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

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY UKRAINE

The following communication, dated 10 November 2016, from the delegation of Ukraine to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

My authorities have instructed me to request the establishment of a panel pursuant to Articles 4 and 6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Article XXIII of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and Article 14 of the *Agreement on Technical Barriers to Trade 1994* ("TBT Agreement") concerning certain measures imposed by the Russian Federation on importation of railway rolling stock, railroad switches, other railroad equipment, and parts thereof ("railway products") from Ukraine.

On 21 October 2015 Ukraine requested consultations with the Russian Federation pursuant to Articles 1 and 4 of the DSU, Article XXII of the GATT 1994, and Article 14 of the TBT Agreement. This request was circulated on 26 October 2015 as document WT/DS499/1. The consultations were held on 4 December 2015 with a view to reaching a mutually agreed solution, but unfortunately failed to settle the dispute.

As a result, Ukraine respectfully requests that a panel be established to examine the measures at issue on the basis of the standard terms of reference as set out in Article 7.1 of the DSU.

I. BACKGROUND

On 15 July 2011 the Commission of the Customs Union¹ of the Republic of Belarus, the Republic of Kazakhstan, and the Russian Federation ("CU") approved Decision No. 710 adopting Technical Regulations No. 001/2011², No. 002/2011³, and No. 003/2011⁴ ("Technical Regulations") setting safety and technical requirements for placing on the market "railway rolling stock", "high-speed rail transport" and "rail transportation infrastructure". The new Technical Regulations entered into force 3 years after their official publication, i.e. on 2 August 2014⁵, and since that date all conformity assessment certificates for railway products have to be issued in accordance with the new procedures set forth in the Technical Regulations.

This decision was subsequently amended by Decision of the Collegium of the Eurasian Economic Commission No. 285 of 2 December 2013 "On Amendment of the Decision of the

¹ Presently, the Eurasian Economic Commission.

² Available at: <http://www.eurasiancommission.org/ru/act/txnreg/deptexreg/tr/Documents/TR%20Podvignoisostev%20PID.pdf>

³ Available at: <http://www.eurasiancommission.org/ru/act/txnreg/deptexreg/tr/Documents/TR%20HighSpeed%20PID.pdf>

⁴ Available at: <http://www.eurasiancommission.org/ru/act/txnreg/deptexreg/tr/Documents/TR%20Infrastruktura%20PID.pdf>

⁵ Available at: <http://www.eurasiancommission.org/en/nae/news/Pages/01-08-2014-2.aspx>

Commission of the CU No. 710 of 15 July 2011" allowing for a transitional period, i.e. until 1 August 2016, during which the conformity assessment certificates issued prior to the entry into force of the above-mentioned Technical Regulations continue to be valid, and the products with such certificates are allowed to be produced, placed on the market, and utilised in the Russian Federation.

II. THE MEASURES AT ISSUE

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 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.

III. LEGAL FRAMEWORK IN THE RUSSIAN FEDERATION

The above measures of the Russian Federation are based on several instruments which together provide a legal framework applicable in the territory of the Russian Federation for the placing on the market of railway products. These instruments include:

- Decision of the Commission of the Customs Union No. 710 of 15 July 2011 "On Adoption of technical regulations of the Customs Union 'On Safety of Railway Rolling Stock', 'On

Safety of High-Speed Rail Transport ' and 'On Safety of Rail Transportation Infrastructure'';

- Decision of the Collegium of the Commission of the Eurasian Economic Commission No. 285 of 2 December 2013 "On Amendment of the Decision of the Commission of the CU No. 710 of 15 July 2011";
- Customs Union Technical Regulation No. 001/2011 "On Safety of Railway Rolling Stock" adopted by the Decision of the Commission of the Customs Union No. 710 of 15 July 2011;
- Customs Union Technical Regulation No. 002/2011 "On Safety of High-Speed Rail Transport" adopted by the Decision of the Commission of the Customs Union No. 710 of 15 July 2011;
- Customs Union Technical Regulation No. 003/2011 "On Safety of Rail Transportation Infrastructure" adopted by the Decision of the Commission of the Customs Union No. 710 of 15 July 2011;
- Chapter 10 and Protocol on Technical Regulation to the Treaty on the Eurasian Economic Union of 29 May 2015;
- The Agreement on Uniform Principles and Rules of Technical Regulation in the Republic of Belarus, the Republic of Kazakhstan and the Russian Federation;
- Federal Law of the Russian Federation No. 184-FZ "On Technical Regulation" of 27 December 2002 (with subsequent amendments);
- Orders of the Ministry of Transport of the Russian Federation No. 137 of 14 November 2005 "On the organization of work for numbered accounting of rolling stock, containers, operated on the roads of general use" and No. 266 of 25 July 2012 "On Approval of the administrative regulations of the Federal Railway Transport Agency concerning public service for implementation of numbered accounting of the railroad rolling stock and containers".

IV. LEGAL BASIS FOR THE COMPLAINT

In Ukraine's view, the measures described in Section II above are inconsistent with the Russian Federation's obligations under the following provisions of the GATT 1994 and the TBT Agreement:

1. Article 5.1.1 of the TBT Agreement, because the procedures for assessing conformity applied by the Russian Federation grant access for Ukrainian suppliers of the like products under conditions less favourable than those accorded to suppliers of like products of national origin or originating in any other country, in a comparable situation;
2. Article 5.1.2 of the TBT Agreement, because the procedures for assessing conformity are applied by the Russian Federation with a view to or with the effect of creating unnecessary obstacles to international trade;
3. Article 5.2.2 of the TBT Agreement, because the competent bodies of the Russian Federation do not promptly examine the completeness of the documentation of Ukrainian producers applying for conformity assessment certificates and do not inform applicants in a precise and complete manner of all deficiencies; and because the competent bodies of the Russian Federation do not transmit as soon as possible the results of the conformity assessment in a precise and complete manner to the applicants so that corrective actions may be taken if necessary;
4. Article 5.2.3 of the TBT Agreement, because the information requirements for conformity assessment procedures are not limited to what is necessary to assess conformity and determine the fees;
5. Article 2.1 of the TBT Agreement, because the measures at issue accord less favourable treatment to like products originating in Ukraine than that accorded to like products of national origin and to like products originating in any other country;

6. Article I:1 of the GATT 1994, because the products of Ukrainian origin are not accorded immediately and unconditionally any advantage, favour, privilege or immunity granted to like products of any other country;
7. Article III:4 of the GATT 1994, because the measures at issue accord less favourable treatment to like products originating in Ukraine than to like products of national origin;
8. Article X:3(a) of the GATT 1994, because the relevant laws, regulations and decisions are not administered in a uniform, impartial and reasonable manner;
9. Article XI:1 of the GATT 1994, because through the measures at issue the Russian Federation instituted and maintains prohibitions or restrictions other than duties, taxes or other charges on imports of Ukrainian products;
10. Article XIII:1 of the GATT 1994, because through the measures at issue the Russian Federation applies prohibitions or restrictions on imports from Ukraine, while imports of the like product from all other third countries or exportation of the like product to all other third countries is not similarly prohibited or restricted.

These violations nullify or impair benefits accruing to Ukraine directly or indirectly under the covered agreements within the meaning of Article XXIII:1 of the GATT 1994.

Ukraine asks that this request be placed on the agenda for the meeting of the Dispute Settlement Body expected to be held on 23 November 2016.

Annex I: Suspension of conformity assessment certificates

No.	Name of the Ukrainian producer at issue	Name of the authority of the Russian Federation	Date and number of cover letter and decision of the Russian authority at issue
1	PJSC «Dneprovagonmash»	FBO "RC FRT" ¹	Cover letter of 08.08.2015 Instruction No. 1767 of 08.08.2014
2	PJSC «Dneprovagonmash»	FBO "RC FRT"	Cover letter of 03.10.2014 Instruction No. 1837 of 03.10.2014
3	PJSC «Dnipropetrovsky Strilotchny Zavod»	FBO "RC FRT"	Instruction No. 1922 of 27.02.2015
4	PJSC «Dnipropetrovsky Strilotchny Zavod»	FBO "RC FRT"	Instruction No. 1921 of 27.02.2015
5	PJSC «Kremenchuk Steel Works»	FBO "RC FRT"	Cover letter of 11.02.2015 No. 01425 Instruction No. 1908 of 11.02.2015
6	PJSC «Kremenchuk Steel Works»	FBO "RC FRT"	Cover letter of 17.07.2014 No. 08997 Instruction No. 1704 of 16.07.2014
7	PJSC "Kryukov railway car building works"	FBO "RC FRT"	Cover letter of 08.10.2014 No. 12422 Instruction No. 1842 of 08.10.2014
8	PJSC "Kryukov railway car building works"	FBO "RC FRT"	Cover letter of 11.02.105 No. 01424 Instruction No. 1907 of 11.02.2015
9	PJSC "Kryukov railway car building works"	FBO "RC FRT"	Cover letter of 18.05.2015 No. 05276 Instruction No. 1998 of 18.05.2015
10	PJSC "Kryukov railway car building works"	FBO "RC FRT"	Cover letter of 06.07.2015 No. 07297 Instruction No. 2034 of 06.07.2015

¹ Federal Budgetary Organization "Register of Certification on the Federal Railway Transport".

No.	Name of the Ukrainian producer at issue	Name of the authority of the Russian Federation	Date and number of cover letter and decision of the Russian authority at issue
11	PJSC "Kryukov railway car building works"	FBO "RC FRT"	Cover letter of 07.09.2015 No. 09999 Instruction No. 2093 of 07.06.2015
12	PJSC "Kryukov railway car building works"	FBO "RC FRT"	Cover letter of 09.10.2014 No. 12794 Instruction No. 1844 of 09.10.2014
13	PJSC "Kryukov railway car building works"	FBO "RC FRT"	Cover letter of 08.06.2015 No. 06223 Instruction No. 2021 of 08.06.2015
14	PJSC "Kryukov railway car building works"	FBO "RC FRT"	Cover letter of 18.05.2015 No. 05284 Instruction No. 1998 of 18.05.2015
15	PJSC "Poltavhimmash"	FBO "RC FRT"	Cover letter of 27.01.2015 No. 00630 Instruction No. 1884 of 27.01.2015
16	PJSC "Poltavhimmash"	FBO "RC FRT"	Cover letter of 11.02.2015 No. 01418 Instruction No. 1901 of 11.02.2015

Annex II: Refusal and/or annulment of issuance of new conformity certificates

No.	Name of the Ukrainian producer at issue	Name of the authority of the Russian Federation	Date and number of cover letter and decision of the Russian authority at issue
1	PJSC «Dneprovagonmash»	FBO "RC FRT" ¹	Decision of 02.10.2014 No. 12206
2	PJSC «Dnipropetrovsky Strilotchny Zavod»	FBO "RC FRT"	Decision of 09.02.2015 No. 01305
3	PJSC «Kremenchuk Steel Works»	FBO "RC FRT"	Decision of 23.01.2015 No. 00543

¹ Federal Budgetary Organization "Register of Certification on the Federal Railway Transport".

Annex III - Rejection of conformity certificates issued in countries of the Customs Union

No.	Name of the Ukrainian producer concerned	Name of the authority of the Russian Federation	Date and number of cover letter and decision of the Russian authority at issue
1	LLP "Kamkhor Vagon" (Astana, Kazakhstan)	Federal Railway Transport Administration of the Ministry of Transport of the Russian Federation	Letter No. B/4 35/4779ac dated 04.02.2015
2	JSC "Kryukov railway car building works"	Federal Railway Transport Administration of the Ministry of Transport of the Russian Federation	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.
3	JSC "Kryukov railway car building works"	Federal Railway Transport Administration of the Ministry of Transport of the Russian Federation	Protocol of the 61 st Meeting of the Commission of the Rolling Stock of 22-24 March 2016 and the annexed Dissenting Opinion of the Federal Railway Transport Administration of the Ministry of Transport of the Russian Federation (Saratov, Russian Federation).