official, diplomatic and business purposes. This suggests that a large number of Russian citizens decided autonomously in pursuit of their own interests, or their employers decided for them, that the situation in Ukraine changed in 2014 as it was no longer advisable to continue travelling there. In the light of this, it seems to us reasonable that FBO employees, and the FBO's management, could reach the same conclusion.

7.382. We recognize that large numbers of Russian citizens continued to travel to Ukraine in 2014 and thereafter. However, the fact remains that only a minority of those Russian citizens who travelled to Ukraine in 2013 continued travelling to Ukraine afterwards. Thus, the evidence on record suggests that the FBO's decision to suspend its inspection activities in Ukraine during the relevant time-period was in keeping with the decision of a very large number of ordinary Russian

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<sup>318</sup> See Table 4 above.

<sup>319</sup> We note that according to Article 8.4(a) of PC-FZT 08-2013, (Exhibit RUS-23), the FBO may suspend a certificate in case of absence of conditions for inspection control, "until there are conditions for ... implementation [of inspection control]".

citizens who decided to abstain from travel to Ukraine. To that extent, and recalling the other evidence on the record, the FBO's decision to consider the possible risk of sending government officials to Ukraine on official business does not appear to us as unreasonable in the specific circumstances and time-frame.

7.383. We recall that the competent body of the importing Members must bear in mind the legitimate interests of suppliers of products originating in the territories of other Members in an assessment of conformity, and the significant adverse impact on trade that the failure to carry out certain conformity assessment activities, such as inspection control, may have. We note in this respect that the FBO in this dispute opted for suspensions rather than the stricter withdrawals or cancellation of the relevant certificates of conformity. Moreover, the FBO needed to balance Ukrainian suppliers' interests against the interests of FBO inspectors, which in this dispute are vital, since they concern the life or health of employees under the responsibility of the FBO.

7.384. In sum, during the relevant time-period, the FBO did not act outside its margin of discretion by balancing the interests of Ukrainian suppliers and FBO employees and then erring on the side of ensuring the safety of the latter and determining that the conditions for carrying out inspection control in Ukraine were not satisfied.

7.385. The other aspects of the situation in Ukraine that were discussed by the parties relate to the evidence concerning entry restrictions and the risk of prosecution. Regarding the former, we have already indicated that to the extent that there was any uncertainty about the existence or otherwise of a limitation on the entry of Russian male citizens, this does not appear to be a sufficient reason not to carry out inspections in Ukraine. The evidence indicates that many Russians continued travelling to Ukraine. This should have created sufficient doubt about the correctness of the assumed limitation on entry of Russian male citizens.

7.386. As concerns the risk of prosecution of those who entered Crimea in contravention of Ukraine's regulation on the entry into that territory, we recall that prosecution is provided for in respect of three specific criminal offences that cover narrowly circumscribed circumstances. We recall that, as we understand the evidence, there is no basis for assuming that ordinary persons, such as FBO employees called upon to travel to Ukraine on official business, seeking to enter Ukraine after having visited Crimea in contravention of Ukraine's entry regulation would be prosecuted, let alone that prosecution would be automatic. We note in this connection that FBO officials would have been travelling to Ukraine in order to undertake conformity assessment activities that were necessary for Ukrainian suppliers to maintain their certificates, which in turn were needed to continue exporting to Russia. Accordingly, we are not persuaded that the alleged risk of prosecution provided a sufficient reason for the FBO to decide that it was not appropriate to carry out inspection control in Ukraine.

7.387. On the basis of the foregoing overall assessment of the evidence on record, we consider that in this instance related to risks to life and health of FBO inspectors, over the time-frame examined above, the situation in Ukraine was not comparable to other countries. We therefore find that, between April 2014 and December 2016, Ukrainian suppliers of railway products were denied no less favourable access in a situation that was not comparable to the situation in which Russia granted access to suppliers of Russian railway products and suppliers of railway products from other countries. This finding covers each of the 14 instructions challenged by Ukraine.

7.388. We underscore that our finding that the situation was not comparable relates to the specific time-period at issue. We note that developments subsequent to a panel's finding that a situation is not comparable could render a situation comparable, with the consequence that the importing Member would have to make a change in the access conditions granted for it to continue to act consistently with Article 5.1.1.

#### **7.3.2.2.5 Like product analysis**

7.389. Ukraine argues that Russia is granting access to Ukrainian suppliers of railway products under conditions less favourable than those accorded to suppliers of like Russian products and like products from other countries. According to Ukraine, likeness can be presumed when a measure distinguishes between products solely on the basis of a criterion unrelated to the products *per se*.



Ukraine submits that such criteria may include whether a particular product is definitively imported or sold domestically as well as the characteristics of the seller or purchaser of the product.<sup>320</sup>

7.390. Ukraine argues that the 14 instructions suspending valid certificates do not distinguish between products based on such traditional likeness criteria as the physical characteristics or end-uses of the products *per se*, but rather based on the location of the producer concerned, and thus the origin of the products. Ukraine submits that in the present dispute, likeness can therefore be presumed. Ukraine further considers that the fact that the FBO did not suspend certificates held by certain Ukrainian producers does not imply that the measures do not distinguish on the basis of the origin of the products. Ukraine argues that the origin distinction need not encompass all products originating in the territory of one Member versus all products originating in the territory of another Member. Moreover, Ukraine submits that in the case of the 14 instructions, the origin-based distinction constitutes at the same time a *de jure* distinction.<sup>321</sup>

7.391. Russia responds that Ukraine failed to provide any analysis of the railway products at issue and explain how those railway products are like domestic railway products and railway products from other countries. Russia argues that when Ukraine compares the certificates issued to Russian, European, Belarusian and Kazakh producers with those suspended to Ukrainian producers, Ukraine ignores that all these certificates are issued with respect to different railway products. Russia further submits that the presumption of likeness referred to by Ukraine will typically be permissible only in the case of measures involving a *de jure* distinction between products of different origin.<sup>322</sup>

7.392. Russia submits that Ukraine failed to identify a specific provision in Russian legislation that mandates a distinction based on the origin of the products. Russia further considers that the fact that certain Ukrainian producers hold no valid certificates cannot serve as evidence of an origin-based requirement, because there are other Ukrainian producers who hold such valid certificates. Russia argues that the likeness of the products at issue cannot, therefore, be presumed, but rather has to be demonstrated. Russia highlights in this respect that Ukraine did not provide any specific support for why, in its view, the Ukrainian products at issue are like Russian products or products from other countries.<sup>323</sup>

7.393. The Panel recalls its finding above that Russia has granted less favourable access for Ukrainian the five relevant suppliers, but that it has done so in a situation that is not comparable to the situation in which Russia granted access to suppliers of Russian and European railway products. In the light of that finding, it is not necessary to make additional findings on whether the railway products supplied by these Ukrainian suppliers are like Russian or European railway products whose suppliers have been granted more favourable access.

### 7.3.2.2.6 Conclusion

7.394. On the basis of the foregoing, the Panel concludes that Ukraine has failed to establish, in respect of each of the 14 instructions at issue, that Russia has acted inconsistently with its obligations under Article 5.1.1 of the TBT Agreement.

<sup>320</sup> Ukraine's first written submission, para. 195 (referring to Panel Reports, *US – Poultry (China)*, paras. 7.431-7.432; and *Colombia – Ports of Entry*, para. 7.357); opening statement at the first meeting of the Panel, para. 41 (referring to Panel Report *Colombia – Ports of Entry*, paras. 7.183-7.184); responses to Panel question Nos. 14, 65 and 97 (referring to Panel Reports, *Argentina – Hides and Leather*, paras. 11.168-11.170; and *China – Publications and Audiovisual Products*, paras. 7.1446 and 7.1447); and second written submission, para. 109.

<sup>321</sup> Ukraine's responses to Panel question Nos. 14 and 65; second written submission, paras. 110-113 and 115; and opening statement at the second meeting of the Panel, paras. 47-48.

<sup>322</sup> Russia's first written submission, paras. 74-75; opening statement at the first meeting of the Panel, para. 13; response to Panel question No. 14 (referring to Appellate Body Report, *Argentina – Financial Services*, para. 6.36); and second written submission, para. 89. See also second written submission, paras. 57-61.

<sup>323</sup> Russia's opening statement at the first meeting of the Panel, para. 14; response to Panel question No. 14; and second written submission, paras. 88-91.

### 7.3.3 Consistency of the suspensions with Article 5.1.2 of the TBT Agreement

7.395. The Panel now turns to examine Ukraine's claims of violation under Article 5.1.2 of the TBT Agreement. The texts of Articles 5.1 and 5.1.2 provide as follows:

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

...

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

7.396. Ukraine claims that each of the 14 instructions through which the FBO suspended certificates held by Ukrainian producers of railway products is inconsistent with Article 5.1.2. Ukraine submits that these inconsistencies arise from Russia applying its conformity assessment procedures with the effect of creating unnecessary obstacles to international trade. According to Ukraine, unnecessary obstacles to international trade exist because Russia applies its conformity assessment procedures more strictly than necessary to give itself adequate confidence that Ukrainian railway products conform with the applicable technical regulations, in the light of the risk non-conformity would create.<sup>324</sup>

7.397. Russia claims that the 14 instructions challenged by Ukraine are not inconsistent with Article 5.1.2. Russia argues that Ukraine failed to demonstrate how the alternative manners of application of the conformity assessment procedure that Ukraine identified make an equivalent contribution to giving Russia positive assurance that the relevant requirements of the technical regulations are fulfilled, at the level of protection sought by Russia.<sup>325</sup>

7.398. The Panel notes that Ukraine's claims are circumscribed to the application of Russia's conformity assessment procedure in the 14 identified instances and do not concern the preparation or adoption of the procedure. In other words, Ukraine has not raised any "as such" claim in respect of Russia's conformity assessment procedure but only claims in respect of the manner in which Russia applied its conformity assessment procedure in each of the challenged instructions.

#### 7.3.3.1 Interpretation

7.399. We will first address the interpretation of Article 5.1.2.<sup>326</sup>

7.400. Ukraine argues that pursuant to the introductory paragraph of Article 5.1, Article 5.1.2 applies in circumstances where a Member requires "a positive assurance of conformity with technical regulations". Ukraine submits that Article 5.1.2 consists of general obligations laid down in the first sentence, and an example of such obligations laid down in the second sentence. Ukraine relies on both sentences in order to establish that Russia acted inconsistently with its obligations under Article 5.1.2.<sup>327</sup>

<sup>324</sup> Ukraine's first written submission, para. 260; opening statement at the first meeting of the Panel, para. 55; and second written submission, para. 150.

<sup>325</sup> Russia's first written submission, para. 94; and second written submission, para. 115.

<sup>326</sup> We note that this provision was interpreted by the panel in *EC – Seal Products*. However, the Appellate Body found the panel's findings under Article 5.1.2 to be moot and of no legal effect. Appellate Body Report, *EC – Seal Products*, para. 5.70.

<sup>327</sup> Ukraine's first written submission, para. 262; and second written submission, paras. 153-155.

7.401. Russia submits that by virtue of Article 5.1.2, Members must not prepare, adopt or apply their conformity assessment procedures with a view to or with the effect of creating unnecessary obstacles to international trade.<sup>328</sup>

7.402. The Panel notes that Article 5.1.2 stipulates, in its first sentence, a general obligation not to prepare, adopt or apply conformity assessment procedures with a view to or with the effect of creating unnecessary obstacles to international trade. An example of a situation where an inconsistency with that general obligation would arise is set out in the second sentence of Article 5.1.2.

7.403. There are two requirements for a conformity assessment procedure to fall within the scope of Article 5.1.2. The first is found in the title and in the introductory paragraph of Article 5.1. They make clear that Article 5.1 concerns procedures for the assessment of conformity *by central government bodies*. The second requirement, which is also found in the introductory paragraph of Article 5.1, is that this provision applies in cases where a *positive assurance of conformity* with technical regulations or standards is required. Thus, Article 5.1.2 applies to mandatory conformity assessment procedures by central government bodies and not voluntary conformity assessment procedures.

7.404. We turn to examine the manner in which both parties suggest that the Panel should interpret Article 5.1.2, first sentence. We then turn to interpret Article 5.1.2, second sentence.

#### **7.3.3.1.1 Article 5.1.2, first sentence**

7.405. Ukraine considers that the obligation in the first sentence of Article 5.1.2 applies to the preparation, adoption, or application of conformity assessment procedures. According to Ukraine, the word "obstacle" in the first sentence is defined as a "hindrance" or an "obstruction". Ukraine notes that in Article 5.1.2 the word "obstacle" is qualified by the term "unnecessary". Ukraine submits that conformity assessment procedures that obstruct or hinder international trade more than necessary will therefore violate Article 5.1.2. Ukraine considers that this obligation is not limited to a situation in which the measures intend to create unnecessary obstacles to international trade but also those that have the effect of creating such obstacles.<sup>329</sup>

7.406. Ukraine submits that the phrase "with a view to or with the effect of creating unnecessary obstacles to international trade" in Article 5.1.2 may be interpreted on the basis of the Appellate Body's interpretation of the similar phrase in the first sentence of Article 2.2 of the TBT Agreement. According to Ukraine, the Appellate Body's guidance suggests that the Panel should assess the necessity of the obstacles to international trade resulting from the application of Russia's conformity assessment procedures by considering: (a) the degree of contribution made by the measure to the objective of achieving positive assurance of conformity with the relevant requirements of a technical regulation or standard; (b) the trade-restrictiveness of the measure; (c) the nature of the risks at issue and the gravity of consequences that would arise from not providing a positive assurance of conformity. Ukraine considers that in addition, as a conceptual tool, the Panel may also compare the measure with possible alternative, reasonably available, measures that are less trade-restrictive and would make an equivalent contribution to achieving a positive assurance of conformity, taking into account the risks non-fulfilment would create.<sup>330</sup>

7.407. Ukraine submits that the second sentence of Article 5.1.2 explains the meaning of the general obligation through a situation where a conformity assessment procedure may be found inconsistent with the first sentence. Ukraine considers that it is therefore not necessary for a complaining party to show an inconsistency with the requirements in both sentences in order for a panel to find a measure to be inconsistent with Article 5.1.2. Ukraine argues that an inconsistency with the first sentence could be established by demonstrating that a given conformity assessment procedure has the effect of creating unnecessary obstacles to international trade or by showing a breach of the specific requirement in the second sentence.<sup>331</sup>

<sup>328</sup> Russia's first written submission, para. 89; and second written submission, para. 109.

<sup>329</sup> Ukraine's first written submission, para. 263; and second written submission, para. 157.

<sup>330</sup> Ukraine's second written submission, paras. 158-162.

<sup>331</sup> Ukraine's first written submission, para. 264; and second written submission, paras. 164-165.

7.408. Russia considers that in order to establish a violation of Article 5.1.2, a complaining party has to show that there were alternative measures reasonably available to the responding party, capable of making an equivalent contribution to the achievement of the objective at the level of protection sought.<sup>332</sup>

7.409. The Panel recalls that the first sentence of Article 5.1.2 requires Members to ensure that their conformity assessment procedures are not prepared, adopted, or applied with a view to or with the effect of creating unnecessary obstacles to international trade.

7.410. The Appellate Body has found that the phrase "unnecessary obstacles to international trade" in the first sentence of Article 2.2 refers to the notion of "necessity". Article 2.2 of the TBT Agreement provides in relevant part:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.

7.411. The Appellate Body has indicated that in the context of Article 2.2, the second sentence qualifies the terms of the first sentence. Moreover, the Appellate Body considers that in the context of Article 2.2, the assessment of "necessity" involves a relational analysis of the trade-restrictiveness of the measure, its degree of contribution to the achievement of the relevant objective, and the risks non-fulfilment would create.<sup>333</sup>

7.412. We note that Article 2.2 concerns the preparation, adoption, and application of technical regulations by central government bodies. Similarly, Article 5.1.2 governs the preparation, adoption, and application of conformity assessment procedures by central government bodies.<sup>334</sup> Thus, the texts of both provisions have certain common elements. One such element is the reference, in the first sentence of both provisions, to "unnecessary obstacles to international trade". Following the Appellate Body's guidance, we consider that the reference in Article 5.1.2 to "unnecessary obstacles to international trade" refers to the notion of "necessity".<sup>335</sup>

7.413. We note that there is a difference between Article 5.1.2 and Article 2.2 in respect of the relationship between the first and the second sentence of these two provisions. Unlike Article 2.2, the second sentence of Article 5.1.2 does not qualify the terms of the first sentence; the term "*inter alia*" at the beginning of the second sentence of Article 5.1.2 indicates that it rather provides an illustration of a situation where a conformity assessment procedure would be prepared, adopted, or applied in a manner inconsistent with the first sentence. To that extent, we consider that a finding of inconsistency with the first sentence of Article 5.1.2 may rest entirely on findings made in respect of the second sentence of Article 5.1.2. Therefore, a complaining party may establish an inconsistency with the first sentence either by demonstrating that the conformity assessment procedure is applied with a view to or with the effect of creating an unnecessary restriction to international trade or through the specific means illustrated in the second sentence.

#### **7.3.3.1.2 Article 5.1.2, second sentence**

7.414. According to Ukraine, the analysis under the second sentence of Article 5.1.2 entails weighing and balancing (a) the trade-restrictiveness of the measure, (b) the degree of its contribution to the relevant objective, and (c) possible less trade-restrictive alternative measures. Ukraine argues that the only relevant objective in the context of the second sentence of Article 5.1.2 is that of giving the importing Member adequate confidence that products conform

<sup>332</sup> Russia's first written submission, para. 93; and second written submission, paras. 112-114.

<sup>333</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 318.

<sup>334</sup> We recall that pursuant to the definition provided in Annex 1.3 to the TBT Agreement, conformity assessment procedures are used to determine, directly or indirectly, that relevant requirements in technical regulations or standards are fulfilled.

<sup>335</sup> In discussing the second sentence of Article 5.1.2, we further develop the elements that need to be examined also when determining whether a conformity assessment procedure creates unnecessary obstacles to international trade.

with the applicable technical regulations or standards, taking account of the risks non-conformity would create. Ukraine submits that the relevant standard of confidence is "positive" and "adequate", which limit the level of confidence that Members may seek as regards the risk that goods might not satisfy the relevant requirements in technical regulations or standards.<sup>336</sup>

7.415. Ukraine submits that it is necessary for a panel assessing a claim under Article 5.1.2, second sentence, to examine whether by preparing, adopting or applying a conformity assessment procedure a Member is seeking to obtain adequate confidence of conformity. Ukraine submits that in making such a determination, a panel must carefully examine what is the objective pursued by the measure at issue. According to Ukraine, a panel must also examine whether a Member is, in fact, using the measure as a vehicle to discriminate arbitrarily or otherwise restrict trade in order to achieve an objective not authorized under Article 5.1.2. Ukraine considers that a Member suspending certificates or rejecting applications for new certificates on grounds other than lack of conformity of the products concerned or other imperative conditions without which conformity may not be reviewed (such as collection of information, payment of a fee, the selection of a sample, the siting of a facility) is thus applying its conformity assessment procedure inconsistently with Article 5.1.2.<sup>337</sup>

7.416. Russia considers that to establish if a measure is inconsistent with Article 5.1.2, second sentence, it is necessary to weigh and balance a measure's trade restrictiveness, the degree of its contribution to the relevant objective, and possible less trade-restrictive alternative measures. Russia submits that under Article 5.1.2 the only relevant objective is that of giving a positive assurance that the relevant requirements of the technical regulation are fulfilled. Russia agrees that conformity assessment procedures must not be applied more strictly than necessary to give Russia adequate confidence that products conform with the applicable technical standards.<sup>338</sup>

7.417. The Panel recalls that according to the second sentence of Article 5.1.2, Members must ensure that their conformity assessment procedures are not more strict, or are not applied more strictly, than necessary to give them adequate confidence of conformity, taking account of the risks non-conformity would create.

7.418. There are similarities and differences between the second sentence of Article 5.1.2 and the second sentence of Article 2.2 of the TBT Agreement. Focusing on the similarities, we consider that both provisions concern the notion of "necessity". To that extent, we consider it useful to refer to the Appellate Body's guidance on the meaning of the second sentence of Article 2.2.

7.419. The Appellate Body and previous panels have interpreted the concept of "more trade-restrictive than necessary" in the context of Article 2.2 of the TBT Agreement. According to the Appellate Body, the task of a panel under Article 2.2 is to determine whether the technical regulation at issue restricts international trade beyond what is necessary for that technical regulation to achieve the degree of contribution that it makes to the achievement of a legitimate objective. The Appellate Body has found that to make such a determination a panel should undertake a holistic weighing and balancing of several factors: (a) the degree of contribution made by the measure to the legitimate objective at issue; (b) the trade-restrictiveness of the measure; and (c) the nature of the risks at issue as well as the gravity of the consequences that would arise from non-fulfilment of the objective pursued by the Member through the measure. In addition, except where the measure is not trade-restrictive or does not contribute to achieving the relevant objective, a panel should compare the challenged measure against possible alternative measures. Such comparison requires examining the following aspects of the proposed alternative: (a) its trade-restrictiveness; (b) whether it would make an equivalent contribution to the relevant objective, taking account of the risks non-fulfilment would create; and (c) whether it is reasonably available to the importing Member.<sup>339</sup>

7.420. These considerations provide useful guidance for interpreting the second sentence of Article 5.1.2. A relevant difference between the second sentence of Article 2.2 and that in

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<sup>336</sup> Ukraine's first written submission, paras. 264-265; opening statement at the first meeting of the Panel, paras. 59-61; and second written submission, paras. 166-167 and 172-180.

<sup>337</sup> Ukraine's second written submission, paras. 168-170.

<sup>338</sup> Russia's first written submission, para. 91.

<sup>339</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.197-5.198.

Article 5.1.2 is that while the former uses the phrase "necessary to fulfil a legitimate objective", the latter uses the phrase "necessary to give the importing Member adequate confidence that the products conform with the applicable technical regulations or standards". In our view, this textual difference indicates that the only relevant objective for an examination under the second sentence of Article 5.1.2 is that of giving the importing Member adequate confidence of conformity.

7.421. We observe that the reference to "adequate" confidence acts as a limit on the type or level of confidence that an importing Member may seek to achieve through its conformity assessment procedures or their application.<sup>340</sup> The immediate context indicates that what is "adequate" confidence depends on "the risks [that] nonconformity would create". Thus, more confidence might be required, for instance, in situations where the likelihood of the risks materializing is higher or where the risks to be controlled concern very important legitimate objectives. Moreover, more confidence could be achieved depending on the applicable conformity assessment procedures. However, a type or level of confidence that is more than "adequate", taking account of the risks that may result from non-conformity with the underlying technical regulations or standards, could not be enforced consistently with the second sentence of Article 5.1.2.

7.422. Another difference between the second sentence of Article 2.2 and that in Article 5.1.2 is that the former uses the concept of "trade-restrictiveness", whereas the latter uses the concept of "strictness" or "strict application". As we see it, a conformity assessment procedure that is more trade-restrictive than necessary, or is applied in a more trade-restrictive manner than is necessary, would constitute a conformity assessment procedure that is more strict than necessary, or a conformity assessment procedure that is applied more strictly than necessary. This is so because the first sentence of Article 5.1.2 prohibits Members from "creating unnecessary obstacles to international trade" and the second sentence indicates that "[t]his means" that a conformity assessment procedure must not be more strict, or be applied more strictly, than necessary. However, there may be other ways (not involving the restriction of trade *per se*) in which a conformity assessment procedure could be more strict, or could be applied more strictly, than necessary and could thus fall foul of the second sentence of Article 5.1.2.

7.423. On the basis of the foregoing, we will undertake a holistic weighing and balancing of the following factors to determine whether Russia applies its conformity assessment procedure consistently with the second sentence of Article 5.1.2. First, we will examine the contribution of Russia's application of its conformity assessment procedure to the objective of giving Russia adequate confidence that Ukrainian railway products conform with the relevant technical regulations.<sup>341</sup> Second, we will examine the strictness of the manner in which Russia applies its conformity assessment procedure, which includes its trade restrictiveness. Third, we will examine the nature and gravity of the risks that non-conformity would create. After having examined those elements, we will compare the manner of applying the procedure chosen by Russia against the alternative manners of applying Russia's conformity assessment procedure suggested by Ukraine, except if the manner of applying the procedure chosen by Russia does not contribute to giving Russia adequate confidence of conformity. We will determine for the identified alternative manners of applying Russia's procedure whether they (a) are less strict; (b) provide an equivalent contribution to giving Russia adequate confidence of conformity; and (c) are reasonably available to Russia.

7.424. Regarding the reasonable availability of an alternative manner of applying Russia's procedure, we consider that this element would be satisfied if the alternative option is not merely theoretical in nature, the importing Member is capable of utilizing it, and it does not impose an

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<sup>340</sup> United States' third-party submission, para. 38; and response to Panel question No. 19, para. 45.

<sup>341</sup> The parties have in a number of instances referred to the contribution that Russia's manner of applying its conformity assessment procedure makes to the objective of achieving "positive assurance of conformity" of railway products with the applicable technical regulations. We note that in accordance with Article 5.1 and 5.2, Article 5.1.2 applies to conformity assessment procedures that require "a positive assurance of conformity" with technical regulations or standards, i.e. to mandatory conformity assessment procedures. However, Article 5.1.2, second sentence, refers to "giv[ing] the importing Member adequate confidence that products conform with the applicable technical regulations or standards". Therefore, what needs to be examined under Article 5.1.2 is the contribution that a challenged manner of applying a conformity assessment procedure makes to the objective of giving the importing Member adequate confidence that products conform with the applicable technical regulations or standards.

undue burden on the importing Member, such as prohibitive costs.<sup>342</sup> In the specific context of a challenge concerning exclusively the "application" of a conformity assessment procedure (and not the procedure as such), it is clear to us that the competent body has to operate within the constraints of the domestic law in force at the time and cannot apply the conformity assessment procedure in a manner that the domestic law does not authorize.<sup>343</sup> We therefore consider that an alternative manner of applying a conformity assessment procedure that is not permissible under the applicable domestic law should not be considered reasonably available to the importing Member.<sup>344</sup> Before turning to examine Ukraine's claims in respect of the challenged measures, we address how the burden of proof should be allocated under Article 5.1.2.

### 7.3.3.1.3 Burden of proof

7.425. Ukraine argues that, under Article 5.1.2, the complaining party carries the burden of proving that the measure at issue creates unnecessary obstacles to trade and therefore is inconsistent with Article 5.1.2. Ukraine submits that in satisfying that burden and thus making a *prima facie* case, a complaining party may seek to identify less trade-restrictive alternative measures that are reasonably available and make an equivalent contribution to providing a positive assurance of conformity. According to Ukraine, where a complaining party identifies an alternative measure, it need not demonstrate that the proposed alternative measure makes an identical contribution to the level of confidence of conformity, nor does it need to provide detailed information on the specific implementation of the proposed alternative measure. Ukraine submits that once the complaining party identifies alternatives that are reasonably available and make an equivalent contribution to the relevant objective, the burden shifts to the responding party to demonstrate that the challenged measure is not more trade restrictive than necessary and, if relevant, that the proposed alternatives are not reasonably available alternatives.<sup>345</sup>

7.426. Russia considers that in order to establish an inconsistency with Article 5.1.2 a complaining party has to show that there were alternative measures reasonably available to the responding party, capable of making an equivalent contribution to the achievement of the objective at the level of protection sought.<sup>346</sup>

7.427. The Panel recalls that Article 5.1.2, second sentence, contains an obligation to apply conformity assessment procedures no more strictly than necessary. To make a *prima facie* case that the importing Member has applied its conformity assessment procedure inconsistently with Article 5.1.2, second sentence, the complaining party needs to demonstrate that the importing Member's chosen manner of applying its conformity assessment procedure is more strict than necessary to give the importing Member adequate confidence of conformity. The complaining party can meet this burden by demonstrating, for instance, that the manner of applying the conformity assessment procedure chosen by the importing Member does not contribute to giving the importing Member adequate confidence of conformity. Alternatively, the complaining party can meet this burden by reference to alternative manners of applying the conformity assessment procedure. Under this second approach, the issue arises as to what the complaining party needs to demonstrate in respect of any identified alternative manners of application.

7.428. In considering this issue, we recall that Article 2.2, second sentence, of the TBT Agreement has a similar structure and text to that of Article 5.1.2, second sentence. Although we are mindful of the differences with regard to the type of measure subject to each provision and the objectives to be fulfilled by covered measures, we consider it appropriate to look at how the Appellate Body and a previous panel have allocated the burden of proof under Article 2.2.

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<sup>342</sup> See also Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.330.

<sup>343</sup> In this context, we note that the domestic law in force at the time includes the rules governing the conformity assessment procedure as well as any other general or specific applicable rules that govern the competent body.

<sup>344</sup> We note that any concern on the part of a complaining party about certain alternative manners of applying a conformity assessment procedure not being permissible under the applicable domestic law of the responding party could be pursued by the complaining party through a claim that a conformity assessment procedure as such is inconsistent with Article 5.1.2.

<sup>345</sup> Ukraine's second written submission, para. 163.

<sup>346</sup> Russia's first written submission, para. 93; and second written submission, paras. 112-114.

7.429. According to the Appellate Body, under the second sentence of Article 2.2, a complaining party may make its *prima facie* case that a technical regulation is more trade-restrictive than necessary by identifying an alternative measure that is (a) less trade-restrictive, (b) makes an equivalent contribution to the relevant objective, and (c) is reasonably available. The Appellate Body has also found that a complaining party need not demonstrate that its proposed alternative measure achieves a degree of contribution identical to that achieved by the challenged measure in order for it to be found to achieve an equivalent degree. Rather, there is a margin of appreciation in the assessment of whether a proposed alternative measure achieves an equivalent degree of contribution, the contours of which may vary from case-to-case. The Appellate Body further found that under Article 2.2, a complaining party must make a *prima facie* case that its proposed alternative measure is indeed available.<sup>347</sup>

7.430. A previous panel similarly found that under Article 2.2, a complaining party has the burden to identify the specific alternative measure, and make a *prima facie* case that such alternative is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available.<sup>348</sup>

7.431. In considering whether the same approach would be appropriate in the context of Article 5.1.2, second sentence, we note that the complaining party has full control of whether it seeks to establish a breach of that provision by focusing on the manner of applying the relevant conformity assessment procedure chosen by the importing Member, or by raising an alternative manner of applying the procedure. If the complaining party chooses to raise one (or more) less strict alternative manners of application, it seems to us appropriate that it assume the burden of establishing, *prima facie*, that the less strict option is reasonably available to the importing Member and makes an equivalent contribution to giving the importing Member adequate confidence of conformity.

7.432. We recall that a *prima facie* case is one which, "in the absence of effective refutation by the [responding] party, requires a panel, as a matter of law, to rule in favour of the complaining party".<sup>349</sup> If the complaining party could limit itself to identifying one or more less strict alternative manners of applying the conformity assessment procedure, without discharging any burden with regard to whether the alternative manners make an equivalent contribution and are reasonably available, the complaining party would in effect be relieved of its burden to make a *prima facie* case. Or to put it differently, in our view identification of a less strict manner of application is not sufficient alone to require or justify a panel to rule, as a matter of law, that the importing Member's manner of applying its conformity assessment procedure is more strict than necessary to give that Member adequate confidence of conformity.

7.433. We therefore consider that if a complaining party seeks to establish an inconsistency with the second sentence of Article 5.1.2, by raising an alternative manner of applying a conformity assessment procedure, it needs to first identify any alternative manner of applying a conformity assessment procedure that in its view is less strict. In addition, the complaining party needs to make a *prima facie* case that this alternative manner of application is (a) less strict, (b) makes an equivalent contribution to the objective of providing the importing Member adequate confidence of conformity, and (c) is reasonably available to the importing Member.

7.434. If the complaining party satisfies that burden, the responding party then needs to rebut the complaining party's arguments and evidence, for example by showing that the alternative proposed manner of application is not less strict, does not make an equivalent contribution to providing adequate confidence of conformity, or is not reasonably available to the responding party.

7.435. In the present dispute, Ukraine consequently has the burden of making a *prima facie* case. Ukraine can meet this burden by providing evidence and argumentation supporting its claim that for each of the 14 challenged instructions the chosen manner of applying the conformity assessment procedure is more strict than necessary because there are alternative manners of

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<sup>347</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.213, 5.215 and 5.338.

<sup>348</sup> Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 7.437.

<sup>349</sup> Appellate Body Report, *EC – Hormones*, para. 104.



applying the procedure that are less strict, make an equivalent contribution to providing Russia adequate confidence of conformity, and are reasonably available to Russia.

### **7.3.3.2 Application**

#### **7.3.3.2.1 Nature of the claims**

7.436. Ukraine challenges, under Article 5.1.2, 14 instructions through which the FBO suspended certificates held by Ukrainian producers of railway products.<sup>350</sup> Ukraine claims that by issuing the 14 instructions, Russia in each case applied its conformity assessment procedures with the effect of creating unnecessary obstacles to international trade.<sup>351</sup> Ukraine therefore has the burden of demonstrating that Russia applied its conformity assessment procedure for railway products with the effect of creating unnecessary obstacles to international trade. We will, therefore, need to assess whether Russia applied its conformity assessment procedure with the effect of creating unnecessary obstacles to international trade when it suspended, through the 14 instructions, numerous certificates held by Ukrainian producers of railway products.

7.437. Ukraine initially submitted arguments in support of its claims under Article 5.1.2 at a general level. Subsequently, in response to Russia's arguments, it submitted arguments in respect of each of the 14 instructions. Similarly, Russia responds to Ukraine's general arguments and addresses each of the 14 instructions challenged by Ukraine. We therefore begin our analysis with the general arguments advanced by the parties and then address the specific arguments and evidence in respect of each instruction. We recall that Ukraine raises claims against each of the 14 instructions and that we found such claims to be within our terms of reference. We will, therefore, make specific findings in respect of each of the 14 instructions challenged by Ukraine.

7.438. Moreover, Ukraine is not challenging the WTO-consistency of Russia's conformity assessment procedure as such. Thus, only those less strict manners of applying Russia's conformity assessment procedure that the FBO had the power to apply under the then existing Russian domestic law can in our view be considered alternatives that were reasonably available to Russia.

#### **7.3.3.2.2 Applicability of Article 5.1.2 and order of analysis**

7.439. We recall that in section 7.3.2.2.2 above, we concluded that each of the 14 instructions challenged by Ukraine concerns (a) conformity assessment by a central government body and (b) a mandatory conformity assessment procedure.<sup>352</sup> On that basis, we consider that Article 5.1.2 is applicable to the 14 instructions challenged by Ukraine.

7.440. Based on the arguments put forward by Ukraine, we first address the elements relevant to establishing an inconsistency with Article 5.1.2, second sentence. We then turn, as necessary, to examine the elements required to establish an inconsistency with Article 5.1.2, first sentence.

#### **7.3.3.2.3 Article 5.1.2, second sentence**

7.441. We recall that in order to establish that a measure is inconsistent with the second sentence of Article 5.1.2, we need to weigh and balance (a) the contribution that the challenged manner of applying Russia's conformity assessment procedure makes to giving Russia adequate confidence that Ukrainian railway products conform to the underlying technical regulations, (b) the trade restrictiveness of Russia's manner of applying its conformity assessment procedure, and (c) the risks that non-conformity with the underlying technical regulations would create. Furthermore, we need to consider the alternative manners of applying the conformity assessment procedure raised by Ukraine. We examine each of these elements in turn.

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<sup>350</sup> Ukraine's first written submission, para. 181; opening statement at the first meeting of the Panel, para. 37; and responses to Panel question Nos. 7(a) and 10(a).

<sup>351</sup> Ukraine's first written submission, paras. 238, 260, and 266.

<sup>352</sup> Ukraine's views on the applicability of Article 5.1.2 to the 14 instructions challenged by Ukraine can be found in Ukraine's second written submission, paras. 182-184.

### 7.3.3.2.3.1 Contribution to giving Russia adequate confidence that the products conform to the technical regulations

7.442. Ukraine does not dispute that Russia's mandatory certification procedure, including periodic inspection control, contributes to ensuring that railway products comply with the applicable technical regulations. Ukraine considers, however, that the manner in which Russia applied its conformity assessment procedures in the case of the 14 instructions is more strict than necessary to ensure conformity.<sup>353</sup>

7.443. Ukraine considers that in the present case, Russia suspended certificates on grounds that are not related to the conformity of products with the applicable technical regulations or to "imperative conditions"<sup>354</sup> without which conformity may not be reviewed. According to Ukraine, the objective of the instructions is not to achieve positive assurance of conformity of Ukrainian railway products with the applicable technical regulations. Ukraine submits that the challenged measures are, instead, disguised restrictions on importation of Ukrainian railway products. Ukraine considers that in the absence of evidence showing that, throughout the territory of Ukraine, there were safety and security concerns precluding FBO inspectors from conducting on-site inspections, Russia's suspensions did not aim to achieve a positive assurance of conformity. In Ukraine's view, the suspensions therefore result in the creation of unnecessary obstacles to international trade.<sup>355</sup>

7.444. Russia submits that through the CS FRT Rules it seeks to, *inter alia*, (a) ensure the safety of the federal railway transport network, (b) protect the environment, (c) protect property of individuals and legal entities, and (d) prevent deceptive practices. Russia thus contends that the objectives it seeks to protect notably include the life and health of humans, animals and plants by ensuring compliance with the relevant technical regulations. Russia also observes that, given the characteristics and end uses of the railway products at issue, it seeks the highest possible level of assurance of conformity. Russia asserts that its certification bodies require the same level of confidence in respect of conformity regardless of the procedure adopted to verify conformity. Russia submits that, in the present dispute, the level of protection that it sought called for the conduct of on-site inspections in Ukraine of the products produced by the Ukrainian producers whose certificates were suspended.<sup>356</sup>

7.445. Ukraine considers that Russia improperly uses the concept of the "level of protection" in the context of Article 5.1.2. In Ukraine's view, this concept is not relevant in the context of conformity assessment procedures, because the sole objective of such procedures is to provide adequate confidence that products conform with the applicable technical regulations. Ukraine notes that Article 5.1.2 contains the phrase "adequate confidence". According to Ukraine, that concept refers to a degree of confidence that is "sufficient" or "satisfactory". Ukraine submits that Article 5.1.2 thus limits the discretion of the importing Member in setting its desired "level of confidence". Ukraine further argues that the alternative manners of application that it identified would make a contribution that is equivalent to that which the suspensions made to giving Russia adequate confidence that Ukrainian railway products conform with the applicable technical regulations. Moreover, Ukraine argues in this respect that Russia has failed to explain why the different forms of yearly inspection control provided for in the CS FRT Rules could not provide the same level of confidence of conformity in the present dispute. Ukraine queries why it would not be possible for Russia to get an adequate level of confidence through alternative manners of applying its conformity assessment procedures.<sup>357</sup>

7.446. The Panel notes that through its technical regulations for railway products, the CS FRT Rules, Russia seeks to protect, *inter alia*, the environment as well as the life and health of humans, animals, and plants against risks arising from train derailments due to low quality equipment. All of these values and interests are important.

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<sup>353</sup> Ukraine's first written submission, para. 274; and second written submission, para. 188-190.

<sup>354</sup> Ukraine's second written submission, para. 192 and 199.

<sup>355</sup> Ukraine's second written submission, paras. 197-202; and opening statement at the second meeting of the Panel, para. 62.

<sup>356</sup> Russia's responses to Panel question Nos. 19, 104, 108, 116, and 137.

<sup>357</sup> Ukraine's opening statement at the first meeting of the Panel, paras. 58-61; and comments on Russia's responses to Panel question Nos. 116, 124, and 131.

7.447. We recall that Russia submits that it "seeks the highest possible level of assurance of conformity with the relevant safety requirements".<sup>358</sup> The evidence supports that Russia seeks a high level of conformity. Russia's general Law on Technical Regulations provides that the safety of products and related production processes "shall mean a condition in which there is no unacceptable risk associated with causing harm to life or health of citizens, property of individuals or legal entities, state or municipal property, environment, life or health of animals".<sup>359</sup> To ensure such safety, Russian technical regulations shall contain rules on conformity assessment which are to be determined taking into account the degree of risk.<sup>360</sup>

7.448. Regarding railway products, CS FRT Rules establish conformity assessment procedures through which conformity with the established safety requirements are verified. Such procedures rely on methods for testing and for assessing conformity that enable the FBO to verify aspects such as the identity of the producer facilities, the products, the origin, and compliance with safety requirements.<sup>361</sup> CS FRT Rules also provide for the verification of continued conformity through different means of inspection control.<sup>362</sup> Russia's conformity assessment procedures require applicants to submit a number of documents, including test results, and undergo different forms of inspection, all aimed at verifying conformity. As further discussed below, the CS FRT Rules include provisions governing the conditions under which inspections may be carried on-site or off-site. The existence of these rules demonstrates that Russia indeed seeks a high level of conformity.

7.449. Moreover, there is evidence that Russia has enforced the rules governing its conformity assessment procedures, thus supporting the view that Russia seeks a high level of conformity.<sup>363</sup>

7.450. Russia's suspension of certificates held by the five relevant Ukrainian producers of railway products ensured that the certified products, for which scheduled on-site inspections in Ukraine could not be carried out, would not enter Russia's market. We consider that this manner of applying the conformity assessment procedure gives Russia a high level of assurance that any non-conforming products covered by the suspensions would not enter its market. We therefore conclude that the suspension, as Russia's chosen manner of applying its conformity assessment procedure in the 14 instances at issue, contributes substantially to the objective of giving Russia adequate confidence of continued conformity of the Ukrainian railway products covered by the certificates that were suspended through the 14 challenged instructions.

### **7.3.3.2.3.2 Strictness of the manner of applying the conformity assessment procedure**

7.451. Ukraine submits that the suspensions have a severe restrictive effect on imports of railway products originating in Ukraine, as suspending certificates results in the impossibility of placing such products on the Russian market.<sup>364</sup>

7.452. Russia submits that contrary to what Ukraine suggests, the evidence on record regarding the entry restrictions and uncertainty with respect to safety and security conditions in Ukraine establish that the suspensions were neither mere pretexts nor an unnecessary obstacle to international trade. Russia submits that due to the impossibility of conducting annual on-site inspections, certificates formerly issued to Ukrainian producers no longer provided adequate assurance of conformity.<sup>365</sup>

<sup>358</sup> Russia's response to Panel question No. 116.

<sup>359</sup> Article 2 of Law No. 184-FZ "On Technical Regulation", (Exhibit UKR-1).

<sup>360</sup> Article 7.3 of Law No. 184-FZ "On Technical Regulation", (Exhibit UKR-1).

<sup>361</sup> Article 9 of CS FRT 01-96, (Exhibit UKR-2); and Article 3.11 of CS FRT Rules 31/PMG 40-2003, (Exhibit UKR-80).

<sup>362</sup> Article 13 of CS FRT 01-96, (Exhibit UKR-2); and Article 7 of CS FRT Rules 31/PMG 40-2003, (Exhibit UKR-80).

<sup>363</sup> See for instance references to certificates suspended in respect of producers from different countries in Extract of the FBO's Register with respect to the suspended certificates, (Exhibit RUS-5); Extract of the FBO's Register with respect to the suspended certificates (dates of suspension and reasons for suspension), (Exhibit RUS-85)(BCI); Extract of the FBO's Register concerning Kazakh producers, (Exhibit RUS-93)(BCI); Extract of the FBO's Register concerning Belarusian producers, (Exhibit RUS-94)(BCI); and Extract of the FBO's Register concerning European producers (Exhibit RUS-95)(BCI).

<sup>364</sup> Ukraine's first written submission, para. 273; and second written submission, para. 187.

<sup>365</sup> Russia's opening statement at the second meeting of the Panel, paras. 41-42.

7.453. The Panel notes that the suspension of certificates leads to the loss of access to the Russian market, for the duration of any period of suspension, because without a certificate, Ukrainian railway products cannot enter the Russian market. We therefore consider that the suspension of certificates substantially restricts trade, and can be considered as a strict manner of application.

7.454. We also note, however, that suspension is not the strictest manner of applying the conformity assessment procedure provided for in Russia's relevant technical regulations. The strictest manner provided for in Russia's legislation would be to withdraw (terminate) the certificates altogether.<sup>366</sup>

### 7.3.3.2.3.3 Risks that non-conformity would create

7.455. Ukraine considers that the risk of non-conformity is that railway products enter Russia's market without satisfying the relevant technical regulations, thus depriving such regulations of their effect.<sup>367</sup>

7.456. Russia submits that the risks of non-conformity are that goods of insufficient quality would enter Russia's market. According to Russia, such low quality equipment can lead to train derailments, which would undermine the objectives of the technical regulations, *inter alia*, of protecting the life and health of humans, animals and plants. Russia considers that given the serious threat of harm to human life and health, the environment, property of individuals and legal entities, the risks of non-conformity are grave.<sup>368</sup>

7.457. The Panel notes that both parties seem to agree that there are high risks arising from non-conformity. In particular, non-conforming railway products may lead to accidents, including train derailments, which in turn may cause great harm, including to human, animal, and plant life and health. We consider that in view of the products concerned (certain railway rolling stock, railroad switches, other railroad equipment, and parts thereof, covered by the suspended certificates), the consequences of a failure of any of such products, due to non-conformity with the underlying technical regulations, could reasonably be expected to create substantial risks for human, animal, and plant life or health as well as the environment.

7.458. We note that the parties disagree on whether different methods of assessing continued conformity would have an impact on providing Russia adequate confidence of conformity. In our view, such disagreement concerns the availability of less-trade restrictive manners of application, which we turn to examine next.

### 7.3.3.2.3.4 Less trade-restrictive manners of application

7.459. Ukraine argues that the suspension of certificates, due to the inability to conduct on-site inspections, was a more strict application of Russia's conformity assessment procedures, than necessary to provide Russia adequate confidence that the relevant Ukrainian railway products conform to the relevant technical regulations. Ukraine submits that other, less trade-restrictive manners of applying Russia's conformity assessment procedure were available to Russia. Specifically, Ukraine identified the following alternatives: (a) additional communications with the relevant Ukrainian producers; (b) entrusting on-site inspections in Ukraine to the competent authorities from Kazakhstan and Belarus; (c) accrediting non-Russian inspectors, either experts or organizations, to conduct inspections in Ukraine; and (d) off-site inspections.<sup>369</sup> Ukraine submits

<sup>366</sup> Article 26.2 of Law No. 184-FZ "On Technical Regulation", (Exhibit UKR-1); Article 13.7 of CS FRT 01-96, (Exhibit UKR-2) provides that "[b]ased on the results of inspection control, the accreditation certificate or the certificate of conformity may be suspended or withdrawn by the issuing authorities". Article 7.2 of CS FRT 12-2003, (Exhibit UKR-3) provides that if deficiencies (non-conformities) are found in an inspection control, the FBO may (a) suspend the certificate or (b) revoke the certificate.

<sup>367</sup> Ukraine's second written submission, para. 209.

<sup>368</sup> Russia's response to Panel question No. 104; second written submission, para. 102; and response to Panel question No. 116.

<sup>369</sup> Ukraine, in its submissions, described this alternative as "remote" inspections. We prefer to use the term "off-site inspections" because that term is used in the translation of Article 7.4.1 of PC-FZT 08-2013, (Exhibit RUS-23). We note that the translation of other provisions, such as Article 5.3 of CS FRT 12-2003,

that these are less strict manners of applying Russia's conformity assessment procedure that make an equivalent contribution to giving Russia adequate confidence of conformity, and are available to Russia.<sup>370</sup>

7.460. Russia responds that Ukraine failed to demonstrate that any of these alternative manners of application are reasonably available to Russia, and that they make an equivalent contribution to giving Russia adequate confidence that Ukrainian railway products conform with the applicable technical regulations.<sup>371</sup>

7.461. The Panel turns to provide a detailed examination of the parties' arguments in respect of each of the alternative manners of application identified by Ukraine in connection with the 14 challenged instructions.

### ***Communicating with Ukrainian producers***

7.462. The first alternative identified by Ukraine is for Russian authorities to communicate with Ukrainian producers.

7.463. Ukraine submits that the FBO could have communicated with the relevant producers in order to create, if and where necessary, the conditions for carrying out the inspections and the certification procedure in general. According to Ukraine, this measure is less trade-restrictive than suspending certificates. Ukraine asserts that this measure was reasonably available to Russian authorities. Ukraine observes that, in fact, the FBO had been contacted by the Ukrainian producers requesting that inspection control take place and expressing their readiness to facilitate the FBO's work. Ukraine considers that this measure would make an equivalent contribution to giving Russia adequate confidence of conformity as it would allow the FBO to carry out the conformity assessment procedures.<sup>372</sup>

7.464. Russia argues that FBO employees communicated by telephone with the relevant Ukrainian producers. According to Russia, however, the conditions for carrying out the procedures could not be ensured as a result of these communications. Russia considers that the relevant producers, as private entities, were not in a position to ensure the safety of FBO officials in Ukraine. Moreover, Russia argues that conformity assessment procedures cannot be substituted by communication with the relevant producers.<sup>373</sup>

7.465. Ukraine responds that Russia did not provide any evidence of the alleged telephone communications that the FBO had with Ukrainian producers.<sup>374</sup>

7.466. The Panel notes that the proposed alternative of communicating with Ukrainian producers is in the nature of a process or procedure.

7.467. The Appellate Body has dealt with a similar situation in *US – Gambling*. In that dispute, the panel examined whether the challenged measures were necessary to protect public morals or to maintain public order, under Article XIV(a) of the GATS. The panel in that dispute found that the challenged measures were not necessary. The panel considered that before imposing a WTO-inconsistent measure, the responding party could have entered into consultations with the complaining party to find alternatives. The Appellate Body reversed that panel's finding. According to the Appellate Body, negotiations are by definition a process, the results of which are uncertain. The Appellate Body considered that negotiations were therefore not capable of comparison with

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(Exhibit UKR-3), refers to "remote inspections". Any reference to off-site inspection(s) should be understood as covering remote inspection(s).

<sup>370</sup> Ukraine's first written submission, para. 275; opening statement at the first meeting of the Panel, paras. 61-68; and second written submission, paras. 212, 248, and 252.

<sup>371</sup> Russia's first written submission, paras. 94-98; and second written submission, paras. 115-120.

<sup>372</sup> Ukraine's first written submission, para. 275; and response to Panel question No. 66.

<sup>373</sup> Russia's first written submission, para. 95; and second written submission, para. 116.

<sup>374</sup> Ukraine's opening statement at the first meeting of the Panel, para. 63.

the measures at issue. The Appellate Body concluded on that basis that consultations could not qualify as a reasonably available alternative measure.<sup>375</sup>

7.468. We consider the Appellate Body's guidance useful in disposing of the matter before us. Ukraine's suggested alternative would have an uncertain outcome. It could theoretically lead to a situation that would allow the conformity assessment procedure to continue, just as it could lead to a situation where the conformity assessment procedure would not continue and certificates would be suspended. We also note that the record contains some letters in which Ukrainian producers wrote to the FBO offering private security arrangements with a view to allowing FBO inspections to proceed in Ukraine.<sup>376</sup> However, these letters did not remove the FBO's concerns about sending inspectors to conduct inspections in Ukraine and the certificates remained suspended.<sup>377</sup> We therefore consider that, similar to the situation in *US – Gambling*, this alternative manner of applying the conformity assessment procedure is not one which could be considered as being reasonably available to Russia and capable of comparison with the challenged suspensions, which provided a result that was certain.

7.469. Moreover, Ukraine did not elaborate on why, in its view, it was not reasonable for the FBO to consider that the arrangements for conducting inspection control in Ukraine that had been proposed by Ukrainian producers were not satisfactory or sufficient. Also, Ukraine did not provide arguments regarding whether under Russia's domestic law, which Ukraine did not challenge as being WTO-inconsistent, the FBO could delay suspending certificates of products whose continued conformity could not be verified.<sup>378</sup>

7.470. Accordingly, we find that Ukraine has not established that communicating with the relevant five Ukrainian producers is a less strict manner of applying Russia's conformity assessment procedure that is reasonably available to Russia.

#### ***Entrusting inspections in Ukraine to the competent authorities of Kazakhstan or Belarus***

7.471. The second alternative identified by Ukraine is for the FBO to entrust inspections to the competent authorities of Belarus and Kazakhstan.

7.472. Ukraine submits that the practice of the competent authorities of Belarus and Kazakhstan demonstrates that inspections in Ukraine were possible and were successfully carried out there by the authorities of those two countries. Ukraine submits that, therefore, another alternative manner of applying Russia's conformity assessment procedure was for Russia to entrust the inspections to the authorities of Belarus and Kazakhstan.<sup>379</sup>

7.473. Russia submits that Ukraine failed to explain how entrusting inspections to the competent authorities of Belarus and Kazakhstan would achieve the level of protection sought by Russia. Moreover, Russia considers that this alternative is not reasonably available to it because Russia does not have jurisdiction over nationals from governments of other countries. Russia submits that none of the disciplines governing recognition of conformity assessment procedures conducted by other Members imposes an obligation on Members to recognize such conformity assessment procedures conducted by other Members. Russia considers that the absence of such an obligation

<sup>375</sup> Appellate Body Report, *US – Gambling*, paras. 315-317 and 321.

<sup>376</sup> Letter [[xxx]] from PJSC [[xxx]] to the FBO, 12 May 2014, (Exhibit UKR-17)(BCI); Letter [[xxx]] from PJSC [[xxx]] to the FBO, (Exhibit UKR-18)(BCI)(Corr.); Letter [[xxx]] from PJSC [[xxx]] to the FBO, 13 March 2015, (Exhibit UKR-21)(BCI); and Letter [[xxx]] from PJSC [[xxx]] to the FBO, 10 October 2014, (Exhibit UKR-41)(BCI).

<sup>377</sup> See Letter [[xxx]] from the FBO to PJSC [[xxx]], 26 March 2015, (Exhibit UKR-22)(BCI); and Letter [[xxx]] from the FBO to PJSC [[xxx]], 1 August 2014, (Exhibit UKR-28)(BCI).

<sup>378</sup> We note that according to Article 13.1 of CS FRT 01-96, (Exhibit UKR-2) and Article 5.2 of CS FRT 12-2003, (Exhibit UKR-3), inspection control should take place once every year. This suggests that the FBO had to make a determination on maintaining the validity or suspending the certificates before that time lapsed.

<sup>379</sup> Ukraine's opening statement at the first meeting of the Panel, para. 68; and second written submission, para. 248.

confirms that this kind of measure is not a true alternative measure. Moreover, Russia asserts that the FBO was the only organization entitled under CS FRT Rules to conduct inspection control.<sup>380</sup>

7.474. The Panel notes that Ukraine refers to entrusting certification bodies in Kazakhstan and Belarus to conduct inspections in Ukraine on behalf of Russia as an alternative to the 14 instructions suspending certificates held by Ukrainian producers. However, Ukraine has failed to submit arguments or evidence demonstrating that this alternative is available to Russia under Russia's rules governing conformity assessment procedures. Indeed, it is not self-evident to us that the FBO has the power to entrust foreign government authorities to carry out tasks entrusted to it.<sup>381</sup> Moreover, Ukraine has not provided any evidence of prior instances of the FBO entrusting certification bodies in other countries with the conduct of inspections abroad. As a result, we consider that Ukraine has not met its burden to establish that this alternative is available to Russia.

7.475. In any event, we note that Ukraine has not claimed that any of the rules governing Russia's conformity assessment procedures that could prevent the FBO from entrusting the competent authorities of Kazakhstan or Belarus to conduct on-site inspections abroad are contrary to Article 5.1.2.

7.476. Accordingly, we find that Ukraine has failed to establish that entrusting the competent authorities of Belarus and Kazakhstan with the conduct of inspections in Ukraine is a less strict manner of applying Russia's conformity assessment procedure that is reasonably available to Russia.

#### ***Accrediting non-Russian experts or organizations to conduct inspections in Ukraine***

7.477. The third alternative identified by Ukraine is for the FBO to accredit non-Russian experts or organizations to conduct inspections in Ukraine.

7.478. Ukraine submits that Russia could have accredited non-Russian experts or organizations to conduct inspections in Ukraine. According to Ukraine, the rules governing the suspension of certificates provide that the certifying body or relevant ministry may accredit an organization as an expert. Ukraine submits that those rules do not preclude the accreditation of non-Russian experts, because they do not prescribe the nationality of the experts who can be used.<sup>382</sup>

7.479. Russia considers that this alternative is not reasonably available to it because Russia does not have jurisdiction over nationals from other countries. Moreover, Russia asserts that the FBO was the only organization entitled to conduct inspection control.<sup>383</sup>

7.480. The Panel understands that Ukraine refers to the possibility of appointing experts, provided for in Article 10 of CS FRT 01-96<sup>384</sup>, as a basis for its view that the FBO could accredit non-Russian experts to conduct inspections in Ukraine. However, it is not clear that that this provision provides for the possibility of accrediting non-Russian experts to conduct on-site inspections. We note that Article 10 provides for a procedure for accreditation with Russia's certification system. Article 10 does not specify the nationality that accredited experts must have, but Ukraine has not provided any evidence to indicate that non-Russian experts have been accredited. Articles 10.3 and 10.7 indicate that experts must file an application for accreditation and that accreditation certificates and licences are granted by Russia's Ministry of Railways. In other words, the system in place is one where experts seek accreditation. It is not contemplated that the Ministry approaches experts and issues them accreditation certificates and licences. We note that under Article 10.4 accredited

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<sup>380</sup> Russia's response to Panel question No. 43; second written submission, para. 118; opening statement at the second meeting of the Panel, para. 44; and response to Panel question No. 116.

<sup>381</sup> The following provisions suggest that only FBO employees are entitled to carry out on-site inspections: Articles 9.6, 13.4 and 13.6 of CS FRT 01-96, (Exhibit UKR-2); Articles 4.1 and 4.3 of CS FRT 12-2003, (Exhibit UKR-3); Articles 4.3 and 6.5 of CS FRT 31/PMG 40-2003, (Exhibit UKR-80); and Articles 5.3 and 7.1 of PC-FZT 08-2013, (Exhibit RUS-23). See also Russia's response to Panel question No. 43.

<sup>382</sup> Ukraine's, second written submission, para. 252.

<sup>383</sup> Russia's response to Panel question No. 43; opening statement at the second meeting of the Panel, para. 44; and response to Panel question No. 116.

<sup>384</sup> CS FRT 01-96, (Exhibit UKR-2).

experts are included in the State Register of the Certification System. There is no evidence on the record to indicate that at the time that the 14 instructions suspending certificates were issued, there were non-Russian experts qualified to conduct inspection control in Ukraine with valid Russian accreditation certificates. We further observe that there is also no evidence of prior instances of the FBO using accredited experts to conduct inspections abroad. As a result, we consider that Ukraine has not met its burden to establish that this alternative was available to Russia when the 14 instructions were issued.

7.481. In any event, Ukraine has not claimed that the accreditation procedure that is set out in CS FRT 01-96 is WTO-inconsistent.

7.482. Accordingly, we find that Ukraine has failed to establish that accrediting non-Russian experts or organizations is a less strict manner of applying Russia's conformity assessment procedure that is reasonably available to Russia.

### ***Conducting off-site inspections***

7.483. The fourth alternative identified by Ukraine is for the FBO to conduct off-site inspections rather than to conduct on-site inspections in Ukraine.

7.484. Ukraine submits that Russia could have made use of off-site inspections instead of suspending the certificates due to the impossibility to conduct on-site inspection control. Ukraine submits that this alternative is less trade restrictive than suspending certificates. Ukraine asserts that this measure was reasonably available to Russian authorities because off-site inspections are explicitly provided for in Article 5.3 of CS FRT 12-2003.<sup>385</sup> Ukraine argues that this measure would make an equivalent contribution to giving Russia adequate confidence of conformity as it would allow the FBO to carry out the relevant conformity assessment procedures.<sup>386</sup>

7.485. Russia rejects Ukraine's alternative. It argues that the possibility of off-site inspections was provided for in Article 5.3 of CS FRT 12-2003 and was available only if certain specified conditions were met. Russia also submits that off-site inspection was available in exceptional situations and was not applied for high-danger goods. Russia refers to derailments of trains containing rolling stock produced in Ukraine. Russia considers that due to such derailments, off-site inspections were not available to Russia. Moreover, Russia underscores that Ukraine has not shown how off-site inspections would provide an equivalent assurance of conformity with Russia's technical regulations.<sup>387</sup>

7.486. Ukraine responds that Russia confirms that Article 5.3 of CS FRT 12-2003 provides for the possibility to conduct off-site inspections. Ukraine submits that although Russia refers to a number of conditions for the use of off-site inspections, Russia fails to identify the relevant documents in which those conditions are laid down. Moreover, Ukraine considers that the accidents involving certain Ukrainian rolling stock would not justify stopping all inspections of Ukrainian railway products.<sup>388</sup>

7.487. Russia argues that the FBO considered off-site inspection as an option regarding the 14 instructions challenged by Ukraine. Russia submits that off-site inspection could only be conducted if the conditions set out in Article 7.4.1 of PC-FZT 08-2013<sup>389</sup> were satisfied. According to Russia, these conditions include absence of prior non-conformities and absence of consumer complaints. Russia considers that this manner of applying its conformity assessment procedure corresponds to the risks that non-conformity would create.<sup>390</sup>

7.488. According to Ukraine, the certificates issued to the five producers affected by the 14 instructions required yearly inspections of production. Ukraine notes that the FBO suspended

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<sup>385</sup> CS FRT 12-2003, (Exhibit UKR-3).

<sup>386</sup> Ukraine's first written submission, para. 275; and response to Panel question No. 66.

<sup>387</sup> Russia's first written submission, paras. 96-98; and opening statement at the first meeting of the Panel, paras. 27-30.

<sup>388</sup> Ukraine's opening statement at the first meeting of the Panel, para. 67.

<sup>389</sup> PC-FZT 08-2013, (Exhibit RUS-23).

<sup>390</sup> Russia's response to Panel question Nos. 22 and 41; and second written submission, para. 117.



those certificates due to the lack of on-site inspection control without considering and offering the five producers the option of off-site inspection. Moreover, Ukraine notes that only in its responses to questions after the first Panel meeting did Russia provide a reference to Article 7.4.1 of PC-FZT 08-2013 as the legal instrument setting out the conditions governing the availability of off-site inspections. Ukraine considers that Russia fails to provide evidence that the FBO examined the conditions laid down in Article 7.4.1 as regards the certificates suspended through the 14 instructions challenged by Ukraine before deciding that off-site inspections were not available. According to Ukraine, the exercise of such discretion may also show that a conformity assessment procedure is applied too strictly.<sup>391</sup>

7.489. In response to Russia's argument that this alternative would not provide an equivalent assurance of conformity, Ukraine argues that Russia maintained the validity of certificates of producers in eastern Ukraine without conducting on-site inspections. Ukraine submits that it follows that off-site inspections could provide Russia the same degree of confidence of conformity in respect of producers located in other parts of Ukraine.<sup>392</sup>

7.490. Russia argues that off-site inspections do not provide the same level of assurance of conformity for the suspended certificates in question. According to Russia, for each of the producers whose certificates were suspended either a non-conformity had been identified in the previous inspection control or there were consumer complaints about the quality of production of the certified products. Russia submits that in those circumstances the FBO had to conduct on-site inspections in respect of the suspended certificates. Russia argues that off-site inspections could only be used as a less trade-restrictive option if the conditions set out in Article 7.4.1 were met. Russia submits that those conditions apply also in circumstances where inspectors cannot travel to conduct an on-site inspection, such as those present in this dispute. With regard to the certificates maintained by producers in eastern Ukraine, Russia submits that no on-site inspections were conducted because such producers met the conditions for off-site inspections.<sup>393</sup>

7.491. Regarding the meaning of Article 7.4.1 of PC-FZT 08-2013, Russia considers that if non-conformities were identified in the previous inspection control of a railway product, such non-conformity would prevent the FBO from conducting the next inspection control through off-site inspection. Russia considers that non-conformities prevent conducting inspection control for any railway product produced by the affected producer, not just the railway product in respect of which a non-conformity was found. In addition, Russia submits that consumer complaints regarding the quality of a specific railway product would prevent the FBO from conducting off-site inspections for that product. Russia bases this interpretation of Article 7.4.1 on the fact that only the condition concerning consumer complaints makes reference to "certified products".<sup>394</sup>

7.492. Ukraine disagrees with Russia's interpretation of Article 7.4.1 of PC-FZT 08-2013. Ukraine submits that Article 7.4.1 only rules out off-site inspection when there has been a non-conformity, or consumer complaints, in respect of the certified products. In Ukraine's view, non-conformities and consumer complaints can thus only prevent off-site inspection for specific products and not for all products produced by a producer. Ukraine further argues that the evidence submitted by Russia regarding non-conformities refers to only 15 of the products covered by the suspended certificates, while the evidence on consumer complaints concerns only one such product. Ukraine therefore rejects Russia's argument that it could not conduct off-site inspections due to non-conformities or consumer complaints.<sup>395</sup>

7.493. Russia responds that the evidence that it has provided of non-conformities covers all Ukrainian producers at issue and therefore all 73 suspended certificates. Moreover, Russia submits

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<sup>391</sup> Ukraine's second written submission, paras. 215-219 and 221-227; and opening statement at the second meeting of the Panel, para. 63.

<sup>392</sup> Ukraine's second written submission, paras. 228-231; and opening statement at the second meeting of the Panel, para. 62.

<sup>393</sup> Russia's opening statement at the second meeting of the Panel, para. 43; and responses to Panel question Nos. 138, 139, 156, and 165.

<sup>394</sup> Russia's second written submission, paras. 117-121; and opening statement at the second meeting of the Panel, para. 43.

<sup>395</sup> Ukraine's response to Panel question No. 145; and comments on Russia's response to Panel question No. 139.

that it has also provided evidence of consumer complaints regarding some of the relevant products.<sup>396</sup>

7.494. The Panel notes that PC-FZT 08-2013 is an organization standard developed, approved and enacted by the FBO on the "procedure of organization and implementation of inspection control of certified products". It is unclear from the exhibit submitted to the Panel whether PC-FZT 08-2013 was officially published. The document is not marked as "confidential" and indicates that the standard may not be reproduced, copied or distributed as an official publication without the FBO's permission.<sup>397</sup> This suggests that access and even publication by third parties is possible and that the standard is not a confidential internal document. Moreover, Ukraine has not asserted that access to the content of the document was not possible either directly or upon request. Indeed, Ukraine submitted a letter from the FBO dated 1 August 2014 in which the FBO did not explicitly refer to Article 7.4.1 of PC-FZT 08-2013, but nevertheless indicated to a Ukrainian producer whose certificates had been suspended what the relevant conditions for off-site inspection were.<sup>398</sup>

7.495. According to Article 5.6 of PC-FZT 08-2013, verification of continued conformity is ordinarily required to be examined at least annually. This can happen through scheduled or unscheduled inspections. The 14 instructions at issue concern scheduled inspections.

7.496. As noted above, it is common ground between the parties that the possibility of conducting inspection control remotely (off-site) is provided for in Article 5.3(b) of CS FRT 12-2003. The main point of contention between the parties is whether, under Article 7.4.1 of PC-FZT 08-2013, which stipulates conditions for the conduct of off-site inspection that are not contained in Article 5.3(b), the FBO is precluded from conducting off-site inspections for the railway products affected by the 14 suspensions. To address this matter, we first examine the conditions set out in Article 7.4.1 and then examine the evidence to determine whether the FBO had a basis to refrain from conducting off-site inspections in respect of the certificates suspended. This examination will allow us to establish whether this alternative manner of applying the conformity assessment procedure was available to Russia in respect of each of the certificates suspended.

#### **Availability of off-site inspections in general**

7.497. The parties differ on the meaning of one of the conditions for off-site inspections, set out in Article 7.4.1 of PC-FZT 08-2013. We recall in this respect that according to the Appellate Body's guidance, the meaning of a provision of domestic law is to be determined by reference to "the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars".<sup>399</sup>

7.498. We note that although both parties provided arguments in relation to their interpretation of Article 7.4.1, neither Ukraine nor Russia provided evidence of the FBO's application of Article 7.4.1, pronouncements of Russian courts on the meaning of Article 7.4.1, or opinions of legal experts or writings of recognized scholars on the meaning of the conditions set out in Article 7.4.1. We do, however, have the text of Article 7.4.1 and PC-FZT 08-2013. Accordingly, we examine Article 7.4.1 and PC-FZT 08-2013 on the basis of the translation provided in the English language by Russia, which was not contested by Ukraine.

7.499. Article 7.4.1 provides as follows:

The prerequisites for conducting an off-site [inspection control] are the following:

[1] Absence of instances of non-conformity in a production status analysis during product certification;

[2] Absence of facts of non-conformity during the previous [inspection control];

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<sup>396</sup> Russia's comments on Ukraine's response to Panel question No. 145.

<sup>397</sup> PC-FZT 08-2013, (Exhibit RUS-23) p. 3.

<sup>398</sup> Letter [[xxx]] from the FBO to PJSC [[xxx]], 1 August 2014, (Exhibit UKR-28)(BCI).

<sup>399</sup> Appellate Body Report, *US – Carbon Steel*, para. 157. See also Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 4.100-4.101.

[3] Absence of consumers' complaints as to the quality of certified products;

[4] An [inspection control] of certified products is conducted again.

In case of an off-site inspection, the scope (number of facilities to be inspected and their potential hazard level) and travel costs are taken into account. Two successive off-site [inspection controls] are not allowed.<sup>400</sup>

7.500. The text of Article 7.4.1 makes clear that there are conditions for the conduct of an off-site inspection control. Like the parties, we consider that all of the listed conditions must be met for conducting an off-site inspection control. Thus, if all conditions for holding an off-site inspection under Article 7.4.1 are not met, an off-site inspection would not be legally available under PC-FZT 08-2013. This indicates that an off-site inspection in a situation where all the conditions are not met would not provide the minimum level of confidence sought by Russia, and would therefore not constitute a reasonably available alternative manner of applying Russia's conformity assessment procedures.

7.501. We note that the parties have only referred to the second and third conditions as being relevant to this dispute. Moreover, the parties only have different interpretations with regard to the second condition, specifically the phrase "[a]bsence of facts of non-conformity during the previous [inspection control]".

7.502. The phrase "absence of facts of non-conformity" appears to refer to a lack of evidence of non-conformity with applicable rules with which conformity is required. The word "previous" in the phrase "previous [inspection control]" is defined in the dictionary as "[c]oming or going before in time or order; foregoing, preceding, antecedent".<sup>401</sup> On this basis, the phrase "during the previous" inspection control appears to mean the preceding or last occurring inspection control. Before elaborating further on this condition, we consider it appropriate to examine other provisions of PC-FZT 08-2013. Such provisions may provide useful context for our assessment of the meaning of Article 7.4.1.

7.503. Article 5.1 of PC-FZT 08-2013 sets out the aims and objectives of inspection control as follows:

Verification of conformity with the rules and procedures used in SSFZHT (SSZHT);

Analysis of the status of manufacture of certified products;

Verification of conformity of certified products with the requirements confirmed during certification.

7.504. Article 5.2 of PC-FZT 08-2013 sets out the following objectives of inspection control as follows:

a) to trace non-conformity of the products certified in SSFZHT (SSZHT) with the mandatory requirements of the normative documents of the SSFZHT (SSZHT) and agreement provisions;

б) to verify observance of the rules and procedures established in SSFZHT (SSZHT);

в) to provide accurate information on the cases of non-conformity of the products certified in SSFZHT (SSZHT) with the mandatory requirements of the normative documents of the SSFZHT (SSZHT), to the federal executive body responsible for railway transport (FOIV ZhT) and other interested eligible bodies and organizations.

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<sup>400</sup> PC-FZT 08-2013, (Exhibit RUS-23).

<sup>401</sup> *The Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2341.

7.505. With this context in mind, we return to the second condition in Article 7.4.1. Ukraine argues that only if a non-conformity has been identified in respect of the same certified railway product as that for which an inspection control needs to be conducted, is off-site inspection excluded for that product. Ukraine argues that Article 7.4.1 makes clear that off-site inspection controls are available except when a non-conformity or a consumer complaint as regards a particular product precludes off-site inspection control regarding only that product for which a non-conformity has been identified. In Ukraine's view, in such a situation it would not preclude off-site inspection for all products produced by a producer.<sup>402</sup>

7.506. Russia submits that Article 7.4.1 refers *inter alia* to two requirements: (a) the absence of facts of non-conformity during the previous inspection control; and (b) the absence of consumer complaints as to the quality of certified products. Russia notes that only the second requirement refers to the "certified products". According to Russia, the first requirement refers to any non-conformity. Therefore, in Russia's view, all non-conformities, including non-conformities with respect to the evidentiary documentation, preclude the availability of off-site inspection for the producer concerned.<sup>403</sup>

7.507. Before examining the text of the second condition, we note that the situation confronting the FBO in the case of the 14 instructions challenged by Ukraine was one where the upcoming inspection control covered several railway products simultaneously. The issue that arises, therefore, is how the second condition of Article 7.4.1 applies in this situation.

7.508. We note that the text of the second condition provides little detail in respect of the issue presented, as it refers, simply, to the absence of facts of non-conformity during the previous inspection control. Unlike the third condition, the text of the second condition does not refer to "certified products". In our view, the text of the second condition could, in principle, be read in four different ways. We examine them in turn.

7.509. The first possibility is to read the second condition as covering non-conformities identified in the immediately prior inspection control concerning any railway product of the producer, including railway products not covered by the upcoming inspection control. Under this reading, the FBO would not conduct an off-site inspection in the upcoming inspection control if there was a non-conformity in the most recent inspection control for any railway product of that producer, regardless of which railway product is subject to the upcoming inspection control. Conversely, if in the most recent inspection control concerning one or more railway products of the relevant producer (other than those covered by the upcoming inspection) no non-conformity had been identified, the first condition for an off-site inspection to take place (absence of non-conformities) would be satisfied for all railway products of that producer covered by the upcoming inspection. In this latter scenario, an off-site inspection could be allowed for the upcoming inspection of a railway product even if a non-conformity had been identified in its most recent inspection control.<sup>404</sup> We do not see how the conduct of an off-site inspection in such circumstances could be reconciled with Russia's position that the conduct of an off-site inspection concerning a particular railway product would not provide adequate confidence of conformity if a non-conformity had been identified in respect of that railway product in the previous inspection control.<sup>405</sup>

7.510. The second possibility is to read the second condition as applying to a non-conformity identified in the most recent inspection control for any of the railway products covered by the upcoming inspection control (which may not be the most recent inspection control of the relevant producer). Thus, if a non-conformity had been identified in the most recent inspection control for any of the products covered by the upcoming inspection control, off-site inspection would be

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<sup>402</sup> Ukraine's response to Panel question No. 145.

<sup>403</sup> Russia's comments on Ukraine's response to Panel question No. 145.

<sup>404</sup> Thus, under this approach, in the case of a producer of, *inter alia*, oil-tank railcars and railroad switches, the FBO would conduct an off-site inspection control for oil-tank railcars on the basis that no non-conformity had been identified in that producer's most recent inspection control (which concerned railroad switches), despite the fact that a non-conformity had been identified in the last inspection control that covered oil-tank railcars produced by that producer.

<sup>405</sup> Russia's response to Panel question No. 116. See also Russia's second written submission, para. 117. We note that just because a producer has successfully passed the most recent inspection control for some railway products does not necessarily mean that the producer has eliminated a non-conformity identified in respect of another railway product in a prior inspection control covering that product.

excluded for all covered products, including those in respect of which no non-conformity had been identified in the most recent inspection. This possibility would present the problem that by treating the products as a group, some railway products covered by the upcoming inspection control could be denied an off-site inspection even if no non-conformity had been identified in the most recent inspection control for those products. This would raise concerns under Article 5.1.2, which requires that Russia not apply its conformity assessment procedure more strictly than necessary to give Russia adequate confidence that the products conform to the underlying technical regulations.

7.511. The third possibility is to read the second condition as excluding an off-site inspection for a railway product covered by an upcoming inspection control only if a non-conformity had been identified in the most recent inspection control concerning that same product. In other words, where the upcoming inspection covers several products, the FBO would not refrain from conducting off-site inspections for products in respect of which non-conformities were not identified in the most recent inspection control covering these products. This product-by-product analysis would not raise the concerns under Article 5.1.2 that we identified in connection with the second possibility, as only products in respect of which a non-conformity had been identified in the preceding inspection control would be denied access to off-site inspection. This reading would also avoid the issue presented under the first possibility, as under the third possible reading a product in respect of which a non-conformity had been identified in its previous inspection control would not have access to off-site inspection.

7.512. The fourth possibility is to read the second condition as applying also to non-conformities relating to the production process rather than to the specific products produced. The three preceding possibilities all focus on non-conformities identified in respect of the certified products. As the text of the second condition of Article 7.4.1 does not define or specify the non-conformity at issue, it appears that production non-conformities identified in the previous inspection control could also provide a basis on which to exclude off-site inspections. Thus, if a railway product was produced through a production line in respect of which non-conformities were found in the previous inspection control, the text of the second condition would appear to allow the FBO to deny an off-site inspection for that particular product. However, if an off-site inspection were denied for a product on the basis that there had been a non-conformity with a production line used for the production of different products, this would raise concerns under Article 5.1.2, as Russia must not apply its conformity assessment procedure more strictly than necessary to give it adequate confidence that the products conform to the underlying technical regulations.

7.513. On the basis of the foregoing, we consider that the first and second possibilities of giving meaning to the second condition of Article 7.4.1 raise concerns that militate against accepting these possibilities. The third possibility does not present such concerns. The fourth possibility raises concerns in its broad version, under which any production non-conformity would be sufficient to exclude off-site inspection. These same concerns do not arise under a narrower version of the fourth possibility, which would lead to the exclusion of off-site inspection only if a production non-conformity concerns the production process for the product covered by an upcoming inspection control. In the light of this, we consider that only the third possibility and the narrow version of the fourth possibility can be accepted, since the two are not mutually exclusive. In sum, we understand the second condition in Article 7.4.1 to mean that an off-site inspection is excluded only for products in respect of which a non-conformity concerning these products or their related production processes had been identified in the most recent inspection control covering these products.

7.514. Before proceeding, we address the third condition (consumer complaints) in Article 7.4.1. It indicates that an off-site inspection is excluded for railway products covered by an upcoming inspection control if there have been consumer complaints concerning the quality of these certified products. The third condition does not specifically address whether any past consumer complaint is sufficient to rule out the possibility of an off-site inspection or whether only recent consumer complaints would have that effect. It appears to us that if a consumer complaint concerning a railway product predates the latest inspection control covering the same railway product, the issue would arise whether the producer had already taken appropriate corrective action and whether that was examined and confirmed during the latest inspection control, as would be expected. If that were the case, it would appear that the consumer complaint would no longer provide a valid basis on which to deny an off-site inspection. Thus, it seems to us that the timing of consumer complaints could well be of relevance in examining whether the complaint warrants excluding an off-site inspection.

**Availability of off-site inspection for the railway products covered by the suspended certificates**

7.515. We now examine whether Ukraine has established, in respect of each of the suspended certificates of the five producers, that off-site inspection was reasonably available to the FBO. As discussed in the previous section, off-site inspection is available under the CS FRT Rules only if there is evidence of absence of non-conformities regarding the certified product or its production process and there has not been any consumer complaint regarding the certified product. We will examine the evidence in respect of those two aspects bearing in mind Ukraine's burden of proof.

7.516. We recall that Ukraine advanced arguments in relation to the availability of off-site inspections, first under Article 5.3 of CS FRT 12-2003, and later, once Russia had referred to Article 7.4.1 of PC-FZT 08-2013, under Article 7.4.1. Russia, for its part, has argued that off-site inspections under Article 7.4.1 were not available, and Russia in addition has provided evidence which it asserts shows that the second and third conditions of Article 7.4.1 were not fulfilled.<sup>406</sup>

7.517. The evidence provided by Russia to rebut Ukraine's assertions as to the availability of off-site inspections was put forward at the second substantive meeting of the Panel. We recall in this respect that the Appellate Body and previous panels have indicated that either party can use evidence submitted by the other party in support of their claims and defences.<sup>407</sup> Therefore, once Russia had submitted its evidence, Ukraine was entitled to use that evidence.

7.518. Russia submitted evidence of non-conformities or consumer complaints for some of the 73 certificates suspended through the 14 instructions. In addition, Ukraine submitted evidence of previous inspection controls in relation to some of the remaining suspended certificates, but not all of them. In our view, evidence of previous inspection controls could have indicated whether individual certified products subject to annual inspection control had received positive results in the immediately preceding inspection control. If so, under our reading of Article 7.4.1, this would have demonstrated that off-site inspections for these products were available to the FBO (unless there were consumer complaints concerning the relevant certified railway products).

7.519. In the circumstances of this dispute, we consider that it was for Ukraine to submit evidence of absence of non-conformities and consumer complaints concerning the railway products covered by the suspended certificates. Article 7.4.1 and its conditions are contained in a legal instrument that, as explained above, we understand was available, whether publicly or upon request. The mere fact that Article 7.4.1 was first brought up by Russia does not relieve Ukraine of its burden of establishing the reasonable availability of off-site inspections for the railway products covered by the challenged instructions. We understand in this respect that the producers receive an "inspection act", once the FBO has completed the inspection control, that indicates the results of the inspection.<sup>408</sup> Also, from the evidence on record it appears to us that the FBO would provide copies, or information about, of consumer complaints to the affected producers, either promptly after receiving them or in the context of any unscheduled inspection control that the FBO would conduct in respect of an affected producer after receiving a consumer complaint.<sup>409</sup> Alternatively,

<sup>406</sup> Evidence provided by Ukraine includes: Inspection act of certified products of PJSC [[xxx]], 23 January 2014, (Exhibit UKR-151)(BCI) and Inspection act of certified products of PJSC [[xxx]], 24 January 2014, (Exhibit UKR-152)(BCI).

Evidence provided by Russia includes: Documents of the FBO providing for the inconsistencies of the certified products of PJSC [[xxx]], (Exhibit RUS-62)(BCI); Documents of the FBO providing for the inconsistencies of the certified products of PJSC [[xxx]], (Exhibit RUS-63)(BCI); Documents of the FBO providing for the inconsistencies of the certified products of PJSC [[xxx]], (Exhibit RUS-64)(BCI); Documents of the FBO providing for inconsistencies of the certified products of PJSC [[xxx]], (Exhibit RUS-65)(BCI); Documents of the FBO providing for the inconsistencies of the certified products of PJSC [[xxx]], (Exhibit RUS-66)(BCI); Letter from company [[xxx]] to the FBO of 23 May 2016, (Exhibit RUS-67)(BCI); Letter from company [[xxx]] to the Deputy Minister of the Ministry of Transport of 13 June 2013, (Exhibit RUS-68)(BCI); Letter from company [[xxx]] to the FBO of 3 December 2015, (Exhibit RUS-69)(BCI); and Letter from company [[xxx]] to the FBO of 17 February 2013, (Exhibit RUS-70)(BCI).

<sup>407</sup> Appellate Body Report, *Korea – Dairy*, paras. 135-150; and Panel Report, *US – Animals*, para. 7.446.

<sup>408</sup> Article 6.2 of CS FRT 12-2003, (Exhibit UKR-3).

<sup>409</sup> According to Article 5.8 of PC-FZT 08-2013, (Exhibit RUS-23), an unscheduled inspection control may be conducted without notifying the certificate holder, *inter alia*, where information is received about a non-conformity of the railway products with the requirements confirmed during certification. Article 5.8 states that such information may be received from consumers. We further note that Article 37.2 of Law No. 184-FZ "On

Ukraine could demonstrate that it undertook reasonable efforts to obtain information from Russia regarding any non-conformities during the previous inspection control or consumer complaints, with an explanation as to why the information could not be obtained. However, Ukraine has not done so for most of the railway products covered by the suspended certificates.

7.520. We proceed on this basis to examine the evidence submitted to us, to determine whether it has been established that off-site inspections were available to the FBO in respect of each of the railway products covered by the suspended certificates. We will examine the relevant certificates of each Ukrainian producer that the FBO suspended through each of the instructions at issue.

### **Producer 1**

7.521. The FBO suspended certificates held by producer 1 [[xxx]] through two instructions. Through instruction 1 [[xxx]], the FBO suspended seven certificates. Russia submitted the previous inspection control act for the products covered by four of those certificates [[xxx]]. In the same inspection control act, FBO inspectors addressed the quality management system on the basis of which another of those certificates was issued [[xxx]]. However, it is unclear which specific products are affected by the "identified inconsistencies" mentioned in the inspection control act.<sup>410</sup> There is also no evidence or explanation on record regarding whether there were consumer complaints with respect to the products covered by those five certificates. In addition, there is no evidence on record regarding the remaining two certificates [[xxx]]. We therefore have no sufficient basis on which to find that there were no relevant non-conformities or consumer complaints for a particular product covered by the certificates at issue. In the light of this, we find that Ukraine has failed to demonstrate that off-site inspections were available under Article 7.4.1 for the railway products covered by instruction 1.

7.522. Through instruction 2 [[xxx]], the FBO suspended seven certificates. The evidence provided by Russia indicates that there were non-conformities in the previous inspection control affecting six [[xxx]] of the seven certificates.<sup>411</sup> In addition, there is no evidence on record regarding the remaining certificate [[xxx]]. On this basis, we find that Ukraine has failed to demonstrate that off-site inspections were available under Article 7.4.1 for the railway products covered by instruction 2.

### **Producer 2**

7.523. The FBO suspended 22 certificates held by producer 2 [[xxx]] through instruction 3 [[xxx]]. The FBO examined the 22 suspended certificates together in the previous inspection control. The inspection report indicated that the railway products covered by the 22 certificates were in conformity.<sup>412</sup> However, in the same report inspectors identified inconsistencies that

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Technical Regulation", (Exhibit UKR-1) provides that a person other than the producer becoming aware of a non-conformity of the products released into circulation with the requirements of technical regulations may send its information about non-conformity of the products to the body of State control (supervision). In such cases, the body of State control is to notify the producer of the receipt of the information within five days. See also Article 34.2 of Law No. 184-FZ. Article 36 of the same Law, in its first three paragraphs, further stipulates that producers are liable for any failure to comply with technical regulations, and are to compensate for damages caused and to take measures to prevent any damages to other persons, their property or the environment. Finally, we note that according to Article 7.12 of the same Law, the relevant Russian authority must keep a record of "all cases of causing damages as a result of a violation of requirements of technical regulations to life or health of citizens, property of individuals or legal entities, state or municipal property, environment, life or health of animals and plants, taking into account the severity of such damages, and shall organize informing of purchasers, including consumers, manufacturers and sellers of the situation in the field of conformity with requirements of technical regulations".

<sup>410</sup> The text of the inspection act dated 18 April 2013 reproduced in Exhibit RUS-62(BCI) is incomplete. Therefore, it is not possible to ascertain to which products the "identified inconsistencies" mentioned in paragraph 7.3 of the inspection act refer. Moreover, the report that is dated 15 May 2013 and reproduced in Exhibit RUS-62(BCI), likewise does not provide clarity about which products are affected by those inconsistencies.

<sup>411</sup> Through Instruction [[xxx]] of 2 October 2013, reproduced in Exhibit RUS-62(BCI), the FBO suspended those six certificates, due to non-conformities identified in the inspection act of 27 September 2013 (which relates to the most recent inspection control before the one scheduled for September 2014).

<sup>412</sup> According to the FBO's report on the results of inspection control of 14 March 2014, reproduced in Exhibit RUS-63(BCI), the products covered by the 22 certificates "remain meeting the requirements" (p. 4) of

apparently concern the production process.<sup>413</sup> The inspection report does not provide a clear and direct link between the identified inconsistencies in the production process and the inspected products.<sup>414</sup> It could be the case that the products covered by the 22 certificates were produced through the same production process with respect to which inspectors found inconsistencies. However, the evidence does not show if this is the case or if the products concerned were produced through different production processes or in different production sites. Thus, the evidence on record is inconclusive as to whether the inconsistencies relative to the production process affected the products covered by the 22 certificates. Moreover, there is no evidence or explanation on record regarding whether there were consumer complaints with respect to the products covered by these certificates. On this basis, we find that Ukraine has failed to demonstrate that off-site inspections were available under Article 7.4.1 for the railway products covered by instruction 3.

### Producer 3

7.524. The FBO suspended certificates held by producer 3 [[xxx]] through two instructions. Through instruction 4 [[xxx]], the FBO suspended three certificates. Russia submitted evidence concerning one of those certificates [[xxx]]. This evidence demonstrates that although there were non-conformities in an earlier inspection control (in November 2012), there were no non-conformities in the most recent inspection control (in June 2013).<sup>415</sup> However, Russia also submitted evidence of a consumer complaint with respect to the railway product (sole-bars) covered by that certificate. This consumer complaint was submitted on 13 June 2013, just five days before the most recent inspection control began.<sup>416</sup> It is not clear to us, and neither party has suggested, that the consumer complaint was addressed and disposed of in the most recent inspection control. We therefore consider that in view of this consumer complaint, off-site inspection was not available for the product covered by this certificate ([[xxx]] regarding sole-bars). There is no evidence on record regarding the remaining two certificates [[xxx]]. On the basis of the foregoing, we find that Ukraine has failed to demonstrate that off-site inspections were available under Article 7.4.1 for the railway products covered by instruction 4.

7.525. Through instruction 5 [[xxx]], the FBO suspended two certificates. There is no evidence on record regarding either of these certificates. We therefore find that Ukraine has failed to demonstrate that off-site inspections were available under Article 7.4.1 for the railway products covered by instruction 5.

### Producer 4

7.526. The FBO suspended certificates held by producer 4 [[xxx]] through two instructions. Through instruction 6 [[xxx]], the FBO suspended one certificate. There is no evidence on record regarding this certificate. We thus find that Ukraine has failed to demonstrate that off-site inspection was available under Article 7.4.1 for the railway products covered by instruction 6.

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the technical regulations for which those products received a certificate. Point 3 of the FBO's report refers to non-conformities specified in part 4 of the inspection act of 24 January 2014.

<sup>413</sup> Part 4 of the inspection act of 24 January 2014, reproduced in Exhibit UKR-152(BCI), refers to non-conformities which appear to relate to the production process.

<sup>414</sup> Documents of the FBO providing for the inconsistencies of the certified products of PJSC [[xxx]], (Exhibit RUS-63)(BCI); and Inspection act of certified products of PJSC [[xxx]], 24 January 2014, (Exhibit UKR-152)(BCI).

<sup>415</sup> The initial non-conformities were identified in the inspection act of 21 November 2012, referred to in Instruction [[xxx]] of 27 November 2012, reproduced in Exhibit RUS-65(BCI), through which the FBO suspended that certificate due to the identified non-conformities. In the FBO's report on inspection of certified products of 31 July 2013, reproduced in Exhibit RUS-65(BCI), it is indicated that that certificates remained in conformity with ("eligible") technical regulations confirmed during certification (p. 7).

<sup>416</sup> Letter from company [[xxx]] to the Deputy Minister of the Ministry of Transport of 13 June 2013, (Exhibit RUS-68)(BCI). We note that Russia submitted another consumer complaint regarding the same product (Letter from company [[xxx]] to the FBO of 23 May 2016, (Exhibit RUS-67)(BCI)). That letter is dated 23 May 2016, which is after the date of issuance of the relevant instruction (17 July 2014) and thus after the point in time at which the FBO had to decide whether to conduct the scheduled inspection control on-site or off-site. This letter suggests that at least from May 2016, off-site inspection was not available in respect of the product covered by this consumer complaint (sole-bars produced by [[xxx]]).



7.527. Through instruction 7 [[xxx]], the FBO suspended four certificates. The parties submitted evidence of the results of the previous inspection control of three of those certificates [[xxx]].<sup>417</sup> According to the inspection results submitted by the parties, there were no non-conformities with regard to the railway products covered by those three certificates. But the inspection results indicate that there were non-conformities at the production level.<sup>418</sup> The evidence on record is inconclusive, however, as to whether the inconsistencies concerning the production process affected the products covered by the three certificates. Moreover, there is no evidence or explanation on record regarding whether there were consumer complaints with respect to the products covered by those three certificates. In addition, there is no evidence on record regarding the remaining certificate [[xxx]]. We thus find that Ukraine has failed to demonstrate that off-site inspection was available under Article 7.4.1 for the railway products covered by instruction 7.

### Producer 5

7.528. The FBO suspended certificates held by producer 5 [[xxx]] through seven instructions. Through instruction 8 [[xxx]], the FBO suspended six certificates. Russia submitted evidence of the previous inspection control of five of those certificates [[xxx]].<sup>419</sup> According to the inspection results, there were no non-conformities with regard to the railway products covered by those five certificates. However, the inspection results indicate that there were non-conformities affecting other products or the production process. Moreover, evidence submitted by Russia indicates that there were consumer complaints, which appear to concern products covered by one of the five certificates.<sup>420</sup> There is no evidence or explanation on record regarding whether there were consumer complaints with respect to the products covered by the other four certificates. In addition, there is no evidence regarding the remaining certificate [[xxx]]. We therefore find that Ukraine has failed to demonstrate that off-site inspection was available under Article 7.4.1 for the railway products covered by instruction 8.

7.529. Through instruction 9 [[xxx]], the FBO suspended seven certificates. The evidence provided by Russia indicates that in the previous inspection control non-conformities of products covered by the seven certificates were identified.<sup>421</sup> We thus find that Ukraine has failed to demonstrate that off-site inspection was available under Article 7.4.1 for the railway products covered by instruction 9.

7.530. Through instruction 10 [[xxx]], the FBO suspended two certificates. There is no evidence on record to support Ukraine's assertion that the conditions for off-site inspection under Article 7.4.1 were met in respect of the railway products covered by this instruction. We therefore find that Ukraine has failed to demonstrate that off-site inspection was available under Article 7.4.1 for the railway products covered by instruction 10.

7.531. Through instruction 11 [[xxx]], the FBO suspended seven certificates. There is no evidence on record to support Ukraine's assertion that the conditions for off-site inspection under Article 7.4.1 were met in respect of the railway products covered by this instruction. We therefore find that Ukraine has failed to demonstrate that off-site inspection under Article 7.4.1 was available for the railway products covered by instruction 11.

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<sup>417</sup> Documents of the FBO providing for the inconsistencies of the certified products of PJSC [[xxx]], (Exhibit RUS-64)(BCI); and Inspection act of certified products of PJSC [[xxx]], 23 January 2014, (Exhibit UKR-151)(BCI).

<sup>418</sup> The inspection act of 23 January 2014, reproduced in Exhibit UKR-151(BCI), refers to a non-conformity consisting of the non-presentation of certain documentation. We consider that this non-conformity concerns the production process.

<sup>419</sup> Documents of the FBO providing for the inconsistencies of the certified products of PJSC [[xxx]], (Exhibit RUS-66)(BCI).

<sup>420</sup> We note that Letter from company [[xxx]] to the FBO of 17 February 2013, (Exhibit RUS-70)(BCI) refers to one of the products covered by the five certificates referred to [freight cars]. However, due to the general reference in instruction 8, we do not have information to determine which certificate concerns that specific product.

<sup>421</sup> Through Instruction [[xxx]] of 25 September 2013, reproduced in Exhibit RUS-66 (BCI), the FBO suspended those seven certificates, due to non-conformities identified in an inspection control that took place in September 2013 (the most recent before the one scheduled for September 2014).

7.532. Through instruction 12 [[xxx]], the FBO suspended three certificates. There is no evidence on record to support Ukraine's assertion that the conditions for off-site inspection under Article 7.4.1 were met in respect of the railway products covered by this instruction. We thus find that Ukraine has failed to demonstrate that off-site inspection was available under Article 7.4.1 for the railway products covered by instruction 12.

7.533. Through instruction 13 [[xxx]], the FBO suspended one certificate. There is no evidence on record to support Ukraine's assertion that the conditions for off-site inspection under Article 7.4.1 were met in respect of the railway products covered by this instruction. We therefore find that Ukraine has failed to demonstrate that off-site inspection was available under Article 7.4.1 for the railway products covered by instruction 13.

7.534. Through instruction 14 [[xxx]], the FBO suspended one certificate. There is no evidence on record to support Ukraine's assertion that the conditions for off-site inspection under Article 7.4.1 were met in respect of the railway products covered by this instruction. We thus find that Ukraine has failed to demonstrate that off-site inspection was available under Article 7.4.1 for the railway products covered by instruction 14.

7.535. In sum, we have found that Ukraine has not established, in respect of any of the suspended certificates covered by the challenged 14 instructions, that off-site inspection was available under Article 7.4.1.

7.536. Moreover, in relation to all of the above considerations concerning the availability of off-site inspection, we note that Ukraine has not claimed that the conditions set out in Article 7.4.1 are, themselves, more strict than necessary and thus contrary to Article 5.1.2.

7.537. Accordingly, we find that Ukraine has failed to establish that conducting off-site inspection control is a less strict manner of applying Russia's conformity assessment procedure that is reasonably available to Russia.

#### **7.3.3.2.3.5 Overall assessment of whether Russia has applied its conformity assessment procedure more strictly than necessary**

7.538. We recall that we have determined above that Russia has applied its conformity assessment procedure, through each of the 14 instructions challenged by Ukraine, in a trade-restrictive manner. We also determined, however, that this manner of applying the conformity assessment procedure contributes substantially to giving Russia adequate confidence that the railway products covered by the suspended certificates conform with Russia's applicable technical regulations. We further determined that the risks that non-conformity would create are high. In the circumstances of this dispute, non-conformity could lead to accidents and thus endanger the life and health of humans, animals, and plants. Such accidents could also cause serious harm to the environment. Clearly, therefore, the values and interests protected are important. We also observed that under the applicable conformity assessment procedure the suspension of certificates was not the strictest manner in which the FBO could, in principle, apply the procedure (which would have been the withdrawal of the certificates).

7.539. In weighing and balancing those elements and determinations, we note that although the FBO applied the underlying conformity procedure in a strict manner that had a significant trade-restrictive effect, this manner of applying the procedure contributed substantially to giving Russia adequate confidence of conformity with the applicable technical regulations and took account of the high risks that non-conformity would have created for important values and interests. We also recall our finding that Ukraine failed to demonstrate that there were less strict manners of applying Russia's conformity assessment procedure that were available to the FBO under the applicable conformity assessment procedure (which Ukraine did not challenge as being WTO-inconsistent). In the light of this, we consider that Ukraine has failed to demonstrate that the FBO, through each of the 14 instructions challenged by Ukraine, has applied its conformity assessment procedure more strictly than is necessary to give Russia adequate confidence of conformity, in the light of the risks that non-conformity would create.

#### **7.3.3.2.3.6 Conclusion**

7.540. On the basis of the foregoing, we find that Ukraine has failed to establish, in respect of each of the 14 instructions at issue, that Russia has acted inconsistently with its obligations under Article 5.1.2, second sentence, of the TBT Agreement.

#### **7.3.3.2.4 Article 5.1.2, first sentence**

7.541. We recall that Ukraine relies on both the first and the second sentences of Article 5.1.2. However, Ukraine has not submitted evidence or arguments that are different from those that we have examined above with respect to the first sentence.

7.542. We recall that the first sentence of Article 5.1.2 prohibits, *inter alia*, that Russia applies its conformity procedure with a view to or with the effect of creating unnecessary obstacles to international trade. As we have found in our analysis under the second sentence of Article 5.1.2 above, the FBO has applied the applicable conformity assessment procedure in a manner that had the effect of creating an obstacle to international trade, inasmuch as it restricted imports of the railway products from Ukraine that are covered by the 14 challenged FBO instructions. However, as our analysis above of the relevant arguments and evidence also indicates, the obstacles to international trade created by each of the 14 instructions were not "unnecessary" within the meaning of Article 5.1.2, first sentence.

7.543. On the basis of the foregoing, we find that Ukraine has failed to establish, in respect of each of the 14 instructions at issue, that Russia has acted inconsistently with its obligations under Article 5.1.2, first sentence, of the TBT Agreement.

#### **7.3.3.2.5 Overall conclusion**

7.544. The Panel concludes that Ukraine has failed to establish, in respect of each of the 14 instructions at issue, that Russia has acted inconsistently with its obligations under Article 5.1.2 of the TBT Agreement.

#### **7.3.4 Consistency of the suspensions with Article 5.2.2 of the TBT Agreement**

7.545. The Panel now turns to examine Ukraine's claims of violation under Article 5.2.2 of the TBT Agreement. Ukraine's claims of inconsistency with Article 5.2.2 in respect of the 14 FBO instructions are based on the third obligation in Article 5.2.2. The texts of Articles 5.2 and 5.2.2 provide in relevant part as follows:

5.2 When implementing the provisions of paragraph 1, Members shall ensure that:

...

5.2.2 the standard processing period of each conformity assessment procedure is published or that the anticipated processing period is communicated to the applicant upon request; *when receiving an application, 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;* even when the application has deficiencies, the competent body proceeds as far as practicable with the conformity assessment if the applicant so requests; and that, upon request, the applicant is informed of the stage of the procedure, with any delay being explained[.] (emphasis added).

7.546. Ukraine claims that in respect of the 14 instructions through which the FBO suspended valid certificates of conformity held by Ukrainian producers of railway products, Russia acted inconsistently with the third obligation in Article 5.2.2 by failing to transmit as soon as possible the

results of the conformity assessment in a precise and complete manner that would have allowed the applicants to take corrective actions, if necessary.<sup>422</sup>

7.547. Russia argues that it did not act inconsistently with this obligation contained in Article 5.2.2 in respect of any of the 14 instructions, because it provided very precise information and because all producers asking for certification were fully aware of the relevant situation.<sup>423</sup>

#### **7.3.4.1 Interpretation of the second and third obligations in Article 5.2.2**

7.548. The Panel begins its assessment of Ukraine's claims by addressing a number of interpretative issues arising from the second and third obligations in Article 5.2.2. We will examine the second and third obligations together, since they share certain concepts and Ukraine makes claims also under the second obligation, albeit in respect of the three FBO decisions to reject new applications, which we address in section 7.4.4 below.

7.549. Ukraine observes that both the second and the third obligations in Article 5.2.2 contain the phrase "in a precise and complete manner". Ukraine submits that "precise" means "exact" or "accurate", whereas "complete" means "having all its parts or elements; entire, full, total". Ukraine deduces from this that the information provided must be full and accurate.<sup>424</sup>

7.550. Ukraine notes that the third obligation in Article 5.2.2 stipulates that the "applicant" is to receive the results of the competent body's assessment. According to Ukraine, nothing in the definition of "conformity assessment procedures" in Article 1.3 of the TBT Agreement suggests that they are limited to initial procedures leading to the issuance of a certificate. Ukraine submits that the third obligation equally applies to conformity assessment procedures that take place after a certificate has been issued. In Ukraine's view, producers who have already received certification but who continue to be subject to, for instance, yearly inspections, are "applicants".<sup>425</sup>

7.551. Ukraine further argues that the phrase "results of the assessment" in the third obligation of Article 5.2.2 should be interpreted to mean not only the results of the overall assessment made under the conformity assessment procedure, but also the results of the assessment made with regard to each procedure that is a necessary element of the conformity assessment procedure. In Ukraine's view, the reference in the text of the third obligation of Article 5.2.2 to "corrective action" (which Ukraine believes is about corrective action by the applicant) indicates that the obligation applies also in case of a negative result of any component procedure or the overall conformity assessment procedure. Ukraine considers that the results of the assessment thus also include the assessment of why the procedure cannot be completed. Ukraine therefore submits that where an inspection procedure is one element of a conformity assessment procedure and cannot be carried out, the results of that assessment must be transmitted to the applicant.<sup>426</sup>

7.552. Russia does not advance specific arguments on the interpretation of Article 5.2.2.

7.553. The Panel notes that pursuant to Article 5.2 the obligations set out in Article 5.2.2 apply to the type of conformity assessment procedures covered by Article 5.1, that is, conformity assessment procedures applied by central government bodies and providing for mandatory conformity assessment.<sup>427</sup> Article 5.2.2 stipulates five distinct procedural obligations that the competent body of the central government must fulfil.

7.554. The second obligation in Article 5.2.2 focuses on the completeness of the documentation and thus the applicant's work. It assumes that the competent body may require that applicants submit documents establishing the conformity of their products. The second obligation imposes a twofold duty on the competent body that arises as soon as it has received an application. First, the competent body must examine whether the documentation is complete, that is, whether the

<sup>422</sup> Ukraine's first written submission, para. 277; and second written submission, para. 254.

<sup>423</sup> Russia's first written submission, paras. 103-104 and 106.

<sup>424</sup> Ukraine's first written submission, para. 280. Ukraine relies on *The Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1 and 2, pp. 471 and 2319.

<sup>425</sup> Ukraine's second written submission, paras. 269-271.

<sup>426</sup> Ukraine's second written submission, paras. 263-264 and 268.

<sup>427</sup> See paragraph 7.251 above.

applicant has submitted all required documents. Second, the competent body must inform the applicant of all deficiencies. As the competent body has only examined the completeness of the documentation at this stage, the "deficiency" of an application in our view relates to a shortcoming affecting the application or incomplete documentation.

7.555. The second obligation further clarifies that a competent body must "promptly examine[] [the application] ... and inform[] the applicant". We consider that the adverb "promptly" qualifies both the verb "examine" and the verb "inform". Otherwise the obligation to examine completeness promptly would be ineffective, as the competent body could delay informing the applicant of deficiencies. We note that "promptly" means "quickly" and "without undue delay".<sup>428</sup> Whether the competent body has acted promptly will depend on the circumstances and must be assessed on a case-by-case basis.

7.556. The competent body is also under an obligation to inform the applicant in a "precise and complete manner" of all deficiencies that it discovers when examining the application. Precise and complete information enables the applicant correctly to complete its application by submitting any missing document(s) or put together complete documentation and resubmit its application, as the case may be.<sup>429</sup> We note that the obligation to inform the applicant in a precise and complete manner is also connected to the obligation to inform the applicant promptly. If the competent body informed the applicant promptly, but in an imprecise or incomplete manner, any time that could be gained as a result of the competent body's prompt information might be lost if the applicant did not come back with the correct documents because the information was not precise or complete.

7.557. We consider that it must be assessed on a case-by-case basis whether the competent body has informed the applicant in a "precise and complete manner". We note, however, that the obligation to provide precise and complete information is unqualified. The competent body must always inform the applicant in a precise and complete manner. Even if the competent body considers that the applicant would know how to correctly complete a deficient application if it received less than precise and complete information, the competent body is still required to provide precise and complete information. The standard for assessing whether information provided is precise and complete is thus an objective one and not a subjective one that will vary from one applicant to another. This understanding also prevents disagreements between competent bodies and applicants, and it facilitates review by a review body.<sup>430</sup>

7.558. We next turn to the third obligation in Article 5.2.2, which focuses on the "results of the assessment" and thus the competent body's work. The competent body must transmit the results to the applicant "as soon as possible ... so that corrective action may be taken if necessary". Although the text does not state so expressly, we consider that the corrective action referred to is corrective action to be taken by the applicant.<sup>431</sup> Indeed, if, for instance, the result of an inspection at the site of facilities was negative (non-conformity), the applicant would want to take the necessary steps to address the inspectors' concerns.

7.559. The third obligation also imposes an obligation on the competent body to transmit to the applicant the results of the assessment "in a precise and complete manner". We consider that the phrase "in a precise and complete manner" should be interpreted in the same way as in the second obligation of Article 5.2.2, as an objective standard.

7.560. As noted, the third obligation requires the competent body to inform the applicant about the "results of the assessment". The "assessment" referred to is the "conformity assessment", which is confirmed by the fourth obligation in Article 5.2.2 (which uses the term "conformity assessment"). Article 5.1.1, second sentence, of the TBT Agreement makes clear that conformity assessment entails various "conformity assessment activities". Annex 1.3 of the TBT Agreement

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<sup>428</sup> See Panel Reports, *EC – IT Products*, para. 7.1074.

<sup>429</sup> The fourth obligation in Article 5.2.2 requires the competent body to proceed as far as practicable with an incomplete application if the applicant so requests.

<sup>430</sup> Under Article 5.2.8, Members are required to put in place a procedure for the review of complaints concerning the operation of a conformity assessment procedure.

<sup>431</sup> Canada, the European Union and the United States have expressed the same view. See Canada's third-party response to Panel question No. 20, para. 87; European Union's third-party response to Panel question No. 18, para. 56; and United States' third-party response to Panel question No. 20, para. 46.

has an explanatory note that indicates that some of those include sampling, testing, inspection, evaluation, verification and assurance of conformity. These activities may be combined in a single conformity assessment procedure, and at least some of these activities may yield independent results. We understand that, in that sense, conformity assessment procedures may yield multiple results that may become available at different times of the process. We note in this connection that the third obligation requires that competent bodies transmit the results "as soon as possible", "so that corrective action may be taken if necessary".

7.561. This dispute presents the issue of what counts as a "result" that must be transmitted. We note that the dictionary defines the meaning of "result" as, *inter alia*, "outcome".<sup>432</sup> There can be no question that affirmative or negative substantive outcomes of an assessment (conformity or non-conformity) are "results" that must be transmitted. Situations may arise, however, as in this dispute, where a relevant assessment activity that in principle would yield an independent substantive result cannot be undertaken or completed. This may be, for instance, because of circumstances that make it impossible to carry out the relevant assessment activity or a need for additional information (which may arise even where the documentation accompanying an application was complete). In such situations, there is no substantive "yes" (conformity) or "no" (non-conformity) result. However, the attempted or incomplete assessment has still yielded an outcome, which is that no substantive outcome is possible, at least for the time being. We consider that such an outcome is, also, a "result" of an assessment that must be transmitted.

7.562. Were it otherwise, a competent body could delay sharing information with the applicant about an outcome even in situations where the competent body cannot proceed with the assessment and where the applicant could take corrective action. This would be at odds with the purpose of the third obligation, which is, *inter alia*, to enable applicants to initiate corrective action promptly.<sup>433</sup>

7.563. Having looked at the second and third obligations in Article 5.2.2 separately, we now examine their relationship with each other. As we have said, the second obligation focuses on the applicant's work (completeness of the application) and the third obligation on the competent body's work (results of the assessment). In the ordinary course of events – and the sequence in which the two obligations appear in Article 5.2.2 reflects this – the competent body will first satisfy itself that an application is complete, and if it is, it will then proceed with the conformity assessment and transmit the results of its assessment to the applicant as soon as possible.

7.564. However, nothing in Article 5.2.2 indicates that the third obligation comes into being only once the competent body has finished its examination of the completeness of the documentation submitted by the applicant. The third obligation states, without qualification, that the competent body must transmit as soon as possible the results of its assessment so that corrective action may be taken. Consequently, the competent body must inform the applicant as soon as possible after any results become available, even if this is before the competent body has been able to finish its examination of the completeness of the documentation. As we have said above, the results to be transmitted would also include "no substantive outcome" results.

7.565. With these interpretative findings in mind, we now proceed to assess the measures that Ukraine challenges under Article 5.2.2.

### **7.3.4.2 Application of the third obligation in Article 5.2.2**

#### **7.3.4.2.1 Applicability of Article 5.2.2**

7.566. The Panel begins its assessment of Ukraine's claims concerning the 14 FBO instructions by addressing whether Article 5.2.2 applies to the conformity assessment procedures that resulted in these instructions. We note in this respect that Article 5.2.2 is part of Article 5.2, which contains

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<sup>432</sup> The Shorter Oxford English Dictionary defines "result" as "[t]he effect, consequence, issue, or outcome of some action, process, or design". *The Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2554.

<sup>433</sup> We are aware that the fifth obligation in Article 5.2.2 gives the applicant the possibility to obtain information about the stage of the procedure and an explanation for any delay. However, this would not ensure that the applicant is informed about a "no substantive outcome" result as soon as possible.

obligations that Members must observe "[w]hen implementing the provisions of paragraph 1 [of Article 5]".

7.567. We found above that the 14 instructions are subject to Article 5.1 because they concern conformity assessment by a central government body and a mandatory conformity assessment procedure.<sup>434</sup> As Russia was therefore required to implement Article 5.1 in respect of the conformity assessment procedures that resulted in these instructions, it was required, in view of Article 5.2, to comply also with Article 5.2.2 when undertaking those conformity assessment procedures.

#### **7.3.4.2.2 Overview of relevant facts**

7.568. Section 7.3.1 above summarizes the relevant facts.<sup>435</sup> It indicates that the record contains the instructions for all 14 suspensions at issue. For five of the 14 suspensions, the record also contains a cover letter that is distinct from the FBO instruction, but accompanied it. The parties have based their analyses of the information that the FBO transmitted to the relevant applicants either on the instructions alone, or where there are separate cover letters, on the instructions and the cover letters.

7.569. In all 14 instances the instructions used the same or similar text.<sup>436</sup> To the extent that there are differences, they principally relate to references to dates. This reflects the different deadlines that had been set in each case for inspection control to take place in Ukraine.

7.570. The cover letters of four of the five suspensions for which cover letters are available – suspensions 2, 4, 8 and 9 – provide similar relevant information to applicants. One additional cover letter, which concerns suspension 1, provides more detailed information than the other four cover letters.

7.571. We note that all instructions and all cover letters invoke as the immediate reason for the decisions to suspend the valid certificates that the conditions for carrying out inspection control in Ukraine were not satisfied at the relevant time.

#### **7.3.4.2.3 Consistency with the third obligation in Article 5.2.2**

7.572. Ukraine claims that in respect of each of the 14 instructions through which the FBO suspended valid certificates, Russia did not comply with the third obligation in Article 5.2.2.<sup>437</sup> Ukraine claims that by suspending the relevant certificates without any further explanation, the FBO failed to transmit in a precise and complete manner, the results of the preliminary assessment which would allow the applicants to take corrective action. According to Ukraine, the generic reason that there were no conditions for carrying out the inspection controls does not amount to full and accurate information. Ukraine argues that without knowing the specific reasons why the inspection controls could not take place, the producers were not in a position to take steps to remedy the situation.<sup>438</sup>

7.573. Regarding suspension 1, Ukraine submits that the producer is located outside the regions where, according to the cover letter, there are military operations conducted by the Ukrainian government. Ukraine further argues that there are no entry restrictions on Russian male citizens. For Ukraine, it follows that the cover letter does not explain why the inspection could not be carried out at the premises of the supplier and what corrective action the supplier could take to

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<sup>434</sup> See paragraphs 7.291- 7.293 above.

<sup>435</sup> See in particular Table 4 above.

<sup>436</sup> According to Ukraine, the text is not always identical because of differences in translation. Ukraine's second written submission, footnote 360.

<sup>437</sup> Ukraine makes no claim in respect of the 14 suspensions under the second obligation in Article 5.2.2. Ukraine's second written submission, para. 254.

<sup>438</sup> Ukraine's first written submission, paras. 282-283.

remedy the situation. According to Ukraine, the information provided about the results must be producer-specific.<sup>439</sup>

7.574. Additionally, Ukraine argues that the suspensions other than suspension 1 did not provide any explanation of why inspections could not be carried out. In Ukraine's view, the competent body must inform the applicants and not assume that they are fully aware of the situation. Ukraine argues that Russia cannot satisfy the third obligation in Article 5.2.2 by making an assumption about the information that may already be known to applicants. Ukraine maintains that there is no basis in Article 5.2.2 for introducing a subjective standard under which a Member's compliance with Article 5.2.2 would depend on the knowledge that each applicant has of the grounds of the competent body's decision or the underlying situation.<sup>440</sup>

7.575. Russia argues that Ukraine has failed to establish its claims under Article 5.2.2. Regarding suspension 1, Russia argues that the cover letter informed the applicant in a very precise manner by making clear that there were no conditions for inspection control. Russia further notes that there was additional explanation regarding why there were no conditions for inspection control. According to Russia, there was no confidence with respect to the safety conditions in the territory of Ukraine.<sup>441</sup>

7.576. Regarding suspensions 2-14, Russia argues that the relevant instructions informed the applicants in a precise manner by making clear that there were no conditions for inspection control. According to Russia, the FBO did not provide the additional information in the case of those suspensions because all applicants were fully aware of the underlying situation and the reason for the inability to conduct the inspection control. Russia submits that this is confirmed by letters sent to the FBO<sup>442</sup> by certain applicants.<sup>443</sup>

7.577. The Panel recalls that the third obligation in Article 5.2.2 required the FBO to transmit the "results of the assessment ... in a precise and complete manner" to applicants so that they could take corrective action, if necessary. We will first address whether, through the 14 instructions and five cover letters, the FBO was transmitting results of its assessment.

7.578. We note that in all 14 instances inspection controls were to have taken place sometime prior to the date of the instructions. The instructions and cover letters informed the applicants<sup>444</sup> that the conditions for the inspection controls were not satisfied when they were scheduled to take place or on the later date of the instructions.

7.579. We recall that inspection control was a distinct integral part of the then-applicable conformity assessment procedure set out in the CS FRT Rules. The "assessment", the result of which is to be transmitted, is, therefore, the assessment to be conducted during the course of inspection control.

7.580. Evidently, the FBO was not transmitting any substantive "conformity" or "non-conformity" outcomes of the inspection controls, since none had been conducted. Instead, the FBO concluded that, for the time being, the assessments to be undertaken during the inspection control part of the conformity assessment procedure could not yield any substantive outcomes. In keeping with our interpretation of the term "results of the assessment" as it appears in the third obligation, we

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<sup>439</sup> Ukraine's opening statement at the first meeting of the Panel, para. 71; and second written submission, paras. 303-305.

<sup>440</sup> Ukraine's second written submission, paras. 306-307; and opening statement at the second meeting of the Panel, para. 71.

<sup>441</sup> Russia's first written submission, paras. 103 and 106; and second written submission, para. 123.

<sup>442</sup> Russia refers to the Letter [[xxx]] from PJSC [[xxx]] to the FBO, 12 May 2014, (Exhibit UKR-17)((BCI); Letter [[xxx]] from PJSC [[xxx]] to the FBO, (Exhibit UKR-18)(BCI)(Corr.); Letter [[xxx]] from PJSC [[xxx]] to the FBO, 13 March 2015 (Exhibit UKR-21)(BCI); and Letter [[xxx]] from PJSC [[xxx]] to the FBO, 10 October 2014, (Exhibit UKR-41)(BCI).

<sup>443</sup> Russia's first written submission, para. 104; and second written submission, para. 124.

<sup>444</sup> As we have already stated, the suspensions concern the post-certification stage of the underlying conformity assessment procedure, and there was no need to submit a specific application for the conduct of inspection control. However, the third obligation in Article 5.2.2 refers to "the applicant", and from the perspective of the third obligation in Article 5.2.2, the producers whose certificates were suspended are the original applicants.



therefore consider that the "result" of the inspection assessment was that there was not and could not be any substantive outcome for the time being. In the light of this, it is clear to us that the FBO was transmitting to applicants the result of its assessment.

7.581. We now turn to address whether the FBO transmitted the result of its assessment in a precise and complete manner so that any corrective action could be taken.

7.582. We note at the outset that, in our view, the FBO conveyed clearly to the applicants that no "conformity" or "non-conformity" inspection control outcome was possible. Ukraine argues, however, that this alone did not inform the applicants in a precise and complete manner so that they could take corrective action, if necessary. In examining this argument, we will first consider the information that the FBO provided to applicants in the instructions and will then examine, where applicable, the additional information provided in the cover letters.

7.583. The relevant instructions inform applicants that the conditions for the conduct of inspection control were lacking up to the date of the instructions. The instructions thus inform the applicants about the result that was reached. However, absent any information about the nature of the "conditions" that make it impossible to carry out inspection control, the applicants have no way of determining whether these conditions are outside their control or whether there is corrective action that they could take with a view to allowing the inspection controls to proceed. For these reasons, the instructions do not inform the applicants in a precise and complete manner and are thus not sufficient, in themselves, to satisfy the requirements of the third obligation.

7.584. According to Russia, all applicants were fully aware of the underlying situation. As we have stated above, however, the standard for assessing whether the results have been transmitted in a precise and complete manner is an objective one. It is therefore not necessary to examine, in addition, what the applicants at issue did or did not know about the relevant "conditions". What matters is whether the information was objectively precise and complete. On an objective assessment, the reference to "conditions" for the conduct of inspection control could cover any number of circumstances, ranging from the conditions of the competent body (e.g. the availability of inspectors), to the conditions of the applicants (e.g. their failure to have paid fees in the past or for the upcoming inspection or their failure to contribute to some necessary preparatory tasks), to the conditions at the location of facilities to be inspected (e.g. their accessibility or the security situation) as well as other conditions. Applicants were therefore objectively not in a position, without additional indications, reliably to infer from the reference to a "lack of conditions" for conducting inspection controls what the relevant conditions were.

7.585. Russia also points to letters sent to the FBO by some applicants in response to the instructions that they had received from the FBO. Russia notes in this connection that these applicants were able to draw the correct inferences from the information provided by the FBO and thus understood the reasons for the FBO's inability to conduct the inspection control. We are not persuaded by this argument. Even if it turned out that some applicants made correct assumptions about the information provided in the instructions, this does not detract from the fact that the instructions objectively did not inform applicants in a precise and complete manner when they were transmitted and that there should have been no need for applicants to make assumptions, which could have turned out to be correct or incorrect.

7.586. We next examine the additional information provided in the four cover letters concerning suspensions 2, 4, 8 and 9. They all refer to a significant change in circumstances as the reason that prevented the conduct of inspection controls and inform the applicants that when these circumstances would revert to normal, inspection controls could resume. The four cover letters thus provide little additional information. All that can be reliably inferred is that there had been a change in circumstances. The cover letters do not elucidate what circumstances changed. On an objective assessment, it is once again unclear whether the competent body's circumstances changed or the applicant's circumstances, or whether the changed circumstances related to the location or country where inspection control was to be conducted. As a consequence, the applicants do not have enough information to determine whether corrective action is a possibility. For these reasons, the four cover letters concerning suspensions 2, 4, 8 and 9, even considered together with the associated instructions, are not sufficient to satisfy the requirements of the third obligation in Article 5.2.2.

7.587. We turn, finally, to consider the additional information provided in the cover letter concerning suspension 1. It indicates that the conditions for the conduct of inspection control in Ukraine were not satisfied for two reasons, which are characterized as *force majeure* circumstances. First, a visit of FBO employees to Ukraine would, allegedly, have posed a threat to their life or health owing to the military operations conducted by Ukraine's government in certain regions of the country. Second, the State Border Guard Service of Ukraine allegedly restricted the entry of Russian male citizens aged between 16 and 60 years.

7.588. This cover letter provides fuller and more detailed information than that provided in the other cover letters and the instructions. The additional information notably clarifies the nature of the "conditions" that were not met for the inspection control to take place. With this information, the applicant was, in our view, placed in a position where it could assess whether there were possibilities of it taking any corrective action. The cover letter specifically indicates that inspection control would be possible again only once military operations on the territory of Ukraine had terminated and entry restrictions had been removed. This explanation covers all producers in Ukraine, including the applicant in question. We therefore do not agree that the information provided in the cover letter needed to be more producer-specific. We also observe that it is not relevant under the third obligation in Article 5.2.2 whether the results transmitted are well-founded from the perspective of the applicant.<sup>445</sup> For these reasons, we consider that the cover letter concerning suspension 1, read together with the relevant instruction, transmitted the "no substantive outcome" result to the applicant in a precise and complete manner.

7.589. The cover letter concerning suspension 1 in our view also serves to confirm our findings concerning the other 13 suspensions. The cover letter demonstrates that the FBO was in a position to provide fuller information than it did in the case of the other 13 suspensions. We add in this respect that the third obligation in Article 5.2.2 imposes a requirement that the result be transmitted in a precise and complete manner in every conformity assessment procedure that is undertaken. Even if the results were the same across many conformity assessment procedures, it is not the burden of applicants to try to identify other applicants in the same situation and inquire with them about what, if any, additional information the competent body had provided to them.

7.590. Finally, we note that the record indicates that the applicant in the case of suspensions 1 and 2 is one and the same producer. Moreover, the instruction for suspension 2 was issued after the instruction for suspension 1. The applicant therefore had access to the information accompanying suspension 1 when it received the instruction for suspension 2. As mentioned above, the cover letter and instruction for suspension 2 are not sufficient to meet the requirements of the third obligation in Article 5.2.2. In our view, Russia cannot benefit in the context of suspension 2 from the fact that the applicant had access to additional information from suspension 1. As we have stated, the requirements of Article 5.2.2 must be satisfied in every conformity assessment procedure. The level of precision and completeness does not vary from applicant to applicant, or depending on what information has been provided to an applicant in the context of a previous conformity assessment procedure.

#### **7.3.4.2.4 Conclusion**

7.591. In the light of the above, the Panel concludes that Ukraine has established, for each of the instructions concerning suspensions 2 to 14, that Russia has acted inconsistently with the third obligation in Article 5.2.2. The Panel also concludes, however, that Ukraine has failed to establish, for the instruction concerning suspension 1, that Russia acted inconsistently with the third obligation in Article 5.2.2. In sum, the Panel concludes that Ukraine has established inconsistencies with the third obligation in Article 5.2.2 in respect of 13 of the 14 suspensions.

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<sup>445</sup> Article 5.2.8 envisages in this respect that Members put in place a procedure that allows an applicant to file a complaint and seek review concerning the operation of a conformity assessment procedure.

## 7.4 Claims concerning the rejections of applications for new certificates

### 7.4.1 Measures at issue

#### 7.4.1.1 Overview of CU legal framework on conformity assessment procedures

7.592. This section concerns the conformity assessment procedures applied by Russia to applications for new certificates for railway products by Ukrainian producers rejected by the FBO. CU Technical Regulations 001/2011, 002/2011, and 003/2011 applied in Russia from 2 August 2014 and set out conformity assessment procedures for railway products.

7.593. The CU Technical Regulations set out the railway products subject to one of the two types of mandatory conformity assessment procedures: supplier's declaration of conformity, or mandatory certification.<sup>446</sup> The choice of the type of conformity assessment procedure depends on the type of railway product in question.<sup>447</sup> The issues raised in this dispute, and the subsequent discussion and analysis, concern mandatory certification only.<sup>448</sup>

7.594. Mandatory certification under the CU Technical Regulations 001/2011, 002/2011, and 003/2011 include the stages<sup>449</sup> which occur *before* a certificate is issued (certification procedure), as well as *after* a certificate has been issued (inspection control). At issue in this dispute is only the application of Russia's conformity assessment procedure to the certification procedure. The "certification procedure" comprises sequential steps to be followed before a certificate can be issued to the applicant by the certification body, which may include testing of samples and inspection of production.<sup>450</sup> For sampling of the product for testing, the place of sampling in the certification procedure is determined by relevant Russian standards (GOST 31814-2012).<sup>451</sup> For serial production sampling occurs at the producer's warehouse of finished products. For batches or consignments of products, sampling occurs at the place where a batch or consignment is located (such as the producer's warehouse of finished products, warehouse of temporary storage, a customs warehouse or at the warehouse of the recipient).<sup>452</sup>

7.595. Under the three CU Technical Regulations, seven different certification schemes are established.<sup>453</sup> The applicable scheme depends on the type and volume of production of the railway product in question, and certificates issued under each scheme have different periods of validity.<sup>454</sup> In an application for certification, the applicant selects the applicable certification

<sup>446</sup> Article 6(2) of CU Technical Regulation 001/2011; Article 6(6) of CU Technical Regulation 002/2011; and Article 6(6) of CU Technical Regulation 003/2011.

<sup>447</sup> For example, under CU Technical Regulation 001/2011, "brake discs for railway rolling stock" are subject to "mandatory certification", while a "driver's seat for locomotives" is subject to "supplier's declaration of conformity". See Articles 6(6) and Appendices 1-5 of CU Technical Regulation 001/2011; Article 6(10) and Appendices 3-5 of CU Technical Regulation 002/2011; and Article 6(10) and Appendices 3-4 of CU Technical Regulation 003/2011.

<sup>448</sup> Ukraine's response to Panel question No. 121, para. 26; and second written submission, footnote 354.

<sup>449</sup> Article 6(21-70) of CU Technical Regulation 001/2011; Article 6(24-73) of CU Technical Regulation 002/2011; and Article 6(24-72) of CU Technical Regulation 003/2011.

<sup>450</sup> These steps include (i) submission of the application; (ii) preliminary assessment of the application in order to decide whether it can be *rejected* (the assessment of the application can no longer proceed) or *accepted* (the applicant will be informed which specific certification scheme will be followed); (iii) a sample of the railway product(s) covered by the application is (are) then tested and these results are analysed; (iv) if specified in the applicable certification scheme, an inspection of the production of the railway product(s) concerned is performed; (v) based on the results under steps (iii) and (iv), a final decision is then taken on whether or not to issue the "certificate of conformity"; (vi) if the final decision is positive, the certificate is issued and officially registered, and will be valid for up to five years (with a possible one-year extension). See Article 6 of Technical Regulation 001/2011 "On the safety of railway rolling stock", (CU Technical Regulation 001/2011), (Exhibit UKR-9)(Corr.).

<sup>451</sup> Russia's response to Panel question No. 141.

<sup>452</sup> Article 4.2.3 of GOST 31814-2012, (Exhibit UKR-140); see also Russia's response to Panel question No. 141.

<sup>453</sup> They are identical for each of the three CU technical regulations.

<sup>454</sup> Article 6(7) and Appendix 6 of CU Technical Regulation 001/2011; Article 6(11) and Appendix 6 of CU Technical Regulation 002/2011; and Article 6(11) and Appendix 5 of CU Technical Regulation 003/2011.

scheme under which mandatory certification by the FBO is requested.<sup>455</sup> The applications for new certificates by Ukrainian producers at issue were submitted under<sup>456</sup> schemes 3c, 4c, and 6c.<sup>457</sup> The following table provides an overview of these three certification schemes.

**Table 5 - Selected certification schemes under CU Technical Regulations 001/2011 and 003/2011<sup>458</sup>**

Scheme	Type of production and validity	Certification procedure
<b>Under CU Technical Regulation 001/2011</b>		
3c	Applicable to series-produced products (serial production).  The certificate is issued for a period not exceeding three years.	(i) tests of a representative (standard) product sample (from producer's warehouse of finished products)
6c	Applicable to a batch of products (batch or consignment).  The certificate covers the declared batch of products.	(i) test of a product sample selected from the batch submitted for certification (at the place where a consignment is located (at the producer's warehouse of finished products, warehouse of temporary storage, customs warehouse or at the warehouse of the recipient with responsible storage, in the vehicle capacity [ <i>sic</i> ]))
<b>Under CU Technical Regulation 003/2011</b>		
4c <sup>459</sup>	Applicable to series-produced products (serial production).  The certificate is issued for a period not exceeding five years.	(i) tests of a representative (standard) product sample (from producer's warehouse of finished products); and (ii) inspection of production

#### 7.4.1.2 Challenged FBO decisions

7.596. The following table compiles information on the three decisions challenged by Ukraine, through which the FBO rejected or annulled applications for new certificates submitted by Ukrainian producers. The first column contains the number of the decision and an indication of the number of applications rejected through the decision. The second column contains the date of the decision. The third column includes the application number and the products covered by the relevant decision. The fourth column refers to the scheme under which the applicant applied for the relevant conformity assessment procedures, as required by the applicable CU Technical

<sup>455</sup> Article 6(22)(e) and Annex 6 to of CU Technical Regulation 001/2011, (Exhibit UKR-9); Article 6.25(d) and Application number 6 of Technical Regulation 002/2011 "On high-speed rail safety", (CU Technical Regulation 002/2011), (Exhibit UKR-10)(Corr.); and Article 6.25(d) and Application number 5 of Technical Regulation 003/2011 "On the safety of rail transport infrastructure", (CU Technical Regulation 003/2011), (Exhibit UKR-11)(Corr.). See Russia's response to Panel question No. 141.

<sup>456</sup> These were three out of the total of seven different certification schemes provided for under the three CU Technical Regulations.

<sup>457</sup> Three of the applications submitted by Ukrainian producers that the FBO rejected were submitted for voluntary certification. Those applications are not at issue in this dispute, as they do not concern mandatory certification. See Table 6 below.

<sup>458</sup> Annex 6 to CU Technical Regulation 001/2011, (Exhibit UKR-9); Application number 5 of CU Technical Regulation 003/2011, (Exhibit UKR-11); and Article 4.2.3 of GOST 31814-2012, (Exhibit UKR-140). As explained below, for the purpose of this dispute, only these three certification schemes are relevant to the three rejection decisions at issue.

<sup>459</sup> The description of the requirements under scheme 4c in CU Technical Regulation 003/2011 (Exhibit UKR-11) is difficult to understand due to quality of the English translation provided to the Panel. The description in the table is based on the English translation of CU Technical Regulation 001/2011 (Exhibit UKR-9). The description of scheme 4c in the Russian original appears to be identical in CU Technical Regulation 001/2011 (Exhibit UKR-9(a)) and in CU Technical Regulation 003/2011 (Exhibit UKR-11(a)).

Regulations.<sup>460</sup> The applications that the FBO rejected through rejection decisions 1 and 2 below were submitted pursuant to CU Technical Regulation 001/2011. The applications that the FBO annulled through rejection decision 3 below were submitted pursuant to CU Technical Regulation 003/2011. Each scheme is accompanied by an indication of the type of sampling and inspection required. The last column reproduces the reasons provided in the decision to reject the corresponding applications. Rejection decision 1 concerns producer 1 [[xxx]]. Rejection decision 2 concerns producer 3 [[xxx]]. Rejection decision 3 concerns producer 2 [[xxx]].<sup>461</sup>

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<sup>460</sup> See Annex B to CS FRT 01-96, (Exhibit UKR-79) and Appendix A to CS FRT Rules 31/PMG 40-2003, (Exhibit UKR-80).

<sup>461</sup> The producers subject to the measures at issue are listed in paragraph 7.236 above.

**Table 6 - Decisions through which applications for new certificates were rejected or annulled**

Rejection decision	Date	Application No and products covered	Scheme and type of Inspection	Reason for rejection
Rejection decision 1 - [[xxx]] <sup>462</sup> Concerns 4 applications	2.10.2014	A1 - [[xxx]]: two-axle bogies; and two-axle bogies of trunk road freight cars with track gage.	3c, which requires tests of a standard product sample, and applies to serial production.	"[The FBO] returns without consideration the application for certification of the goods, produced by [company] [[xxx]], since it is impossible to carry out the certification procedure in full."
		A2 - [[xxx]]: universal flat wagons; and flat wagons for large-capacity containers.	3c	
		A3 - [[xxx]]: universal flat wagon and flat wagons for carrying timber.	3c	
		A4 - [[xxx]]: open wagons	3c	
Rejection decision 2 - [[xxx]] <sup>463</sup> Concerns 2 applications	23.1.2015	A1 [[xxx]]: solebar of parts of the carriages, running balancer trolleys and similar trolleys of wagons (bolster) batch of 7581	6c, which requires test of a product sample selected from the batch submitted for certification. This scheme applies for a specific quantity of products.	"[The FBO] returns without consideration the applications for certification of products manufactured by [company] [[xxx]] due to the impossibility to carry out a certification procedure in full."
		A2 [[xxx]]: solebar of parts of the carriages, running balancer trolleys and similar trolleys of wagons (side frame) batch of 15057	6c	
Rejection decision 3 - [[xxx]] <sup>464</sup> Concerns 19 applications	9.2.2015	A1 - [[xxx]]: unhardened core frogs of railroad switches and crossing frogs.	4c, which requires tests of a standard product sample and inspection of production. This scheme applies to serial production.	"Due to the absence of the documents, necessary for the performance of certification (Para. 28 Art. 6 of Technical Regulations of the Customs Union 003/2011 and VP SSFZhT 31/PMG 40-2003 (the
		A2 - [[xxx]]: railroad switch maintenance kits.	4c	
		A3 - [[xxx]]: railroad switches	4c	

<sup>462</sup> Letter [[xxx]] from the FBO to PJSC [[xxx]], 2 October 2014, (Exhibit UKR-16)(BCI). See also the description of the relevant products included in Applications submitted by PJSC [[xxx]], 1 October 2014, (Exhibit UKR-111)(BCI); and in Letter of the FBO No. [[xxx]] of 2 October 2014, (Exhibit RUS-3).

<sup>463</sup> Letter [[xxx]] from the FBO to PJSC [[xxx]], 23 January 2015, (Exhibit UKR-32)(BCI). See also the description of the relevant products included in Letter [[xxx]] from PJSC [[xxx]], 7 September 2017, (Exhibit UKR-136)(BCI); and Letter of the FBO No. [[xxx]] of 23 January 2015, (Exhibit RUS-4).

<sup>464</sup> Letter [[xxx]] from the FBO of 9 February 2015, (Exhibit UKR-23)(BCI). See also the description of the relevant products included in Exhibit UKR-112(BCI) and the initial acceptance of those applications in Decisions [[xxx]], 20 and 21 January 2015, (Exhibit UKR-113)(BCI).

	A4 - [[xxx]]: unhardened core frogs of railroad switches and connecting tracks for underground railway	Application submitted under 4c. However the application was initially accepted under voluntary certification scheme 3a.	Procedure for certification of means of railway transport)), the submitted applications for certification of track switching equipment of [company] [[xxx]] and registered with [the FBO] as of 25.12.2014 <sup>465</sup> [[xxx]], are annulled.
	A5 - [[xxx]]: railroad switch maintenance kits for underground railway	Applied under 4c and accepted under 3a	
	A6 - [[xxx]]: railroad switches for underground railway	Applied under 4c and accepted under 3a	
	A7 - [[xxx]]: unhardened core frogs of railroad switches and connecting tracks models for industrial transport	4c	
	A8 - [[xxx]]: switching facilities maintenance kits for industrial transport	4c	
	A9 - [[xxx]]: armory type switching facilities for industrial transport	4c	
	A10 - [[xxx]]: bolts for joining of parts of armory type switching facilities	4c	
	A11 - [[xxx]]: bolts for joining of rail-track and points of railway switches with rail basis	4c	
	A12 - [[xxx]]: fixed crossing	4c	
	A13 - [[xxx]]: switching mechanisms	3a, which refers to certification of a voluntary declaration of conformity.	
	A14 - [[xxx]]: points of armory type switching facilities for industrial transport	4c	
	A15 - [[xxx]]: blades of armory type switching facilities	4c	
	A16 - [[xxx]]: pads with cushions on the welded joint for armory type switching facilities	4c	
	A17 - [[xxx]]: pads with cushions on the welded joint for armory type switching facilities	4c	
	A18 - [[xxx]]: brake unit removers	3a	
	A19 - [[xxx]]: equalizing joints (mechanisms)	3a	

<sup>465</sup> We note that both the original version and the translation of Letter [[xxx]] from the FBO of 9 February 2015, (Exhibit UKR-23)(BCI) refer to applications registered on 25 December 2015. This appears to be a clerical error. The date in which the relevant applications were submitted, as indicated in the documents contained in Exhibit UKR-112(BCI) and Exhibit UKR-113(BCI), is 25 December 2014.

### 7.4.1.3 Panel's terms of reference

7.597. Russia asserts that it is evident from the plain terms of the panel request that Ukraine failed to ask the Panel to make findings on each individual FBO decision rejecting applications for new certificates. Russia argues that in the absence of such request, findings on each individual decision would be outside the Panel's terms of reference.<sup>466</sup>

7.598. The Panel considers that contrary to Russia's view, the terms of the panel request identify the measures at issue as being each of the decisions through which the FBO rejected applications for certificates of conformity submitted by Ukrainian producers under the CU Technical Regulations. Point two of section II of the panel request describes the measure at issue as the "the rejections of new applications for conformity assessment certificates... as mentioned in [Annex] II".<sup>467</sup> In turn, Annex II includes a list of the three decisions through which the FBO rejected applications for certificates of conformity submitted by Ukrainian producers under CU Technical Regulations. It is thus clear that Ukraine's panel request identifies, as challenged measures, the three decisions issued by the FBO. On this basis, we consider that the three decisions challenged by Ukraine are properly within our terms of reference.

## 7.4.2 Consistency of the rejections with Article 5.1.1 of the TBT Agreement

### 7.4.2.1 Nature of the claims

7.599. Ukraine requests that the Panel find that each of the three decisions through which the FBO rejected applications for certificates of conformity submitted by Ukrainian producers of railway products under CU Technical Regulations 001/2011 or 003/2011 is inconsistent with Article 5.1.1.<sup>468</sup> Ukraine notes that two decisions rejected applications due to the "impossibility to carry out a certification procedure in full", and another decision rejected applications due to the "absence of documents". Ukraine submits that applications submitted by producers from Russia, the European Union, Belarus and Kazakhstan have not been similarly rejected. Ukraine therefore argues that Russia is applying its conformity assessment procedures in a manner inconsistent with Russia's non-discrimination obligations (both in respect of national treatment and most-favoured nation treatment) set out in Article 5.1.1.<sup>469</sup>

7.600. Russia argues that the three decisions challenged by Ukraine are not inconsistent with Article 5.1.1. Regarding two of the decisions, Russia maintains that the security situation in Ukraine prevented inspectors from conducting the required inspections. Regarding the other decision, Russia submits that the applicant failed to submit the documents required by the relevant technical regulation for the application to be considered.<sup>470</sup>

7.601. The Panel first addresses the arguments concerning the decisions rejecting applications due to the "impossibility to carry out a certification procedure in full" and then turns to the decision rejecting applications due to the "absence of documents".

7.602. Ukraine has framed its claims as concerning, not a conformity assessment procedure as such, but the application of a conformity assessment procedure.<sup>471</sup> We will therefore assess whether Ukraine has demonstrated that Russia applied its conformity assessment procedure for railway products so as to grant access for specific suppliers of like products originating in Ukraine under conditions less favourable than those accorded to suppliers of like Russian products and like products from other countries, in a comparable situation. Thus, we will focus our assessment on Russia's application of its conformity assessment procedures for railway products, CU Technical Regulations 001/2011 or 003/2011, in the three instances which resulted in the decisions through which the FBO rejected applications for certificates of conformity submitted by the relevant Ukrainian producers.

<sup>466</sup> Russia's opening statement at the first meeting of the Panel, para. 21.

<sup>467</sup> WT/DS499/2, p. 2.

<sup>468</sup> Ukraine's first written submission, para. 183; response to Panel question Nos. 7(b), para. 2; and opening statement at the first meeting of the Panel, para. 37.

<sup>469</sup> Ukraine's first written submission, paras. 257-259.

<sup>470</sup> Russia's first written submission, paras. 83-87.

<sup>471</sup> Ukraine's first written submission, paras. 238 and 248.



#### 7.4.2.2 Applicability of Article 5.1.1 and order of analysis

7.603. We note that it is uncontested among the parties that the three decisions challenged by Ukraine (a) were adopted by a central government body, and (b) concern a mandatory conformity assessment procedure.<sup>472</sup> We consider that the evidence on record confirms that the three decisions satisfy the requirements to be subject to Article 5.1.1.

7.604. First, the three decisions were issued by the FBO. According to the evidence on record, the FBO is the entity in charge of certification of railway transport in Russia. The FBO acts under the jurisdiction of the Federal Agency of Railway Transport of Russia's Ministry of Transport.<sup>473</sup> The FBO thus is an entity of Russia's federal government. Moreover, the rejections were based on CU Technical Regulations 001/2011 and 003/2011, which are applied by Russia.<sup>474</sup> We therefore consider that the decisions at issue were adopted by a central government body.

7.605. Second, the three decisions were issued in response to applications submitted by suppliers of Ukrainian products for certificates of conformity. The applications rejected through two of the decisions were submitted pursuant to CU Technical Regulation 001/2011 and the applications rejected through the other decision were submitted pursuant to CU Technical Regulation 003/2011. Under the CU Technical Regulations, conformity assessment of railway products is carried out in the form of mandatory confirmation of conformity.<sup>475</sup> Railway products can only be released into the CU if they conform to the relevant technical requirements. This is verified by allowing the customs release of the products only if they are accompanied by documents attesting to conformity, such as certificates of conformity.<sup>476</sup> Thus, the challenged decisions concern mandatory conformity assessment procedures.

7.606. However, it should be noted that through decision 3, the FBO rejected 19 applications submitted by a Ukrainian producer of railway products. The evidence indicates that at least three of those 19 applications were submitted pursuant to CU rules governing voluntary certification of conformity. Article 5.1.1 only applies to mandatory certification of conformity and Ukraine has raised claims only in respect of Russia's mandatory certification of conformity.<sup>477</sup> Therefore, our findings in this section only concern the FBO's rejection of applications for mandatory certification under CU Technical Regulation 003/2011. The rejection of applications for voluntary certification under CU Technical Regulation 003/2011 is not at issue, and our findings therefore do not extend to the FBO's rejection of those applications.<sup>478</sup>

7.607. We now turn to examine the elements necessary to demonstrate an inconsistency with Article 5.1.1. We will assess those elements in the same order and under the same assumption as for the 14 instructions through which the FBO suspended certificates of conformity held by Ukrainian producers.<sup>479</sup>

7.608. In the light of the differences in the reasons adduced by the FBO for rejecting the applications submitted by the relevant suppliers of Ukrainian railway products, we will examine decisions 1 and 2 together before addressing decision 3.

<sup>472</sup> Ukraine's response to Panel question No. 64; and second written submission, para. 106. Russia's first written submission, para. 73.

<sup>473</sup> Extract from the FBO's website (Exhibit UKR-81).

<sup>474</sup> Article 6(3) of CU Technical Regulation 001/2011, (Exhibit UKR-9); Article 6(7) of CU Technical Regulation 003/2011, (Exhibit UKR-11); and Ukraine's first written submission, para. 57.

<sup>475</sup> Article 6(1) of CU Technical Regulation 001/2011 (Exhibit UKR-9).

<sup>476</sup> Article 3 of Technical Regulation 001/2011, (Exhibit UKR-9); and Article 3 of Technical Regulation 003/2011 (Exhibit UKR-11). See Articles 210(1)(2), 4(1)(8), and 195 of Customs Union Customs Code (selected provisions) (CU4 Customs Code), (Exhibit UKR-129). See also Article 29 of Law No. 184 "On Technical Regulation", (Exhibit UKR-1); and Ukraine's second written submission, paras. 15-16.

<sup>477</sup> Ukraine's first written submission, para. 39; second written submission, footnote 354 to para. 287; and response to Panel question No. 121.

<sup>478</sup> See Table 6 above.

<sup>479</sup> See paragraph 7.292 above.

### 7.4.2.3 Decisions 1 and 2: Impossibility to carry out a certification procedure in full

#### 7.4.2.3.1 Whether Russia has *granted access for specific suppliers of products from another Member under conditions less favourable*

7.609. Ukraine notes that the FBO rejected the applications for certificates of conformity submitted by Ukrainian producers of railway products under CU Technical Regulation 001/2011 based on the alleged "impossibility to carry out the inspection procedure in full". Ukraine further notes that the decisions did not further specify the reasons for the alleged "impossibility", nor did they indicate what steps should be taken by the affected producers to remedy the situation. Ukraine further submits that despite repeated requests from producers to complete the certification process, the FBO refused to consider the applications and to issue new certificates of conformity. On this basis, Ukraine argues that the FBO 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 Regulation.<sup>480</sup>

7.610. Ukraine argues that the FBO did not take similar decisions in respect of Russian products or products from other countries. Ukraine points out that Russian producers of railway products and producers of railway products from other countries have obtained certificates of conformity under the CU Technical Regulations. According to Ukraine, Russian producers hold 1,103 certificates, Kazakh producers hold 39 certificates, Belarusian producers hold 23 certificates, and European producers hold 97 certificates. Ukraine submits that these numbers show that suppliers of domestic railway products and suppliers of railway products originating in other countries did not face the same obstacles as the suppliers of Ukrainian railway products with regard to accessing the conformity assessment procedures provided for in CU Technical Regulation 001/2011.<sup>481</sup>

7.611. In Ukraine's view, by refusing to carry out the certification procedure and by rejecting the applications for new certificates of conformity, Russia applied the conformity assessment procedure established under CU Technical Regulation 001/2011 so as to grant suppliers of Ukrainian railway products access under less favourable conditions than those accorded to suppliers of Russian railway products and of railway products from other countries.<sup>482</sup>

7.612. Russia submits that the access conditions to Russia's conformity assessment procedure on railway products for suppliers of railway products are the same, irrespective of the origin of the products. In Russia's view, Ukraine failed to prove the contrary. Russia argues that the access conditions are established in the relevant technical regulations. Russia further submits that the FBO issued certificates of conformity to Ukrainian producers whenever the conditions for issuing the certificates were met.<sup>483</sup>

7.613. The Panel notes that for these two decisions the FBO "returned the applications without consideration", due to the "impossibility to carry out a certification procedure in full".<sup>484</sup> We understand from Russia's explanations to the Panel that what the FBO was communicating to the suppliers in abbreviated form was the following. First, owing to the situation in Ukraine, the FBO would not be able to carry out all parts of the certification procedure. Specifically, the FBO would not be able to test product samples in Ukraine. Second, as it was already clear to the FBO that it would not be able to carry out all parts of the procedure, the FBO returned the applications without consideration, without processing them further.<sup>485</sup>

7.614. CU Technical Regulation 001/2011 establishes that, depending on the scheme under which an application is submitted, the competent certification body must conduct testing of product samples before issuing a certificate.<sup>486</sup> On this basis, we consider that testing of samples is an

<sup>480</sup> Ukraine's first written submission, para. 257.

<sup>481</sup> Ukraine's first written submission, para. 258; and response to Panel question No. 85.

<sup>482</sup> Ukraine's first written submission, para. 259.

<sup>483</sup> Russia's first written submission, para. 76; second written submission, paras. 92 and 100; and opening statement at the second meeting of the Panel, para. 32.

<sup>484</sup> Letter [[xxx]] from the FBO of 2 October 2014, (Exhibit UKR-16)(BCI); and Letter [[xxx]] from the FBO of 23 January 2015, (Exhibit UKR-32)(BCI).

<sup>485</sup> Russia's first written submission, paras. 83-84; and second written submission, paras. 104-105.

<sup>486</sup> Article 21(c) of CU Technical Regulation 001/2011 (Exhibit UKR-9).

integral part of Russia's conformity assessment procedure for railway products under CU Technical Regulation 001/2011.

7.615. As we see it, the FBO's position was not that it would not grant the relevant Ukrainian suppliers any access to the conformity assessment procedure. Rather, the FBO's position appears to have been that it could not give access to one part of the conformity assessment procedure, the testing of samples, and it therefore rejected the applications. The evidence thus supports the conclusion that the FBO did not grant the two suppliers of Ukrainian railway products at issue access to one part of Russia's conformity assessment procedure for railway products.<sup>487</sup>

7.616. There also is evidence demonstrating that the FBO issued certificates of conformity to suppliers of Russian, Belarusian, Kazakh and European railway products under CU Technical Regulations.<sup>488</sup> We note that this evidence does not directly demonstrate that suppliers of Russian, Belarusian, Kazakh and European railway products had access to testing of samples in order to obtain the certificates of conformity. However, we agree with Ukraine that a presumption arises that the FBO issued at least a number of those certificates on the basis of the results of testing of samples.<sup>489</sup> This is further confirmed by evidence submitted by Russia.<sup>490</sup> We thus infer that the FBO granted suppliers of Russian, Belarusian, Kazakh, and European railway products access to testing of samples, which is part of Russia's conformity assessment procedure for railway products. Moreover, we note that there is no evidence on record demonstrating otherwise.

7.617. In sum, the FBO in our view has denied the two suppliers of Ukrainian railway products at issue access to a part of Russia's conformity assessment procedure for railway products, testing of samples, while at the same time granting suppliers of Russian, Belarusian, Kazakh, and European railway products access to that same part of Russia's conformity assessment procedure for railway products.

7.618. The FBO's denial of access to testing of samples resulted in the relevant suppliers of Ukrainian railway products not being able to obtain a certificate, which, in turn, prevented the relevant products entering the Russian market. The same has not been true for Russian, Belarusian, Kazakh, and European railway products that received certificates of conformity, as a result of their products having had access to testing of samples. Consequently, this is a case where the relevant Ukrainian suppliers have not been given the possibility to have certain conformity assessment activities (testing of samples) undertaken, whereas Russian suppliers and suppliers from other countries have been given that possibility. It is clear to us, therefore, that this difference has modified the conditions of competition for access to the conformity assessment procedure to the detriment of the affected Ukrainian suppliers. We thus consider that this difference in the conditions of access amounts to Russia granting access to the two suppliers of Ukrainian railway products under conditions "less favourable" than those accorded to Russian, Belarusian, Kazakh, and European suppliers of railway products.

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<sup>487</sup> See decisions 1 and 2 in Table 6 above.

<sup>488</sup> Extract of Unified Register of Issued Certificates of Conformity and Registered Declarations of Conformity concerning Russian producers, (Exhibit UKR-83); Extract of Unified Register of Issued Certificates of Conformity and Registered Declarations of Conformity concerning European producers, (Exhibit UKR-54) (Corr.); Extract of Unified Register of Issued Certificates of Conformity and Registered Declarations of Conformity concerning Belarusian producers, (Exhibit UKR-58); and Extract of Unified Register of Issued Certificates of Conformity and Registered Declarations of Conformity concerning Kazakh producers (Exhibit UKR-56).

<sup>489</sup> We note that this presumption extends to those certificates issued by the FBO under schemes that require inspection of samples. However, the FBO could have issued certificates under a scheme that did not require inspection of samples, such as the scheme that requires testing of each specific product. Scheme 7c, as provided in Annex 5 ("Application number 5" in the translation) to CU Technical Regulation 001/2011, (Exhibit UKR-9). Corr.).

<sup>490</sup> Information provided by the FBO on certificates of conformity with the requirements of CU Technical Regulations 001/2011, 002/2011, and 003/2011 issued in the period from 2 August 2014 to 31 August 2017 to foreign manufacturers, (Exhibit RUS-77)(BCI). See also List of the certificates of conformity to the requirements of CU Technical Regulations 001/2011, 002/2011, 003/2011 issued in the period from 02 August 2014 to 31 August 2017 to foreign manufacturers, (Exhibit RUS-42); and Certificates of conformity issued on the basis of CU Technical Regulations 001/2011, 002/2011 and 003/2011 during the period from 02 August 2014 to 31 August 2017 to the third countries producers, (Exhibit RUS-50)(BCI).

7.619. This conclusion is not affected by the fact that the FBO granted certificates of conformity under CU Technical Regulation 001/2011 to certain other suppliers of Ukrainian railway products.<sup>491</sup> Ukraine is challenging the two identified instances of application of Russia's conformity assessment procedure (the two FBO decisions), not the conformity assessment procedure as such. The fact that no less favourable treatment has been accorded to some suppliers of Ukrainian railway products does not alter the fact that the conformity assessment procedure was applied to deny access to certain conformity assessment activities (testing of samples) for the two suppliers of Ukrainian railway products to whom the two decisions are addressed.<sup>492</sup>

7.620. On the basis of the foregoing, we reach the conclusion that Russia, by issuing the two challenged decisions, applied its conformity assessment procedure so as to grant access to the two relevant suppliers of Ukrainian railway products under conditions less favourable than those accorded to suppliers of Russian, Belarusian, Kazakh, and European railway products. We now turn to examine whether Ukrainian suppliers were granted less favourable access conditions "in a comparable situation".

#### **7.4.2.3.2 Whether Russia has granted less favourable access conditions for specific suppliers of products, "in a comparable situation"**

7.621. Ukraine submits that suppliers of Ukrainian railway products are in a comparable situation to suppliers of European, Russian, Belarusian, and Kazakh railway products.<sup>493</sup>

7.622. Russia argues that the security and safety situation in Ukraine and the existence of entry restrictions on Russian nationals into Ukraine prevented FBO employees from carrying out the necessary testing of samples. In Russia's view, these conditions put suppliers of Ukrainian railway products in a situation that is not comparable to that of suppliers of European, Russian, Belarusian, and Kazakh railway products.<sup>494</sup>

7.623. The Panel recalls that in the section concerning Ukraine's claims against the 14 instructions through which the FBO suspended valid certificates of conformity held by Ukrainian producers it examined the evidence submitted by the parties in respect of whether the situation in Ukraine was comparable. We concluded, after conducting an assessment of the evidence before us, that, during the period April 2014 to December 2016, Ukrainian suppliers of railway products were granted less favourable access in a situation that was not comparable to the situation in which Russia granted access to suppliers of Russian railway products and suppliers of railway products from other countries.

7.624. The two decisions through which the FBO rejected the relevant applications by Ukrainian suppliers are dated 2 October 2014 and 23 January 2015. Thus, these decisions were issued within the time-frame covered by the evidence that we have already examined in section 7.3.2.2.4 above. Moreover, we recall that our findings regarding the situation not being comparable are based, in part, on events that took place in certain regions in Ukraine. Some of those events occurred in regions or near regions where both suppliers, whose applications the FBO rejected, are located.<sup>495</sup> Therefore, our finding that less favourable access conditions were granted to Ukrainian suppliers of railway products in a situation that was not comparable equally applies to the two decisions through which the FBO rejected applications submitted by Ukrainian suppliers under CU Technical Regulation 001/2011 (i.e. decisions 1 and 2).<sup>496</sup>

<sup>491</sup> Extract of Unified Register of Issued Certificates of Conformity and Registered Declarations of Conformity, (Exhibit UKR-13); Extract of the Unified Register of certificates issued to Ukrainian producers under the CU Technical Regulations, (Exhibit UKR-154); and Table of the valid certificates issued to Ukrainian producers on the basis of CU Technical Regulations 001/2011, 002/2011 and 003/2011 (based on Exhibit UKR-13), (Exhibit RUS-49)(BCI).

<sup>492</sup> See also Panel Reports, *Argentina – Hides and Leather*, para. 11.260 and *US – Gasoline*, para. 6.14.

<sup>493</sup> Ukraine's opening statement, paras. 43-52; and second written submission, paras. 118-121 and 128-148.

<sup>494</sup> Russia's first written submission, paras. 83-84.

<sup>495</sup> See paragraphs 7.328-7.331 above.

<sup>496</sup> We note that in section 7.3.2.2.4 above, we were focusing on whether the FBO could send its employees to Ukraine to conduct inspection control. In the context of the decisions through which the FBO rejected applications, we are concerned with whether the FBO could send its employees to Ukraine to test

7.625. As we have done in section 7.3.2.2.4.5 above, we stress that our finding that the situation in Ukraine was not comparable relates to the specific time-period at issue. Developments subsequent to a panel's finding that a situation is not comparable could render a situation comparable, with the consequence that the importing Member would have to make a change in the access conditions granted for it to continue to act consistently with Article 5.1.1.

#### **7.4.2.3.3 Like products analysis**

7.626. Turning to the like products analysis, the parties' arguments on this issue are the same, *mutatis mutandis*, as those that are summarized in section 7.3.2.2.5 above.

7.627. We recall our conclusion above that Russia has granted less favourable access conditions for Ukrainian suppliers, but that it has done so in a situation that is not comparable to the situation in which Russia granted access to suppliers of Russian railway products and suppliers of railway products from other countries. In the light of that conclusion, it is not necessary to make additional findings on whether the railway products supplied by Ukrainian suppliers are "like" Russian railway products or railway products from other countries.

#### **7.4.2.3.4 Conclusion**

7.628. On the basis of the foregoing, the Panel concludes that Ukraine has failed to establish, in respect of the two decisions through which the FBO "returned without consideration" applications for certificates submitted by Ukrainian producers under CU Technical Regulation 001/2011, i.e. decisions 1 and 2, that Russia has acted inconsistently with its obligations under Article 5.1.1 of the TBT Agreement.

#### **7.4.2.4 Decision 3: Absence of documents**

7.629. We turn to examine decision 3, through which the FBO "annulled" 19 applications submitted by a Ukrainian producer under CU Technical Regulation 003/2011.<sup>497</sup>

##### **7.4.2.4.1 Whether Russia has granted access for specific suppliers of products from another Member under conditions less favourable**

7.630. In respect of decision 3, Ukraine submits that the FBO rejected the relevant applications for certificates of conformity submitted by Ukrainian producers of railway products under CU Technical Regulation 003/2011 based on the alleged "absence of documents". Ukraine argues that the decision did not further specify why the FBO considered certain documents to be missing, nor did the FBO indicate what steps should be taken by the affected producers to remedy the situation. On this basis, Ukraine argues that the FBO effectively denied the right of this supplier of Ukrainian railway products to an assessment of conformity under CU Technical Regulation 003/2011.<sup>498</sup>

7.631. Ukraine argues that the FBO did not take similar decisions with regard to Russian products or products from other countries, which have obtained certificates of conformity under the CU Technical Regulation 003/2011.<sup>499</sup> In Ukraine's view, by refusing to carry out the certification procedure and by rejecting the applications for new certificates of conformity, Russia applied the conformity assessment procedure for railway products established under CU Technical Regulation 003/2011 to this supplier of Ukrainian railway products in a less favourable manner than that accorded to suppliers of Russian railway products and of railway products from other countries.<sup>500</sup>

7.632. Russia responds that the FBO rejected the applications relevant to decision 3 because they were submitted without the documents required by Article 6(28) of CU Technical Regulation 003/2011. Russia considers that Ukraine has therefore failed to demonstrate that Russia applied

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product samples. Subject to that qualification, our considerations in section 7.3.2.2.4 above apply equally to the rejections under CU Technical Regulation 001/2011.

<sup>497</sup> Letter [[xxx]] from the FBO of 9 February 2015, (Exhibit UKR-23)(BCI).

<sup>498</sup> Ukraine's first written submission, para. 257.

<sup>499</sup> Ukraine's first written submission, para. 258, and response to Panel question No. 85.

<sup>500</sup> Ukraine's first written submission, para. 259.

its conformity assessment procedure for railway products in a manner inconsistent with Article 5.1.1.<sup>501</sup>

7.633. Ukraine submits that Russia's argument that the applications were rejected because of missing documents is contradicted by the fact that those same 19 applications had previously been accepted by the FBO as being submitted under Article 6.21 of CU Technical Regulation 003/2011. Ukraine considers that only subsequently did the FBO issue decision 3, making reference to the lack of documents required by Article 6(28) of CU Technical Regulation 003/2011.<sup>502</sup>

7.634. The Panel recalls that a Member would apply a conformity assessment procedure so as to grant access for suppliers under less favourable conditions, when it denies or limits these suppliers' right or possibility to have conformity assessment activities undertaken under the rules of the applicable conformity assessment procedure. According to the conformity assessment procedure applicable to this rejection, the competent certification body must reject applications submitted without the required documents.<sup>503</sup> Ukraine challenges Russia's application of the conformity assessment procedure (CU Technical Regulation 003/2011), not the fact that Russia has adopted specific conformity assessment procedure rules, i.e. in this case the rule, according to which incomplete applications must be rejected. In our view, the FBO in rejecting the relevant applications followed the applicable rules of the procedure. The rules in question are the same for all suppliers. Moreover, the FBO applied the rules as foreseen. It made a determination that there were missing documents and rejected the applications on that basis. In addition, we see nothing in CU Technical Regulation 003/2011 that would prevent the Ukrainian supplier from resubmitting new applications with all required documents. Finally, Ukraine has not pointed to any instances of application of the conformity assessment procedure where the FBO did not reject applications by other suppliers from other countries even though these applications lacked the required documents. We therefore have no basis for concluding that the FBO applied the applicable rules so as to deny or limit the right or possibility of the Ukrainian supplier concerned to have conformity assessment activities undertaken under these rules, and that the Ukrainian supplier was thereby granted access to the conformity assessment procedure under less favourable conditions than those accorded to suppliers from Russia or any other country.

7.635. We do not consider that Ukraine's reference to the decisions through which the FBO previously accepted the same applications affects the foregoing consideration. The measure that Ukraine challenges is decision 3, which indicates that the basis for rejecting the application is the absence of documents required by Article 6(28) of CU Technical Regulation 003/2011. On the basis of the evidence on record, we consider that applications for mandatory certification with respect to products produced in series are to be accompanied by the documents listed in Article 6(28).<sup>504</sup> Moreover, as we address below in our analysis of Ukraine's claims under Article 5.1.2 of the TBT Agreement<sup>505</sup>, the evidence before us suggests that there were indeed documents listed in Article 6(28) that had not been submitted to the FBO as part of the applications in question.

7.636. In the light of the foregoing, we consider that Ukraine failed to demonstrate that through decision 3, the FBO applied CU Technical Regulation 003/2011 to the relevant supplier of Ukrainian railway products so as to grant conditions of access to the conformity assessment procedure less favourable than those accorded to suppliers of Russian railway products or of railway products from other countries.

7.637. On the basis of the foregoing we do not consider it necessary to further examine whether the situation in which the FBO rejected the Ukrainian supplier's applications was "comparable" to others in which the FBO proceeded to process applications that had been submitted to it, nor whether the products of the Ukrainian supplier concerned were "like" the products of suppliers

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<sup>501</sup> Russia's first written submission, paras. 85-87; response to Panel question No. 72; and second written submission, paras. 107-108.

<sup>502</sup> Ukraine's opening statement at the first meeting of the Panel, para. 53; and response to Panel question No. 38.

<sup>503</sup> Article 33(a) of CU Technical Regulation 003/2011, (Exhibit UKR-11).

<sup>504</sup> The applications for mandatory certification concerned certification for "series-produced products" (serial production). Applications submitted by PJSC [[xxx]] on behalf of PJSC [[xxx]], 22 December 2014, (Exhibit UKR-112)(BCI).

<sup>505</sup> See paragraph 7.746 below.

from Russia or any other country whose applications were not rejected on grounds of incompleteness.

#### **7.4.2.5 Overall Conclusion**

7.638. On the basis of the foregoing, the Panel concludes that Ukraine has failed to establish, in respect of the two decisions through which the FBO "returned without consideration" applications for certificates submitted by Ukrainian producers under CU Technical Regulation 001/2011, and in respect of the decision through which the FBO "annulled" applications for certificates submitted by a Ukrainian producer under CU Technical Regulation 003/2011 that Russia has acted inconsistently with its obligations under Article 5.1.1 of the TBT Agreement.

### **7.4.3 Consistency of the rejections with Article 5.1.2 of the TBT Agreement**

#### **7.4.3.1 Nature of the claims**

7.639. Ukraine challenges, under Article 5.1.2, the three decisions through which the FBO rejected applications for new certificates submitted by Ukrainian producers of railway products.<sup>506</sup> Ukraine claims that by issuing the three decisions, Russia in each case applied its conformity assessment procedures with the effect of creating unnecessary obstacles to international trade.<sup>507</sup> Ukraine therefore has the burden of demonstrating that Russia applied its conformity assessment procedure for railway products with the effect of creating unnecessary obstacles to international trade. We will therefore need to assess whether Russia applied its conformity assessment procedure with the effect of creating unnecessary obstacles to international trade when it rejected, through the three decisions, numerous applications for new certificates submitted by Ukrainian producers of railway products.

7.640. Ukraine initially submitted arguments in support of its claims under Article 5.1.2 only at a general level. In response to Russia's arguments, Ukraine also raised arguments in respect of each of the three decisions. Russia has responded to both Ukraine's general arguments and Ukraine's specific arguments related to each of the three decisions challenged by Ukraine. We therefore begin our analysis with the general arguments advanced by the parties and then address the specific arguments and evidence in respect of each decision. We recall that Ukraine raises claims against each of the three decisions and that we found these claims to be within our terms of reference. We will therefore make specific findings in respect of each of the three decisions challenged by Ukraine.

7.641. Moreover, we recall that Ukraine is not challenging the WTO-consistency of Russia's relevant conformity assessment procedures as such. Therefore, only those less strict manners of applying Russia's conformity assessment procedures that the FBO had the power to apply under the then existing rules governing these procedures, or applicable domestic law more generally, can in our view be considered alternatives that were reasonably available to Russia.

#### **7.4.3.2 Applicability of Article 5.1.2 and order of analysis**

7.642. We recall that in section 7.4.2.2 above, we concluded that each of the three decisions challenged by Ukraine concerns (a) conformity assessment by a central government body and (b) a mandatory conformity assessment procedure. On that basis, we consider that Article 5.1.2 is applicable to the three decisions challenged by Ukraine.

7.643. We first examine FBO decisions 1 and 2 regarding applications submitted under CU Technical Regulation 001/2011, issued due to the impossibility to carry out the conformity assessment procedure in full. We then examine FBO decision 3 regarding applications submitted under CU Technical Regulation 003/2011, issued because the applications were not accompanied by all necessary documents.<sup>508</sup> In respect of each of those decisions, we first address the elements relevant to establishing an inconsistency with Article 5.1.2, second sentence. We then turn, as

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<sup>506</sup> Ukraine's first written submission, para. 183; opening statement at the first meeting of the Panel, para. 37; and response to Panel question No. 7(b).

<sup>507</sup> Ukraine's first written submission, paras. 238, 260, and 266.

<sup>508</sup> The measures are described in Table 6 above.

necessary, to examine the elements relevant to establishing an inconsistency with Article 5.1.2, first sentence.

### **7.4.3.3 Decisions 1 and 2**

#### **7.4.3.3.1 Article 5.1.2, second sentence**

7.644. We recall that in order to establish that a measure is inconsistent with the second sentence of Article 5.1.2, we need to weigh and balance (a) the contribution that the challenged manner of application of Russia's conformity assessment procedure makes to giving Russia adequate confidence that Ukrainian railway products conform to the underlying technical regulations, (b) the strictness (including the trade restrictiveness) of Russia's manner of application of its conformity assessment procedure, and (c) the risks that non-conformity with the underlying technical regulations would create. Furthermore, we need to consider the alternative manners of application of the conformity assessment procedure raised by Ukraine. We examine each of these elements in turn.

##### **7.4.3.3.1.1 Contribution to giving Russia adequate confidence that the products conform to the technical regulations**

7.645. Ukraine does not dispute that Russia's mandatory certification procedure contributes to ensuring that railway products comply with the applicable technical regulations. Ukraine considers, however, that the manner in which Russia applied its conformity assessment procedures in the case of the three decisions is more strict than necessary to ensure conformity.<sup>509</sup>

7.646. Ukraine considers that in the present case, Russia rejected applications for new certificates on grounds that are not related to the conformity of products with the applicable technical regulations or to "imperative conditions"<sup>510</sup> without which conformity may not be reviewed. According to Ukraine, the objective of the decisions is not to achieve positive assurance of conformity of Ukrainian railway products with the applicable technical regulations. Ukraine submits that the challenged measures are, instead, disguised restrictions on importation of Ukrainian railway products. Ukraine considers that in the absence of evidence showing that, throughout the territory of Ukraine, there were security concerns precluding FBO inspectors from conducting on-site inspections, Russia's rejections did not aim to achieve a positive assurance of conformity. In Ukraine's view, the rejections therefore result in the creation of unnecessary obstacles to international trade.<sup>511</sup>

7.647. Russia submits that through CU Technical Regulation 001/2011 it seeks to, *inter alia*, (a) protect the life and health of citizens; (b) protect the property of individuals, legal entities, the state or municipalities; (c) protect the environment, life or health of animals and plants; and (d) prevent deceptive practices. Russia also observes that, given the characteristics and end uses of the railway products at issue, it seeks the highest possible level of assurance of conformity. Russia asserts that its certification bodies require the same level of assurance of conformity in respect of conformity regardless of the procedure adopted to verify conformity. Russia submits that, in the present dispute, the schemes under which Ukrainian producers of railway products submitted their application required inspection of production or testing of samples. According to Russia, with respect to the products at issue, such activities can only be carried out by visiting the producer's facilities in Ukraine, due to the non-conformities or consumer complaints affecting the products of all the producers that had their applications rejected. Russia submits that the FBO is not in a position to carry out such activities with respect to producers in Ukraine and it has thus been unable to conduct the certification procedure in full. Russia considers that the FBO has therefore not been able to get positive assurance of conformity.<sup>512</sup>

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<sup>509</sup> Ukraine's first written submission, para. 274; and second written submission, paras. 188-190.

<sup>510</sup> Ukraine's second written submission, paras. 192 and 199.

<sup>511</sup> Ukraine's second written submission, paras. 197-202; and opening statement at the second meeting of the Panel, para. 62.

<sup>512</sup> Russia's responses to Panel question Nos. 19, 21, and 104; second written submission, para. 102; and responses to Panel question Nos. 108, 124, and 137.



7.648. Ukraine argues that the alternative manners of application that it has identified would make a contribution that is equivalent to that which the rejection of the applications to giving Russia adequate confidence that Ukrainian railway products conform with the applicable technical regulations.<sup>513</sup>

7.649. The Panel notes that through CU Technical Regulation 001/2011 Russia seeks to protect, *inter alia*, the environment as well as the life and health of humans, animals, and plants against risks arising from train derailments due to low quality equipment. All of these values and interests are important.

7.650. We recall that Russia submits that it "seeks the highest possible level of assurance of conformity with the relevant safety requirements".<sup>514</sup> The evidence supports that Russia seeks a high level of conformity. Article 52 of the EAEU Treaty provides that the technical regulations in the EAEU shall be adopted to protect the life and health of people, property, the environment, life and health of animals and plants, prevent consumer deception and ensure energy efficiency and resource conservation.<sup>515</sup> According to Article 1(3) of CU Technical Regulation 001/2011, the Technical Regulation 001/2011 establishes that its requirements for railway rolling stock and its components serve to protect the life and health of humans, animals and plants; maintain the safety of property; and prevent any actions that would mislead consumers with respect to the purpose and safety of the railway products.<sup>516</sup>

7.651. To ensure the protection of, *inter alia*, life and health of humans, animals and plants, as well as of the environment, CU Technical Regulation 001/2011 sets out conformity assessment procedures through which conformity with the established safety requirements is verified. Such procedures rely on methods for testing and for assessing conformity that enable certification bodies in the CU members to verify conformity of products with the technical requirements contained in CU Technical Regulation 001/2011.<sup>517</sup> Under CU Technical Regulation 001/2011, applicants must submit, together with an application, a number of documents, including test results, and undergo different forms of inspection, all aimed at verifying conformity.<sup>518</sup> The existence of these rules demonstrates that Russia indeed seeks a high level of conformity.

7.652. Moreover, there is evidence that Russia has enforced the rules governing its conformity assessment procedures, thus supporting the view that Russia seeks a high level of conformity.<sup>519</sup>

7.653. Russia's rejection of applications for new certificates submitted by the two relevant Ukrainian producers of railway products pursuant to CU Technical Regulation 001/2011 ensured that the products for which new certificates were sought would not enter Russia's market. We consider that this manner of applying the conformity assessment procedure gives Russia a high level of assurance that any non-conforming products covered by the rejections would not enter its market. We therefore conclude that rejection of applications, as Russia's chosen manner of application of its conformity assessment procedure in the case of the two decisions at issue, contributes substantially to the objective of giving Russia adequate confidence of conformity of the Ukrainian railway products covered by the applications for new certificates submitted by the two relevant producers pursuant to CU Technical Regulation 001/2011.

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<sup>513</sup> Ukraine's opening statement at the first meeting of the Panel, para. 61; and comments on Russia's responses to Panel question Nos. 116, 124, and 131. See also paragraph 7.445 above.

<sup>514</sup> Russia's response to Panel question No. 116.

<sup>515</sup> Treaty on the Eurasian Economic Union (EAEU Treaty) (Exhibit UKR-5).

<sup>516</sup> CU Technical Regulation 001/2011 (Exhibit UKR-9).

<sup>517</sup> Article 6(11) of CU Technical Regulation 001/2011.

<sup>518</sup> Articles 6(21)-6(28) of CU Technical Regulation 001/2011.

<sup>519</sup> See for instance references to certificates issued under the CU Technical Regulations, contained in the following exhibits: Extract of Unified Register of Issued Certificates of Conformity and Registered Declarations of Conformity, (Exhibit UKR-13); Extract of Unified Register of Issued Certificates of Conformity and Registered Declarations of Conformity concerning European producers, (Exhibit UKR-54)(Corr.); Extract of Unified Register of Issued Certificates of Conformity and Registered Declarations of Conformity concerning Kazakh producers, (Exhibit UKR-56); Extract of Unified Register of Issued Certificates of Conformity and Registered Declarations of Conformity concerning Belarusian producers, (Exhibit UKR-58); and Extract of Unified Register of Issued Certificates of Conformity and Registered Declarations of Conformity concerning Russian producers, (Exhibit UKR-83).

#### **7.4.3.3.1.2 Strictness of the manner of applying the conformity assessment procedure**

7.654. Ukraine submits that the rejections have a severe restrictive effect on imports of railway products originating in Ukraine, as rejecting applications for new certificates results in the impossibility of placing such products on the Russian market.<sup>520</sup>

7.655. Russia submits that contrary to what Ukraine suggests, the evidence on record regarding the entry restrictions and uncertainty with respect to safety and security conditions in Ukraine establish that the rejections were neither mere pretexts nor an unnecessary obstacle to international trade. Russia submits that due to the impossibility to conduct inspection of production, the FBO was unable to carry out the inspection procedure in full.<sup>521</sup>

7.656. The Panel notes that the rejection of applications for new certificates leads to the loss of access to the Russian market, for as long as new certificates are not issued, because without a valid certificate, Ukrainian railway products cannot enter the Russian market. We therefore consider that the rejection of applications for new certificates substantially restricts trade, and can be considered as a strict manner of application.<sup>522</sup>

#### **7.4.3.3.1.3 Risks that non-conformity would create**

7.657. Ukraine considers that the risk of non-conformity is that railway products enter Russia's market without satisfying the relevant technical regulations, thus depriving these regulations of their effect.<sup>523</sup>

7.658. Russia submits that the risks of non-conformity are that goods of insufficient quality would enter Russia's market. According to Russia, such low quality equipment can lead to train derailments, which would undermine the objective of the technical regulations of protecting the life and health of humans, animals and plants. Russia considers that given the serious threat of harm to human life and health, the environment, property of individuals and legal entities, the risks of non-conformity are grave.<sup>524</sup>

7.659. The Panel notes that both parties seem to agree that there are high risks arising from non-conformity. In particular, non-conforming railway products may lead to accidents, including train derailments, which in turn may cause great harm, including to human, animal, and plant life and health and the environment. We consider that in view of the products concerned (railway rolling stock and its parts thereof, such as axles, wagons, solebars and bogies, covered by the relevant applications for new certificates), the consequence of a failure of any of such products, due to non-conformity with the underlying technical regulations, could reasonably be expected to create substantial risks for human, animal, and plant life or health as well as the environment.

#### **7.4.3.3.1.4 Less trade-restrictive manners of application**

7.660. Ukraine argues that the rejection of applications for new certificates due to the inability to conduct on-site inspections was a more strict application of Russia's conformity assessment procedure than necessary to provide Russia adequate confidence that the relevant Ukrainian railway products conform to the relevant technical regulation. Ukraine submits that other, less trade restrictive manners of application of Russia's conformity assessment procedure were available to Russia. Specifically, Ukraine identified the following alternatives: (a) additional communication with the relevant Ukrainian producers; (b) entrusting on-site inspections in Ukraine

<sup>520</sup> Ukraine's first written submission, para. 273; and second written submission, para. 187.

<sup>521</sup> Russia's opening statement at the second meeting of the Panel, paras. 41-42; and response to Panel question No. 24.

<sup>522</sup> We recall that we are concerned here with how Russia has applied the certification provisions of CU Technical Regulation 001/2011. Recognition of certificates issued under CU Technical Regulation 001/2011 in other CU members is a different matter. We recall in this respect the possibility for Ukrainian railway products to enter the Russian market with a valid certificate issued by a certification body in any other CU member state. As discussed in section 7.5 below, however, Russia has not recognized valid certificates issued to Ukrainian railway producers by the competent authorities of Belarus and Kazakhstan.

<sup>523</sup> Ukraine's second written submission, para. 209.

<sup>524</sup> Russia's response to Panel question No. 104; second written submission, para. 102; and response to Panel question No. 116.

to the competent authorities from Kazakhstan and Belarus; (c) accrediting non-Russian inspectors, either experts or organizations, to conduct inspections in Ukraine; and (d) off-site inspections.<sup>525</sup> Ukraine submits that these are less strict manners of application of Russia's conformity assessment procedure that make an equivalent contribution to giving Russia adequate confidence of conformity, and that they are available to Russia.<sup>526</sup>

7.661. Russia responds that Ukraine failed to demonstrate that any of these alternative manners of application is reasonably available to Russia, and that they make an equivalent contribution to giving Russia adequate confidence that Ukrainian railway products conform with the applicable technical regulation.<sup>527</sup>

7.662. The Panel addresses each of the alternative manners of application identified by Ukraine below in connection with the two challenged decisions.

#### ***Communicating with Ukrainian producers***

7.663. The first alternative identified by Ukraine is for Russian authorities to communicate with the two relevant Ukrainian producers.

7.664. We have examined this alternative manner of application in section 7.3.3.2.3.4 above. We found that for several reasons this alternative manner of application is not reasonably available to Russia. First, this alternative is in the nature of a procedure, which makes it unsuitable as an alternative. Second, Ukraine did not elaborate on why, in its view, it was not reasonable for the FBO to consider that the arrangements for conducting inspection control in Ukraine that had been proposed by Ukrainian producers were not satisfactory or sufficient. Third, Ukraine did not provide arguments regarding whether under Russia's domestic law, which Ukraine did not challenge as being WTO-inconsistent, the FBO could delay suspending certificates of products whose continued conformity could not be verified.

7.665. Similarly, we consider that communicating with the two Ukrainian producers would be a process that is not a suitable alternative to the rejections of new applications. Moreover, Ukraine has not explained why additional communication with the Ukrainian producers would have led the FBO to accept that the conditions necessary to conduct the certification in full were present. Ukraine has also not provided arguments regarding whether under CU Technical Regulation 001/2011 or Russia's domestic law more generally, which Ukraine did not challenge as being WTO-inconsistent, the FBO could delay deciding on the applications.<sup>528</sup>

7.666. Accordingly, we find that Ukraine has not established that communicating with the relevant Ukrainian producers is a less strict manner of applying Russia's conformity assessment procedure that is reasonably available to Russia.

#### ***Entrusting inspections in Ukraine to the competent authorities of Kazakhstan or Belarus***

7.667. The second alternative identified by Ukraine is for the FBO to entrust inspections to the competent authorities of Belarus and Kazakhstan.

7.668. Ukraine submits that the CU Technical Regulations lay down the technical requirements and conformity assessment procedures applicable in all CU members. Ukraine argues that the technical regulations governing railway products and reflecting a defined level of protection are therefore common to Russia, Belarus and Kazakhstan. Ukraine considers that it follows that Russia may not rely on its unique level of protection (as regards technical regulations) and level of

<sup>525</sup> We recall that we use the term "off-site inspection" instead of "remote inspections". See footnote 369 above.

<sup>526</sup> Ukraine's first written submission, para. 275; opening statement at the first meeting of the Panel, paras. 61-68; second written submission, paras. 212, 248, and 252.

<sup>527</sup> Russia's first written submission, paras. 94-98; and second written submission, paras. 115-120.

<sup>528</sup> We note that according to Article 6(28) of CU Technical Regulation 001/2011, the certification body must notify the applicant of its decision on an application for certification within one month after receipt of the application.

confidence (as regards conformity assessment procedures). Moreover, Ukraine considers that if Russian inspectors were not able to conduct inspections in Ukraine, the FBO could have asked the competent authorities of Belarus and Kazakhstan to assist with conducting that component of the conformity assessment procedure. According to Ukraine, because the Technical Regulations are common to all certification bodies in the CU, it follows that the FBO and other certification bodies in the CU must assess conformity with the same requirements based on the same information. Ukraine notes that there is evidence that the competent authorities of Belarus and Kazakhstan carried out on-site inspections in Ukraine in connection with applications for certification submitted to those competent authorities.<sup>529</sup>

7.669. Russia considers that this alternative is not reasonably available to it because Russia does not have jurisdiction over nationals from governments of other countries. Russia acknowledges that Ukrainian railway products may circulate in Russia on the basis of a certificate issued under CU Technical Regulations. However, Russia considers that this requires Ukrainian producers to submit an application for certification to the relevant certification body of Belarus or Kazakhstan. In such circumstances, the certification body of Belarus or Kazakhstan would act in its own capacity rather than as a certification body of Russia.<sup>530</sup>

7.670. The Panel notes that Ukraine refers to entrusting certification bodies in Kazakhstan and Belarus to conduct inspections in Ukraine on behalf of Russia as an alternative to the two decisions rejecting applications for new certificates due to the impossibility to carry out the procedure in full. However, Ukraine has failed to submit arguments or evidence demonstrating that this alternative is reasonably available to Russia. Indeed, it is not clear to us that the FBO has the power under Russia's domestic law to entrust foreign government authorities to carry out tasks entrusted to it on Russia's behalf. Moreover, Article 6.31 of CU Technical Regulation 001/2011, which we understand is part of Russia's domestic law, provides that in the course of certification, the certification body should carry out product identification and product sampling. And Article 6.32 indicates that a sampling certificate must bear the signatures of the representatives of the certification body. The certification body under this proposed alternative manner of application of the conformity assessment procedure is the FBO, because the applications in the case of decisions 1 and 2 were submitted to the FBO. It is not clear whether under Articles 6.31 and 6.32 the certification body must itself carry out certain certification tasks, including product sampling, or whether it could entrust them to another entity. Thus, we consider that Ukraine has not met its burden to establish that it would be possible for the FBO under the applicable rules to entrust the relevant part of the certification process to the competent authorities of Belarus or Kazakhstan. Moreover, we note that Ukraine has not argued that any of the applicable rules are contrary to Article 5.1.2.

7.671. Accordingly, we find that Ukraine has failed to establish that entrusting the competent authorities of Belarus and Kazakhstan with the conduct of inspections in Ukraine is a less strict manner of application of Russia's conformity assessment procedure that is reasonably available to Russia.

#### ***Accrediting non-Russian experts or organizations to conduct inspections in Ukraine***

7.672. The third alternative identified by Ukraine is for the FBO to accredit non-Russian experts or organizations to conduct inspections in Ukraine.

7.673. Ukraine submits that Russia could have accredited non-Russian experts or organizations to conduct inspections in Ukraine. According to Ukraine, the rules governing applications for new certificates provide that the certifying body or relevant Ministry may accredit an organization or an expert. Ukraine submits that those rules do not preclude the accreditation of non-Russian organizations or experts, because they do not prescribe the nationality of the experts who can be used.<sup>531</sup>

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<sup>529</sup> Ukraine's opening statement at the first meeting of the Panel, para. 68; response to Panel question No. 69; and second written submission, paras. 250-251.

<sup>530</sup> Russia's second written submission, para. 119; opening statement at the second meeting of the Panel, para. 44; and response to Panel question No. 116.

<sup>531</sup> Ukraine's second written submission, para. 252.

7.674. Russia considers that this alternative is not reasonably available to it because Russia does not have jurisdiction over nationals of other countries. Moreover, Russia asserts that the FBO was the only organization entitled to conduct inspection control.<sup>532</sup>

7.675. The Panel notes that Ukraine did not refer to any specific provision in CU Technical Regulation 001/2011 that provides for the possibility of appointing experts in support of its view that the FBO could accredit non-Russian experts or organizations to conduct inspections in Ukraine. We note that Article 6.3 of CU Technical Regulation 001/2011 refers to "accredited certification ... bodies" listed in the Unified Register of the CU Certification Bodies and Testing Laboratories as being competent to assess conformity with this technical regulation. However, CU Technical Regulation 001/2011 does not indicate who is eligible to receive an accreditation certificate and under what conditions. It is therefore unclear whether there exists a possibility of non-Russian experts or organizations being accredited as certification bodies. Moreover, Ukraine has not argued that any of the applicable rules are contrary to Article 5.1.2. Furthermore, there is no evidence on the record to indicate that at the time that the two decisions rejecting applications for new certificates were issued, there were non-Russian experts or organizations qualified to conduct inspection control in Ukraine with valid CU accreditation certificates. In addition, there is also no evidence that the FBO has previously used accredited non-Russian experts to conduct inspections abroad. As a result, we consider that Ukraine has not met its burden to establish that this alternative manner of application was available to Russia when the two decisions were issued.

7.676. Accordingly, we find that Ukraine has failed to establish that accrediting non-Russian experts or organizations is a less strict manner of application of Russia's conformity assessment procedure that is reasonably available to Russia.

#### ***Conducting off-site inspections***

7.677. The fourth alternative identified by Ukraine is for the FBO to conduct off-site inspections and off-site sampling rather than to conduct them on-site with the two relevant producers in Ukraine.

7.678. Ukraine submits that Russia could have made use of off-site inspections rather than rejecting applications for new certificates due to the impossibility of carrying out the procedure in full. Ukraine considers that this alternative manner of application of Russia's conformity assessment procedure would make an equivalent contribution to giving Russia adequate confidence of conformity and would allow the FBO to carry out the relevant conformity assessment procedures.<sup>533</sup>

7.679. Russia initially argued that Ukraine has not shown how off-site inspections would provide an equivalent assurance of conformity with Russia's technical regulations. Russia also submitted that off-site inspection is not provided for under the CU Technical Regulations. Russia later stated that the FBO issued new certificates to Ukrainian producers of railway products located in the eastern part of the country for applications submitted under schemes that required sampling, but not inspection of production, because the producers sent the FBO a group of products from which it could select the sample to be tested. Russia submits that, in contrast, the applications rejected by the FBO through the two decisions concerned products produced in series and of a large size, which required that sampling be conducted at the producers' facilities.<sup>534</sup>

7.680. Ukraine responds that, contrary to Russia's view, there is no provision in CU Technical Regulation 001/2011 precluding the possibility of conducting inspection of production through off-site inspection. Ukraine submits that the evidence in fact shows that remote inspections are possible under CU Technical Regulation 001/2011. Ukraine refers to the fact that the FBO issued certificates to producers in eastern Ukraine without visiting their facilities, despite them submitting applications under schemes that required both inspection of production and sampling at the

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<sup>532</sup> Russia's opening statement at the second meeting of the Panel, para. 44; and response to Panel question No. 116.

<sup>533</sup> Ukraine's first written submission, para. 275; and opening statement at the first meeting of the Panel, paras. 62 and 67-68.

<sup>534</sup> Russia's first written submission, para. 98; response to Panel question No. 22; and second written submission, paras. 22-23 and 117.

producer's facilities. Moreover, Ukraine considers that contrary to Russia's assertion, CU Technical Regulation 001/2011 makes no distinction between large-sized and other-sized products. Ukraine further observes that Russia granted certificates to Ukrainian producers in the east on the basis of off-site sampling of products of a similar size to those for which it rejected applications submitted by Ukrainian producers in the west. Ukraine also notes that Ukrainian producers submitted applications for certification under schemes 3c and 6c of CU Technical Regulation 001/2011, which require sampling. Ukraine accepts that, pursuant to GOST 31814-2012<sup>535</sup>, certificates issued under scheme 3c require sampling at the producers' facilities; however, Ukraine submits that Russia issued certificates to producers in eastern Ukraine without testing samples at the producer's facilities. In Ukraine's view, Russia thus accepts that the FBO could test samples without entering Ukraine and needing to be on-site. For Ukraine, this demonstrates that refusing to issue the certificates due to the impossibility of carrying out the procedure in full is a mere excuse.<sup>536</sup>

7.681. Russia notes that under scheme 3c, inspection of production is not required, but sampling must be conducted before issuance of a certificate. Russia contends that sampling of large-size products must be conducted on the premises of the producer. Moreover, Russia states that the applications submitted under scheme 3c were rejected because, due to prior non-conformities identified in respect of the products covered by the application submitted by the Ukrainian producer, the FBO had to conduct sampling at the producer's facilities. Russia notes that, in contrast, the products covered by the certificates issued to Ukrainian producers in eastern Ukraine were not affected by prior non-conformities. Moreover, Russia observes that it has not issued certificates to a producer in eastern Ukraine under a scheme that required inspection of production without conducting on-site inspection of the producers' facilities.<sup>537</sup>

7.682. Russia explains that although the CU Technical Regulations do not envisage off-site inspections, the FBO has conducted such inspections on the basis of the criteria and subject to the conditions set forth in Article 7.4.1 of PC-FZT 08-2013. According to Russia, these criteria include that off-site inspection can take place only if, with respect to the railway products for which a producer is seeking certification, there have been no prior complaints concerning their quality and no prior non-conformities have been identified by the FBO.<sup>538</sup>

7.683. Russia also notes that the FBO takes into account the guidelines concerning sampling procedures provided in GOST 31814-2012. Russia submits that according to GOST, sampling for the consignment of products, such as the ones covered by scheme 6c, is to be conducted at the place where the consignment is located. According to Russia, the information available to the FBO indicated that the consignments for which the relevant Ukrainian producer sought new certificates were located at the premises of that producer in Ukraine. Russia underscores that Ukraine has not provided evidence to the contrary.<sup>539</sup>

7.684. Ukraine notes that Russia has changed its position on the availability of off-site inspections under the CU Technical Regulations. According to Ukraine, it is no longer contested that off-site inspections are available in respect of applications for certification under the CU Technical Regulations. Ukraine submits that despite this, the FBO did not offer this possibility to all Ukrainian producers. Ukraine notes that the FBO issued new certificates only to some Ukrainian producers located in eastern parts of the country on the basis of off-site inspections or off-site sampling.<sup>540</sup>

7.685. Ukraine further submits that the non-conformities identified through inspections conducted under the prior CS FRT Rules are irrelevant for the purposes of certification under the CU Technical Regulations. According to Ukraine, only non-conformities identified during an inspection control under the CU Technical Regulations would be relevant for purposes of certification under CU Technical Regulations. Ukraine considers that in any event, the evidence submitted by Russia

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<sup>535</sup> GOST 31814-2012 "Conformity assessment. General Rules of sampling for tests of products in the course of conformity assessment" (GOST 31814-2012), (Exhibit UKR-140).

<sup>536</sup> Ukraine's second written submission, paras. 234 and 237-247; and opening statement at the second meeting of the Panel, paras. 22-24 and 64.

<sup>537</sup> Russia's second written submission, para. 23; and responses to Panel question Nos. 163 and 166.

<sup>538</sup> Russia's response to Panel question No. 167.

<sup>539</sup> Russia's response to Panel question No. 123.

<sup>540</sup> Ukraine's comments on Russia's responses to Panel question Nos. 165 and 166.

demonstrates non-conformities with respect to only three of the products covered by the applications rejected by the FBO.<sup>541</sup>

7.686. The Panel notes that, initially, Ukraine identified as the alternative manner of applying Russia's conformity assessment procedure in respect of the two relevant producers the conduct by the FBO of off-site inspection instead of on-site inspection. Ukraine also referred to the possibility of carrying out off-site sampling. Following Russia's clarification that under the certification schemes at issue, schemes 3c and 6c, inspection of production is not required, Ukraine focused its attention on the alternative of verifying conformity through off-site sampling instead of sampling at the producer's facilities.

7.687. We therefore begin by examining the availability of off-site sampling in respect of schemes 3c and 6c in general. On the basis of that assessment, we will then examine whether in respect of decisions 1 and 2 off-site sampling was a reasonably available alternative manner of application of Russia's conformity assessment procedure. We first examine decision 1, which concerns scheme 3c, before examining decision 2, which concerns scheme 6c.

#### **Availability of off-site testing of samples for applications submitted under scheme 3c in general**

7.688. According to Annex 6 of CU Technical Regulation 001/2011, applications submitted under scheme 3c concern railway products produced in series and require sampling of products before issuance of a certificate. CU Technical Regulation 001/2011 is silent in respect of the procedure to be conducted for sampling of products. It is uncontested that the FBO follows the guidelines set out in GOST 31814-2012<sup>542</sup>, which emanates from Russian national law, when sampling products for purposes of certification under the CU Technical Regulations.

7.689. Article 4.2.3 of GOST 31814-2012, which governs how sampling is to be carried out, provides in relevant part:

Sampling is carried out:

[1] for mass-produced items (serial production) – at the producer's warehouse of finished products.

[2] for batch products – at the place where a batch is located (at the producer's warehouse of finished products, warehouse of temporary storage, customs warehouse or at the warehouse of the recipient with responsible storage, in the vehicle capacity [*sic*])

[3] for single products – at the place a product is located (at the production facility of the manufacturer, at the buyer's place of installation, at the warehouse of temporary storage[]).

7.690. The first paragraph of Article 4.2.3 of GOST 31814-2012 requires that sampling for products produced in series should be carried out at the warehouse of the producer. Thus, for applications for certification of products produced in series, like those covered by scheme 3c, sampling should take place at the producer's facilities.

7.691. However, in response to a question from the Panel, Russia provided additional clarifications concerning the FBO's practice of applying GOST 31814-2012 guidelines for sampling when considering applications submitted pursuant to CU Technical Regulation 001/2011. Russia submits that it has been the FBO's practice to allow sampling under scheme 3c to take place at a location other than the producer's facilities under the conditions that it previously applied under Article 7.4.1 of PC-FZT 08-2013 when determining whether to allow off-site inspection control.<sup>543</sup>

<sup>541</sup> Ukraine's comments on Russia's responses to Panel question Nos. 163 and 165 and 166.

<sup>542</sup> GOST 31814-2012, (Exhibit UKR-140).

<sup>543</sup> Russia's second written submission, para. 23; and responses to Panel question Nos. 163, 166, and 167.

We understand this to mean that the FBO conducts testing of samples on the basis of a sample taken from products located somewhere other than the producer's facilities when there is no pre-existing evidence of non-conformities or consumer complaints in respect of the producer. We understand that it was on this basis that the FBO issued new certificates to producers in eastern Ukraine who had submitted applications under scheme 3c, without carrying out sampling at the producer's facilities. According to Russia, these producers were not affected by previous non-conformities or consumer complaints in respect of the producer.<sup>544</sup>

7.692. The certificates issued to producers in eastern Ukraine thus provide evidence that Russia has not applied the guidelines set out in GOST 31814-2012 as strictly as its text appears to contemplate. Although Article 4.2.3 of GOST 31814-2012 contemplates sampling only at the producer's warehouse, the FBO has applied this provision less strictly and allowed off-site testing of samples. This suggests that GOST 31814-2012 does not prevent the FBO from carrying out off-site testing of samples. Moreover, we note that there is no evidence on record, and Russia has not argued, that the FBO's practice of permitting off-site testing of samples in respect of applications submitted under scheme 3c has been officially published or is publicly known or available.

7.693. Russia has not specifically explained why the conditions contained in Article 7.4.1 of PC-FZT 08-2013, which concern post-certification inspection control, are relevant to applications for certification under CU technical regulations. We recall in this respect that the CU technical regulations replaced Russia's prior domestic technical regulations, including their conformity assessment procedures. This meant that producers who held certificates issued under the prior domestic regulations needed to submit applications for new certificates under CU technical regulations if they wished to continue marketing their products in Russia.

7.694. Producer 1 [[xxx]] is a case in point. It submitted applications for certification under scheme 3(c) for railway products that it had already marketed in Russia on the basis of certificates issued under Russia's prior domestic CS FRT Rules. As the relevant products of producer 1 were already in Russia's market, and known to the FBO, it is understandable that in these particular circumstances the FBO would consider off-site testing of samples as acceptable for certification under the new CU Technical Regulation. However, it is also understandable that it would be difficult for the FBO to disregard a known non-conformity or consumer complaint that had not been adequately addressed in a prior inspection control under CS FRT Rules. Had CS FRT Rules remained in force, prior non-conformities or consumer complaints would have meant that the next inspection control would have needed to be conducted on-site. It therefore seems logical that the FBO would wish to conduct sampling at the producer's warehouse in circumstances where the conditions for off-site inspection set out in Article 7.4.1 were not met.

7.695. In the light of the foregoing, we consider that Russia's practice of allowing off-site testing of samples under the conditions set out in Article 7.4.1 indicates that this form of testing provides Russia adequate confidence of conformity. Moreover, since Article 4.2.3 of GOST 31814-2012 provides for on-site testing of samples, off-site testing of samples constitutes a less strict manner of application of this part of Russia's conformity assessment procedure. In the circumstances of the present dispute, off-site testing of samples is also, notably, a less trade-restrictive manner of applying the procedure, as the FBO would not need to travel to Ukraine in order to complete the certification procedure. Consequently, if the conditions applied by the FBO for off-site testing of samples are satisfied, off-site testing of samples would be an alternative manner of applying the conformity assessment procedure that is less strict, makes an equivalent contribution to giving Russia adequate confidence of conformity and is available to Russia.

7.696. We now turn to address the burden of proof. In our analysis above of Ukraine's claims under Article 5.1.2 concerning suspensions, we have determined that it is Ukraine's burden to provide evidence and argumentation to establish that any identified alternative manner of application of the conformity assessment procedure was reasonably available to Russia. We further observed that for Ukraine to make its case that off-site inspections were an alternative manner of application of the conformity assessment procedure that was reasonably available to Russia to on-site inspections, Ukraine had to demonstrate that the conditions provided for in Article 7.4.1 of PC-FZT 08-2013 for off-site inspections were met in respect of each of the railway products covered

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<sup>544</sup> Russia's response to Panel question No. 156.



by the challenged instructions.<sup>545</sup> As also explained earlier, the evidence on record indicates that PC-FZT 08-2013 was available publicly or upon request. Finally, we recall that there is evidence that the FBO sent a letter to one of the Ukrainian producers whose certificates were suspended in which it did not explicitly refer to Article 7.4.1, but specified the relevant conditions for off-site inspection to be available.<sup>546</sup>

7.697. By contrast, there is no evidence on record that the FBO's practice of permitting off-site testing of samples under the conditions set out in Article 7.4.1 when processing applications concerning railway products produced in series under CU Technical Regulation 001/2011 has been officially published or is publicly known or available. Nor is there evidence that the FBO informed the producers elsewhere in Ukraine who were applying for new certificates under CU Technical Regulation 001/2011 that off-site testing of samples was a possibility.

7.698. We consider that this contrast with the situation that we were dealing with in our analysis concerning the suspensions has implications for the allocation of the burden of proof in the context of the claims concerning the rejections. It is clear that it is for Ukraine to establish a *prima facie* case and thus a presumption that what is claimed is true. However, according to the Appellate Body, "precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case".<sup>547</sup> As we have highlighted, there is no evidence or allegation in this case that going into the present panel proceedings Ukraine either did know or should have known about the availability of off-site testing of samples and the conditions that applicants must satisfy to benefit from off-site testing of samples.<sup>548</sup> In these circumstances, we consider that it would not be in keeping with procedural fairness for Ukraine to have the burden of demonstrating that those conditions, which were not previously known to it, had been met in the case of the challenged decisions.<sup>549</sup>

7.699. In our view, in the particular circumstances of this case, it is sufficient for Ukraine to establish that off-site sampling is reasonably available to Russia as a less strict manner of applying CU Technical Regulation 001/2011. We consider that Ukraine can rely in this respect on Russia's own submission and acknowledgement before the Panel that the FBO can apply, and has applied, Article 4.2.3 of GOST 31814-2012 less strictly than its text contemplates. By contrast, we consider that Ukraine does not need to demonstrate, as part of substantiating its claim that off-site sampling is a less strict manner of application reasonably available to Russia, that the conditions set out in Article 7.4.1 were satisfied in the case of the applications submitted pursuant to scheme 3c.<sup>550</sup> However, if there is evidence on record that demonstrates that those conditions were not met, we would find that off-site sampling was not reasonably available to Russia.<sup>551</sup> Regarding these conditions, we recall that in section 7.3.3.2.3.4 above, we found that according to Article 7.4.1 of PC-FZT 08-2013 off-site inspection control was not available if non-conformities

<sup>545</sup> See section 7.3.3.2.3.4 above.

<sup>546</sup> Letter [[xxx]] from the FBO to PJSC [[xxx]], 1 August 2014, (Exhibit UKR-28)(BCI).

<sup>547</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 323 at 335.

<sup>548</sup> We note in this connection that in *EC – Tariff Preferences*, the Appellate Body in determining whether the complaining party "would have been ... aware" that the challenged measure was a preferential tariff scheme implemented pursuant to the Enabling Clause similarly looked to whether the measure on its face, or publicly available explanatory documentation, made this clear. Appellate Body Report, *EC – Tariff Preferences*, para. 117.

<sup>549</sup> We recall in this context that in the Appellate Body's view the allocation of the burden of proof in the context of Article 22.8 of the DSU is a function of, among other considerations, the requirements of procedural fairness. Appellate Body Reports, *Canada – Continued Suspension*, para. 361; and *US – Continued Suspension*, para. 361. We further note that, according to the Appellate Body, "[d]ue process is intrinsically connected to notions of fairness, impartiality, and the rights of parties to be heard and to be afforded an adequate opportunity to pursue their claims, make out their defences, and establish the facts in the context of proceedings conducted in a balanced and orderly manner, according to established rules." Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 147.

<sup>550</sup> We observe in this respect that according to the Appellate Body, "although the complainant must establish the *prima facie* case in support of its complaint, the respondent bears the burden of proving the facts that it asserts in its defence". Appellate Body Report, *India – Additional Import Duties*, para. 187. We note that in this dispute Russia asserts that the conditions set out in Article 7.4.1 are applicable in the context of Article 4.2.3 of GOST 31814-2012 and that these conditions were satisfied in the case of the applications submitted pursuant to scheme 3c.

<sup>551</sup> As noted above in our analysis of Ukraine's claims under Article 5.1.2 concerning the suspensions, Ukraine has not argued that the conditions set out in Article 7.4.1 are, themselves, more strict than necessary and thus contrary to Article 5.1.2.

were identified in the most recent inspection control for the railway product with an upcoming inspection control and there were no consumer complaints in respect of that product. Accordingly, off-site sampling would be similarly unavailable if there is evidence of non-conformities identified in the most recent inspection control of the railway product for which an application for certification has been submitted or if there are consumer complaints in respect of that product.

7.700. With the foregoing considerations in mind, we turn to examine the availability of off-site sampling in the case of the applications for new certificates that were rejected by the FBO through decision 1.

### **Decision 1: Availability of off-site testing of samples**

7.701. Through decision 1 [[xxx]] of 2 October 2014, the FBO rejected four applications for new certificates submitted by producer 1 [[xxx]], pursuant to CU Technical Regulation 001/2011. According to decision 1, the FBO "return[ed] without consideration" the applications submitted by producer 1, "since it is impossible to carry out the certification procedure in full."<sup>552</sup> Russia has elaborated on this explanation, explaining that it was not possible for the FBO to carry out sampling at the producer's warehouse due the situation in Ukraine. As discussed above, off-site testing of samples would be reasonably available to Russia if non-conformities were not identified in the most recent inspection control of the railway product concerned and there were no consumer complaints in respect of that product.

7.702. On the basis of the foregoing, we examine decision 1, which concerns four applications (i.e. A1, A2, A3 and A4) covering various railway products manufactured by producer 1. The four applications were submitted under scheme 3c. Application A1 [[xxx]] concerns certification of two products, two-axle bogies and two-axle bogies of trunk road freight cars with track gage 1520mm [[xxx]]. Application A2 [[xxx]] concerns two products, universal flat wagons and flat wagons for large capacity containers [[xxx]]. Application A3 [[xxx]] concerns an application for two products, universal flat wagons [[xxx]] and flat wagons for carrying timber [[xxx]]. Lastly, application A4 concerns one product, open wagons with non-removable sides [[xxx]].<sup>553</sup>

7.703. The products at issue in the four applications had been covered by certificates that were suspended under the previous CS FRT Rules.<sup>554</sup> Russia submitted evidence of non-conformities, identified in the most recent inspection control available under CS FRT Rules, in respect of one of the products covered by application A3 (universal flat wagons [[xxx]]) and the product covered by application A4 (open wagons with non-removable sides [[xxx]]).<sup>555</sup> On the basis of this evidence, we consider that the FBO had valid grounds not to conduct off-site sampling in respect of one product covered by application A3 and the product covered by application A4.

7.704. We therefore consider that Ukraine has failed to establish that off-site sampling was a less strict manner of application reasonably available to Russia in respect of one product covered by application A3 (universal flat wagons [[xxx]]) and application A4.

7.705. However, Russia has failed to submit evidence of specific non-conformities or consumer complaints for the products covered by applications A1 (two-axle bogies and two-axle bogies of trunk road freight cars with track gage 1520mm [[xxx]]), A2 (universal flat wagons and flat wagons for large capacity containers [[xxx]]), and one of the products covered by application A3 (flat wagons for carrying timber [[xxx]]).<sup>556</sup> We therefore consider that Ukraine has established

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<sup>552</sup> Letter [[xxx]] from the FBO of 2 October 2014, (Exhibit UKR-16)(BCI). The version of this communication submitted by Russia through Exhibit RUS-3 contains a copy of the applications submitted by producer 1.

<sup>553</sup> The text of the applications is contained in Letter of the FBO No. [[xxx]] of 2 October 2014, (Exhibit RUS-3).

<sup>554</sup> Products for which producer 1 submitted new applications were suspended through Letter [[xxx]] from the FBO of 8 August 2014, (Exhibit UKR-15)(BCI); and Letter [[xxx]] from the FBO of 3 October 2014, (Exhibit UKR-19)(BCI).

<sup>555</sup> The non-conformities in respect of both these products (universal flat wagons [[xxx]] and open wagons with non-removable sides [[xxx]]) were identified in the inspection act of 28 January 2014 contained in Exhibit RUS-62(BCI).

<sup>556</sup> As indicated in footnote 410 above, the text of the inspection act of 18 April 2013 contained in Exhibit RUS-62(BCI) is incomplete, thus making it impossible to ascertain to which products the "identified

that off-site sampling was a less strict manner of application reasonably available to Russia in respect of the products covered by applications A1 and A2, and one of the products covered by application A3 (flat wagons for carrying timber [[xxx]]).

7.706. Accordingly, we find that Ukraine has established that off-site testing of samples is a less strict manner of application reasonably available to Russia in respect of three of the four applications (A1, A2, and A3 in respect of one of the covered railway products) rejected by the FBO through decision 1.

#### **Availability of off-site testing of samples for applications submitted under scheme 6c in general**

7.707. We now turn to examine the availability in general of off-site sampling for applications submitted under scheme 6c. We recall that the applications rejected by the FBO through decision 2 were submitted under scheme 6c.

7.708. According to Annex 6 of CU Technical Regulation 001/2011, applications submitted under scheme 6c concern a batch of railway products and require sampling of railway products from the batch before issuance of a certificate. As explained in the previous section, the procedure for sampling is set out in Article 4.2.3 of GOST 31814-2012. According to the second paragraph of this Article, sampling should be carried out at the place where the batch is located, such as the producer's warehouse, a warehouse of temporary storage, a customs warehouse, or the client's warehouse.

7.709. We recall that off-site sampling would be a situation where the FBO would allow a producer to send a sample of the batch of products, with a sufficient number of units for the FBO to select those that would be subject to testing. On the basis of the text of Article 4.2.3 of GOST 31814-2012, the FBO would allow for this possibility, depending on where the batch to be certified is located.

#### **Decision 2: availability of off-site testing of samples**

7.710. Through decision 2, the FBO rejected two applications submitted by producer 3 [[xxx]], one for a batch of 7,581 units of solebars and another for a batch of 15,057 units of side-frames.<sup>557</sup> The only reference to the location of those batches was made by Russia.<sup>558</sup> According to Russia, the information available to the FBO indicates that those batches were at the producers' premises in Ukraine. Ukraine has not challenged this assertion nor provided evidence to the contrary. Under the second paragraph of Article 4.2.3 of GOST 31814-2012, when the batch is located at the producer's premises, sampling must be carried out at that location. Consequently, Ukraine has not demonstrated that under Article 4.2.3 the FBO had the possibility to carry out the sampling of the batches covered by decision 2 elsewhere than in Ukraine.

7.711. We recall in this connection that there is evidence that the FBO has applied the first paragraph of Article 4.2.3 flexibly so as to permit off-site sampling in respect of applications submitted under scheme 3c (railway products produced in series). However, there is no evidence on record to indicate that the FBO has applied the second paragraph of Article 4.2.3 more flexibly than its text contemplates. We therefore have no reason to consider that the FBO had the possibility of not applying the second paragraph of Article 4.2.3 as written. Moreover, we note that Ukraine has not challenged the WTO-consistency of Article 4.2.3.

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inconsistencies" mentioned in paragraph 7.3 of the inspection act refer. Moreover, we note that the report on materials of inspection control dated 15 May 2013, contained in Exhibit RUS-62 (BCI), indicates that prior non-conformities identified in the inspection act of 18 April 2013, which concerns the inspection of the products covered by applications A1 and A2 (two-axle bogies and two-axle bogies of trunk road freight cars with track gage 1520mm [[xxx]] and universal flat wagons and flat wagons for large capacity containers [[xxx]]), had been eliminated. The evidence submitted by Russia does not contain any reference to the remaining product covered by application A3 (flat wagons for carrying timber [[xxx]]).

<sup>557</sup> Letter [[xxx]] from PJSC [[xxx]], 7 September 2017, (Exhibit UKR-136)(BCI); and Letter of the FBO No. [[xxx]] of 23 January 2015, (Exhibit RUS-4).

<sup>558</sup> Russia's response to Panel question No. 123.

7.712. Accordingly, we consider that Ukraine has failed to establish that off-site sampling is a less strict manner of application of the conformity assessment procedure reasonably available to Russia in respect of the two applications rejected by the FBO through decision 2.

#### **7.4.3.3.1.5 Overall assessment of whether Russia has applied its conformity assessment procedure more strictly than necessary**

7.713. We recall that we have determined above that Russia has applied its conformity assessment procedure, through decisions 1 and 2, in a trade-restrictive manner. We have also determined, however, that this manner of application of the conformity assessment procedure contributes substantially to giving Russia adequate confidence that the railway products covered by the rejected applications for new certificates conform with Russia's applicable technical regulations. We have further observed that the risks that non-conformity would create are high. In the circumstances of this dispute, non-conformity could lead to accidents and thus endanger, *inter alia*, the life and health of humans, plants, and animals. Such accidents could also cause serious harm to the environment. Clearly, therefore, the values and interests protected are very important.

7.714. In weighing and balancing these elements, we note that although in the case of decisions 1 and 2 the FBO applied the underlying conformity procedure in a strict manner that had a significant trade-restrictive effect, this manner of application of the procedure contributed substantially to giving Russia adequate confidence of conformity with the applicable technical regulations and took account of the high risks that non-conformity would have created for very important values and interests.

7.715. As regards alternative manners of application, we recall our finding concerning decision 1 that, in respect of the products covered by applications A1 and A2, and one of the products covered by application A3, Ukraine has established that off-site sampling is a less strict manner of application reasonably available to the FBO under the applicable conformity assessment procedure. At the same time, Ukraine failed to establish, in respect of one product covered by application A3 and application A4, that there were less strict manners of applying Russia's conformity assessment procedure that were reasonably available to the FBO under the applicable conformity assessment procedure (which Ukraine did not challenge as being WTO-inconsistent).

7.716. In the light of the foregoing, we consider that in respect of decision 1 Ukraine has (a) established that the FBO, through applications A1 and A2, and one of the products covered by application A3 (flat wagons for carrying timber [[xxx]]), has applied its conformity assessment procedure more strictly than is necessary to give Russia adequate confidence of conformity, in the light of the risks that non-conformity would create; and (b) failed to establish that the FBO, through application A4 and one of the products covered by application A3 (universal flat wagons [[xxx]]), has applied its conformity assessment procedure more strictly than is necessary to give Russia adequate confidence of conformity, in the light of the risks that non-conformity would create.

7.717. We note that application A3 is one single application covering two products. Neither party has addressed whether under CU Technical Regulation 001/2011 the FBO could issue a mixed decision with regard to such an application and issue a certificate for one covered product while refusing to issue a certificate for the other covered product. Article 6(21)(e) and (f) of CU Technical Regulation 001/2011 contemplate that the FBO can either adopt a decision to issue a certificate or refuse issuance of a certificate and provide a justification. It does not indicate that in cases where an application covers more than one product, the FBO must apply CU Technical Regulation 001/2011 in such a manner that it either accepts the application as a whole or rejects it as a whole. It is worth noting in this connection that Article 6(22) of CU Technical Regulation 001/2011 indicates that an application for certification must provide, *inter alia*, "product information and its identifying characteristics ..., [and a] technical description of the product ...". Yet the evidence before us establishes that despite the use of the term "product" in the singular, an application can cover more than one product.<sup>559</sup> We infer from this that CU Technical Regulation 001/2011 leaves CU members some flexibility in respect of implementation. We therefore proceed

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<sup>559</sup> Article 6(25) of CU Technical Regulation 001/2011 on applications concerning serial production similarly refers to "series-production product" and "product specification" in the singular.

on the basis that CU Technical Regulation 001/2011 does not prevent the FBO from issuing product-specific decisions on applications for certification under scheme 3c that cover multiple products.

7.718. Regarding decision 2, we recall our finding that Ukraine has failed to establish that off-site sampling is a less strict manner of application reasonably available to the FBO under the applicable conformity assessment procedure (which Ukraine did not challenge as being WTO-inconsistent as such).

7.719. In the light of the foregoing, we consider that in respect of decision 2 Ukraine has failed to establish that the FBO has applied its conformity assessment procedure more strictly than is necessary to give Russia adequate confidence of conformity, in the light of the risks that non-conformity would create.

#### **7.4.3.3.1.6 Conclusion**

7.720. On the basis of the foregoing, the Panel concludes with regard to decision 1 that Ukraine has established, in respect of applications A1, A2 and one of the products covered by application A3, that Russia has acted inconsistently with its obligations under Article 5.1.2, second sentence, of the TBT Agreement.

7.721. The Panel also concludes with regard to decision 1 that Ukraine has failed to establish that, in respect of application A4 and one of the products covered by application A3, Russia has acted inconsistently with its obligations under Article 5.1.2, second sentence, of the TBT Agreement.

7.722. Finally, the Panel concludes with regard to decision 2 that Ukraine has failed to establish that Russia has acted inconsistently with its obligations under Article 5.1.2, second sentence, of the TBT Agreement.

#### **7.4.3.3.2 Article 5.1.2, first sentence**

7.723. We recall that Ukraine's claims are based on both the first and the second sentence of Article 5.1.2. However, in relation to the first sentence, Ukraine has not submitted evidence or arguments that are different from those that we have examined in our analysis under the second sentence of Article 5.1.2.

7.724. The first sentence of Article 5.1.2 prohibits Russia from applying its conformity assessment procedure with a view to or with the effect of creating "unnecessary obstacles to international trade". We have found in our analysis under the second sentence of Article 5.1.2 that the FBO has applied the applicable conformity assessment procedure in a manner that had the effect of creating an obstacle to international trade, inasmuch as it restricted imports of the railway products from Ukraine that are covered by decisions 1 and 2. However, as our analysis above of the relevant arguments and evidence also indicates, the obstacles to international trade created by (a) decision 1 in respect of application A4 and one of the products covered by application A3, and (b) decision 2, were not "unnecessary" within the meaning of Article 5.1.2, first sentence. At the same time, our analysis above has led us to conclude with regard to decision 1 that applications A1, A2 and one of the products covered by application A3, were "unnecessary" within the meaning of Article 5.1.2, first sentence.

7.725. On the basis of the foregoing, we find that Ukraine has established in respect of decision 1, for applications A1, A2 and one of the products covered by application A3 (flat wagons for carrying timber [[xxx]]), that Russia has acted inconsistently with its obligations under Article 5.1.2, first sentence, of the TBT Agreement.

7.726. We also find that Ukraine has failed to establish in respect of decision 1, for application A4 and one product covered by application A3 (universal flat wagons [[xxx]]), and also in respect of decision 2, that Russia has acted inconsistently with its obligations under Article 5.1.2, first sentence, of the TBT Agreement.

### 7.4.3.3.3 Overall conclusion

7.727. The Panel concludes that Ukraine has established in respect of decision 1, for applications A1, A2 and one of the products covered by application A3 (flat wagons for carrying timber [[xxx]]), that Russia has acted inconsistently with its obligations under Article 5.1.2 of the TBT Agreement.

7.728. The Panel also concludes that Ukraine has failed to establish in respect of decision 1, for application A4 and one of the products covered by application A3 (universal flat wagons [[xxx]]), and decision 2, that Russia has acted inconsistently with its obligations under Article 5.1.2 of the TBT Agreement.

### 7.4.3.4 Decision 3

#### 7.4.3.4.1 Article 5.1.2, second sentence

7.729. According to Ukraine, through decision 3 [[xxx]] of 9 February 2015 the FBO annulled 19 applications for new certificates submitted by a Belarusian agent [[xxx]] of producer 2 [[xxx]] pursuant to CU Technical Regulation 003/2011, due to a lack of necessary documentation. Ukraine claims that through decision 3, Russia applied its conformity assessment procedure 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.<sup>560</sup>

7.730. Russia submits that the FBO issued decision 3 based on Article 6.33 of CU Technical Regulation 003/2011. Russia submits that the FBO issued decision 3 because the 19 annulled<sup>561</sup> applications did not contain all of the documents required by Article 6(28) of CU Technical Regulation 003/2011.<sup>562</sup>

7.731. Ukraine submits that the FBO first accepted the 19 applications as being complete, and that the FBO issued decision 3 only afterwards. According to Ukraine, this presupposes that in the FBO's view there were no missing documents when the applications were submitted. In Ukraine's view, the FBO's reference to missing documents was a mere pretext for rejecting those 19 applications.<sup>563</sup>

7.732. Ukraine further submits that, irrespective of whether the required documentation was complete, the FBO would arguably have rejected the applications due to the impossibility of carrying out on-site inspection, which was required by scheme 4c of CU Technical Regulation 003/2011.<sup>564</sup>

7.733. Russia submits that Ukraine's view that the FBO initially accepted the applications is based on an incomplete view of the facts. Russia submits that although the FBO initially accepted certain applications, it subsequently reviewed the decision and found that documents were missing, leading it to annul those applications through decision 3.<sup>565</sup>

7.734. The Panel turns to examine each of the elements required to establish whether decision 3 constitutes an application of Russia's conformity assessment procedure that is more strict than necessary to give Russia adequate confidence that Ukrainian railway products conform with Technical Regulation 003/2011, taking into account the risks non-conformity would create.

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<sup>560</sup> Ukraine's first written submission, para. 271; and second written submission, para. 204.

<sup>561</sup> Russia has explained that there is no difference between annulling an application and returning it without consideration, which is what the FBO did in the case of decisions 1 and 2. Russia's response to Panel question No. 34.

<sup>562</sup> Russia's first written submission, paras. 85-86 and 99; response to Panel question No. 72; second written submission, para. 106; and response to Panel question No. 169.

<sup>563</sup> Ukraine's opening statement at the first meeting of the Panel, para. 53; responses to Panel question Nos. 38 and 70; and second written submission, para. 205.

<sup>564</sup> Ukraine's second written submission, para. 206.

<sup>565</sup> Russia's second written submission, para. 107; and response to Panel question No. 125.

#### **7.4.3.4.1.1 Contribution to giving Russia adequate confidence that the products conform to the technical regulations**

7.735. Ukraine submits that because decision 3 is based on the pretext that documents were not complete, it constitutes a trade restrictive measure that makes no contribution to the objective of giving Russia adequate confidence that Ukrainian railway products conform with CU Technical Regulation 003/2011.<sup>566</sup>

7.736. Russia submits that through CU Technical Regulation 003/2011 it seeks to, *inter alia*, (a) protect the life and health of citizens; (b) protect the property of individuals, legal entities, the state or municipalities; (c) protect the environment, life or health of animals and plants; and (d) prevent deceptive practices. Russia also observes that, given the characteristics and end uses of the railway products at issue, it seeks the highest possible level of assurance of conformity.<sup>567</sup>

7.737. Ukraine argues that the alternative manners of application that it has identified would make an equivalent contribution to giving Russia adequate confidence that Ukrainian railway products conform with the applicable technical regulations.<sup>568</sup>

7.738. The Panel notes that through CU Technical Regulation 003/2011 Russia seeks to protect, *inter alia*, the environment as well as the life and health of humans, animals, and plants against risks arising from train derailments due to low quality equipment. All of these values and interests are very important.

7.739. We recall that Russia submits that it "seeks the highest possible level of assurance of conformity with the relevant safety requirements".<sup>569</sup> The evidence supports that Russia seeks a high level of conformity. Article 52 of the EAEU Treaty provides that the technical regulations in the EAEU shall be adopted to protect the life and health of people, property, the environment, life and health of animals and plants, prevent consumer deception and ensure energy efficiency and resource conservation.<sup>570</sup> According to Article 1.3 of CU Technical Regulation 003/2011, this CU technical regulation establishes the requirements for railway rolling stock and its components for the purpose of protecting the life and health of humans, animals and plants, maintaining the safety of property, and preventing any actions that would mislead consumers with respect to the purpose and safety of the covered railway products.<sup>571</sup>

7.740. To ensure the protection of life and health of humans, animals, and plants, as well as of the environment, the CU technical regulation sets out a conformity assessment procedure through which conformity with the safety requirements are verified. Such procedures rely on methods for testing and for assessing conformity that enable certification bodies in CU members to verify conformity of products with the technical requirements contained in CU Technical Regulation 003/2011.<sup>572</sup> According to CU Technical Regulation 003/2011, applicants must submit, together with an application, a number of documents, including test results, and producers undergo different forms of inspection, all aimed at verifying conformity.<sup>573</sup> The existence of these rules demonstrates that Russia indeed seeks a high level of conformity.

7.741. Moreover, there is evidence that Russia has enforced the rules governing its conformity assessment procedures, thus supporting the view that Russia seeks a high level of conformity.<sup>574</sup>

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<sup>566</sup> Ukraine's second written submission, para. 207.

<sup>567</sup> Russia's responses to Panel question Nos. 108, 124, and 137.

<sup>568</sup> Ukraine's opening statement at the first meeting of the Panel, para. 61; and comments on Russia's responses to Panel question Nos. 116, 124, and 131.

<sup>569</sup> Russia's response to Panel question No. 116.

<sup>570</sup> EAEU Treaty, (Exhibit UKR-5).

<sup>571</sup> CU Technical Regulation 003/2011, (Exhibit UKR-11).

<sup>572</sup> Article 6(8) of CU Technical Regulation 003/2011, (Exhibit UKR-11).

<sup>573</sup> Articles 6(21) and 6(24)-6(29) of CU Technical Regulation 003/2011, (Exhibit UKR-11).

<sup>574</sup> See for instance references to certificates issued under the CU Technical Regulations, contained in the following exhibits: Extract of Unified Register of Issued Certificates of Conformity and Registered Declarations of Conformity, (Exhibit UKR-13); Extract of Unified Register of Issued Certificates of Conformity and Registered Declarations of Conformity concerning European producers, (Exhibit UKR-54)(Corr.); Extract of Unified Register of Issued Certificates of Conformity and Registered Declarations of Conformity concerning

7.742. Russia's annulment and rejection of applications submitted by producer 2 pursuant to CU Technical Regulation 003/2011 ensured that the railway products for which new certificates were sought would not enter Russia's market. We consider that this manner of application of the conformity assessment procedure gives Russia a high level of assurance that no non-conforming products covered by decision 3 enter its market.

7.743. We note that Article 6(28) of CU Technical Regulation 003/2011 sets out ten specific documents or types of information that must be submitted together with an application for a new certificate concerning products produced in series. Pursuant to Article 6.33 of CU Technical Regulation 003/2011, a certification body must reject an application when (a) it fails to contain the documents required under paragraphs 25, 26, and 28 of Article 6 or (b) the information contained in the documents submitted is unreliable. To us, Article 6.33(a) indicates that any application, including one submitted under Article 6.21, must be accompanied by the documents required, as relevant, in paragraphs 25, 26, and 28 of Article 6. Most of the applications rejected through decision 3 concern products produced in series (pursuant to scheme 4c of CU Technical Regulation 003/2011).<sup>575</sup> As such, they should be accompanied by the documents required by Article 6(28). Ukraine has not demonstrated otherwise. Moreover, Ukraine has not claimed that the documentary and information requirements set out in Article 6(28) are WTO-inconsistent.

7.744. According to the texts of the applications submitted by Ukraine under scheme 4c, the documents attached to the applications do not appear to have included each of the documents required by Article 6(28).<sup>576</sup> Ukraine has not submitted the attachments themselves or other evidence of the documents that were attached to the applications. In the light of this, it appears to us that the applications were indeed not accompanied by all documents required by Article 6(28). We consider that without the required documents or information, the FBO was not in a position properly to assess the conformity of the products covered by the applications.

7.745. Thus, Russia's chosen manner of application of its conformity assessment procedure – the annulment of the applications – contributes substantially to the objective of giving Russia adequate confidence of conformity inasmuch as it ensured that no covered railway product that might not have conformed with CU Technical Regulation 003/2011 could enter Russia's market.

#### **7.4.3.4.1.2 Strictness of the manner of applying the conformity assessment procedure**

7.746. Ukraine submits that decision 3 has a severe restrictive effect on imports of railway products originating in Ukraine, as rejecting applications for new certificates results in the impossibility of placing such products on the Russian market.<sup>577</sup>

7.747. Russia submits that the FBO issued decision 3 because the 19 annulled applications did not contain all of the documents required by Article 6(28) of CU Technical Regulation 003/2011.<sup>578</sup>

7.748. The Panel notes that the rejection of applications for new certificates leads to the loss of access to the Russian market, for as long as new certificates are not issued, because without a valid certificate, Ukrainian railway products cannot enter the Russian market.<sup>579</sup> We therefore consider that the rejection of applications for new certificates substantially restricts trade, and can be considered as a strict manner of application.

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Kazakh producers, (Exhibit UKR-56); Extract of Unified Register of Issued Certificates of Conformity and Registered Declarations of Conformity concerning Belarusian producers, (Exhibit UKR-58); and Extract of Unified Register of Issued Certificates of Conformity and Registered Declarations of Conformity concerning Russian producers, (Exhibit UKR-83).

<sup>575</sup> We note that at least three of those 19 applications were submitted pursuant to CU rules governing voluntary certification of conformity. See Table 6 above.

<sup>576</sup> Applications submitted by PJSC [[xxx]] on behalf of PJSC [[xxx]], 22 December 2014, (Exhibit UKR-112)(BCI).

<sup>577</sup> Ukraine's first written submission, para. 273; and second written submission, para. 187.

<sup>578</sup> Russia's first written submission, paras. 85-86 and 99; response to Panel question No. 72; second written submission, para. 106; and response to Panel question No. 169.

<sup>579</sup> Article 3(2) of CU Technical Regulation 003/2011 provides that objects and elements of railway infrastructure in respect of which conformity has not been certified cannot be released into the market, (Exhibit UKR-11).



#### 7.4.3.4.1.3 Risks that non-conformity would create

7.749. Ukraine considers that the risk of non-conformity is that railway products enter Russia's market without satisfying the CU technical regulations, thus depriving these regulations of their effect.<sup>580</sup>

7.750. Russia submits that the risks of non-conformity are that goods of insufficient quality would enter Russia's market. According to Russia, such low-quality equipment can lead to train derailments, which would undermine the objective of the technical regulations, including that of protecting the life and health of humans, animals, and plants. Russia considers that given the serious threat of harm to human life and health, the environment, property of individuals and legal entities, the risks of non-conformity are grave.<sup>581</sup>

7.751. The Panel notes that both parties seem to agree that there are high risks arising from non-conformity. In particular, non-conforming railway products may lead to accidents, including train derailments, which in turn may cause great harm, including to human, animal, and plant life and health. We consider that in view of the railway products covered by the applications for new certificates (railway rolling stock and its parts thereof such as, wagons, switches, etc.), the consequences of a failure of any of such products, due to non-conformity with the underlying technical regulations, could reasonably be expected to create substantial risks notably for human, animal, and plant life or health as well as the environment.

#### 7.4.3.4.1.4 Less trade-restrictive manners of application

7.752. We now turn to examine the alternative manners of application raised by Ukraine.

7.753. Ukraine argues that the rejection of applications for new certificates was a stricter application of Russia's conformity assessment procedures than necessary to provide Russia adequate confidence that Ukrainian railway products conform to the relevant technical regulations. Ukraine submits that other, less trade restrictive manners of application of Russia's conformity assessment procedure were available to Russia. Specifically, Ukraine identified the following alternatives: (a) additional communications with the relevant Ukrainian producers; (b) entrusting on-site inspections in Ukraine to the competent authorities of Kazakhstan and Belarus; (c) accrediting non-Russian inspectors, either experts or organizations, to conduct inspections in Ukraine; and (d) off-site inspections.<sup>582</sup> Ukraine submits that these are less strict manners of application of Russia's conformity assessment procedure that make an equivalent contribution to giving Russia adequate confidence of conformity, and are available to Russia.<sup>583</sup>

7.754. Russia does not raise arguments addressing Ukraine's proposed alternatives. Russia responds that the FBO annulled the applications through decision 3 because necessary documents had not been submitted with the applications.

7.755. The Panel understands that the alternative manners of application proposed by Ukraine are meant to be alternatives to the FBO not conducting inspections (suspensions) or sampling (rejections) in Ukraine. However, decision 3 concerns the application of a different and prior part of Russia's conformity assessment procedure, the initial examination of whether applications have deficiencies. We therefore do not consider that Ukraine has identified any alternative manners of application that would have allowed the FBO to avoid annulling the applications through decision 3.<sup>584</sup>

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<sup>580</sup> Ukraine's second written submission, para. 209.

<sup>581</sup> Russia's response to Panel question No. 104; second written submission, para. 102; and response to Panel question No. 116.

<sup>582</sup> We recall that, as explained in footnote 369 above, we use the term "off-site inspection" and "remote inspection" interchangeably.

<sup>583</sup> Ukraine's first written submission, para. 275; opening statement at the first meeting of the Panel, paras. 61-68; and second written submission, paras. 212, 248, and 252.

<sup>584</sup> We note Ukraine's argument that irrespective of whether the required documentation was complete, the FBO would arguably have rejected the applications due to the impossibility to carry out on-site inspection.

#### **7.4.3.4.1.5 Overall assessment of whether Russia has applied its conformity assessment procedure more strictly than necessary**

7.756. We recall that we have determined above that Russia has applied its conformity assessment procedure, through decision 3, in a trade-restrictive manner. We have also determined, however, that this manner of applying the conformity assessment procedure contributes substantially to giving Russia adequate confidence that the railway products covered by the annulled applications for new certificates cannot enter Russia's market, unless they conform with Russia's applicable technical regulations. We have further found that the risks that non-conformity would create are high. In the circumstances of this dispute, non-conformity could lead to accidents and thus endanger the life and health of humans, animals, and plants. Such accidents could also cause serious harm to the environment. Therefore, the values and interests protected are important.

7.757. In weighing and balancing those elements and findings, we note that although the FBO applied the underlying conformity procedure in a strict manner that had a significant trade-restrictive effect, this manner of applying the procedure contributed substantially to giving Russia adequate confidence of conformity with the applicable technical regulations and took account of the high risks that non-conformity would have created for important values and interests. We further observe that the FBO in annulling the incomplete applications followed Article 6(33)(a) of CU Technical Regulation 003/2011. Ukraine has not argued that Article 6(33) is contrary to Article 5.1.2.

7.758. We also recall our finding that Ukraine has failed to identify less strict manners of application available to the FBO under Russia's domestic law, including Article 6(33) and other provisions of the applicable conformity assessment procedure.

7.759. In the light of this, we consider that Ukraine has failed to establish that the FBO, through decision 3, has applied its conformity assessment procedure more strictly than is necessary to give Russia adequate confidence of conformity, in the light of the risks that non-conformity would create.

#### **7.4.3.4.1.6 Conclusion**

7.760. We thus conclude that Ukraine has failed to establish that, through decision 3, Russia has acted inconsistently with its obligations under the second sentence of Article 5.1.2 of the TBT Agreement.

#### **7.4.3.4.2 Article 5.1.2, first sentence**

7.761. We recall that Ukraine bases its claims under Article 5.1.2 on both the first and the second sentence of Article 5.1.2. However, in relation to the first sentence, Ukraine has not submitted evidence or arguments that are different from those that we have examined in our analysis under the second sentence of Article 5.1.2.

7.762. The first sentence of Article 5.1.2 prohibits Russia from applying its conformity assessment procedure with a view to or with the effect of creating "unnecessary obstacles to international trade". We have found in our analysis under the second sentence of Article 5.1.2 that the FBO has applied the applicable conformity assessment procedure in a manner that had the effect of creating an obstacle to international trade, inasmuch as it restricted imports of the railway products from Ukraine that are covered by decision 3. However, as our analysis above of the relevant arguments and evidence also indicates, the obstacle to international trade created by decision 3 was not "unnecessary" within the meaning of the first sentence of Article 5.1.2.

7.763. On that basis, we find that Ukraine has failed to establish in respect of decision 3 that Russia has acted inconsistently with its obligations under the first sentence of Article 5.1.2 of the TBT Agreement.

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However, we cannot speculate about what the FBO would have done. Moreover, Article 6(33) of CU Technical Regulation 003/2011 contemplates that the FBO reject applications that are not complete.

#### **7.4.3.4.3 Overall conclusion**

7.764. In respect of decision 3, the Panel thus concludes that Ukraine has failed to establish that Russia has acted inconsistently with its obligations under Article 5.1.2 of the TBT Agreement.

#### **7.4.4 Consistency of the rejections with Article 5.2.2 of the TBT Agreement**

7.765. Ukraine has also presented claims of violation under Article 5.2.2 of the TBT Agreement, to which we now turn. Ukraine's claims concern all three decisions, through which the FBO rejected or annulled applications by Ukrainian producers, and they are based on the second and third obligations in Article 5.2.2.

7.766. Ukraine claims that in respect of the three FBO decisions Russia acted inconsistently with Article 5.2.2, both by failing to examine promptly the completeness of the documentation submitted by the applicants and failing to inform them in a precise and complete manner of all deficiencies in their applications (second obligation) and by failing to transmit the results of the conformity assessment in a precise and complete manner that would have allowed the applicants to take corrective actions (third obligation).<sup>585</sup>

7.767. Russia rejects all of Ukraine's claims under the second and third obligations in Article 5.2.2, arguing that Ukraine has failed to establish that the three decisions are inconsistent with Article 5.2.2.<sup>586</sup>

7.768. The Panel recalls that it has already addressed the meaning of the second and third obligations in Article 5.2.2 in section 7.3.4.1 above. We therefore proceed directly to apply Article 5.2.2 to the challenged rejections.

#### **7.4.4.1 Application of the second and third obligations in Article 5.2.2**

##### **7.4.4.1.1 Applicability of Article 5.2.2**

7.769. We found above that the three decisions, through which the FBO rejected or annulled applications, fall within the scope of Article 5.1 of the TBT Agreement, as they concern conformity assessment by a central government body and a mandatory conformity assessment procedure.<sup>587</sup> Article 5.2 indicates that in situations where a Member must implement the obligations set out in Article 5.1, it must also implement those set out in Article 5.2, including the obligations contained in Article 5.2.2. The three challenged decisions are therefore subject to Article 5.2.2.

##### **7.4.4.1.2 Overview of relevant facts**

7.770. Section 7.4.1 above summarizes the relevant facts.<sup>588</sup> For each of the three decisions, it provides the explanation given in support of the relevant decision. The explanation given for decisions 1 and 2, through which the FBO returned the applications without consideration, are virtually the same. A different explanation was given for decision 3, through which the submitted applications were annulled.

7.771. We note that decisions 1 and 2 refer to the impossibility of carrying out the certification procedure in full. They do not refer to any missing documents or incomplete applications. In contrast, decision 3 does not refer to the impossibility of carrying out the certification procedure in full. But it points to the absence of documents necessary for performance of certification.

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<sup>585</sup> Ukraine's first written submission, para. 277; and second written submission, para. 254.

<sup>586</sup> Russia's first written submission, paras. 104-106.

<sup>587</sup> See paragraphs 7.608- 7.611 above.

<sup>588</sup> See in particular Table 6 above.

#### 7.4.4.1.3 Consistency with the third obligation in Article 5.2.2

7.772. Turning now to the matter of the consistency of the three rejection decisions with Article 5.2.2, we will address the claimed inconsistencies with the third obligation in Article 5.2.2 before addressing the claimed inconsistencies with the second obligation.

7.773. Ukraine claims that Russia did not comply with the third obligation in Article 5.2.2 in respect of decisions 1 and 2 because it failed to transmit in a precise and complete manner the results of the preliminary assessment, which would have allowed the applicants to take corrective action. Ukraine submits that the explanation provided by the FBO did not address why the certification procedure could not be carried out in full or which specific part of the certification procedure was posing difficulty.<sup>589</sup>

7.774. Regarding decision 3, Ukraine submits that Russia acted inconsistently with the third obligation in Article 5.2.2 because it failed to inform the relevant producer in a precise and complete manner of the results of the FBO's assessment. Ukraine argues that the FBO decision did not indicate which specific documents had not been provided, thus making it impossible for the producer to know what corrective action it could take (i.e. what documents to submit) in order for the applications to be processed by the FBO. According to Ukraine, Article 6(24) of CU Technical Regulation 003/2011 indicates that immediately following the submission of an application, the certification procedure foresees as the second of seven steps "assessment of the application ... by the certification body, the decision in respect of the said application and the direction of the applicant". In Ukraine's view, it therefore follows that the FBO's conclusion that documents were missing constitutes an "assessment" within the meaning of the third obligation of Article 5.2.2.<sup>590</sup>

7.775. Russia argues that Ukraine has failed to establish its claims under the third obligation of Article 5.2.2. Regarding decisions 1 and 2, Russia argues that the two producers were fully aware of the relevant situation and the reasons for the inability to conduct the inspection control necessary for the certification, which included uncertainty about the safety of FBO employees. According to Russia, without visiting the premises of the producer, it was impossible for the FBO to carry out product identification, sampling of products, inspection of production or certification of the quality management system or production. Russia further observes that according to Article 6(9) of CU Technical Regulation 001/2011 certification is conducted on the basis of a contract between the certification body and the applicant. Russia submits that the FBO could not conclude such contracts given the situation in Ukraine, as otherwise it would have entered into contractual obligations that it could not have performed.<sup>591</sup>

7.776. Regarding decision 3, Russia argues that the applications covered by this decision were incomplete, and that the reference to Article 6(28) of CU Technical Regulation 003/2011 was sufficient to inform the applicant in a precise and complete manner of all the documents that were necessary for the applications to be accepted.<sup>592</sup>

7.777. Ukraine counters in respect of decisions 1 and 2 that there is no basis in Article 5.2.2 for a presumption that applicants are supposed to be fully aware of the situation. According to Ukraine, it is up to the FBO to inform the applicants in a precise and complete manner. Ukraine also argues that the certification schemes relevant to decisions 1 and 2, schemes 3c and 6c, do not require FBO inspectors to visit the producer's site of production. In Ukraine's view, the reference to the impossibility of carrying out the certification procedure is therefore an excuse for refusing the issuance of certificates.<sup>593</sup>

7.778. The Panel begins its analysis with decisions 1 and 2. We first address whether, through decisions 1 and 2, the FBO was transmitting the results of an assessment. In the two decisions,

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<sup>589</sup> Ukraine's first written submission, paras. 284-285.

<sup>590</sup> Ukraine's first written submission, paras. 286-287; and Ukraine's second written submission, paras. 316-317.

<sup>591</sup> Russia's first written submission, paras. 84 and 104; second written submission, para. 124; and responses to Panel question Nos. 21, 34 and 71.

<sup>592</sup> Russia's first written submission, para. 105.

<sup>593</sup> Ukraine's opening statement at the first meeting of the Panel, para. 72; and second written submission, paras. 313-314.

the FBO refers to the impossibility of carrying out a certification procedure in full. As we noted above and as explained by Russia<sup>594</sup>, the FBO's position appears to have been that it could not give access to one integral part of Russia's conformity assessment procedure set out in CU Technical Regulation 001/2011, the testing of samples, and that it therefore returned the applications without substantive consideration. Thus, the relevant "assessment", the result of which was to be transmitted, is the assessment concerning the testing of samples.

7.779. As the FBO determined that it was impossible to carry out the testing of samples for the Ukrainian suppliers concerned, it was clear that the assessment to be undertaken by the FBO during the testing of samples could not yield any substantive "conformity" or "non-conformity" outcomes. In keeping with our interpretation of the term "results of the assessment"<sup>595</sup>, we therefore consider that the "result" of the FBO's assessment concerning the testing of samples was that there was not and could not be any substantive outcome. In the light of this, we further consider that by referring to the impossibility of carrying out a certification procedure in full, the FBO was transmitting to the relevant applicants the result of its assessment concerning one integral part of the conformity assessment procedure.

7.780. We now turn to address whether the FBO transmitted the result of its assessment in a precise and complete manner so that any corrective action could be taken. Decisions 1 and 2 inform applicants that it is not possible to carry out a certification procedure in full. The decisions thus inform the applicants about the result of an assessment, but it is not clear to what part of the conformity assessment procedure and hence to what assessment the FBO is referring. Moreover, the decisions do not provide any information about the nature of, and reason for, the "impossibility" that prevents the FBO from carrying out the certification procedure in full. Consequently, the applicants have no way of determining whether there is any corrective action that they could take with a view to allowing the certification procedure to proceed. For these reasons, decisions 1 and 2 do not inform the applicants in a precise and complete manner and are thus not sufficient to satisfy the requirements of the third obligation.

7.781. In our view, Russia's argument that the two suppliers were fully aware of the relevant situation and the reasons for the impossibility of carrying out the certification procedure in full is inapposite. As we have explained above, the standard for assessing whether the results have been transmitted in a precise and complete manner is an objective one. It is therefore not necessary to examine, in addition, what the applicants at issue did or did not know about the "impossibility". On an objective assessment, applicants were not in a position, without additional indications, reliably to infer from the reference to the "impossibility" of carrying out the certification procedure in full what the nature of, and reason for, the impossibility was.

7.782. Turning to decision 3, we note that it refers to the absence of documents "necessary for the performance of certification". This decision informs the applicant that the documentation submitted by the applicant was incomplete. In contrast, nothing in decision 3 indicates that the FBO was transmitting the result of any part of the conformity assessment procedure.

7.783. To be sure, and as noted by Ukraine, decision 3 indicates that the FBO "assessed" the completeness of the applications and found deficiencies in this respect. However, not every assessment by the competent body that is undertaken in connection with a conformity assessment procedure falls within the scope of the third obligation in Article 5.2.2. Assessing the completeness of the documentation submitted by an applicant is not the same as assessing, or determining<sup>596</sup>, the conformity of a product. The former activity is specifically addressed in the second obligation in Article 5.2.2; the latter activity is covered by the third obligation in Article 5.2.2. Moreover, if the assessment of the completeness of an application were subject to the third obligation, the second obligation in Article 5.2.2 would be redundant.<sup>597</sup>

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<sup>594</sup> See paragraph 7.617 above; and Russia's response to Panel question No. 21.

<sup>595</sup> See section 7.3.4.1 above.

<sup>596</sup> Article 5.2.7 uses the term "determination" of conformity, whereas the fourth obligation of Article 5.2.2 and Article 5.2.3 refer to "assessment" of conformity or "assess[ing]" conformity.

<sup>597</sup> We recall that treaty provisions must be interpreted so as not to deprive them of meaning and effect. Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, p. 3 at 21.

7.784. For these reasons, we do not agree with Ukraine that the FBO's conclusion that documents were missing constitutes the result of an assessment that the FBO had to transmit in a precise and complete manner to the applicant, as prescribed by the third obligation of Article 5.2.2. In our view, the third obligation is not applicable to the information provided in decision 3.

#### **7.4.4.1.3.1 Conclusion**

7.785. In the light of the above, the Panel concludes that Ukraine has established, for decisions 1 and 2, that Russia has acted inconsistently with the third obligation in Article 5.2.2. The Panel also concludes, however, that Ukraine has failed to establish, for decision 3, that Russia has acted inconsistently with the third obligation in Article 5.2.2. In sum, the Panel concludes that Ukraine has established inconsistencies with the third obligation in Article 5.2.2 in respect of two of the three rejections of new applications.

#### **7.4.4.1.4 Consistency with the second obligation in Article 5.2.2**

7.786. We now turn to examine Ukraine's claims of inconsistency with the second obligation in Article 5.2.2.

7.787. Ukraine claims that Russia did not comply with the second obligation in Article 5.2.2 in respect of decisions 1 and 2 because it failed to inform the two producers in a precise and complete manner of all deficiencies in their applications. Ukraine notes that the explanation provided by the FBO did not address why the certification procedure could not be carried out in full or which specific part of the certification procedure was posing difficulty.<sup>598</sup>

7.788. Ukraine further submits that the FBO failed to examine the completeness of the documentation submitted by the two producers. For Ukraine, this is clear from the two decisions themselves, which indicate that the FBO decided to return the applications without consideration. Ukraine also argues that the FBO did not have sufficient time to examine properly the completeness of the documentation submitted. Regarding decision 1, Ukraine refers to the number of documents that were submitted and the issuance of the FBO's decision only a day after the applications had been submitted. Ukraine notes that in the case of decision 2, the FBO's decision was issued only three days after the applications had been submitted.<sup>599</sup>

7.789. Regarding decision 3, Ukraine submits that Russia acted inconsistently with the second obligation in Article 5.2.2 because it failed to inform the relevant producer in a precise and complete manner of all deficiencies in its applications. Ukraine argues that the FBO's decision did not indicate which specific documents had not been provided, thus making it impossible for the producer to take corrective action (i.e. submit the missing documents).<sup>600</sup>

7.790. Ukraine further argues that the reference in the FBO's decision to Article 6(28) of CU Technical Regulation 003/2011 was not sufficient, in the circumstances of decision 3, to comply with the second obligation of Article 5.2.2. Ukraine contends that the applications had been submitted and accepted by the FBO under Article 6(21) of CU Technical Regulation 003/2011, without mentioning that any documents were missing, before the FBO decided to annul these applications on the basis of a lack of documents required by Article 6(28). Ukraine argues that since the FBO had not previously invoked Article 6(28), did not explain why this provision was being invoked, and merely referred to Article 6(28), which lists all documents that must be submitted with an application for certification for serial production, the FBO did not inform the applicant in a precise and complete manner of the specific documents that were missing.<sup>601</sup>

7.791. Russia argues that Ukraine has failed to establish its claims under the second obligation of Article 5.2.2. Regarding decisions 1 and 2, Russia argues that the two producers were fully aware

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<sup>598</sup> Ukraine's first written submission, paras. 284-285.

<sup>599</sup> Ukraine's second written submission, paras. 280-281 and 283-284.

<sup>600</sup> Ukraine's first written submission, paras. 286-287; and second written submission, paras. 316-317.

<sup>601</sup> Ukraine's second written submission, paras. 288-290; and responses to Panel question Nos. 70 and

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of the relevant situation and the reasons for the inability to conduct the inspection control necessary for the certification.<sup>602</sup>

7.792. Regarding decision 3, Russia argues that this application was incomplete, and that the explicit reference to Article 6(28) of CU Technical Regulation 003/2011 was sufficient to inform the applicant in a precise and complete manner of all the documents that were necessary for the applications to be accepted. Russia notes that Article 6(28) lists ten different documents that are necessary for an application for certification. According to Russia, the FBO annulled these applications because they contained only two out of the ten necessary documents, (a) a proposed method and point of application of a single sign of products on the markets of CU members, and (b) the document establishing an expiration date of the goods.<sup>603</sup>

7.793. In respect of decision 3, Ukraine responds that Russia's assertion is incorrect and that the applications were accompanied by multiple documents showing conformity of the covered railway products with CU Technical Regulation 003/2011, such as technical documentation (certificates for components) and protocols of certification tests.<sup>604</sup>

7.794. The Panel again begins its analysis with decisions 1 and 2. As noted above, the two decisions inform the applicants of the result of the FBO's assessment concerning one integral part of the conformity assessment procedure, the testing of samples. Nothing in decisions 1 and 2 suggests that the FBO had determined that the applications had any deficiencies. The FBO's explanation that it was impossible for it to carry out a certification procedure in full does not indicate that the applications had deficiencies. To that extent, it is clear that the second part of the second obligation in Article 5.2.2, which requires that the competent body "inform[] the applicant in a precise and complete manner of all deficiencies", is not applicable to the information provided in decisions 1 and 2. Thus, the facts do not support Ukraine's claim that in respect of these two decisions Russia has acted inconsistently with the second part of the second obligation in Article 5.2.2.

7.795. Ukraine also claims an inconsistency with the first part of the second obligation, according to which when receiving an application, the competent body must promptly examine the completeness of the documentation. In support of its claims, Ukraine refers to the FBO's decision to return the applications "without consideration". However, it is important to bear in mind the FBO's complete explanation. The FBO returned the applications without consideration due to the impossibility of carrying out a certification procedure in full. Thus, the FBO indicated that it would not proceed with a conformity assessment because it was not possible to complete it. In other words, the consideration that the FBO declined to undertake concerned whether the covered products conformed with the CU Technical Regulation 001/2011. The FBO did not state that it would not examine whether the applications were complete.

7.796. Ukraine further argues that the FBO did not have sufficient time to examine properly the completeness of the documentation submitted, since the FBO issued the two decisions one and three days, respectively, after the applications had been submitted. Russia has not argued that the FBO finished its examination of the completeness of the documentation. As we see it, the FBO issued the two decisions so promptly because it was in a position to transmit to the applicants a result of its assessment, the impossibility of carrying out an integral part of the conformity assessment procedure in full. We note in this respect that the third obligation required the FBO to transmit results of its assessment "as soon as possible". In our view, it cannot be inferred from the prompt issuance of the two decisions that the FBO had not engaged at all, or was no longer engaged, in an examination of the completeness of the documentation submitted when it issued the two decisions. Indeed, Ukraine itself states in respect of decision 1 that numerous documents had been submitted with the applications. And in respect of decision 2 Ukraine similarly asserts that three days were not enough properly to examine the completeness of the documentation.

7.797. Furthermore, we recall that under Article 5.2.2 the competent body must "promptly" inform the applicant of all deficiencies of the application and also transmit the results of its

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<sup>602</sup> Russia's first written submission, para. 104; and response to Panel question No. 71.

<sup>603</sup> Russia's first written submission, paras. 85-86 and 105; second written submission, para. 125; and response to Panel question No. 72.

<sup>604</sup> Ukraine's second written submission, para. 286; and response to Panel question No. 70.

assessment "as soon as possible". As we have explained in section 7.3.4.1 above, the competent body in our view must inform the applicant as soon as possible after any results become available, even if this is before the competent body has been able to finish its examination of the completeness of the documentation. Consequently, the FBO was not required to have finished its examination of the completeness of the documentation before it issued decisions 1 and 2 to transmit a result of its assessment. In the case of decisions 1 and 2, the FBO had clarity regarding the result of the assessment concerning the testing of samples quickly, which is why the FBO transmitted the two decisions without delay. And Ukraine does not argue that the FBO could have finished its examination of the completeness of the documentation before decisions 1 and 2 were issued. In fact, Ukraine argues the opposite. Therefore, it cannot be inferred from the prompt issuance of decisions 1 and 2 that the FBO did not promptly examine the completeness of the documentation. For these reasons, we reject Ukraine's claim that Russia in respect of decisions 1 and 2 has acted inconsistently with the first part of the second obligation in Article 5.2.2.

7.798. We now turn to examine Ukraine's claim concerning decision 3. Through decision 3, the FBO clearly informed the applicant that its applications had deficiencies. It is not in dispute that the FBO indicated that documents necessary for the conduct of a conformity assessment were missing, and that it referred the applicant to Article 6(28) of CU Technical Regulation 003/2011 for a list of the required documents.<sup>605</sup> Ukraine claims an inconsistency with the second obligation in Article 5.2.2 on the basis that the FBO did not inform the applicant in a precise and complete manner of all deficiencies in its applications.

7.799. We observe at the outset that Ukraine does not challenge the WTO-consistency of Article 6(28) as such, nor does it argue that there is a lack of clarity regarding the specific documents or type of information that Article 6(28) lists as having to be submitted with the application for certification. As Russia has pointed out, Article 6(28) lists ten distinct documents or types of information.

7.800. It is correct that decision 3 does not identify the specific documents or types of information that are missing. However, Ukraine does not argue that the applicant did not have a copy of the documentation that it submitted or that the applicant could not have had access to the documentation that it submitted upon request.<sup>606</sup> In our view, the applicant should therefore have been able to ascertain which specific document or type of information was missing in its application. To do so, the applicant only needed to compare the documents and information that it submitted against the ten items listed in Article 6(28). We observe in this connection that the first obligation in Article 5.2.2 does not state that the competent body, which may have numerous applications to process at any given time, must necessarily identify any missing documents directly or explicitly, or in as precise and complete a manner as possible, as Ukraine seems to consider. Rather, it states more broadly that the applicant must be informed of all deficiencies "in a precise and complete manner".

7.801. We note, in addition, that the parties disagree over how many of the ten documents or types of information listed in Article 6(28) the applicant had submitted to the FBO with the applications. Similar to what we have already stated in respect of the third obligation in Article 5.2.2, we also observe that, in our view, it is not relevant under the second obligation in Article 5.2.2 whether the competent body's allegation that an application has deficiencies is well-founded from the perspective of the applicant.<sup>607</sup>

7.802. In sum, we note that the FBO informed the applicant that its applications had deficiencies and what their nature was (missing documents that were necessary). The FBO further called the applicant's attention to the specific legal provision that lists all documents and information that needed to accompany the applications for certification. Ukraine does not assert that the legal provision is itself unclear. Moreover, the FBO's reference to the relevant legal provision enabled, or

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<sup>605</sup> The FBO also referred the applicant to VP SSFZhT 31/PMG 40-2003 (the procedure for certification of means of railway transport). However, as neither party has discussed this procedure, our analysis does not further address this procedure.

<sup>606</sup> Indeed, during the course of these proceedings, Ukraine has submitted copies of the applications at issue. Applications submitted by PJSC [[xxx]] on behalf of PJSC [[xxx]], 22 December 2014, (Exhibit UKR-112)(BCI).

<sup>607</sup> As previously noted, Article 5.2.8 envisages that Members put in place a procedure that allows an applicant to file a complaint and seek review concerning the operation of a conformity assessment procedure.



should have enabled, the applicant to determine which specific documents or types of information were missing and hence what deficiencies needed to be corrected. On this basis, we consider that the FBO informed the applicant of all deficiencies in its applications in a precise and complete manner.

7.803. Ukraine argues, however, that in the specific circumstances of decision 3, which Ukraine suggests were confusing, the FBO should have informed the applicant about the specific documents that were missing. The evidence on record indicates that after receiving and "processing" the applications, the FBO took a decision on each application regarding how to conduct the certification procedure.<sup>608</sup> Article 6(21) of CU Technical Regulation 003/2011 is referred to in some of these initial decisions on application for certification, which mirrors the fact that the applicant had submitted documents pursuant to Article 6(21). The FBO's initial decisions do not refer to any missing documents. Less than three weeks later, the FBO issued decision 3.<sup>609</sup>

7.804. In considering Ukraine's argument, we note that it is less than clear from the evidence before us what is the relationship between Articles 6(21) and 6(28) of CU Technical Regulation 003/2011; why the FBO issued decision 3 soon after its initial decisions on application for certification; and whether decision 3 was prompted by the FBO's subsequent detection of a deficiency in the applications or by a different assessment of the legal provision applicable to the applications. In response to questions from the Panel, Russia has explained that applicants applying for certification of serial production must always submit the documents and information listed in Article 6(28), and that they must submit in addition the documents listed in Article 6(21) in those cases where Article 6(21) is applicable.<sup>610</sup> Russia has further stated that after issuing its initial decisions, the FBO reviewed these decisions and informed the applicant that the requirements of Article 6(28) had not been satisfied.<sup>611</sup>

7.805. While the circumstances surrounding the annulment of the applications are thus not entirely clear, we note that what is clear is that Ukraine is challenging decision 3. Ukraine's claim is that in annulling the applications through decision 3, Russia failed to inform the applicant of all deficiencies in a precise and complete manner.<sup>612</sup> Decision 3 indicates that the applications were annulled because documents required by Article 6(28) were missing. It is correct that the FBO had not invoked Article 6(28) in its initial decisions on application for certification. However, this fact alone, and the lack of an explanation as to why Article 6(28) was being invoked, in our view did not impede the ability of the applicant to ascertain, on the basis of the list contained in Article 6(28), which specific documents or types of information were missing. In the light of this, the circumstances surrounding the issuance of decision 3 do not change our initial assessment that, through decision 3, the FBO informed the applicant of all deficiencies in its applications in a precise and complete manner. For all these reasons, we find that Ukraine has not established that Russia in respect of decision 3 has acted inconsistently with the second obligation in Article 5.2.2.

#### **7.4.4.1.4.1 Conclusion**

7.806. In the light of the above, the Panel concludes that Ukraine has not established, for decisions 1, 2 and 3, that Russia has acted inconsistently with the second obligation in Article 5.2.2. In sum, the Panel concludes that Ukraine has not established inconsistencies with the second obligation in Article 5.2.2 in respect of any of the three rejections of new applications.

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<sup>608</sup> Decisions [[xxx]], 20 and 21 January 2015, (Exhibit UKR-113)(BCI).

<sup>609</sup> Not all of the initial FBO decisions on application for certification have legible dates. Those that do date from 21 January 2015, whereas decision 3 dates from 9 February 2015. Letter [[xxx]] from the FBO of 9 February 2015, (Exhibit UKR-23)(BCI); and Decisions [[xxx]], 20 and 21 January 2015, (Exhibit UKR-113)(BCI).

<sup>610</sup> Russia's response to Panel question No. 125(a).

<sup>611</sup> Russia's response to Panel question No. 125(c).

<sup>612</sup> We note that Ukraine does not claim that the FBO did not inform the applicant of all deficiencies promptly. Ukraine's second written submission, paras. 285-290.

## 7.5 Claims concerning the non-recognition of CU certificates issued in other CU countries under CU Technical Regulation 001/2011

7.807. We now turn to the third measure at issue, Ukraine's claims concerning Russia's alleged non-recognition of CU Technical Regulation certificates issued by other CU countries.<sup>613</sup>

7.808. Ukraine claims that Russia does not recognize in its territory the validity of certificates issued to producers of Ukrainian railway products in other CU countries. In Ukraine's view, this measure is inconsistent with Articles 2.1, 5.1.1 and 5.1.2 of the TBT Agreement and Articles I:1, III:4, and X:3(a) of the GATT 1994.<sup>614</sup>

7.809. Russia argues that the measure as described by Ukraine in its first written submission is different from the measure identified in the panel request and is therefore outside the Panel's terms of reference, except with regard to the claim under Article X:3(a) of the GATT 1994. However, even if the Panel were to consider that the measure as described by Ukraine in its first written submission is within its terms of reference, Russia considers that Ukraine has not shown that the measure is inconsistent with Articles 2.1, 5.1.1, and 5.1.2 of the TBT Agreement or Articles I:1, III:4 and X:3(a) of the GATT 1994.<sup>615</sup>

### 7.5.1 The measure at issue

7.810. The parties have divergent views about how the third measure at issue should be described and what it covers.

7.811. According to Ukraine, the measure at issue is Russia's alleged decision that it will not recognize the validity of certificates issued for Ukrainian railway products by certification bodies in other CU countries. Ukraine notes that this decision can be found in Protocol No. A 4-3 of Russia's Ministry of Transport and two individual decisions of Russia's Federal Agency for Railway Transport. The individual decisions are listed in Annex III of the panel request.<sup>616</sup>

7.812. Ukraine further explains that Russia bases its alleged decision on CU Technical Regulation 001/2011. More specifically, Ukraine asserts that Russia relied on the text of CU Technical Regulation 001/2011 to develop two "additional"<sup>617</sup> requirements.<sup>618</sup> According to Ukraine, Russia subjects the application of the requirements in CU Technical Regulation 001/2011 to these additional requirements. Ukraine contends that Russia has used these requirements as reasons not to recognize the validity of certificates issued for railway products of Ukrainian origin by certification bodies in other CU countries.<sup>619</sup>

7.813. Ukraine describes the two requirements as:

- a. the requirement that only products manufactured in the territory of the CU may be subject to certification under CU Technical Regulation 001/2011; and

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<sup>613</sup> We note that the term "non-recognition" is Ukraine's term, and it is used in the panel request. This term is not to be confused with the term "recognition" that appears in Article 6 of the TBT Agreement. What is at issue in Article 6 is the recognition of the results of conformity assessment procedures conducted in other Members under their own rules. What is at issue in the context of the third measure at issue in this dispute is Russia's alleged non-recognition of the results of conformity assessment procedures conducted in other CU countries under common CU rules, namely CU Technical Regulation 001/2011, which is equally applicable in Russia and the other CU countries.

<sup>614</sup> Ukraine's first written submission, paras. 4 and 8.

<sup>615</sup> Russia's first written submission, paras. 107-108 and 190.

<sup>616</sup> Ukraine's first written submission, para. 373.

<sup>617</sup> Ukraine's first written submission, para. 373.

<sup>618</sup> Ukraine also says that the two additional requirements are imposed by CU Technical Regulation 001/2011, read together with the Protocol of the Ministry of Transport and the decisions listed in Annex III to the panel request. Ukraine's first written submission, para. 398.

<sup>619</sup> Ukraine's first written submission, paras. 4, 315, 373, 377 and 398; and second written submission, para. 339.

- b. the requirement that only entities registered in the same country as the relevant certification body can apply for certification.<sup>620</sup>

7.814. According to Ukraine, these requirements are applied towards Ukrainian producers, but not towards producers from other third countries. Depending on the legal basis for its claims, Ukraine takes issue with one or both requirements. Regarding the first requirement, Ukraine points out that the Russian authorities have never invoked that requirement when rejecting applications submitted to the FBO by Ukrainian producers under CU Technical Regulation 001/2011 for certification of products produced in Ukraine<sup>621</sup>, like those discussed above in the context of measure two challenged by Ukraine. Regarding the second requirement, Ukraine notes that, according to Russian authorities, it is laid down in Article 6(9) of CU Technical Regulation 001/2011.<sup>622</sup>

7.815. For Russia, it follows from the panel request that the measure at issue is CU Technical Regulation 001/2011 as such. Russia submits that under the umbrella of this measure, which has been included in the panel request, Ukraine is trying to challenge different measures depending on the measure that would be more suitable to support a particular claim. Russia argues that Ukraine in its first written submission puts forward a new and different measure for its claims concerning Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994, Russia's alleged decision not to recognize the validity of certificates issued to Ukrainian producers by certification bodies in other CU countries. Russia further argues that for its claims under Articles 5.1.1 and 5.1.2 of the TBT Agreement, Ukraine in its first written submission challenges yet another new measure, the application of Article 6(9) of CU Technical Regulation 001/2011, read together with one of the decisions listed in Annex III of the panel request.<sup>623</sup>

7.816. Ukraine responds that a single measure may be simultaneously inconsistent with different WTO provisions, since different aspects of the same measure may be covered by different WTO provisions. The measure at issue in Ukraine's view includes elements of a technical regulation and elements relating to conformity assessment procedures. Ukraine also clarifies that its claims under the GATT 1994 concern both the production and the registration requirement, whereas its claim under Article 2.1 of the TBT Agreement concerns only the production requirement and the claims under Articles 5.1.1 and 5.1.2 concerns only the registration requirement.<sup>624</sup>

7.817. Before addressing the parties' divergent descriptions of the third measure at issue, the Panel must address a claim put forward by Russia concerning the terms of reference. Russia claims that the measure described by Ukraine in its first written submission is not within the Panel's terms of reference.

#### **7.5.1.1 Terms of reference**

7.818. Russia expresses strong concern about the nature and substance of Ukraine's description of the third measure in its first written submission. In Russia's view, in these proceedings Ukraine has not challenged the measure referred to in the panel request, CU Technical Regulation 001/2011, and it therefore has not made any prima facie case in respect of its claims concerning that measure. According to Russia, Ukraine instead challenges measures that are not referred to in the panel request, Russia's alleged "decision" and certain requirements of the conformity assessment procedure.<sup>625</sup>

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<sup>620</sup> Ukraine's first written submission, paras. 375-376; and responses to Panel question Nos. 23, 26 and 36.

<sup>621</sup> Ukraine challenges those rejections as part of measure two, which is discussed above.

<sup>622</sup> Ukraine's first written submission, para. 398; opening statement at the first meeting of the Panel, paras. 97 and 108; and response to Panel question No. 26. See also Ukraine's claims concerning the rejections of applications under CU Technical Regulations 001/2011 and 003/2011 at section 7.4 and Table 6 above.

<sup>623</sup> Russia's first written submission, paras. 107-108; and opening statement at the first meeting of the Panel, para. 31.

<sup>624</sup> Ukraine's opening statement at the first meeting of the Panel, para. 76; and second written submission, para. 322.

<sup>625</sup> Russia's opening statement at the first meeting of the Panel, para. 31; and second written submission, paras. 130-131.

7.819. Regarding Russia's alleged "decision" not to recognize, Russia argues that there is "no trace"<sup>626</sup> in the panel request of this new measure, which does not even mention CU Technical Regulation 001/2011. In Russia's view, the measure put forward by Ukraine in its first written submission is not adequately identified in the panel request. Russia submits that the panel request refers only to CU Technical Regulation 001/2011 as a measure being challenged, while Ukraine's first written submission refers also to Russia's "decision". According to Russia, this new measure significantly changes and extends the scope of the dispute, and thereby prejudices Russia's right to know what case it has to answer. Russia therefore asks the Panel to find that the panel request does not satisfy the requirements of Article 6.2 of the DSU and, consequently, that the claims regarding this measure fall outside the Panel's terms of reference.<sup>627</sup>

7.820. Regarding the application of Article 6(9) of CU Technical Regulation 001/2011, Russia submits that this concerns neither CU Technical Regulation 001/2011 as such nor Russia's alleged "decision". In Russia's view, 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. Russia therefore asks the Panel to find that the panel request does not satisfy the requirements of Article 6.2 of the DSU and, consequently, that the claims regarding this measure fall outside the Panel's terms of reference.<sup>628</sup>

7.821. Ukraine rejects Russia's arguments. According to Ukraine, the measure identified in the panel request is Russia's decision not to recognize the validity of certificates issued to Ukrainian producers by other CU countries. Regarding that decision, Ukraine submits that the decisions listed in Annex III to the panel request do rely on CU Technical Regulation 001/2011. Ukraine recalls that the panel request identifies the measure at issue as CU Technical Regulation 001/2011, read together with the Protocol of the Ministry of Transport and the decisions listed in Annex III. Regarding the application of Article 6(9) of CU Technical Regulation 001/2011, Ukraine argues that the measure identified in the panel request is equally a measure concerning the application of conformity assessment procedures, since underlying that decision is the requirement that only entities registered in the same country as the relevant certification body can apply for certification.<sup>629</sup>

7.822. The Panel notes at the outset that contrary to what Russia appears to suggest, its claim about the terms of reference does not concern the sufficiency of the panel request and thus its consistency with Article 6.2 of the DSU. In fact, we have already reached an affirmative conclusion in our preliminary ruling that the panel request satisfies Article 6.2 insofar as it concerns the third measure. Rather, what Russia is claiming now is that the measure that Ukraine challenges before the Panel is different from the measure that is identified in the panel request. There is no question that we do not have jurisdiction to make findings on claims concerning a measure that is outside our terms of reference. We have therefore undertaken further analysis of the panel request and the measure challenged by Ukraine before the Panel.

7.823. In our preliminary ruling, we have analysed the panel request in detail.<sup>630</sup> Our analysis supports the conclusion that Ukraine's third measure concerns an alleged requirement that Russia's authorities consider to flow from CU Technical Regulation 001/2011.<sup>631</sup> Under that alleged non-recognition requirement, Russia's authorities must not recognize certificates issued to Ukrainian producers in other CU countries, unless certain conditions are met. One such condition is that for certificates issued in another CU country to be recognized, the products covered by these certificates must have been produced in a CU country. The third narrative paragraph of the panel

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<sup>626</sup> Russia's first written submission, para. 108.

<sup>627</sup> Russia's first written submission, paras. 107 and 109-111; opening statement at the first meeting of the Panel, para. 31; second written submission, para. 130; and Russia's comments on Ukraine's response to Panel question No. 132.

<sup>628</sup> Russia's first written submission, para. 139.

<sup>629</sup> Ukraine's opening statement at the first meeting of the Panel, paras. 78-79 and 81; and response to Panel question No. 132.

<sup>630</sup> See paragraph 7.93 above.

<sup>631</sup> As we have noted in our preliminary ruling, Ukraine has indicated that it is not pursuing any claims in respect of the individual instructions mentioned in Annex III to the panel request. Ukraine's response to Panel question No. 7(c).

request specifically identifies this production condition.<sup>632</sup> It is therefore clear to us from the analysis of the panel request in our preliminary ruling that any challenge to the alleged requirement that Russia's authorities must not recognize certificates issued in other CU countries if the certified products were not produced in a CU country is within our terms of reference.

7.824. As indicated above, Ukraine has also raised before the Panel the matter of non-recognition of certificates issued in other CU countries in situations where another condition is not met. Under that alleged condition, certificates issued in a CU country other than Russia cannot be recognized if entities applying for certification are not registered in the same country as the relevant certification body (the registration condition).<sup>633</sup> We note that the third narrative paragraph in section II of the panel request makes no reference to a registration condition. The paragraph refers to non-recognition and then indicates that the non-recognition was based on the view that CU Technical Regulation 001/2011 is applicable only to products produced in CU countries. This does not alert the reader to the existence of a second pathway to non-recognition. We further note that none of the numbered points in section II of the panel request make any mention of the alleged registration condition. In contrast, the third numbered point refers to the fact that the Protocol of the Ministry of Transport concerns "certificates ... for products manufactured by third-countries", which is consistent with the reference in the third narrative paragraph to the alleged production condition. Finally, there is the reference to Annex III. It became clear during the course of the proceedings that one of the instructions mentioned in Annex III identifies the alleged registration condition. However, the same instruction also identifies the alleged production condition. As the third narrative paragraph only refers to the production condition, a logical inference to draw from the absence of a reference to the registration condition would be that non-recognition resulting from non-fulfilment of that condition is not being challenged. Furthermore, we note that the instruction concerned predates the request for establishment of a panel. Also, it is a letter from Russia's Federal Agency for Railway Transport to a company ([[xxx]]). As such, it is not publicly available. We recall in this regard that also the third parties must be given adequate notice about what measures are at issue.<sup>634</sup>

7.825. For these reasons, we find that the panel request does not give adequate notice to Russia and third parties of a complaint being made about non-recognition resulting from a failure to meet the alleged registration condition. Non-recognition resulting from a failure to meet the alleged registration condition is, therefore, not a measure within our terms of reference. Consequently, we will not make findings with regard to those of Ukraine's claims about non-recognition that relate to the alleged registration condition.

7.826. Consistent with this finding, we will not address Ukraine's claims that the third measure is inconsistent with Articles 5.1.1 and 5.1.2 of the TBT Agreement. As regards Ukraine's claims that the third measure is inconsistent with Articles I:1, III:4 and X:3(a) of the GATT 1994, we will not address these to the extent that they relate to the alleged registration condition.

7.827. Ukraine in its submissions to the Panel describes the third measure as Russia's "decision" not to recognize in its territory certificates issued to Ukrainian producers in other CU countries. We agree with Russia that this description is somewhat different from the description provided in the panel request. The panel request only talks about a "decision" in the third narrative paragraph, when it refers to Russia's decision regarding the meaning and scope of CU Technical Regulation 001/2011. Moreover, the third numbered point in the panel request and the third narrative paragraph of section II with its reference to Russia's interpretation of CU Technical Regulation 001/2011 both indicate that the alleged non-recognition finds its basis in CU Technical Regulation 001/2011 as interpreted by Russia, and not in some independent "decision" by Russia that is divorced from CU Technical Regulation 001/2011.

7.828. There are therefore good reasons for us to refer to the alleged non-recognition requirement flowing from CU Technical Regulation 001/2011 rather than to a non-recognition

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<sup>632</sup> As referenced above, Ukraine in its submissions refers to the production condition as the production "requirement".

<sup>633</sup> As referenced above, Ukraine in its submissions refers to the registration condition as the registration "requirement".

<sup>634</sup> Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 16 and footnote 22 of the preliminary ruling incorporated at para. 6.8.

"decision". Nonetheless, what matters for purposes of our assessment of Ukraine's claims regarding the third measure is not so much what terms Ukraine has employed before the Panel to describe the third measure. Rather, what matters is whether Ukraine has demonstrated the existence of the measure that Ukraine has identified in the panel request, i.e. the alleged non-recognition requirement. That Ukraine has referred to Russia's "decision" not to recognize is not sufficient justification, in and of itself, for finding that the measure challenged by Ukraine is outside our terms of reference and not examining the evidence submitted by Ukraine in support of the third measure.

7.829. As a final point about the terms of reference, we observe that the panel request clearly circumscribes the scope of the third measure. The third measure concerns only the non-recognition by Russia of certificates already issued to Ukrainian producers under CU Technical Regulation 001/2011 in other CU countries. It does not concern non-certification by Russia, i.e. any refusal by Russia to issue certificates under CU Technical Regulation 001/2011 to Ukrainian producers. Accordingly, in the context of the third measure, we will not examine any claims of inconsistency arising from non-certification by Russia of Ukrainian products.<sup>635</sup>

7.830. Having clarified the scope of our terms of reference in relation to the third measure at issue, we can proceed to examine the evidence before the Panel regarding the existence of the third measure.

#### 7.5.1.2 Existence of the measure at issue

7.831. Russia submits that it is Ukraine's burden to establish a *prima facie* case that the alleged "decision" exists. Russia argues that it has taken no "decision" not to recognize the certificates issued to Ukrainian producers by other CU countries, let alone a binding decision. Russia also contends that the documents put forward by Ukraine are not of general application, as they refer only to two Ukrainian producers. Russia states that one of those documents, the Protocol of the Ministry of Transport, is of a non-binding nature and reflects the opinions expressed in the course of a January 2015 meeting by government officials representing various Russian bodies. Russia submits that its Federal Agency for Railway Transport could not find the first of the three documents listed in Annex III (the letter to company [[xxx]] concerning products produced by company [[xxx]]), which according to Ukraine refers to the alleged registration condition. Russia states that it was therefore not in a position to verify the validity and content of the document. Russia further argues that its Federal Agency for Railway Transport is not authorized to issue any decisions on the recognition of certificates or take any other action in respect of the certificates, whether they have been issued in Russia or other CU countries. Russia argues that even if the Federal Agency had issued the document in question, its significance would be limited to the circumstances of the relevant conformity assessment procedure and could not contain any general decision or requirement not to recognize certificates issued in other CU countries.<sup>636</sup>

7.832. Russia also submits that according to Article 53 of the EAEU Treaty<sup>637</sup> products that are subject to technical regulations of the CU are put into circulation within the territory of the whole CU after completion of the necessary conformity assessment procedure.<sup>638</sup> As Russia also notes, Article 53 further provides that CU countries must ensure the circulation of the products that conform to CU technical regulations within their respective territories without introducing any requirements additional to those set out in the CU technical regulations or any additional conformity assessment procedures.<sup>639</sup>

7.833. Regarding the alleged production condition, Russia submits that no such condition exists. Russia observes that products manufactured in the territory of the CU are indeed subject to certification under CU Technical Regulation 001/2011. Russia contends, however, that neither the

<sup>635</sup> We recall that, in contrast, one of the components of the second measure at issue concerns Russia's rejections of applications for certificates of conformity under CU Technical Regulation 001/2011.

<sup>636</sup> Russia's second written submission, paras. 133-134; opening statement at the second meeting of the Panel, paras. 48-49 and 51; responses to Panel question Nos. 129 and 172; and comments on Ukraine's responses to Panel question Nos. 127 and 154.

<sup>637</sup> EAEU Treaty, (Exhibit UKR-5); and Ukraine's response to Panel question No. 25.

<sup>638</sup> Ukraine observes that Russia's contention is further supported by Eurasian Economic Commission, Decision No. 20, 28 April 2017, (Exhibit UKR-94), para. 1. Ukraine's response to Panel question No. 74.

<sup>639</sup> Russia's second written submission, para. 159.

Protocol of the Ministry of Transport nor the decisions listed in the panel request state that CU Technical Regulation 001/2011 applies only to such products.<sup>640</sup> Russia points out that CU Technical Regulation 001/2011 has been applied to products put into circulation in the customs territory of the CU, but manufactured in third countries. Russia asserts that these products circulate freely within the territory of the CU, including in Russia.<sup>641</sup> Russia further notes that it has issued certificates under CU Technical Regulation 001/2011 to Ukrainian producers.<sup>642</sup> According to Russia, CU Technical Regulation 001/2011 is therefore applicable to railway rolling stock and their parts, put into circulation in the customs territory of the CU, irrespective of their origin. Russia submits that the documents referred to by Ukraine do not contain any additional conditions based on the origin of Ukrainian producers.<sup>643</sup>

7.834. As concerns the alleged registration condition, Russia observes that there is no requirement in Article 6(9) of CU Technical Regulation 001/2011 that the legal entity applying for a certificate must register in the CU country where it is seeking a certificate. Russia states that under Article 6(9), the applicant can be registered in any CU country. Russia further notes that the Protocol of the Ministry and the decisions listed in Annex III also do not contain the alleged generally applicable requirement. According to Russia, neither its Ministry of Transport nor the Federal Agency for Railway Transportation has the authority to interpret the scope of CU Technical Regulation 001/2011 or establish any additional requirements. Russia also asserts that the FBO issued certificates in response to applications submitted by legal entities registered in Belarus and Kazakhstan.<sup>644</sup>

7.835. Russia alleges that the reason for the non-recognition of the certificates covered by the decisions identified by Ukraine was not the alleged imposition of two additional requirements. The reason, according to Russia, was Article 6(51) of CU Technical Regulation 001/2011, which requires that, for products composed of components, certificates may be issued only if there also are certificates of conformity for the components. Russia points out in this respect that the certificates referred to in the Protocol of the Ministry of Transport indicate that marking with a single sign of product circulation on the market of the CU is carried out only if there are certificates for components subject to mandatory certification.<sup>645</sup> Russia asserts that the certification body of Belarus certified the Ukrainian producers under CU Technical Regulation 001/2011 despite the lack of certificates for the components of the products at issue. Russia notes in this respect that Belarusian legislation did not provide for the certification of components before the entry into force of CU Technical Regulation 001/2011, whereas Russia's did. According to Russia, in keeping with a 2014 explanatory letter of the Eurasian Economic Commission<sup>646</sup>, the components of the products at issue could therefore be put into circulation only within the territory of Belarus. Russia submits that the non-recognition of the relevant certificates would thus have occurred for any producer of any origin. Russia finally observes that the representatives present at the meeting that resulted in the Protocol of the Ministry of Transport wished to resolve their concerns and therefore included in the Protocol a paragraph that refers to initiating a dialogue with the authorities of Belarus. Russia

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<sup>640</sup> Regarding two of the documents emanating from the Federal Agency for Railway Transport on which Ukraine relies to demonstrate the existence of the production condition, Russia states that the Federal Agency "could have cited the provisions of the CU Technical Regulation [more clearly], not creating such ambiguity". Russia's response to Panel question No. 77.

<sup>641</sup> Russia refers to Exhibit RUS-51(BCI), which lists 35 certificates issued by Belarus and Kazakhstan to Ukrainian producers between 2014 and 2017. Russia also refers to Exhibit UKR-54(Corr.) (Extract of Unified Register of Issued Certificates of Conformity and Registered Declarations of Conformity concerning European producers). According to Ukraine, this evidence shows that Russia issued certificates to producers located in the European Union after CU Technical Regulation 001/2011 had entered into force.

<sup>642</sup> Certificate of Conformity [[xxx]], (Exhibit RUS-11)(BCI); and Certificate of Conformity [[xxx]], (Exhibit RUS-12)(BCI). We note that these certificates concern a producer located in eastern Ukraine.

<sup>643</sup> Russia's first written submission, paras. 128-130; and opening statement at the second meeting of the Panel, para. 50.

<sup>644</sup> Russia's second written submission, paras. 158-159, 164 and 168; opening statement at the second meeting of the Panel, para. 53; and responses to question Nos. 26, 36, 75, and 82.

<sup>645</sup> Extract of Belarusian registry of certificates [[xxx]], (Exhibit RUS-52) and Extract of Belarusian registry of certificates [[xxx]], (Exhibit RUS-53).

<sup>646</sup> Explanatory letter of the Eurasian Economic Commission, (Exhibit RUS-13). According to Russia, the explanatory letter is not of a binding nature, but its purpose is to clarify the provisions of the CU Technical Regulation. Russia's response to Panel question No. 106.

notes that a few months later, Belarus terminated the certificates referred to in the letter to which the Protocol was attached.<sup>647</sup>

7.836. Ukraine responds that the refusal to recognize is not a one-off situation, but has affected all Ukrainian producers trying to export to Russia using Belarusian or Kazakh certificates. Ukraine argues that Russia denies the existence of the production and registration conditions, but fails to explain how this view can be reconciled with the text of the relevant documents.<sup>648</sup>

7.837. Regarding the production condition, Ukraine submits that the text of CU Technical Regulation 001/2011 does not require that only railway products manufactured in the territory of the CU may be subject to certification. Ukraine maintains, however, that Russia nonetheless applies this requirement. According to Ukraine, the decision not to recognize certificates issued to Ukrainian producers in other CU countries is based on the fact that these certificates were issued for products manufactured outside the CU territory. In Ukraine's view, the certificates issued under CU Technical Regulation 001/2011 for some products manufactured in third countries or in certain regions in eastern Ukraine simply show that the manner in which Russia applies this additional requirement is arbitrary and targets specifically railway products manufactured in Ukraine. Ukraine also observes that there is no evidence before the Panel showing that any Ukrainian products covered by these certificates actually circulate freely in Russia's territory.<sup>649</sup>

7.838. With regard to the registration condition, Ukraine states that the text of CU Technical Regulation 001/2011 does not require that the applicant must be registered in the same country as the relevant certification body. Ukraine submits that, regardless of whether that requirement is based on the text of CU Technical Regulation 001/2011, what matters is that Russia nonetheless applies this requirement to producers of Ukrainian railway products. According to Ukraine, Russian producers applying through an entity registered in Russia have been issued certificates in Kazakhstan, and their products are available for sale in Russia.<sup>650</sup>

7.839. Regarding the alleged lack of certificates for the components of the products concerned, Ukraine submits that this was never mentioned by the Russian authorities in their decisions not to recognize certificates. Ukraine argues that the certificates issued to Ukrainian producers in other CU countries were issued under CU Technical Regulation 001/2011, which means that their products, including the components, complied with the relevant requirements. Ukraine also argues that Russia has not supported its assertion regarding the components with evidence that would indicate that the products needed such certificates and that Belarus legislation did not provide for the certification of components. According to Ukraine, the products referred to in the first letter listed in Annex III of the panel request concern a type of product (solid-rolled wheels), which does not have any components. Ukraine also notes that there is no evidence that Russia has failed to recognize certificates for products from Belarus on the basis that Belarusian legislation did not provide for certification of components. Regarding the 2014 explanatory letter of the Eurasian Economic Commission, Ukraine submits that it concerns transitional arrangements for the entry into force of the CU technical regulations. Ukraine states that these arrangements related to products that CU countries could put into circulation until 2 August 2017 without certificates or with national certificates, even though they did not undergo conformity assessment under CU technical regulations. Ukraine points out that these transitional arrangements do not apply to certificates that Belarus issued under CU Technical Regulation 001/2011 to Ukrainian producers. Finally, Ukraine notes that the two certificates referred to in the letter to which the Protocol was attached were terminated due to clerical errors and immediately replaced by new certificates.<sup>651</sup>

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<sup>647</sup> Russia's first written submission, paras. 131-135; second written submission, paras. 135-136; and responses to Panel question Nos. 25, 35, 76, 79, 81, 129 and 130.

<sup>648</sup> Ukraine's second written submission, para. 443; and opening statement at the second meeting of the Panel, para. 74.

<sup>649</sup> Ukraine's opening statement at the first meeting of the Panel, paras. 90-91; second written submission, para. 357; opening statement at the second meeting of the Panel, para. 83; and response to Panel question No. 142.

<sup>650</sup> Ukraine's second written submission, paras. 393 and 409; response to Panel question No. 82; Certificate TC.KZ.7100990.22.01.00063, (Exhibit UKR-67); Tehnomashkomplekt's shop webpage (Exhibit UKR-68); Certificate TC.KZ.7100990.22.01.00061, (Exhibit UKR-69); and Rostok's shop webpage (Exhibit UKR-70).

<sup>651</sup> Extract of Belarus Register with information concerning certificates issued to PJSC [[xxx]], (Exhibit UKR-148)(BCI).



For these reasons, Ukraine considers that the alleged lack of certificates for the components should not be accepted as a reason for the non-recognition of certificates.<sup>652</sup>

7.840. The Panel recalls that panels have the authority to make findings on measures that were in existence on the date of their establishment. This Panel was established on 16 December 2016. We will therefore review the evidence to determine whether Russia's authorities applied the third measure on that date.

7.841. The evidence submitted by Ukraine includes three letters from Russia's Federal Agency for Railway Transport to private companies, dated between January 2015 and August 2016. The letters concern the validity of certificates issued under CU Technical Regulation 001/2011 by the certification body in Belarus for products manufactured by two different Ukrainian producers. Each letter contains, or refers to, a decision covering the relevant products. The letters were sent in response to requests by companies that appear to have sought the registration of specified Ukrainian railway products for operation in Russia. The following table compiles relevant information about the three letters:

**Table 7 - Overview of letters not recognizing certificates of conformity issued by the Belarusian certification body to Ukrainian producers**

Product and Ukrainian producer	Date of letter and decision	Reasons provided
<b>The January 2015 letter</b>		
<i>Product:</i> Two types of wagons <i>Producer:</i> [[xxx]] (Exhibit UKR-48 (BCI))	The date is unclear; the letter most likely dates from soon after 20 January 2015, which is the date of the Protocol of the Ministry of Transport that was attached to the letter (the "January 2015 letter").  <i>Decision:</i> The certificates are not valid within Russia's territory and the products are not registered.	The products were manufactured by a third-country (a producer in Ukraine). CU Technical Regulation 001/2011 applies to products manufactured in the territory of the CU. The applicable conformity assessment procedures for products manufactured in third countries are established in accordance with the national laws.  The reason was provided in the attached Protocol of the Ministry of Transport.
<b>The February 2016 letter</b>		
<i>Products:</i> Two types of solid-rolled wheels <i>Producer:</i> [[xxx]] (Exhibit UKR-49) (BCI) (Corr.)	4 February 2016 (the "February 2016 letter") <sup>653</sup>  <i>Decision:</i> The certificates are not valid within Russia's territory.	Belarus issued the certificates with two violations of CU Technical Regulation 001/2011. According to its Article 1(1), CU Technical Regulation 001/2011 applies to products produced within the territory of the CU. Furthermore, in accordance with Article 6(9), an applicant for certification may register in a CU country in accordance with the legislation of that country a legal entity that is a producer or a seller or that performs the functions of a foreign producer. In this case, the products were produced in Ukraine and Belarus certified them on receiving an application from a business entity registered in Russia.
<b>The August 2016 letter</b>		
<i>Producer:</i> Same as in Exhibit UKR-48 (BCI) [[xxx]] <i>Products:</i> One type of	10 August 2016 (the "August 2016 letter")  <i>Decision:</i> The certificates are not valid within Russia's	Belarus issued the certificate with violations of CU Technical Regulation 001/2011. According to its Article 1(1), CU Technical Regulation 001/2011 applies to products manufactured within the territory of the CU. Moreover, according to Article

<sup>652</sup> Ukraine's opening statement at the first meeting of the Panel, paras. 92-93 and 103; second written submission, paras. 366, 371-374, 416 and 419; and opening statement at the second meeting of the Panel, para. 82.

<sup>653</sup> Ukraine initially submitted a translation showing the date as 4 February 2015, but later provided a modified version showing the date as 4 February 2016 (Letter from the Federal Agency for Railway Transport to company [[xxx]] – on validity of certificates, 4 February 2016, (Exhibit UKR-49)(BCI)(Corr.)).

Product and Ukrainian producer	Date of letter and decision	Reasons provided
wagon (one of those also at issue in Exhibit UKR-48 (BCI))  (Exhibit UKR-141 (BCI))	territory and the product cannot be registered.	6(9), an applicant for certification shall be a legal person registered in accordance with the legislation of the CU country. In this case, the products were manufactured in Ukraine and Belarus certified them according to a request from an economic entity registered in Russia.

7.842. Russia raises several preliminary points in respect of the letters submitted by Ukraine that, in its view, detract from their importance. Russia first asserts that notwithstanding the reasons given in the above letters, the reason why the Federal Agency for Railway Transport did not accept the validity of the certificates at issue was the lack of certificates for the components of the relevant products. We are unable to accept this assertion. Russia has provided no evidence to show that Belarus issued certificates under CU Technical Regulation 001/2011 without requiring certificates for the components or that Belarusian legislation did not require certificates for the components before the entry into force of CU Technical Regulation 001/2011. Nor does the evidence on record indicate that Belarus terminated and immediately re-issued the certificates for the products covered by the January 2015 and August 2016 letters because of a lack of certificates for the products' components.<sup>654</sup>

7.843. In connection with the January 2015 letter, Russia argues that the Protocol of the Ministry of Transport is a non-binding document that records the opinions of representatives of various Russian railway-related bodies. The Protocol indicates that the Deputy Minister of Transport met with representatives of these bodies, including the Federal Agency for Railway Transport, the FBO and Russian Railways, to consider an application from a legal entity for registration of Ukrainian railway products for operation in Russia. The Protocol sets forth the "results" of the consideration of the application, which are signed by the Deputy Minister. The Protocol notably reveals that the Ministry of Transport reached a particular view on the scope of CU Technical Regulation 001/2011. The Protocol then sets out the "decisions" that were adopted based on that view. They include that the certificates issued in Belarus under CU Technical Regulation 001/2011 are not valid in Russia's territory and that Russia's Customs Service is to be informed of this; that the Federal Agency for Railway Transport should be informed of the non-registration of the products concerned; that the products concerned require a certificate issued in accordance with Russian legislation; and that Belarus' Ministry of Transport should be notified of the results of the consideration of the application. Consequently, it emerges from the Protocol itself that the underlying meeting was not a mere exchange of opinion. Rather, specific decisions were taken with regard to the application that prompted the meeting.

7.844. As concerns the February 2016 letter, Russia questions its authenticity. According to Ukraine, the copy that it provided to the Panel, an English translation of the original letter in Russian, mistakenly referred to the year 2015 instead of 2016. Ukraine therefore submitted a version of the translation with the modified date. We note in this connection that the text of the letter indicates that it was sent in response to a request from July 2015 and concerns certificates issued in Belarus in April 2015. To that extent, it is difficult to see how the initially provided date of the letter, February 2015, could be correct. For its part, Russia submitted a document from January 2016 indicating that the person whose signature is on the February 2016 letter was on medical leave on the date of the letter.<sup>655</sup> However, the February 2016 letter could have been signed either before the start of the medical leave or during the leave and away from the office.<sup>656</sup> Russia also argues that if the letter dates from February 2016, the third measure did not exist when the parties held consultations in this dispute.<sup>657</sup> However, Ukraine relies on the February

<sup>654</sup> The extracts of the Belarusian registry of certificates submitted by Russia (Exhibit RUS-52 and Exhibit RUS-53) do not specify the reason for Belarus' termination of the relevant certificates.

<sup>655</sup> Order of Federal Agency on Railway Transport as of 27 January 2016 No. 50/k "On temporary assignment of performance of duties", (Exhibit RUS-92)(BCI); and Russia's response to Panel question No. 172. Ukraine observes that Exhibit RUS-92(BCI) was filed too late in the proceedings, but nevertheless comments on its content and relies on it. Ukraine's comments on Russia's response to Panel question No. 172.

<sup>656</sup> Ukraine has commented that the signature on the January 2016 document matches that in the letter contained in Exhibit UKR-49(BCI)(Corr.), which was signed by the same person. Ukraine's comments on Russia's response to Panel question No.172.

<sup>657</sup> Russia's response to Panel question No. 172.

2016 letter as evidence of the existence of the third measure; it is not challenging the February 2016 letter as such. In any event, Ukraine also relies on the January 2015 letter and the Protocol accompanying it. In the light of the foregoing, we are not persuaded that the February 2016 letter constitutes evidence that is either not valid or that we cannot take into account.

7.845. Additionally, Russia argues that the Federal Agency for Railway Transport is not authorized to make any decisions on the recognition of certificates issued in other CU countries. In support, Russia submits, but without any further explanation, a regulation on the Federal Agency that lists its powers.<sup>658</sup> It is our understanding, and this is based on the January 2015 and August 2016 letters and the Protocol, that the Federal Agency is responsible for registration of railway products, and it appears that registration assumes the existence of a valid certificate. But even if the Federal Agency acted *ultra vires* under Russian law by deciding on the validity of certificates issued in other CU countries, this would not prevent the Panel from making findings on the WTO-consistency of the third measure, which is about actual non-recognition by Russian authorities, whether allowed under Russian law or not.

7.846. Having dealt with Russia's preliminary points, we now proceed to analyse in more detail the content of the letters and the Protocol. They indicate that the Ministry of Transport (for the Protocol sent with the 2015 letter) or the Federal Agency for Railway Transport (for the 2016 letters) decided that the relevant certificates issued by Belarus' certification body were not valid in Russia's territory.<sup>659</sup> In each case, the decision was based explicitly on the provisions of CU Technical Regulation 001/2011. Indeed, the documents make very clear that it was because of CU Technical Regulation 001/2011 that the decision was made not to recognize the validity of the certificates issued in Belarus.

7.847. Specifically, the Ministry and the Federal Agency provided their interpretation of Articles 1(1) and 6(9) of CU Technical Regulation 001/2011 and then applied it to the certificates at issue. According to the interpretation reflected in the Protocol and the 2016 letters, a certificate cannot be validly issued under CU Technical Regulation 001/2011, unless (a) the products to be certified were produced within the CU (the production condition) and (b) the applicant for certification is registered in the same CU country in which the application has been submitted (the registration condition). Indeed, the 2016 letters explicitly state that the relevant certificates were issued by Belarus in "violation" of CU Technical Regulation 001/2011 because Belarus had not enforced the two requirements.

7.848. We observe in this respect that, according to Russia, the Protocol or the letters do not say that CU Technical Regulation 001/2011 applies only to products produced in the territory of the CU. However, the Protocol states that for products produced in third countries the applicable conformity assessment procedures are established by the national laws of the importing CU countries. Also, the 2016 letters make it clear that one of the reasons for not recognizing the validity of the certificates at issue was that the products had been produced in Ukraine.

7.849. We also note that the Protocol makes no reference to the registration condition (presumably because it was not an issue), but that the 2016 letters do. One of the letters says that applicants "may" register in the same CU country as the certification body, the other says that they "shall" register in the same CU country. But it is clear from both letters that the registration condition was enforced, since one of the reasons for not recognizing the validity of the relevant certificates was that the applicant was registered in Russia, while the certification body was in Belarus.

7.850. Russia submits that the letters concern products from only two Ukrainian producers and that the letters are not of general application. However, CU Technical Regulation 001/2011 is a regulation of general application. Nothing in the Protocol or the 2016 letters suggests that the Ministry's and the Federal Agency's interpretation of Articles 1(1) and 6(9) of CU Technical Regulation 001/2011 would not be generally applicable and would apply only to Ukrainian products. Thus, the relevant documents provide a general interpretation. In fact, the Protocol

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<sup>658</sup> Abstract from the Statute of the Federal Agency for Railway Transport of Russia's Ministry of Transport, (Exhibit RUS-71).

<sup>659</sup> The January 2015 and August 2016 letters indicate that the decision on the validity of the certificates resulted in the Federal Agency for Railway Transport declining to register the covered products.

specifically states that the underlying meeting concerned "certificates of conformity for products manufactured by third-countries", which countries include, but are not limited to Ukraine. Only the decisions about the validity of the identified certificates are specific to the covered products.

7.851. Russia also argues, without elaboration, that neither the Ministry nor the Federal Agency has the authority to interpret CU Technical Regulation 001/2011. It may well be that in Russia only courts can interpret laws authoritatively or that in the case of CU Technical Regulation 001/2011 only a CU body can do so. However, it is clear from the Protocol and the letters that the Ministry and Federal Agency reached a conclusion on the meaning and scope of certain provisions of CU Technical Regulation 001/2011 and based their decisions on it. Whether or not the Ministry and the Federal Agency had the power to interpret CU Technical Regulation 001/2011 and interpreted it correctly is not relevant to our analysis, which, as we have already noted, concerns what these authorities actually did or did not do.

7.852. As regards the resulting non-recognition, it is apparent from the Protocol and the 2016 letters that, in the Ministry's and the Federal Agency's view, they were prohibited from accepting a certificate as having been validly issued under CU Technical Regulation 001/2011 in another CU country if it had been issued in violation of CU Technical Regulation 001/2011. In their view, proper enforcement of CU Technical Regulation 001/2011 required that they not recognize such certificates as valid within Russia's territory.

7.853. In the light of the foregoing, we consider that the three letters and the Protocol support the view that the Ministry and the Federal Agency applied a general non-recognition requirement within Russia (which they considered to flow from CU Technical Regulation 001/2011 as they interpreted it). The situations in which that requirement was applied included those where a certificate had been issued in another CU country in violation of the production condition.

7.854. In our view, the evidence submitted by Ukraine thus indicates that the Ministry and the Federal Agency did not independently "decide" to establish a new general non-recognition requirement. Instead, that requirement flows from CU Technical Regulation 001/2011 as they interpreted it. We therefore believe that the panel request correctly identifies, as the source of the non-recognition requirement, CU Technical Regulation 001/2011 as interpreted and applied by Russia in the Protocol and the 2016 letters.

7.855. Russia has also submitted evidence and made additional counterarguments, which we turn to consider now. We begin by addressing Russia's evidence concerning the situation before the Panel's establishment. This evidence includes a commercial analytical report on a Ukrainian producer whose products are also at issue in the February 2016 letter. The report indicates that in 2015 that producer exported 33,000 tons of railway wheels to Russia.<sup>660</sup> The third measure concerns certificates issued under CU Technical Regulation 001/2011 by other CU countries. However, the report provides no information on whether these exports to Russia were made using a certificate issued under CU Technical Regulation 001/2011 by another CU country or a certificate issued by Russia prior to the entry into force of CU Technical Regulation 001/2011. As noted, any certificates issued by Russia for railway products before the entry into force of the CU Technical Regulations that remained valid could still be used until 2 August 2017.<sup>661</sup> For these reasons, the report provided by Russia does not demonstrate that, notwithstanding the evidence submitted by Ukraine, in 2015 Russia applied no requirement not to recognize certificates issued under CU Technical Regulation 001/2011 in other CU countries.

7.856. Russia further maintains that it has applied no production condition. Russia refers to Article 53 of the EAEU Treaty, according to which a product that conforms to CU technical regulations must be permitted to circulate freely across the territory of the CU. However, the 2016 letters from Russian authorities submitted by Ukraine explicitly stated that the certificates had been issued in violation of CU technical regulations. Having said this, there is indeed evidence that

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<sup>660</sup> Information provided on analytical website Share Ukrainian Potential with respect to the company [[xxx]], (Exhibit RUS-72); and Russia's response to Panel question Nos. 128.

<sup>661</sup> Ukraine's response to Panel question No. 45. According to Ukraine, the last Russian certificates covering products of the relevant Ukrainian producer were suspended by Russia on 21 December 2015, and Ukraine contends that the certificates could therefore be used until that time. Ukraine's responses to Panel question Nos. 142 and 154; and Extract of the FBO's Register, (Exhibit UKR-12).

Russia has itself issued certificates under CU Technical Regulation 001/2011 to producers located in third countries.<sup>662</sup> Nevertheless, there is no evidence that before the date of establishment of this Panel Russia actually allowed registration and importation of products produced outside the CU and covered by a certificate issued under CU Technical Regulation 001/2011 by another CU country. Russia has therefore not rebutted Ukraine's evidence concerning non-recognition that shows that a production condition was enforced.

7.857. Russia similarly asserts that it has not applied a registration condition. Russia submits that it has itself issued certificates to applicants registered in other CU countries. Here again, however, there is no evidence that before the date of establishment of this Panel Russia actually allowed registration and importation of products covered by a certificate that had been issued under CU Technical Regulation 001/2011 by another CU country to an applicant not registered in that same country. Russia has therefore not rebutted Ukraine's evidence regarding the application of the registration condition in connection with certificates issued in other CU countries.

7.858. Turning to the temporal scope of application of the third measure, we note that the most recent of the three letters submitted by Ukraine dates from August 2016, whereas this Panel was established in December 2016. In our view, it can be presumed in the specific circumstances of this case that the general non-recognition requirement was still being applied by the Ministry and the Federal Agency on the date of establishment of this Panel. The Panel was established only four months after the August 2016 letter, and the August 2016 letter concerned one of the certificates at issue in the January 2015 letter and effectively reconfirmed that decision. Moreover, Russia has provided no contrary evidence.

7.859. Both parties have also submitted evidence concerning the situation after the Panel's establishment. This evidence consists of letters that were prepared during the course of these proceedings and sent to the parties' authorities. Ukraine produced a letter from September 2017 from a Ukrainian producer ([[xxx]]) in which the producer indicates that as of that date it did not have valid certificates to export to Russia, *inter alia*, because of the non-recognition by Russia's Ministry of Transport of certificates that had been issued under CU Technical Regulation 001/2011 by the certification bodies in Kazakhstan and Belarus.<sup>663</sup> Russia provided two letters from November 2017 concerning a certificate for a product that is produced by a Ukrainian producer and that is also at issue in the February 2016 letter submitted by Ukraine. The November 2017 letters were sent by two different Russian companies. Their letters state that as of November 2017 they were using the product covered by the certificate and that the certificate had been issued by Belarus.<sup>664</sup>

7.860. We note that the September and November 2017 letters are not letters from official Russian government sources or specifically from Russia's Ministry of Transport or the Federal Agency, which are the authorities that applied the non-recognition requirement. Moreover, whereas the September 2017 letter suggests that the requirement was still being applied in September, the November 2017 letters suggest that at least from November 2017 the situation may have changed at least with regard to one Ukrainian producer's certificate. As we have little and only indirect evidence and that evidence is contradictory, we refrain from taking a position on whether the general non-recognition requirement continued to be applied by Russia after the Panel's establishment.

#### **7.5.1.2.1 Conclusion**

7.861. In conclusion, we find that the third measure has been demonstrated to exist. More particularly, the evidence on the record supports the conclusion that on the date of establishment of this Panel Russia's Ministry of Transport and its Federal Agency for Railway Transport applied a general non-recognition requirement, which these authorities considered to flow from CU Technical

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<sup>662</sup> Extract of Unified Register of Issued Certificates of Conformity and Registered Declarations of Conformity concerning European producers, (Exhibit UKR-54)(Corr.).

<sup>663</sup> Letter [[xxx]] from company [[xxx]] to Ukraine's Ministry of Economic Development and Trade, 12 September 2017, (Exhibit UKR-139)(BCI); and Ukraine's response to Panel question No. 127.

<sup>664</sup> Letter from company [[xxx]] to the FBO of 3 November 2017, (Exhibit RUS-73)(BCI); and Letter from company [[xxx]] to the FBO of 7 November 2017, [[xxx]], (Exhibit RUS-78)(BCI); and Russia's responses to Panel question Nos. 128 and 171.

Regulation 001/2011 as they interpreted it. In accordance with that requirement, the Ministry and the Federal Agency were not to recognize certificates issued under CU Technical Regulation 001/2011 in other CU countries if (a) the certified products were not produced in a CU country or (b) the applicant for certification is not registered in the same CU country in which the application had been submitted.

7.862. As noted above, however, the non-recognition requirement falls within the Panel's terms of reference only to the extent that it requires non-recognition in situations where the certified products were not produced in a CU country. Accordingly, in the remainder of this section and the following sections of our Report we will use the term "non-recognition requirement" to refer to the requirement not to recognize certificates issued in other CU countries if the certified products were not produced in a CU country.

### **7.5.2 Ukraine's claim under Article 2.1 of the TBT Agreement**

7.863. We now begin our analysis of Ukraine's claims of violation against the third measure. The first claim raised by Ukraine is that the third measure is inconsistent with Article 2.1 of the TBT Agreement. The heading of Article 2 and text of Article 2.1 provide as follows:

Preparation, Adoption and Application of Technical Regulations by Central Government Bodies

With respect to their central government bodies:

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

7.864. Ukraine describes and states its claim under Article 2.1 variously:

- a. Russia violates Article 2.1 because, in respect of CU Technical Regulation 001/2011, railway products of Ukrainian origin are accorded treatment less favourable than the treatment accorded to like products of national origin and to like products originating in any other country<sup>665</sup>;
- b. Russia's decision whereby Russian authorities refused to recognize the validity of certificates issued to Ukrainian producers by certification bodies in other CU countries violates the MFN and national treatment obligation in Article 2.1<sup>666</sup>; and
- c. Russia violates Article 2.1 because, by imposing the additional requirement that only products manufactured in the CU territory may be subject to certification and by not accepting the validity of certificates issued to Ukrainian producers in other CU countries on that basis, Russia accords less favourable treatment to railway products imported from Ukraine.<sup>667</sup>

7.865. Russia argues that the third measure is not inconsistent with Article 2.1. According to Russia, the third measure is not a "technical regulation" within the meaning of the TBT Agreement and therefore falls outside the scope of Article 2.1. Russia argues that the alleged decision not to accept certificates issued in other CU countries does not meet the definition of a technical regulation. Russia further argues that Ukraine in any event failed to demonstrate the likeness of the products at issue and did not show that the measure violated the MFN and national treatment obligations in Article 2.1. Russia argues that, in any event, CU Technical Regulation 001/2011 does not contain any discriminatory provisions, and that the same is true for the Protocol of the Ministry

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<sup>665</sup> Ukraine's first written submission, para. 289; and second written submission, para. 324.

<sup>666</sup> Ukraine's first written submission, para. 304.

<sup>667</sup> Ukraine's second written submission, para. 382.

of Transport and the letters of the Federal Agency for Railway Transport, which also do not contain any additional requirements based on the origin of Ukrainian producers.<sup>668</sup>

7.866. The Panel notes that three elements must be established for a measure to be inconsistent with Article 2.1: (a) the measure must be a "technical regulation", (b) the relevant products must be "like products", and (c) the measure must accord less favourable treatment to imported products as compared to a relevant group of like products.<sup>669</sup> We begin our analysis of the non-recognition requirement with the first element.

#### **7.5.2.1 Obligation to ensure no less favourable treatment "in respect of technical regulations"**

7.867. Ukraine points out that Article 2.1 stipulates an obligation to ensure no less favourable treatment "in respect of technical regulations". Ukraine argues that the words "in respect of" indicate that the scope of Article 2.1 is broader than technical regulations. In Ukraine's view, Article 2.1 applies also in cases where a measure relates to a technical regulation applicable in its territory and through which it discriminates between like products in respect of the (application of) that technical regulation. According to Ukraine, Article 2.1 therefore applies to technical regulations and measures in respect of technical regulations.<sup>670</sup>

7.868. Ukraine further submits that Article 2.1 is not limited to technical regulations promulgated by central government bodies of a Member, but applies more broadly to all technical regulations, and measures in respect of technical regulations, that are applicable in the territory of a Member, regardless of the specific body that adopted such instrument. In Ukraine's view, in the event that a Member is part of a customs union or other supranational organization with competence to adopt directly applicable technical regulations, these regulations may constitute "technical regulations" covered by the TBT Agreement. Ukraine submits that otherwise Members could circumvent their obligations under Article 2.1, for example by adopting distinct measures setting out discriminatory conditions for the application of technical regulations put in place by supranational harmonizing bodies. With regard to CU Technical Regulation 001/2011, Ukraine therefore considers that it is a technical regulation within the meaning of Annex 1.1 of the TBT Agreement, as it was adopted by a supranational body of the CU and is applicable in Russia's territory. Ukraine further argues that the measure at issue (Russia's decision not to accept the validity of certificates issued in other CU countries) is a measure relating to a technical regulation, i.e. CU Technical Regulation 001/2011. Ukraine states that this is because the production condition applied by Russia is an element relating to a technical regulation inasmuch as it imposes a condition on the application of the requirements laid down in CU Technical Regulation 001/2011. According to Ukraine, the measure taken on the basis of the production condition is, therefore, a measure taken "in respect of a technical regulation".<sup>671</sup>

7.869. Russia asks the Panel to disregard Ukraine's interpretation of Article 2.1, according to which that provision covers measures other than technical regulations. Russia submits that the TBT Agreement draws a clear line between two types of TBT measures: "Technical Regulations and Standards", on the one hand, and "Conformity with Technical Regulations and Standards", on the other. Russia considers that the third measure at issue can either fall under one type of TBT measure or the other. In Russia's view, Ukraine's claims appear to be concerned with issues covered by Articles 5 and 6 of the TBT Agreement rather than with issues covered by Article 2.1.<sup>672</sup>

7.870. Russia agrees that CU Technical Regulation 001/2011 is a technical regulation within the meaning of the TBT Agreement. But Russia considers that the Protocol of the Ministry of Transport

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<sup>668</sup> Russia's first written submission, paras. 112, 125, 127-128 and 130; and second written submission, para. 139.

<sup>669</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5)*, para. 7.25.

<sup>670</sup> Ukraine's first written submission, p. 93 and para. 310; and second written submission, para. 331.

<sup>671</sup> Ukraine's first written submission, paras. 311-312, 315-316, 320 and 346.

<sup>672</sup> Russia's second written submission, paras. 140-141; and opening statement at the second meeting with the Panel, para. 52.

and the letters of the Federal Agency for Railway Transport do not satisfy the criteria established in WTO jurisprudence for measures to qualify as technical regulations.<sup>673</sup>

7.871. Ukraine responds that the measure challenged by it is the decision not to accept the validity of certificates issued in other CU countries. According to Ukraine, this measure is not itself a technical regulation, but a measure "in respect of a technical regulation".<sup>674</sup>

7.872. Canada considers that Article 2.1 may apply also to actions other than the preparation, adoption and application of technical regulations, as long as such action is in respect of technical regulations. Canada also notes, however, that decisions whether to accept certificates issued by other CU countries are not the type of actions subject to Article 2.1 if they are governed by Article 5 of the TBT Agreement.<sup>675</sup>

7.873. The European Union argues that Article 2.1 may encompass measures that are not, in and of themselves, technical regulations within the meaning of the TBT Agreement. Yet the European Union also observes that the decision challenged by Ukraine falls squarely within the scope of Article 6 of the TBT Agreement.<sup>676</sup>

7.874. The Panel begins by considering Ukraine's interpretation of Article 2.1, which relies on the phrase "in respect of". As we see it, this phrase serves to circumscribe the scope of application of the non-discrimination obligation<sup>677</sup> contained in Article 2.1.<sup>678</sup> It specifies the measures – technical regulations – to which the obligation applies.<sup>679</sup> Indeed, we see no difference in this respect with the phrase "with respect to" in the introductory paragraph to Article 2. This functionally equivalent phrase further circumscribes the scope of application of the non-discrimination obligation in Article 2.1. It specifies that Article 2 applies only to measures emanating from central governmental bodies.

7.875. According to Ukraine, Article 2.1 "expressly refers to measures 'in respect of technical regulations'".<sup>680</sup> However, we are bound to note that the text of Article 2.1 does not contain the term "measures". Nor does it say that Members must observe a non-discrimination obligation "in respect of" (a) "technical regulations" and (b) measures in respect of technical regulations, i.e. other measures that are related to technical regulations. In our view, the phrase "in respect of" as it is used in Article 2.1 does not, therefore, provide any useful indication as to whether Article 2.1 may be interpreted broadly so as to encompass also measures in respect of technical regulations.

7.876. Looking beyond the phrase "in respect of", we observe that Articles 2-4 of the TBT Agreement are preceded by the heading "Technical Regulations...". Annex 1.1 of the TBT Agreement defines the term "technical regulation". The term means a "[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory". Applying this definition to Article 2.1 yields a useful clarification regarding its meaning: when Members (at the central government level) prescribe certain product characteristics or product-related processes and production methods, they must ensure that they treat imported products no less favourably than like domestic or other like imported products. We deduce from this that Article 2.1 is concerned with substantive technical requirements concerning product characteristics or their related processes and production methods.<sup>681</sup>

<sup>673</sup> Russia's first written submission, paras. 117, 119 and 124.

<sup>674</sup> Ukraine's second written submission, paras. 337-338 and 343.

<sup>675</sup> Canada's third-party submission, paras. 51 and 52.

<sup>676</sup> European Union's third-party submission, paras. 54 and 56.

<sup>677</sup> We use the term "non-discrimination obligation" as a shorthand to refer to the obligation to ensure that imported products are not treated less favourably than like domestic or other like imported products.

<sup>678</sup> See also Panel Report, *US – COOL*, para. 7.245.

<sup>679</sup> Article III:4 of the GATT 1994, which we discuss further below, similarly states that imported products must be accorded treatment no less favourable "in respect of" any "laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use".

<sup>680</sup> Ukraine's opening oral statement at the second meeting with the Panel, para. 77 (emphasis in original).

<sup>681</sup> We use the term "substantive technical requirement", which does not appear in the TBT Agreement, as shorthand for a substantive requirement in a technical regulation.



7.877. Whereas Article 2.1 is about technical regulations and hence substantive technical requirements, Articles 5-9 of the TBT Agreement, as their introductory section heading indicates, are about "Conformity with Technical Regulations..."<sup>682</sup> and hence conformity with substantive technical requirements. We recall that Article 5, for instance, is entitled "Procedures for Assessment of Conformity by Central Government Bodies". Moreover, Annex 1.3 of the TBT Agreement defines the term "conformity assessment procedure" as "[a]ny procedure used, directly or indirectly, to determine that relevant requirements in technical regulations ... are fulfilled". We observe, finally, that Article 5.1.1 sets out a specific non-discrimination obligation also in respect of conformity assessment procedures.

7.878. To us, the explicit distinction in the TBT Agreement between, on the one hand, disciplines applicable to substantive technical requirements and, on the other hand, disciplines applicable to procedures for assessment of conformity with substantive technical requirements indicates that issues relating to conformity with substantive technical requirements do not fall within the scope of application of Article 2.1.<sup>683</sup>

7.879. Consequently, even if, in principle, Article 2.1 could encompass also "measures in respect of technical regulations" (and we take no position on this issue), they would need to be measures in respect of substantive technical requirements. To be covered by Article 2.1, "measures in respect of technical regulations" could not include measures in respect of the assessment of conformity with substantive technical requirements. Any conclusion to the contrary would improperly disregard the different section headings for Articles 2-4 (Technical Regulations) and Articles 5-9 (Conformity with Technical Regulations).

7.880. Bearing these introductory interpretative observations in mind, we now examine whether the third measure can be properly characterized as a "measure in respect of a technical regulation". The relevant technical regulation is CU Technical Regulation 001/2011.

7.881. As we have determined above, the measure at issue is the general non-recognition requirement (as applied by the identified Russian authorities in situations where a product certified in another CU country had not been produced in a CU country). This requirement is applied in cases where another CU country has already assessed the conformity of a product with the substantive requirements of a technical regulation, CU Technical Regulation 001/2011, and issued a certificate under CU Technical Regulation 001/2011. Thus, the non-recognition requirement goes to the issue of whether in respect of an already-certified product there in fact is conformity with a CU-level technical regulation.

7.882. In other words, the non-recognition requirement is about whether certain products conform with the applicable substantive technical requirements contained in CU Technical Regulation 001/2011. It is not about certain products having to conform with different or additional substantive technical requirements. It follows that the non-recognition requirement fits comfortably within the section of the TBT Agreement that is entitled "Conformity with Technical Regulations" (Articles 5-9). The non-recognition requirement does not fall within the scope of Article 2.1 merely because CU Technical Regulation 001/2011 "serves as the basis"<sup>684</sup> for the non-recognition of certificates.

7.883. For these reasons, we consider that even if Article 2.1 could in principle cover "measures in respect of a technical regulation", the non-recognition requirement is no such measure. We consequently find that the non-recognition requirement falls outside the scope of application of Article 2.1.

7.884. We note that in one of its various descriptions of the claim under Article 2.1, Ukraine appears to allege that Russia violates Article 2.1 by imposing the requirement that only products manufactured in the CU territory may be subject to certification.<sup>685</sup> However, the production condition (i.e. the condition that only products produced within the CU are eligible for certification

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<sup>682</sup> The full heading reads: "Conformity with Technical Regulations and Standards".

<sup>683</sup> We note that Ukraine considers that "conformity assessment procedures and technical regulations are mutually exclusive". Ukraine's second written submission, para. 345.

<sup>684</sup> Ukraine's opening statement at the first meeting of the Panel, para. 85.

<sup>685</sup> See paragraph 7.864c above.

under CU Technical Regulation 001/2011) is not a measure at issue that can be separately challenged in these proceedings as being inconsistent with Article 2.1. Indeed, nothing in the panel request gives notice that the production condition as such is a challenged measure and that it is independently claimed to be inconsistent with Russia's WTO obligations. Rather, as is clear from the multiple references to non-recognition in section II of the panel request<sup>686</sup>, the third measure that Ukraine identified as a measure at issue concerns Russia's failure to recognize certificates issued in other CU countries. It is in that context that the panel request in the third narrative paragraph makes a reference to the production condition. However, that reference simply explains why Russia's authorities "concluded that the conformity assessment certificates issued to Ukrainian producers in other CU countries were not valid".<sup>687</sup> Accordingly, we will not examine whether the production condition falls within the scope of application of Article 2.1.

### 7.5.2.2 Conclusion

7.885. As the non-recognition requirement falls outside the scope of application of Article 2.1, the Panel concludes that the requirement is not inconsistent with Article 2.1 of the TBT Agreement.

### 7.5.3 Ukraine's claim under Article I:1 of the GATT 1994

7.886. We now turn to Ukraine's claim of violation under Article I:1 of the GATT 1994.<sup>688</sup> The text of Article I:1 provides as follows:

With respect to customs duties and charges of any kind imposed on or in connection with importation [...] or imposed on the international transfer of payments for imports [...], and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation [...], and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in [...] any other country shall be accorded immediately and unconditionally to the like product originating in [...] the territories of all other contracting parties.<sup>689</sup>

7.887. Ukraine claims that Russia's decision not to accept in its territory the validity of certificates issued to Ukrainian producers in other CU countries based on the requirement whereby only products manufactured in the territory of the CU may be subject to certification is inconsistent with Article I:1. In Ukraine's view, a violation arises because Russia's decision does not immediately and unconditionally grant railway products originating in Ukraine the same advantage as is granted to like products originating in the CU territory.<sup>690</sup>

7.888. Russia argues that the measure at issue is consistent with Article I:1.<sup>691</sup>

7.889. The Panel notes that four elements must be demonstrated to establish an inconsistency with Article I:1: (a) the measure at issue must fall within the scope of application of Article I:1; (b) the imported products at issue must be like products; (c) the measure at issue grants an advantage, favour, privilege, or immunity to a product originating in the territory of any country; and (d) the advantage, favour, privilege, or immunity is not extended immediately and unconditionally to like products originating in the territory of all Members.<sup>692</sup> We will address these four elements in turn, combining the third and fourth into one. We begin with the question whether the measure falls within the scope of application of Article I:1.

<sup>686</sup> See section 7.1.1.1.5 on the Panel's preliminary ruling.

<sup>687</sup> See paragraph 7.93 above.

<sup>688</sup> As explained above, we do not make findings with regard to those of Ukraine's claims about non-recognition that relate to the registration condition.

<sup>689</sup> *Ad note omitted.*

<sup>690</sup> Ukraine's first written submission, paras. 351 and 361.

<sup>691</sup> Russia's first written submission, para. 157.

<sup>692</sup> Appellate Body Report, *EC – Seal Products*, para. 5.86.

### 7.5.3.1 Matters referred to in Article III:4 of the GATT 1994

7.890. Ukraine notes that Article I:1 covers "all matters referred to in [paragraph] 4 of Article III". Ukraine submits that the measure at issue is a requirement affecting the internal sale and offering for sale of railway products. According to Ukraine, the refusal to recognize the validity of certificates issued in other CU countries implies that railway products from Ukraine having such certificates cannot be placed on Russia's market.<sup>693</sup>

7.891. Russia argues that the measure at issue does not deal with the importation of railway products into Russia and is therefore not a measure "in connection with importation" as provided for in Article I:1. As such, Russia claims, the measure falls outside the scope of Article I:1.<sup>694</sup>

7.892. The Panel notes that the parties appear to agree that the measure at issue is an internal measure, not a border measure. Ukraine says that the measure affects the internal sale or offering for sale, while Russia says that it is not a measure taken in connection with importation.

7.893. The measure at issue is the requirement not to recognize certificates issued in other CU countries if the certified products were not produced in a CU country. The requirement that products must have been produced in a CU country is contained in CU Technical Regulation 001/2011 as interpreted by Russia's Ministry of Transport and the Federal Agency for Railway Transport. The production condition applies both to products imported into Russia and domestic Russian products. It is enforced in the case of imported and some domestically produced products through non-recognition of certificates issued in other CU countries, which appears to mean that the product could not be imported.<sup>695</sup> In the case of other domestically produced products, Russia's authorities would check that the products have in fact been domestically produced and hence can be subject to certification in Russia. For these reasons, the non-recognition requirement in our view forms part of an internal measure that is enforced in the case of imported products at the time or point of importation.<sup>696</sup> As such, the requirement is an internal requirement that falls within the scope of Article III.

7.894. Article I:1 brings within the scope of its most-favoured nation treatment obligation "all matters referred to in [paragraph] 4 of Article III". Ukraine has correctly stated that this includes any requirement "affecting" the "internal sale" of imported products, or their "offering for sale". In our view, non-recognition of a certificate issued in another CU country has an adverse effect on a supplier's ability to offer the product covered by the certificate for internal sale, as it would seem that the product could not be lawfully offered for internal sale in Russia's territory without a valid certificate. But even if the product could be offered for sale, it could not be lawfully sold for operation on Russia's territory without a valid certificate. Indeed, if Ukrainian producers could sell into Russia despite Russia's refusal to recognize their certificate from another CU country, there would be no need for Ukraine to challenge the third measure. We therefore find that the non-recognition requirement falls within the scope of application of Article I:1.

### 7.5.3.2 Like imported products

7.895. Turning to the issue of "like products", Ukraine submits that the measure at issue distinguishes between products based solely on whether the products were manufactured in the territory of the CU (and thus based on their origin) and on where the applicant and the certification body are located. Ukraine argues that the structure and design of the measure at issue therefore distinguish between products based on factors that are not relevant to the definition of likeness. Ukraine notes that based on the design and structure of the measure, any good exported from Ukraine that is subject to certification could potentially have a corresponding like counterpart. For

<sup>693</sup> Ukraine's first written submission, para. 355.

<sup>694</sup> Russia's first written submission, para. 174.

<sup>695</sup> We note that the Protocol of the Ministry instructed that Russia's Customs Service be informed of the non-validity of the certificates issued in Belarus.

<sup>696</sup> The *Ad* note to Article III provides in relevant part that "any law, regulation or requirement of the kind referred to in paragraph 1 [of Article III] which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as ... a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III".

Ukraine, it follows that the likeness of the railway products imported into Russia from Ukraine and the railway products imported from other countries has been established.<sup>697</sup>

7.896. Russia argues that Ukraine has failed to present a *prima facie* case with regard to the likeness of the goods at issue. Russia submits that Ukraine failed to identify the products in question and did not substantiate likeness. Russia submits that Ukraine failed to present any evidence that the products at issue satisfy the likeness criteria (physical characteristics, end-uses, consumers' tastes and tariff classification). Moreover, in Russia's view, Ukraine failed to demonstrate that the measure at issue draws a distinction based on origin. According to Russia, the presumption of likeness is therefore inapplicable.<sup>698</sup>

7.897. The Panel begins by recalling that under the non-recognition requirement the Ministry of Transport and the Federal Agency for Railway Transport would not recognize a certificate issued under CU Technical Regulation 001/2011 by e.g. Belarus for a product manufactured in Ukraine, regardless of whether the applicant for the certificate was registered in Belarus or elsewhere. In contrast, the aforementioned authorities would recognize a certificate issued by Belarus for a product manufactured in either Belarus or Kazakhstan (to use CU countries other than Russia), if the applicant was registered in Belarus. Thus, in cases where the applicants are registered locally in Belarus, a Ukrainian product, on the one hand, and a Belarusian and Kazakh product, on the other, are treated differently even if they both have a certificate that was issued in Belarus. The only basis for the difference in treatment between the products is where they were produced. In the case of the Ukrainian product, it was produced outside the CU, whereas in the case of the Belarusian and Kazakh product, it was produced inside the CU. Consequently, the non-recognition requirement in some situations draws a distinction based on the origin of the imported products – CU-origin imported products versus non-CU-origin imported products.

7.898. Under well-established WTO jurisprudence, when origin is the sole criterion for a regulatory distinction between products, it is sufficient for a complaining party to demonstrate that there can or will be imported products that are "like".<sup>699</sup> As the above example illustrates, owing to the requirement that products must have been produced in a CU country if certificates are to be recognized, the non-recognition requirement will in certain situations result in differential treatment even if a product produced in Ukraine is identical in all respects to a product produced in Belarus or Kazakhstan. In the light of this, it is not necessary for the complaining party to establish likeness by reference to the likeness criteria that have likewise been developed in the jurisprudence, or to identify specific imported railway products covered by CU Technical Regulation 001/2011 that are like.

7.899. As the complaining party in this dispute has shown that the non-recognition requirement in certain situations results in an origin-based distinction between imported railway products, the likeness of the products can be presumed. As explained, such situations arise where two imported railway products have been certified in a CU country; one was produced in the CU, the other was produced outside the CU; and the applicant in each case was registered in the CU country where it applied for the certificate. Russia has not adduced argument or evidence sufficient to rebut this presumption of likeness.

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<sup>697</sup> Ukraine's opening statement at the first meeting of the Panel, para. 106; second written submission, paras. 429-430; and response to Panel question No. 23.

<sup>698</sup> Russia's first written submission, para. 157; second written submission, paras. 144 and 175; and response to Panel question No. 14.

<sup>699</sup> See, with specific reference to Article I:1, e.g. Panel Reports, *Colombia – Ports of Entry*, paras. 7.355-7.356; *US – Poultry (China)*, paras. 7.424-7.432; with reference to Article III:2 of the GATT 1994, e.g. Panel Reports, *Argentina – Hides and Leather*, para. 11.168; *China – Auto Parts*, para. 7.216; and with reference to Article III:4 of the GATT 1994, e.g. Panel Reports, *Argentina – Import Measures*, para. 6.274; *Canada – Autos*, para. 10.74; *Canada – Wheat Exports and Grain Imports*, para. 6.164; *China – Publications and Audiovisual Products*, para. 7.1447; *India – Autos*, para. 7.174; *Thailand – Cigarettes (Philippines)*, para. 7.661; *Turkey – Rice*, paras. 7.214-7.216; *US – FSC (Article 21.5 – EC)*, paras. 8.132-8.135. The Appellate Body has also applied this approach in the context of the non-discrimination obligations contained in the GATS. Appellate Body Report, *Argentina – Financial Services*, para. 6.38.

### 7.5.3.3 Non-extension of an advantage

7.900. Ukraine submits that the measure at issue grants an advantage to products manufactured in the territory of CU countries like Belarus and Kazakhstan that is not granted at all to products that are not manufactured in the territory of the CU, like those of Ukraine. In Ukraine's view, the opportunity to obtain certificates necessary for placing railway products on Russia's market is an advantage. Ukraine notes that the certificates issued for products from Ukraine are not accepted as valid in Russia and, as a consequence, they cannot be placed on the Russian market. Ukraine therefore argues that the requirement that only products manufactured in the territory of the CU may be subject to certification under CU Technical Regulation 001/2011, which Russia used as a reason not to recognize the certificates issued in other CU countries, grants an advantage to products manufactured in the CU countries.<sup>700</sup>

7.901. Russia argues that CU Technical Regulation 001/2011 is applicable to railway products put into circulation in the CU territory irrespective of their origin. According to Russia, the documents to which Ukraine refers do not contain any requirements based on the origin of Ukrainian products. Russia further notes that it has already explained the reasons for the non-recognition of the relevant certificates for Ukrainian products.<sup>701</sup>

7.902. Russia further observes that between 2014 and 2017 the Belarusian and Kazakh certification bodies issued 35 certificates to Ukrainian producers and that the relevant products are allowed to circulate freely in the CU territory, including in Russia. Russia also recalls that the FBO had issued three certificates to a Ukrainian producer ([[xxx]]) pursuant to Russia's Certification Rules for the Certification System for Federal Railway Transport, and that these products were able to circulate freely in the CU market.<sup>702</sup>

7.903. The Panel notes that under the non-recognition requirement two like imported products, one produced in Ukraine, the other produced in Belarus or Kazakhstan, that are both covered by a certificate issued in Belarus will be treated differently, provided that the applicant was in both cases registered in Belarus. The Belarusian or Kazakh product thus enjoys an advantage, since the certificate issued in Belarus that covers the product can be used to obtain registration of the product in Russia and operate the product on Russia's territory.<sup>703</sup> The Ukrainian product can neither be registered nor operated in Russia. The advantage enjoyed by the Belarusian or Kazakh product is therefore not being extended, immediately and unconditionally, to a Ukrainian product.

7.904. Russia's evidence concerning the 35 certificates from Belarus and Kazakhstan only indicates that the certificates were issued there. There is no evidence that these products could circulate freely also within Russia's territory. Indeed, we have determined that on the date of establishment of the Panel there was a general non-recognition requirement in place. Moreover, Ukraine has submitted evidence concerning certificates very similar to the 35 that Russia has submitted. That evidence – the three letters from Russia's Federal Agency for Railway Transport dated between January 2015 and August 2016 concerning certificates issued in Belarus for products produced in Ukraine – shows that the certified products were not allowed to circulate freely within Russia's territory. We are therefore unable to accept that the 35 certificates referred to by Russia show that the advantage granted to some products covered by certificates issued in a CU country and produced in a CU country has been extended to like Ukrainian products covered by certificates in the same countries.

7.905. As regards the three certificates that the FBO issued to a Ukrainian producer under Russia's own Certification Rules, we note that Ukraine's claim relates to the difference in treatment between like imported products covered by certificates issued under CU Technical Regulation 001/2011 in a CU country other than Russia. The evidence referred to by Russia concerns a different, national technical regulation and a different situation, namely the issuance of certificates

<sup>700</sup> Ukraine's first written submission, paras. 357-360.

<sup>701</sup> Russia's first written submission, para. 160.

<sup>702</sup> Russia's first written submission, paras. 178-179; and CS FRT 31/PMG 40-2003, (Exhibit RUS-25); and Ukraine's response to Panel question No. 49.

<sup>703</sup> As the text of Article I:1 refers to "any other country", even an advantage granted to a product originating in a country that is not a WTO Member must be extended immediately and unconditionally to like imported products of WTO Members.

by Russia rather than recognition by Russia of certificates issued elsewhere. We therefore do not consider that these three certificates demonstrate that Russia has extended an equivalent advantage to all Ukrainian products affected by the non-recognition requirement.

7.906. We therefore find that the non-recognition requirement in some situations confers an advantage on products produced in a CU country that is not immediately and unconditionally extended to like products produced outside the CU countries.

#### **7.5.3.4 Conclusion**

7.907. As the four elements of Article I:1 have all been established, the Panel concludes that the non-recognition requirement is inconsistent with Article I:1 of the GATT 1994.

#### **7.5.4 Ukraine's claim under Article III:4 of the GATT 1994**

7.908. The Panel next examines Ukraine's claim of violation under Article III:4 of the GATT 1994.<sup>704</sup> The text of Article III:4 provides in relevant part as follows:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

7.909. Ukraine claims that Russia's decision not to accept in its territory the validity of certificates issued to Ukrainian producers in other CU countries is inconsistent with Article III:4. In Ukraine's view, a violation arises because this decision accords less favourable treatment to Ukrainian railway products than is accorded to like products of national origin.<sup>705</sup>

7.910. Russia argues that the measure at issue is consistent with Article III:4, as products of Ukraine imported into Russia are afforded treatment no less favourable than that accorded to like products of national origin.<sup>706</sup>

7.911. The Panel notes that a measure is inconsistent with Article III:4 if three elements have been established: (a) that the measure is a law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use, of products; (b) that the imported and domestic products at issue are like; and (c) that the imported products are accorded less favourable treatment.<sup>707</sup> We will examine these elements in turn, starting with the question whether the measure falls within the scope of application of Article III:4.

##### **7.5.4.1 Internal requirement affecting the internal sale and offering for sale**

7.912. Ukraine submits that the measure at issue is a requirement affecting the internal sale and offering for sale of railway products.<sup>708</sup>

7.913. Russia does not specifically address this point.

7.914. The Panel recalls its findings under Article I:1 in section 7.5.3.1 above regarding whether the measure at issue concerns "matters referred to in [paragraph] 4 of Article III". We found already in that context that the non-recognition requirement is an internal requirement that falls within the scope of Article III:4. More particularly, we determined that non-recognition of a certificate issued in another CU country has an adverse effect on the offering for internal sale, or at least the internal sale, of the product covered by the certificate.

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<sup>704</sup> As explained above, we do not make findings with regard to those of Ukraine's claims about non-recognition that relate to the registration condition.

<sup>705</sup> Ukraine's first written submission, para. 362.

<sup>706</sup> Russia's first written submission, para. 171; and second written submission, para. 187.

<sup>707</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 133.

<sup>708</sup> Ukraine's first written submission, para. 370.

#### 7.5.4.2 Like imported and domestic products

7.915. Regarding "like products", Ukraine submits that the measure at issue distinguishes between products based solely on whether the products were manufactured in the territory of the CU (and thus based on their origin) and on where the applicant and the certification body are located. Ukraine argues that the structure and design of the measure at issue therefore distinguish between products based on factors that are not relevant to the definition of likeness. Ukraine notes that based on the design and structure of the measure, any good exported from Ukraine that is subject to certification could potentially have a corresponding like domestic counterpart. For Ukraine, it follows that the likeness of the railway products imported into Russia from Ukraine and the domestic railway products has been established.<sup>709</sup>

7.916. Russia argues that Ukraine has failed to present a *prima facie* case with regard to the likeness of the goods at issue. Russia submits that Ukraine failed to present any evidence that the products at issue satisfy the likeness criteria (physical characteristics, end-uses, consumers' tastes and tariff classification). Moreover, in Russia's view, Ukraine failed to demonstrate that the measure at issue draws a distinction based on origin. According to Russia, the presumption of likeness is therefore inapplicable.<sup>710</sup>

7.917. The Panel recalls that under the non-recognition requirement the Ministry of Transport and the Federal Agency for Railway Transport would not recognize a certificate issued under CU Technical Regulation 001/2011 by e.g. Belarus for a product manufactured in Ukraine, regardless of whether the applicant for the certificate was registered in Belarus or elsewhere. In contrast, the aforementioned authorities would recognize a certificate issued by Belarus for a product manufactured in Russia, if the applicant was registered in Belarus. Thus, similar to what we have seen above in the context of our analysis under Article I:1, in cases where the applicants are registered locally in Belarus, the Ukrainian product, on the one hand, and the domestic (Russian) product, on the other, are treated differently based solely on where they were produced, even though they both have a certificate that was issued in Belarus.

7.918. Accordingly, the non-recognition requirement in some situations (when the applicant for certification is registered in the place where the certification body is also located) draws a distinction between domestic (Russian) products (which are by definition produced in a CU country) and one sub-category of imported products (those that were not produced in a CU country) that is based solely on where they were produced and hence their origin. In contrast, the requirement draws no origin-based distinction between domestic products and the other sub-category of imported products (those that were produced in a CU country).

7.919. As we have explained above, past WTO jurisprudence establishes that when origin is the sole criterion for a regulatory distinction between products, the likeness of the products that are distinguished in this way can be presumed.<sup>711</sup> We have also explained that, when viewing the non-recognition requirement through a national treatment lens, origin is the sole criterion for differential treatment between domestic products and imported products only in respect of a sub-category of imported products (those that were not produced in a CU country). Ukraine's claim under Article III:4 focuses exclusively on the treatment accorded to that particular sub-category of imported products. We therefore do not need to make findings on likeness with regard to the other sub-category. Moreover, the two sub-categories of imported products do not overlap. In the light of these circumstances, we find it appropriate in this instance to apply the presumptive likeness test in examining those imported products that are treated differently based on their origin.

7.920. Applying this test to the facts of Ukraine's claim, we note that, owing to the requirement that products must have been produced in a CU country if certificates are to be recognized, the non-recognition requirement will in certain situations result in differential treatment even if a product produced in Ukraine is identical in all respects to a product produced in Russia. In the light of this, it is not necessary for Ukraine to establish likeness by reference to the customary likeness

<sup>709</sup> Ukraine's second written submission, paras. 433-434.

<sup>710</sup> Russia's first written submission, para. 165; and second written submission, paras. 144 and 183.

<sup>711</sup> See Appellate Body Report, *Argentina – Financial Services*, para. 6.38; and e.g. Panel Reports, *Argentina – Import Measures*, para. 6.274; *China – Publications and Audiovisual Products*, para. 7.1447; and *Canada – Wheat Exports and Grain Imports*, para. 6.164.

criteria, or to identify specific imported railway products covered by CU Technical Regulation 001/2011 that are like domestic ones.

7.921. As Ukraine has shown that the non-recognition requirement in certain situations results in an origin-based distinction between domestic railway products and the sub-category of imported railway products that is relevant to Ukraine's claim, the likeness of the products can be presumed. Russia has not adduced argument or evidence sufficient to rebut this presumption.

#### 7.5.4.3 Less favourable treatment

7.922. Ukraine recalls that the requirement that only products manufactured in the territory of the CU may be subject to certification has been used by Russia as a reason not to recognize the validity of certificates issued in other CU countries for railway products originating in Ukraine. According to Ukraine, the production condition modifies the conditions of competition to the detriment of imported Ukrainian railway products, since under this requirement Russian products can obtain certification under CU Technical Regulation 001/2011 and be placed on Russia's market, while Ukrainian products cannot.<sup>712</sup>

7.923. Ukraine further submits that under the measure at issue only certificates issued for products manufactured in the CU to applicants located in the same country as the certification body can be recognized in Russia. According to Ukraine, this means that Russian railway producers can use certificates obtained in other CU countries in Russia, while this is not the case for Ukrainian producers. In Ukraine's view, Russia therefore treats suppliers of railway products originating in third countries less favourably than suppliers of domestic railway products.<sup>713</sup>

7.924. Russia argues that it has already explained the reasons for the non-recognition of the relevant certificates for Ukrainian products.<sup>714</sup>

7.925. The Panel notes that for there to be "less favourable" treatment within the meaning of Article III:4, the regulatory distinctions applied between imported and like domestic products need to "distort the conditions of competition to the detriment of imported products".<sup>715</sup> This holds true also, in our view, in cases where differential treatment distorts competition to the detriment of only a sub-category of imported products.

7.926. We recall that under the non-recognition requirement two like products, one produced in Ukraine, the other produced in Russia, that are both covered by a certificate issued in Belarus and an application submitted there by an applicant registered in Belarus, will be treated differently. Whereas in the case of the Russian product the certificate issued in Belarus can be used to obtain registration of the product in Russia and operate the product on Russia's territory, the Ukrainian product can neither be registered nor operated in Russia. This indicates that the non-recognition requirement in certain situations (when the applicant for certification is registered in the place where the certification body is also located) distorts the conditions of competition to the detriment of that sub-category of imported products which comprises products not produced in a CU country. We therefore determine that the non-recognition requirement accords "less favourable" treatment to these imported products than it accords to the like domestic products.

7.927. According to Ukraine, there is evidence to show that Russia has in fact recognized certificates issued by the Kazakh certification body to Russian producers applying through Russian entities.<sup>716</sup> In support of this assertion, Ukraine has submitted copies of two certificates issued by the Kazakh certification body and two print-outs from webpages of Russian shops where, according to Ukraine, the products can be bought for use in Russia. However, it is not clear from this evidence that in both cases the certificates and webpages cover identical products, since there are minor differences in the product descriptions and product type names. It is also not clear from

<sup>712</sup> Ukraine's first written submission, paras. 376-377.

<sup>713</sup> Ukraine's opening statement at the first meeting of the Panel, para. 107.

<sup>714</sup> Russia's first written submission, para. 160.

<sup>715</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 128.

<sup>716</sup> Certificate TC.KZ.7100990.22.01.00063, (Exhibit UKR-67); Tehnomashkomplekt's shop webpage, (Exhibit UKR-68); Certificate TC.KZ.7100990.22.01.00061, (Exhibit UKR-69); and Rostok's shop webpage, (Exhibit UKR-70).



the print-outs that these products could indeed be bought for use in Russia, as website shops often sell across borders. In any event, Ukraine challenges the non-recognition requirement as such, and the record evidence establishes that this requirement distorts the conditions of competition to the detriment of imported products. Evidence of actual trade effects, whether favourable or unfavourable, is not necessary to establish "less favourable" treatment under Article III:4. Article III protects competitive opportunities of imported products and not trade flows.<sup>717</sup>

#### 7.5.4.4 Conclusion

7.928. As the three elements of Article III:4 have all been established, the Panel concludes that the non-recognition requirement is inconsistent with Article III:4 of the GATT 1994.

#### 7.5.5 Claim under Article X:3(a) of the GATT 1994

7.929. We now begin our analysis of Ukraine's claim that the third measure is inconsistent with Article X:3(a) of the GATT 1994.

7.930. Article X:3(a) provides that:

Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

7.931. Ukraine claims that the third measure violates Article X:3(a) of the GATT 1994 because it has not been administered in a uniform, impartial and reasonable manner.<sup>718</sup>

7.932. Russia argues that Ukraine has failed to make a prima facie case that Russia does not administer its laws in a uniform, impartial and reasonable manner. Russia submits that Ukraine identifies Technical Regulation 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. Russia argues that Technical Regulation 001/2011 as a whole and the Protocol of the Ministry of Transport No. A 4-3 could not on their face be covered by Article X:3(a); only the administration of those acts falls within the scope of that Article. As regards the letters from the Federal Agency for Railway Transport, Russia recalls that Article X:1 is not concerned with specific transactions, but with the administration of rules of general application. Russia considers that the letters from the Federal Agency do not evince a generally applicable requirement not to recognize certificates issued in other CU countries.<sup>719</sup>

7.933. Regarding "uniform" administration of laws, Ukraine argues that Russia does not recognize certificates issued to Ukrainian railway products in other CU countries. According to Ukraine, a number of certificates have been issued to producers located in the European Union. In Ukraine's view, if the requirement had been applied in a uniform manner to all countries outside the CU, no certificates would have been issued for products manufactured in the European Union. Ukraine is challenging the fact that the Russian Federation applies those requirements only towards Ukrainian producers and not towards producers from other third countries.<sup>720</sup>

7.934. Russia argues that Technical Regulation 001/2011 is applied in a uniform manner. Russia argues that Ukraine tries to build its case on an incorrect reading of the relevant provisions. According to Russia, the evidence submitted by Ukraine is partially irrelevant, partially inconclusive, and in any event does not show a general pattern of non-uniform administration of relevant laws in Russia.<sup>721</sup>

7.935. Regarding "impartial" administration of laws, Ukraine claims that the Russian Federation fails to administer the requirements in an impartial manner. Ukraine argues that since the

<sup>717</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 15, DSR 1996:I, 97, at 110; and Panel Report, *Argentina – Hides and Leather*, para. 11.20.

<sup>718</sup> Ukraine's second written submission, para. 437.

<sup>719</sup> Russia's second written submission, paras 189-194; and opening statement at the second meeting of the Panel, para. 53.

<sup>720</sup> Ukraine's second written submission, 439-445.

<sup>721</sup> Russia's first written submission, paras. 178 and 181; and second written submission, para. 150.

requirements are only applied to products originating in Ukraine, the manner in which the Russian authorities has administered Technical Regulation 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 impartial.<sup>722</sup>

7.936. Russia responds that Technical Regulation 001/2011 is applied in an impartial manner, as it is applied in an unbiased and unprejudiced manner without any distinction on the basis of origin.<sup>723</sup>

7.937. Regarding "reasonable" administration of laws, Ukraine recalls that Russian authorities rely on the requirement that goods need to be produced in the territory of the CU in order to be eligible for certification under Technical Regulation 001/2011 in the context of denying the validity of certificates issued for Ukrainian railway products by certification bodies in other CU countries. Ukraine notes that this requirement was, however, never invoked by the Russian authorities in the context of rejecting the applications for certifications submitted by Ukrainian producers under the very same Technical Regulation. According to Ukraine the fact that this requirement has been raised only in some cases but not in others clearly shows that the third measure has been administered in an unreasonable manner in order to discriminate against railway products from Ukraine.<sup>724</sup>

7.938. Russia argues that Technical Regulation 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 by Belarus of components integrated into a final (certified) product.<sup>725</sup>

7.939. The Panel has found that the third measure is inconsistent with both Articles I:1 and III:4 of the GATT 1994. In the light of our conclusions that Russia has acted inconsistently with Articles I:1 and III:4, we see no need, for the purpose of resolving this dispute, to make additional findings regarding whether Russia has also acted inconsistently with Article X:3(a). We therefore exercise judicial economy and decline to make findings with respect to this claim.

#### **7.5.5.1 Conclusion**

7.940. Accordingly, the Panel reaches no conclusion in respect of Ukraine's claims of inconsistency with Article X:3(a) of the GATT 1994.

### **7.6 Claims concerning the alleged systematic import prevention**

7.941. Ukraine claims that Russia maintains, since mid-2014, a measure consisting of the systematic prevention of Ukrainian railway products from being imported into Russia by means of: (a) suspending valid certificates held by Ukrainian producers, (b) refusing to issue new certificates, and (c) not recognizing certificates issued by other CU countries, as evidenced in the instructions and decisions listed in Annexes I, II and III to the panel request. Ukraine claims that this measure is inconsistent with Russia's obligations under Articles I:1, XI:1 and XIII:1 of the GATT 1994.<sup>726</sup>

7.942. Russia claims that Ukraine failed to demonstrate the existence of such measure, and in the alternative, that Ukraine failed to demonstrate that the alleged measure is inconsistent with Articles I:1, XI:1 and XIII:1.<sup>727</sup>

7.943. The Panel will begin by assessing the parties' arguments and evidence regarding the existence of the measure. If Ukraine has demonstrated the existence of the measure, we will then assess Ukraine's claims of inconsistency with Russia's obligations under the relevant provisions of the GATT 1994.

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<sup>722</sup> Ukraine's first written submission, para 397.

<sup>723</sup> Russia's first written submission, para 182.

<sup>724</sup> Ukraine's first written submission, para. 398.

<sup>725</sup> Russia's first written submission, para 182.

<sup>726</sup> Ukraine's first written submission, paras. 187-188.

<sup>727</sup> Russia's first written submission, paras. 29, 37, 60, and 70.

## 7.6.1 Measure at issue

### 7.6.1.1 Ascertaining the existence of an unwritten systematic measure

7.944. Ukraine submits that the challenged measure is unwritten, overarching, and systematic. According to Ukraine, any act or omission attributable to a Member can be a measure of that Member for the purposes of dispute settlement proceedings. Ukraine submits that according to the Appellate Body, a complaining party seeking to prove the existence of an unwritten measure will need to prove the attribution of the measure to a Member and its precise content. In addition, the specific measure challenged and how it is described or characterized by the complaining party will determine the kind of evidence that a complaining party must submit and the elements that it must prove to demonstrate the existence of the measure. Moreover, Ukraine argues that a systematic measure is one "that is done according to a system, plan or organized method". Ukraine submits 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.<sup>728</sup>

7.945. Russia responds that Ukraine characterized this measure as unwritten, systematic and distinct from the legal acts that it is based on, or from the Russian authorities' acts or actions. Russia argues that consistent with the Appellate Body's guidance, the evidentiary burden to demonstrate the existence of an unwritten measure is high. Russia agrees with Ukraine that the systematic nature of a measure must be demonstrated through the existence of a plan or organized effort.<sup>729</sup>

7.946. The Panel notes that to demonstrate the existence of an unwritten measure, a complaining party must provide evidence demonstrating (a) that the measure is attributable to the responding party; (b) the precise content of the measure; and (c) other elements arising from the manner in which the complaining party described or characterized the measure. Such other elements may include demonstrating the specific nature of the measure, i.e., whether it is of general and prospective application or of a different nature. A complaining party may also have to demonstrate how the different components of the measure operate together as part of a single measure and how such single measure exists as distinct from its components. Furthermore, the evidentiary threshold for proving the existence of an unwritten measure is high.<sup>730</sup>

7.947. We further observe that a complaining party seeking to demonstrate the systematic nature of a measure must demonstrate that such measure is aimed at achieving a particular policy or result and is done according to a system, plan, or organized method or effort. The systematic nature of a measure could be demonstrated, for instance, by proving that the measure is applied to economic operators in a broad variety of different sectors as part of an organized effort, or coordinated and implemented at the highest levels of government.<sup>731</sup>

7.948. On the basis of the foregoing, we turn to examine the parties' arguments and evidence regarding the precise content and existence of the measure.

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<sup>728</sup> Ukraine's first written submission, paras. 142-144; opening statement at the first meeting of the Panel, paras. 14-15; response to Panel question No. 87; second written submission, para. 10.

<sup>729</sup> Russia's first written submission, paras. 12-13 and 16; and second written submission, paras. 24-31. See also Russia's opening statement at the second meeting of the Panel, paras. 6-12.

<sup>730</sup> Appellate Body Reports, *Argentina - Import Measures*, paras. 5.104 and 5.108; and *US - Zeroing (EC)*, para. 198; and Panel Reports, *Indonesia - Chicken*, paras. 7.616 and 7.656; and *Russia - Tariff Treatment*, paras. 7.283, 7.338, and 7.341. See also European Union's third-party submission, paras. 10-12 and 16; Indonesia's third-party submission, paras. 9-12; Japan's third-party submission, paras. 4-7; and the United States' third-party submission, paras. 3-7.

<sup>731</sup> Appellate Body Reports, *Argentina - Import Measures*, para. 5.142; and Panel Report, *Russia - Tariff Treatment*, paras. 7.302-7.311.

### 7.6.1.2 Precise content and evidence of the existence of the measure

#### 7.6.1.2.1 The components of the measure and its systematic nature

7.949. According to Ukraine, the alleged systematic import prevention is unwritten and directed against the importation of Ukrainian railway products into Russia. Ukraine submits that "to prevent" means to "provide beforehand against the occurrence of (something); make impractical or impossible by anticipatory action; stop from happening".<sup>732</sup> Thus, Ukraine considers that the prevention of Ukrainian railway products from being imported into Russia consists of Russia's action of making it impracticable for Ukrainian railway products to be imported into Russia.<sup>733</sup>

7.950. Ukraine submits that the systematic import prevention has been in place since mid-2014. According to Ukraine, the existence of this measure is evidenced through (a) the systematic suspension of valid certificates, refusals to issue new certificates and non-recognition of certificates of certificates issued in other CU countries, as shown by the drastic decrease in the number of certificates held by Ukrainian producers, (b) the fact that the systematic prevention only concerns railway products originating in Ukraine, and (c) the individual decisions listed in Annexes I, II, and III to the panel request. Ukraine argues that Ukrainian producers have been denied, or have been unable to use, certificates for reasons other than the lack of conformity with the relevant technical regulations. Ukraine argues that because certificates are required at the time of importation, it follows that through anticipatory action, Russia makes it impracticable or impossible to import Ukrainian railway products into Russia.<sup>734</sup>

7.951. Ukraine submits, finally, that Russia prevents the importation of Ukrainian railway products through an organized effort. Ukraine considers that Russia has put in place all means possible to prevent imports of Ukrainian railway products into Russia. Moreover, Ukraine argues that this measure has been applied to substantially all producers of Ukrainian railway products who exported to Russia. In Ukraine's view, the measure thus does not consist of merely sporadic instances or unrelated applications. Ukraine contends that this measure appears to be part of a set of trade-restrictive measures taken by Russia against Ukraine following the conclusion by Ukraine of an Association Agreement with the European Union in June 2014.<sup>735</sup>

7.952. Russia submits that Ukraine has failed to demonstrate the existence of this measure and its systematic nature.<sup>736</sup> Russia considers that the mere reference by Ukraine to the FBO's suspension of 313 certificates and rejection of 33 applications for certificates for Ukrainian producers is not evidence of the existence of the alleged systematic import prevention. Russia argues that, to the contrary, Ukraine's submissions support the existence of trade in railway products between Ukraine and Russia, which rebuts the existence of this measure. Moreover, Russia submits that Ukraine ignores evidence of the FBO having issued certificates to Ukrainian producers in certain areas of Ukraine. Russia also argues that Ukraine ignores the reasons for the suspensions of valid certificates and the rejections of the applications for new certificates.<sup>737</sup>

7.953. Russia further argues that the conditions for suspensions of certificates are established in its conformity assessment procedure for all producers irrespective of their origin. Moreover, Russia submits evidence that it has suspended certificates or rejected applications of Russian producers

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<sup>732</sup> Ukraine's first written submission, para. 146 (referring to the definition of "to prevent" provided by the Appellate Body in its reports in *China – Raw Materials*, para. 327).

<sup>733</sup> Ukraine's first written submission, paras. 142-147; opening statement at the first meeting of the Panel, para. 16; response to Panel question No. 87; and second written submission, paras. 11-18.

<sup>734</sup> Ukraine's first written submission, para. 147; second written submission, paras. 13 and 18; and opening statement at the second meeting of the Panel, paras. 30 and 38-39; and response to Panel question No. 143.

<sup>735</sup> Ukraine's first written submission, paras. 132-141 and 150-159; second written submission, paras. 19-20 and 38-56; and opening statement at the second meeting of the Panel, para. 40. See also Ukraine's responses to Panel question Nos. 86 and 133; and comments on Russia's response to Panel question No. 109.

<sup>736</sup> Russia's first written submission, paras. 11-14; and second written submission, paras. 24-26.

<sup>737</sup> Russia's first written submission, paras. 11-14 and 18-22; second written submission, paras. 24-26 and 27, 33 and 35; opening statement at the second meeting of the Panel, paras. 6-12; and comments on Ukraine's response to Panel question No. 143.

and producers from other countries, which means that suspensions and rejections have not been applied exclusively to Ukrainian producers.<sup>738</sup>

7.954. Russia submits that Ukraine failed to meet the high evidentiary standard required to demonstrate that Russian authorities acted in accordance with a plan aimed at preventing Ukrainian railway products from being imported into Russia. Russia considers that Ukraine failed to submit any evidence of an "organized effort" on the part of Russian authorities that could turn measures two (suspensions and rejections) and three (non-recognition of certificates from other CU countries) into the alleged systematic import prevention. Moreover, Russia argues that Ukraine failed to demonstrate how this measure is distinct from its components or how such components operate together as a single measure.<sup>739</sup>

7.955. Russia asks the Panel to disregard Ukraine's suggestion that the alleged measure is part of alleged unlawful trade-restrictive measures on products from Ukraine. Russia points out that no such measures are mentioned in the panel request, and they are therefore outside the Panel's terms of reference. In any event, Russia considers that these other alleged measures are not relevant, as they are in no way linked to imports into Russia of the railway products.<sup>740</sup>

7.956. The Panel first addresses the specific content of the challenged measure. As explained, Ukraine considers that it was because of an overarching unwritten measure taken by Russia that Ukrainian producers between 2014 and 2016 faced a reduction in trade opportunities in the Russian market. Ukraine describes this measure as the systematic prevention of imports of Ukrainian railway products into Russia by way of suspensions of certificates, rejections of applications for new certificates, and non-recognition of certificates issued by other CU countries. According to Ukraine, this measure is not an import ban, but rather a measure making imports of Ukrainian railway products "impracticable" through "anticipatory action". Ukraine bases this understanding of the term "prevention", on the Appellate Body's definition of the term "to prevent". According to the Shorter Oxford English Dictionary, to "prevent" is "[to p]rovide beforehand against the occurrence of (something); make impractical or impossible by anticipatory action; stop from happening".<sup>741</sup> Based on this definition, Ukraine argues that the alleged measure does not formally and completely ban the importation of the products at issue but rather makes it impracticable to import such products, therefore allowing for a certain degree of trade.

7.957. With this in mind, we turn to assess first whether the instructions through which the FBO suspended valid certificates, the decisions through which the FBO rejected applications for certificates, and the non-recognition requirement applied by Russia's authorities, which we have separately examined in the previous sections, are evidence of the existence of this measure and of its systematic nature.<sup>742</sup>

7.958. In the preceding sections of our findings, we carefully examined the WTO-consistency of the instructions through which the FBO suspended valid certificates, the decisions through which the FBO rejected applications for certificates, and the non-recognition requirement applied by Russia's authorities.

7.959. The evidence before us concerning the 14 instructions through which the FBO suspended valid certificates does not support the conclusion that the FBO adopted these instructions with the aim or as part of a plan directed at preventing the importation of Ukrainian railway products into Russia. Rather, the evidence suggests that the FBO adopted those instructions because its inability to conduct inspections in Ukraine due to the situation there prevented the FBO from having

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<sup>738</sup> Russia's first written submission, paras. 23-25; and second written submission, para. 34.

<sup>739</sup> Russia's first written submission, paras. 15-17; second written submission, paras. 26, 28-32; opening statement at the second meeting of the Panel, paras. 13-18 and 20-23; and comments on Ukraine's responses to Panel question Nos. 110 and 133.

<sup>740</sup> Russia's second written submission, para. 43; and opening statement at the second meeting, para. 19.

<sup>741</sup> *The Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2341.

<sup>742</sup> We note that the specific suspension instructions and rejection decisions on which we made findings in the sections above are not the only instances of such suspensions and rejections. We address the relevant evidence submitted by the parties regarding additional suspensions and rejections further below in this section.

adequate confidence that the products at issue still conformed with the relevant technical requirements.

7.960. The evidence before us also indicates that, in respect of the challenged decisions, the FBO had valid grounds to reject many of the applications for certificates submitted by Ukrainian producers under CU Technical Regulations 001/2011 and 003/2011. Our findings that in the case of two applications and one product subject to another application the FBO rejected applications unjustifiably and contrary to Russia's obligations under Article 5.1.2 rest on the lack of evidence on the record regarding past non-conformities or consumer complaints involving the producers at issue. We further note that there is evidence on record indicating that Russia granted applications for certificates under CU Technical Regulations 001/2011 and 003/2011 to Ukrainian suppliers, the majority of whom are located in the eastern regions of Ukraine.<sup>743</sup> Russia has explained that these applications for certificates were granted because, since no inconsistencies had been identified with regard to the products at issue in the course of the previous inspections, the conditions for off-site testing of samples or off-site inspection of production were satisfied.<sup>744</sup> We note that the inspection acts that Russia submitted in support of the fact that no inconsistencies had been identified with regard to the products at issue in the course of the previous inspections are from 2016 and 2017 and post-date the date of issuance of those certificates.<sup>745</sup> The parties have not submitted other evidence in this respect. Therefore, there is no evidence on record that would allow us to either accept or reject Russia's explanation. In the light of this, we are not persuaded that the applications unjustifiably rejected by the FBO, mentioned above, are proof that the FBO used its powers with the aim or as part of a plan directed at preventing the importation of Ukrainian railway products into Russia.

7.961. Additionally, we have found that the requirement, applied by the Ministry of Transport and the Federal Agency for Railway Transport, that certificates issued in other CU countries must not be recognized if the certified products were not produced in a CU country is inconsistent with Articles I:1 and III:4 of the GATT 1994. We recall that the non-recognition requirement is the result of a particular interpretation of Article 1(1) of CU Technical Regulation 001/2011 adopted and applied by Russia's Ministry of Transport and Russia's Federal Agency for Railway Transport. Russia before this Panel has, however, distanced itself from that interpretation, suggesting that under EAEU Treaty rules products certified under CU Technical Regulation 001/2011 in one CU country may circulate freely in the territory of other CU countries, including Russia. Also, it seems that the FBO did not follow the same interpretation when considering applications from Ukrainian producers for certification under CU Technical Regulation 001/2011. Indeed, the challenged decisions through which the FBO rejected applications do not indicate that certification was not possible because the Ukrainian products had not been produced in the CU.

7.962. We further observe that there is no evidence on record that the general requirement that Russia's authorities must not recognize certificates issued in other CU countries if the certified products were not produced in a CU country has been applied to products from countries other than Ukraine. It is unclear from the information before us, however, whether other third-country (i.e. non-CU) producers have requested Russia's authorities to recognize certificates that they obtained in other CU countries.

7.963. Thus, the facts surrounding the application by Russia's Ministry of Transport and Russia's Federal Agency for Railway Transport of the non-recognition requirement are in principle consistent with Ukraine's allegation that Russia was seeking to prevent importation of railway

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<sup>743</sup> Extract of Unified Register, (Exhibit UKR-13); Extract of the Unified Register of certificates issued to Ukrainian producers under the CU Technical Regulations, (Exhibit UKR-154); and Table of the valid certificates issued to Ukrainian producers on the basis of CU Technical Regulations 001/2011, 002/2011 and 003/2011 (based on Exhibit UKR-13), (Exhibit RUS-49)(BCI).

<sup>744</sup> Russia's response to Panel question No. 156. See Table of the valid certificates issued to Ukrainian producers on the basis of CU Technical Regulations 001/2011, 002/2011 and 003/2011 (based on Exhibit UKR-13), (Exhibit RUS-49)(BCI). We note that in its comments on Russia's response to Panel question No. 156, Ukraine submitted that the evidence provided by Russia is insufficient to establish that there have been no non-conformities regarding the products.

<sup>745</sup> We note that the certificates were issued to the relevant companies between 2015 and 2016 (Extract of Unified Register, (Exhibit UKR-13)) and the exhibits submitted by Russia refer to inspection acts from 2016, regarding the certificates issued in 2015, and from 2017, regarding the certificates issued in 2016 (Exhibit RUS-79(BCI), Exhibit RUS-80(BCI), Exhibit RUS-81(BCI) and Exhibit RUS-82(BCI)).

products from Ukraine. Indeed, application of the non-recognition requirement prevented Ukrainian suppliers from entering Russia's market using certificates issued in other CU countries in situations where they were unable to obtain certificates under CU Technical Regulation 001/2011 directly in Russia (or where their valid Russian certificates had been suspended by Russia).<sup>746</sup>

7.964. However, the fact that one of the three elements of the alleged systematic import prevention (suspensions of certificates, rejections of certificates, and non-recognition of certificates issued in other CU countries) unjustifiably restricts access to the Russian market is not sufficient to demonstrate the existence of systematic prevention of imports of Ukrainian products as an independent measure. As is clear from our analysis of the suspensions and rejections challenged by Ukraine, the suspensions and rejections have not been demonstrated to be inconsistent with Article 5.1.1 and only one decision rejecting applications has been demonstrated to be inconsistent with Article 5.1.2 in respect of two applications and one product subject to another application. Thus, the suspensions and rejections challenged by Ukraine, considered together, were in their great majority justified. In the light of this, it is only if the circumstances justifying these decisions disappeared and they were nonetheless maintained or such decisions were nonetheless adopted in respect of new applications, that the issue would arise whether those measures form part of a comprehensive systematic import prevention that covers both the recognition of certificates issued in other CU countries and issuance of certificates in Russia.

7.965. In our view, the mere fact that the non-recognition requirement has been applied alongside the (for the most part) justified suspensions and rejections, which also had the effect of preventing imports of Ukrainian products, does not mean that these distinct measures in fact form a single, coherent measure with a common aim of preventing imports of Ukrainian products through any means possible. Or to put it differently, there is no indication that the combined effect of these distinct measures is the reason for applying *each* of them.

7.966. Moreover, we note that at least one producer [[xxx]] located in the western part of Ukraine maintained valid certificates after the approximate date when, according to Ukraine, Russia introduced the alleged systematic import prevention. There is evidence that this producer was able to export to Russia between 2014 and the end of 2016.<sup>747</sup> At the same time, Ukraine notes that this producer had certificates both for products produced in series and for batch products. According to Ukraine, the certificates for products produced in series were suspended in late 2015, whereas the certificates for batch products could have been used only until the batch had been exported.<sup>748</sup> Russia responds that Ukraine has failed to submit any evidence supporting that this producer could not use certificates for batch products during the relevant time-period and requests that the Panel take into account the certificates issued to this producer.<sup>749</sup> We note that although this producer had the possibility of exporting its railway products to Russia between 2014 and 2016, the explanation provided by Ukraine suggests that such possibility could not be used for products in series after late 2015, and for batch products upon exportation of the entire batch. To that extent, the exports by the relevant producer between 2014 and 2016 do not, by themselves, support a conclusion that no systematic import prevention was operated during that time.

7.967. We recall that Ukraine submits additional evidence in support of the existence of this measure and its alleged systematic nature. First, Ukraine argues that the systematic nature of the measure may be established on the basis of substantial repetition (i.e. repeated suspensions of certificates and rejections of new applications for certification affecting Ukrainian producers), which, in Ukraine's view, renders it more likely than not that the underlying system exists. Ukraine considers that the decrease in the number of certificates held by Ukrainian producers and the number of Ukrainian producers holding certificates is proof of such substantial repetition.<sup>750</sup>

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<sup>746</sup> We recall that the non-recognition requirement concerns CU Technical Regulation 001/2011.

<sup>747</sup> Ukraine's responses to Panel question Nos. 11, 32 and 49; and Information provided on analytical website Share Ukrainian Potential with respect to the company [[xxx]] (Exhibit RUS-72).

<sup>748</sup> Ukraine's responses to Panel question Nos. 115 and 143.

<sup>749</sup> Russia's comments on Ukraine's response to Panel question No. 115.

<sup>750</sup> Ukraine's response to Panel question No. 86 (referring to the panel report in *Russia – Tariff Treatment*, paras. 7.311 and 7.374); second written submission, paras. 38-46; opening statement at the second meeting of the Panel, para. 32; and response to Panel question No. 110.

Second, Ukraine submits that the systematic nature of the measure is evidenced through a "set of trade restrictive measures" adopted by Russia.<sup>751</sup>

7.968. The Panel has compiled the evidence submitted by Ukraine in support of its argument on the repetition of the measure in the following table.<sup>752</sup> The table reflects the certificates (a) granted by the FBO between 1 January 2012 and 31 July 2014, (b) held by producers in 2013, (c) suspended by the FBO for producers from different countries from 2014, (d) issued by the FBO under CU Technical Regulations from August 2014, and (e) certificates held in April 2017, issued both under CS FRT Rules and under CU Technical Regulations.

**Table 8 - Information on certificates of conformity, by producers from different countries**<sup>753</sup>

Origin of producers of railway products	(a) Granted between January 2012 and July 2014 <sup>754</sup>	(b) Held in 2013	(c) Suspended since 2014, issued both under CS FRT Rules and CU TRs	(d) Issued under CU TR from August 2014	(e) Held in April 2017 <sup>755</sup>
European Union <sup>756</sup>	260	126	109	97	287
Kazakhstan <sup>757</sup>	34	26	22	39	38
Belarus <sup>758</sup>	35	39	6	23	26
Ukraine <sup>759</sup>	379	244	313 (between the beginning of 2014 and the end of 2015)	18 (all but three of these 18 were issued to producers in eastern Ukraine)	40 <sup>760</sup>

<sup>751</sup> Ukraine's first written submission, para. 132-141; response to Panel question No. 86; and second written submission, paras. 51-55.

<sup>752</sup> Russia submitted evidence in support of its comments on some of the certificate numbers and on evidence submitted by Ukraine.

<sup>753</sup> Except where indicated otherwise, this table compiles the data submitted by Ukraine. Where relevant, the table includes footnotes referring to any discrepancy between the data included in Ukraine's submissions, Ukraine's exhibits, and Russia's submissions and supporting exhibits.

<sup>754</sup> This column includes certificates issued by the FBO, under CS FRT Rules, between 1 January 2012 and 31 July 2014, regardless of their status as valid, suspended, cancelled or expired.

<sup>755</sup> The number of certificates listed in this column includes certificates issued under CU Technical Regulations and certificates issued under CS FRT Rules which could have remained valid up to 2 August 2017 because they had not been suspended or expired.

<sup>756</sup> Ukraine's first written submission, para. 162; response to Panel question No. 85 (regarding certificates held in April 2017); and Exhibit UKR-53 and Exhibit UKR-54(Corr.) (regarding certificates issued under CU Technical Regulations). Russia disagrees with the numbers submitted by Ukraine (Russia's response to Panel question No. 134(b) (referring to Exhibit RUS-95(BCI))). Ukraine responds that Russia's numbers are inaccurate because they include certificates issued to companies from non-EU countries, such as Switzerland and Serbia (Ukraine's comments on Russia's responses to Panel question No. 134). We note that there are discrepancies between the numbers submitted by Ukraine in its first written submission, the information included in Exhibit UKR-53, and the information included in Exhibit RUS-95(BCI). There is not enough evidence on record to verify the accuracy of the numbers submitted by Ukraine.

<sup>757</sup> Ukraine's first written submission, para. 163; and Exhibit UKR-55 and Exhibit UKR-56. Russia disagrees with the numbers submitted by Ukraine (Russia's response to Panel question No. 134(b) (referring to Exhibit RUS-93(BCI))). Ukraine does not contest Russia's comments. We have included in the table the numbers submitted by Ukraine in its first written submission.

<sup>758</sup> Ukraine's first written submission, para. 164; and Exhibit UKR-57 and Exhibit UKR-58. Russia disagrees with the numbers submitted by Ukraine (Russia's response to Panel question No. 134(b) (referring to Exhibit RUS-94(BCI))). Ukraine responds that Exhibit RUS-94(BCI) is missing certain certificates issued to Belarusian producers (Ukraine's comments on Russia's response to Panel question No. 134).

<sup>759</sup> Ukraine's first written submission, paras. 155-158; and Exhibit UKR-12 and Exhibit UKR-13. Russia disagrees with the numbers submitted by Ukraine (Russia's response to Panel question No. 134(b)). Ukraine responds that Russia does not provide sufficient evidence or arguments in support of its view of the numbers regarding Ukrainian producers (Ukraine's comments on Russia's response to Panel question No. 134(b)).

<sup>760</sup> Despite initially submitting that Ukrainian producers held 40 valid certificates in April 2017, Ukraine considers that this number should be reflected as 30, because 10 of those certificates were issued under the CS FRT Rules for batches of products and all of these batches have been exported. According to Ukraine, this means that although these 10 certificates appear as valid in the FBO's Register, they cannot be used by the



7.969. The table shows that in 2017 Ukrainian producers held only a fraction of the certificates that they held in 2013. This is due, *inter alia*, to the fact that certificates issued before the CU Technical Regulations entered into force were suspended or expired, and that the FBO issued few certificates to Ukrainian producers under the new CU Technical Regulations.<sup>761</sup> We note that the table does not show repetition with regard to rejections of new applications from August 2014. Instead, it shows the numbers of certificates accepted.

7.970. However, the table does show repetition with regard to suspensions of valid certificates since 2014. In our view, in the particular circumstances of this dispute, the evidence adduced by Ukraine regarding repetition (i.e. the substantial number of times that suspension instructions were repeated in the case of certificates held by Ukrainian producers) is not, by itself, probative of the existence of the measure or of its systematic nature. As explained above, Russia in the case of the challenged suspensions had justified reasons for suspending certificates concerning Ukrainian producers. We have no evidentiary basis on which to infer that the FBO should have suspended more certificates also in the case of producers from the other countries identified in the table, but did not.

7.971. Specifically with regard to producers from the European Union, we note that, like Ukrainian producers, they had a substantial number of their certificates suspended since 2014. At the same time, the number of certificates held by producers from the European Union in April 2017 was substantially higher than the corresponding number for Ukrainian producers, in good part because in the case of producers from the European Union fewer certificates were suspended and more new certificates were granted under the new CU Technical Regulations. As noted, we do not have detailed evidence regarding the basis for maintaining the validity of certificates issued under CS FRT Rules or issuing certificates under the CU Technical Regulations in the case of producers of the European Union. Absent such evidence, we have no basis for inferring that the reasons behind the suspensions and rejections that we have analysed in the context of measure two (including the safety and security situation in the country of the producers, non-conformities, and consumer complaints) similarly affected producers from the European Union.

7.972. For all these reasons, we do not consider that the differences in the number of certificates held, suspended, and applications rejected, concerning producers from different countries establishes the existence of the alleged systematic import prevention.

7.973. We have carefully examined the evidence submitted by Ukraine in respect of the alleged "set of trade restrictive measures".<sup>762</sup> According to Ukraine, the alleged systematic import prevention concerning railway products is part of a set of trade-restrictive measures adopted by Russia in response to Ukraine's negotiation and conclusion of an Association Agreement with the

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producers holding them to export railway products to Russia. Ukraine further argues that as those certificates were issued for batches of products, they could not be suspended because they do not require yearly inspection control. Ukraine's responses to Panel question Nos. 110, 115 and 133.

<sup>761</sup> We understand that the numbers submitted by Ukraine do not include certificates issued under CU Technical Regulations by certification bodies other than the FBO, whether in Russia or other CU members.

<sup>762</sup> "Between two stools: Ukraine says EU trade deal certain, Russia-led union also an option", RT, 25 Sep, 2013, (Exhibit UKR-50); "Minister of the EEC: exports of goods from the Customs Union to Ukraine could be complicated", Chamber of Commerce of the Russian Federation, 30 September 2013, (Exhibit UKR-51); Irina Ksayanova, "Glazyev: Euromissioners receive good fees for involving Ukraine", Vesti, December 14, 2013, (Exhibit UKR-52); "Russia's customs service halts all Ukrainian imports, says Ukraine's Employers Federation", Interfax-Ukraine, 14 August 2013, (Exhibit UKR-95); R. Emmott, "Putin warns Ukraine over Europe ambitions", Reuters, 23 September 2014, (Exhibit UKR-96); "Russia is getting ready to cease cooperation with Ukraine in production of aircraft", 22 August 2013, Levyy Bereg, (Exhibit UKR-97); B. Hoyle, "Russia threatens to back Ukraine split", The Times, 23 September 2013, (Exhibit UKR-98); S. Walker, "Ukraine's EU trade deal will be catastrophic, says Russia", The Guardian, 22 September 2013, (Exhibit UKR-99); J. Fleming, "Lithuania warns Russia over cheese ban and KGB smears", Euractiv, 6 November 2013, (Exhibit UKR-100); "More than 500 trucks occupied the Russian-Ukrainian border", Vesti, 31 October 2013, (Exhibit UKR-101); "Russia will strengthen customs control if Kyiv is to sign an agreement with the EU", RIA Novosti Ukraine, 18 August 2013, (Exhibit UKR-102); "Russia hits at Ukraine with chocolate war", Euractiv, 14 August 2013, (Exhibit UKR-128); D. Cenusă, M. Emerson, T. Kovziridese & V. Movchan, Russia's Punitive Trade Policy Measures towards Ukraine, Moldova and Georgia, CEPS Working Document, No. 400, September 2014, (Exhibit UKR-131); and "An unfortunate agreement with the anti-Russian nature - Russia's reaction to the ratification of the Ukraine-EU Association Agreement", 24TV, 31 May 2017, (Exhibit UKR-132).

European Union in June 2014. Ukraine does not argue that the set of alleged trade-restrictive measures are challenged measures in these proceedings and that the Panel should make findings on them. Rather, Ukraine submits evidence of those measures in support of its case that Russia adopted the alleged systematic prevention on the importation of Ukrainian railway products. We will limit our assessment of that evidence to that purpose.

7.974. The media articles that Ukraine has presented point to tensions in the bilateral relationship in connection with the negotiation and conclusion by Ukraine of an Association Agreement with the European Union. They also refer to trade action that Russian authorities might take or did take against Ukraine in response. We recall that in Ukraine's view, that evidence further supports the existence of the alleged systematic import prevention. Ultimately, however, the evidence presented to the Panel does not demonstrate that Russia adopted a plan or decided to embark on an organized effort to prevent the importation into Russia of Ukrainian products in general or Ukrainian railway products in particular. Moreover, even if trade-restrictive measures were taken with regard to some Ukrainian products, this does not necessarily mean that such measures were taken also with regard to Ukrainian railway products.

#### **7.6.1.2.2 Import trade data**

7.975. Ukraine further submits that certain trade data supports the existence of the alleged systematic import prevention of Ukrainian railway products into Russia. Ukraine argues that between 2012 and 2016 there was a decline of imports of railway products into Russia that affected Ukraine the most. According to Ukraine, the decline of Ukrainian imports represents 85% of the decline of imports of railway products from all import sources into Russia. Ukraine submits that this negative effect translates, as a separate matter, into the loss of 54% of Ukraine's share in the imports of railway products into Russia, while at the same time China's and the European Union's share increased. Ukraine also refers to the substantial decrease in imports of Ukrainian railway products into Russia.<sup>763</sup>

7.976. Russia argues that the information submitted by Ukraine only shows that there was a decrease in the imports of the products at issue into Russia. Russia submits that there was an overall decrease of imports into Russia, which affected imports from all countries. Russia further submits that the decrease of Ukrainian imports can be explained by other factors, such as (a) the decrease of production of railway products in Ukraine; (b) a generalized industrial crisis in Ukraine, which began in January 2015; and (c) a decrease in demand of railway products in the Russian market. Russia concludes that the decrease in imports from Ukraine is not the consequence of actions taken by Russian authorities.<sup>764</sup>

7.977. Russia also submits that the increase in the Chinese and European Union's share of imports of railway products into Russia may be explained by reasons other than Russia's actions, including currency rate fluctuations. Moreover, Russia notes that the products imported from China and the European Union are not the same as those imported from Ukraine between 2014 and 2016. Russia therefore considers that the evidence submitted by Ukraine in respect of China's and the European Union's share is irrelevant and does not demonstrate the systematic nature of the alleged measure.<sup>765</sup>

7.978. Ukraine responds that the decrease in production of Ukrainian railway products is explained by the existence of Russia's alleged systematic import prevention. Moreover, Ukraine submits that railway products are made to order. Ukraine notes in this respect that, in 2013, 60% of exports of Ukrainian railway products were destined to Russia. Ukraine argues that because exporters could no longer get certificates to export to Russia, they no longer received orders and therefore halted their production. Ukraine considers that this demonstrates the existence of the alleged systematic import prevention. Ukraine also submits that the economic problems to which

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<sup>763</sup> Ukraine's first written submission, paras. 169-171; response to Panel question No. 90; second written submission, paras. 21 and 24; opening statement at the second meeting of the Panel, paras. 34-35; and response to Panel question No. 109.

<sup>764</sup> Russia's first written submission, paras. 26-28; and second written submission, para. 38.

<sup>765</sup> Russia's second written submission, paras. 39-42; response to Panel question No. 109; and comments on Ukraine's response to Panel question No. 111.

Russia refers primarily affected companies in the eastern regions of Ukraine, which have not been subject to the alleged measure.<sup>766</sup>

7.979. As regards the decrease in demand in Russia, Ukraine responds that the decrease in demand for railway products in Russia is the result of an import substitution policy conducted by Russia, aimed at favouring the consumption of Russian goods. Ukraine disagrees with Russia that, between 2014 and 2016, Russia imported products from other countries that were different from those imported from Ukraine. According to Ukraine, producers from other countries held certificates for precisely the same products as the ones imported from Ukraine, such as locomotives and parts thereof, railway switches and parts thereof, and cargo and cistern wagons. Moreover, Ukraine submits that the decrease in demand in Russia also affected the amount of exports of Ukrainian products to Kazakhstan and Belarus. Ukraine considers that the fall in demand in Russia has led to a decline in industrial production both in Kazakhstan and Belarus, thus leading to less demand for railway parts from Ukraine. Ukraine considers that the decline in demand in Kazakhstan and Belarus was also caused by the impossibility of selling Ukrainian railway products in Russia.<sup>767</sup>

7.980. Russia disagrees that all railway products are made to order and that production in Ukraine therefore decreased because of the suspensions of certificates or while applications or renewals are pending. Moreover, Russia states that it has not put in place an import substitution policy. Russia points out that what Ukraine refers to is a measure aimed at developing and increasing competitive opportunities of the domestic industry. Russia nevertheless notes that Ukraine's import substitution argument seems to concede that factors other than the alleged systematic import prevention are responsible for the decrease in importation of Ukrainian railway products.<sup>768</sup>

7.981. Ukraine considers that even if the import substitution programme explains a drop in the demand for railway products in Russia, such decline in demand cannot alone explain why Ukraine's market share in Russia fell, while the market shares of China and the European Union grew. According to Ukraine, that development is rather the result of the alleged systematic import prevention.<sup>769</sup>

7.982. The Panel will examine the evidence with a view to determining whether the trade and economic data demonstrates the existence of the alleged measure, including its systematic nature.

7.983. The evidence on record regarding the trade and economic data on imports of Ukrainian railway products into Russia supports the following three points. First, between 2012 and 2016, there was a sharp decrease in imports of railway products into Russia, which affected most significantly Ukrainian imports.<sup>770</sup> Second, production of Ukrainian railway products declined significantly between 2012 and 2016.<sup>771</sup> Third, Ukraine's exports of railway products have decreased not only for exports to Russia, but also for exports to Kazakhstan and Belarus.<sup>772</sup>

7.984. The evidence supports the view that there have been problems with Ukrainian industrial production, including the railway products industry, associated with factors such as a decline in economic and investment activities in Ukraine's domestic market and the decline in sales to

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<sup>766</sup> Ukraine's response to Panel question No. 88; second written submission, paras. 26-29; response to Panel question No. 112.

<sup>767</sup> Ukraine's response to Panel question No. 47; opening statement at the second meeting of the Panel, paras. 36-37; and responses to Panel question Nos. 90 and 111.

<sup>768</sup> Russia's response to Panel question No. 113; and comments on Ukraine's response to Panel question No. 112.

<sup>769</sup> Ukraine's comments on Russia's response to Panel question No. 113.

<sup>770</sup> Ukraine's first written submission, para. 60; and Export data from International Trade Centre for customs code 86, (Exhibit UKR-14).

<sup>771</sup> See Russia's first written submission, para. 27; Report of Financial Results for 2015 of Public Joint-Stock Company [[xxx]], (Exhibit RUS-27)(BCI); Report of Financial Results for 2015 of Public Joint-Stock Company [[xxx]], (Exhibit RUS-28)(BCI); Report of Financial Results for 2015 of Public Joint-Stock Company [[xxx]], (Exhibit RUS-29)(BCI); Report of Financial Results for 2015 of Public Joint-Stock Company [[xxx]], (Exhibit RUS-30)(BCI); Report of Financial Results for 2015 of Public Joint-Stock Company [[xxx]], (Exhibit RUS-31)(BCI); Ukraine's response to Panel question No. 48; and State Statistics Service of Ukraine "On production of railway products in Ukraine during 2012-2016", (Exhibit UKR-87).

<sup>772</sup> Ukraine's response to Panel question No. 47.

Russia.<sup>773</sup> Although, as Ukraine argues, those conditions may have affected producers in eastern Ukraine the most, the evidence suggests that such circumstances have generally affected industrial production in Ukraine. These elements suggest to us that some supply-side economic factors within Ukraine may well explain the decrease of production in Ukraine. On this basis, we are not persuaded by Ukraine's argument that the decrease of orders of railway products by Russian clients was the main cause of the decrease in production in Ukraine. We thus consider that the evidence on record does not establish that the decline in Ukraine's production is the result of the alleged systematic import prevention.

7.985. Moreover, we do not consider that the increase in China's and the European Union's share of imports of railway products into Russia, when compared to the significant decline of Ukraine's share, demonstrates the existence of the alleged systematic import prevention. The evidence shows that the general decrease in imports of railway products into Russia affected Ukraine the most.<sup>774</sup> However, as we have discussed, there are several factors specific to Ukraine that explain why imports of Ukrainian railway products into Russia decreased. Such factors include aspects on the supply-side, such as a decline in the production of railway products and in economic and investment activities in Ukraine, including in the railway product sector. We also recall that imports of Ukrainian railway products into Kazakhstan and Belarus likewise decreased, albeit for reasons that may also be linked to the situation in Russia's market for railway products.

7.986. According to Russia, the decrease in exports of Ukrainian railway products resulted from a decrease in demand of railway products in Russia. The evidence on record does not demonstrate that there was a decrease in Russia's demand for railway products.<sup>775</sup> However, we cannot rule out that such a decrease in demand exists and that this, coupled with other economic factors in the Russian market, resulted in a decrease in imports of railway products into Russia, including from Ukraine.

7.987. We note in this connection Ukraine's suggestion that the decrease in demand may be explained by a policy of import substitution applied by Russia. Ukraine's position suggests that it accepts the existence of a decrease in Russia's demand for railway products. However, the evidence submitted by Ukraine in respect of Russia's import substitution policy is inconclusive as to the existence of such a policy objective.<sup>776</sup> Even if that objective had been demonstrated to exist, we fail to see how it would be probative of the existence of another measure, the alleged systematic import prevention.

7.988. In sum, the evidence on record does not paint a clear picture regarding what caused the decline in Ukraine's import market share in Russia. The evidence on the economic situation in Ukraine suggests that there may be economic factors other than the alleged systematic import prevention that could have caused the decrease of imports of Ukrainian railway products into

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<sup>773</sup> Dmytro Kostyuk (First Deputy Director of JSC "Electrovazhmash"), "Results of the year for Ukrainian heavy manufacturing", 29 December 2014, (Exhibit UKR-64); Olga Levkovich, "Infographics: what's happening to import and export in Ukraine", 1 October 2015, (Exhibit UKR-65). See also Information provided on analytical website Share Ukrainian Potential with respect to the company [[xxx]], (Exhibit RUS-72); Uaprom.info, extract from article (Exhibit RUS-74); and Center of Transport Strategies, extract from the article, "Second life: How [[xxx]] produces railway wheels from scrap iron", 8 November 2016, (Exhibit RUS-75).

<sup>774</sup> Ukraine's first written submission, para. 60; and Export data from International Trade Centre for customs code 86, (Exhibit UKR-14).

<sup>775</sup> We note that the evidence submitted by Russia in support of this assertion is limited to the volume of purchase of cargo wagons and rolling stock by one Russian company between 2012 and 2016 (Volume of Purchase by the company [[xxx]] of the park of Russia's cargo wagons in 2013-2016, (Exhibit RUS-39)(BCI); and Volume of Purchase by the company [[xxx]] of Production for Rolling Stock in the Period 2012-2016, (Exhibit RUS-40)(BCI). In our view, such evidence is insufficient to serve as a basis for the conclusion that there was a decline in demand of railway products in the Russian market.

<sup>776</sup> Russia's government Order No. 328 "On implementation of state program of Russian Federation 'Development of the manufacturing industry and increase of its competitiveness'", 15 April 2014, (Exhibit UKR-104); The main results of the work of Russia's Ministry of Industry and Trade in 2016, 19 April 2017, (Exhibit UKR-105); and Russia's government Decree No. 925 Moscow "On the priority of goods of Russian origin, works and services performed by Russian persons in relation to goods originating from a foreign country, work, services performed by foreign Persons", 16 September 2016, (Exhibit UKR-106). See Ukraine's response to Panel question No. 90.

Russia. We, therefore, consider that the trade and other economic data on record does not demonstrate the existence of the alleged systematic import prevention.

#### **7.6.1.2.3 Overall assessment of the evidence submitted in support of the existence of the measure**

7.989. We recall that the evidence submitted by Ukraine to support the existence of the alleged systematic import prevention consists of (a) suspensions of valid certificates, refusals to issue new certificates (including the ones challenged individually and examined above), and the general non-recognition requirement, and (b) trade and economic data concerning the decline in the imports of Ukrainian railway products into Russia and in Ukraine's share of Russia's imports of railway products, as compared to that of other countries.

7.990. In our view, the evidence on record does not establish that the three elements of the alleged systematic import prevention (suspension of certificates, rejection of certificates, and the general non-recognition of certificates issued in other CU countries) have been designed, structured, or operated in combination so as to constitute a separate measure with the aim of systematically preventing imports of Ukrainian railway products into Russia.

7.991. Moreover, the evidence does not establish that those elements form part of a plan or coordinated effort directed at attaining the aim of preventing the importation of Ukrainian railway products into Russia.

7.992. Finally, the trade and other economic data submitted by Ukraine also does not establish the existence of the alleged systematic import prevention. The evidence does not demonstrate that the cause of the decrease in Ukraine's imports and import share in Russia was more likely than not the alleged existence of a systematic prevention of imports by Russia. Rather, we consider that there is evidence on record suggesting that there are other causes that could explain the decrease of imports of Ukrainian railway products into Russia.

7.993. On the basis of an overall assessment of the evidence on record, we thus consider that Ukraine has failed to demonstrate that Russia systematically prevented the importation of Ukrainian railway products into Russia.

#### **7.6.2 Conclusion**

7.994. Accordingly, we find that Ukraine has failed to demonstrate the existence of the alleged systematic prevention of imports of Ukrainian railway products into Russia.

7.995. As Ukraine has not demonstrated the existence of the systematic import prevention, the Panel concludes that Ukraine has failed to establish its claims of inconsistency with Articles I:1, XI:1, and XIII:1 of the GATT 1994.

## 8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

- a. in respect of Russia's preliminary ruling request:
  - i. the Panel finds that Russia has failed to establish that Ukraine's panel request is inconsistent with Article 6.2 of the DSU;
- b. in respect of the instructions suspending certificates:
  - i. the Panel finds that Ukraine has failed to establish, in respect of each of the 14 instructions at issue, that Russia has acted inconsistently with its obligations under Article 5.1.1 of the TBT Agreement;
  - ii. the Panel finds that Ukraine has failed to establish, in respect of each of the 14 instructions at issue, that Russia has acted inconsistently with its obligations under Article 5.1.2, first and second sentence, of the TBT Agreement;
  - iii. the Panel finds that Ukraine has established, in respect of 13 out of 14 instructions at issue that Russia has acted inconsistently with its obligations under Article 5.2.2, third obligation, of the TBT Agreement;
  - iv. the Panel finds that Ukraine has failed to establish, in respect of the other instruction at issue that Russia has acted inconsistently with its obligations under Article 5.2.2, third obligation, of the TBT Agreement;
- c. in respect of the decisions rejecting applications for certificates:
  - i. the Panel finds that Ukraine has failed to establish, in respect of the two decisions through which the FBO "returned without consideration" applications for certificates submitted by Ukrainian producers under CU Technical Regulation 001/2011, and in respect of the decision through which the FBO "annulled" applications for certificates submitted by a Ukrainian producer under CU Technical Regulation 003/2011, that Russia has acted inconsistently with its obligations under Article 5.1.1 of the TBT Agreement;
  - ii. the Panel finds that Ukraine has established, in respect of one of the decisions through which the FBO "returned without consideration" applications for certificates submitted by a Ukrainian producer under CU Technical Regulation 001/2011 (decision 1 insofar as it relates to applications A1 and A2 and one of the products covered by application A3), that Russia has acted inconsistently with its obligations under Article 5.1.2, first and second sentence, of the TBT Agreement;
  - iii. the Panel finds that Ukraine has failed to establish, in respect of both decisions through which the FBO "returned without consideration" applications for certificates submitted by a Ukrainian producer under CU Technical Regulation 001/2011 (decision 1 insofar as it relates to one of the products covered by application A3 and application A4, and decision 2), and in respect of the decision through which the FBO "annulled" applications for certificates submitted by a Ukrainian producer under CU Technical Regulation 003/2011, that Russia has acted inconsistently with its obligations under Article 5.1.2, first and second sentence, of the TBT Agreement;
  - iv. the Panel finds that Ukraine has failed to establish, in respect of the two decisions through which the FBO "returned without consideration" applications for certificates submitted by Ukrainian producers under CU Technical Regulation 001/2011, and in respect of the decision through which the FBO "annulled" applications for certificates submitted by a Ukrainian producer under CU Technical Regulation 003/2011, that Russia has acted inconsistently with its obligations under Article 5.2.2, second obligation, of the TBT Agreement;

- v. the Panel finds that Ukraine has established, in respect of the two decisions through which the FBO "returned without consideration" applications for certificates submitted by Ukrainian producers under CU Technical Regulation 001/2011, that Russia has acted inconsistently with its obligations under Article 5.2.2, third obligation, of the TBT Agreement;
  - vi. the Panel finds that Ukraine has failed to establish, in respect of the decision through which the FBO "annulled" applications for certificates submitted by a Ukrainian producer under CU Technical Regulation 003/2011 that Russia has acted inconsistently with its obligations under Article 5.2.2, third obligation, of the TBT Agreement;
- d. in respect of the non-recognition of certificates issued in CU countries other than Russia:
- i. the Panel finds that the non-recognition requirement is properly before the Panel;
  - ii. the Panel finds that Ukraine has failed to establish that the non-recognition requirement falls within the scope of application of Article 2.1 of the TBT Agreement;
  - iii. the Panel made no findings regarding Ukraine's claims under Articles 5.1.1 and 5.1.2 of the TBT Agreement because these claims concern aspects of the non-recognition requirement that are not properly before the Panel;
  - iv. the Panel finds that Ukraine has established, in respect of the non-recognition requirement, that Russia has acted inconsistently with Article I:1 of the GATT 1994;
  - v. the Panel finds that Ukraine has established, in respect of the non-recognition requirement, that Russia has acted inconsistently with Article III:4 of the GATT 1994; and
  - vi. the Panel exercises judicial economy in respect of Ukraine's claims of inconsistency with Article X:3(a) of the GATT 1994;
- e. in respect of the systematic import prevention:
- i. the Panel finds that Ukraine has failed to establish its claims of inconsistency with Articles I:1, XI:1, and XIII:1 of the GATT 1994, because it did not demonstrate the existence of the systematic import prevention.

8.2. Pursuant to Article 19.1 of the DSU, the Panel recommends that the Dispute Settlement Body request that Russia bring its measures at issue into conformity with its obligations under the TBT Agreement and the GATT 1994.

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