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

NOTICE OF AN OTHER APPEAL BY THE RUSSIAN FEDERATION
UNDER ARTICLE 16.4 AND ARTICLE 17.1 OF THE UNDERSTANDING ON RULES
AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU), AND
UNDER RULE 23(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following communication, dated 3 September 2018, from the Delegation of the Russian Federation, is being circulated to Members.

1. Pursuant to Article 16.4 and Article 17.1 of the DSU the Russian Federation hereby notifies the Dispute Settlement Body of its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof* (WT/DS499) ("Panel Report"). Pursuant to Rule 23(1) of the Working Procedures for Appellate Review (WT/AB/WP/6, 16 August 2010) ("Working Procedures") the Russian Federation simultaneously files this Notice of Other Appeal with the Appellate Body Secretariat.

2. For the reasons further elaborated in its submissions to the Appellate Body, the Russian Federation appeals and requests the Appellate Body to reverse or modify certain issues of law covered in the Panel Report and legal interpretations developed by the Panel in this dispute.

3. Pursuant to Rule 23(2)(c)(iii) of the Working Procedures the present Notice of Other Appeal provides an indicative list of the paragraphs of the Panel Report containing the alleged errors of law and legal interpretation, without prejudice to the ability of the Russian Federation to refer to other paragraphs of the Panel Report in the context of its appeal.

I. Appeal of the Panel's error in interpreting and applying Article 6.2 of the DSU in its preliminary ruling

4. The Russian Federation seeks review by the Appellate Body of the Panel's interpretation and application of Article 6.2 of the DSU in its preliminary ruling. In its examination of the Russian Federation's claim on the preliminary ruling the Panel made several errors.

5. First, the Panel erred in concluding that Ukraine's Panel Request presents the problem clearly under Article 6.2 of the DSU by properly linking the measures at issue with the legal basis.

6. Accordingly, the Russian Federation requests that the Appellate Body:

- find that the Panel erred in its legal analysis in paragraphs 7.40-7.41;
- reverse the Panel's findings in paragraphs 7.39 and 7.43.

7. Second, the Panel erred in finding that in respect of the third measure Ukraine's Panel Request had identified a specific measure at issue, in particular:

- the Panel erred by neglecting to determine the meaning of the third measure considered on its face;
- the Panel failed to acknowledge that Ukraine's written submissions confirm neither the words used for the description of the third measure in the Panel Request nor the Panel's interpretation of the third measure.

8. Accordingly, the Russian Federation requests that the Appellate Body:

- find that the Panel erred in its analysis in paragraphs 7.93, 7.97, 7.98 and in its inference in paragraph 7.29 of its Report;
- reverse the Panel's findings in paragraphs 7.99, 7.102 (sentences two and three), 7.103, and 7.104 of its Report;

9. Third, the Panel erred in its conclusion that CU Technical Regulation 001/2011 is identified in the Panel Request with the sufficient degree of precision to embody the third measure.

10. Accordingly, the Russian Federation requests that the Appellate Body:

- reverse paragraphs 7.100-7.104 and, correspondingly, paragraph 7.829 (first sentence) of the Panel Report;
- conclude that the third measure was not properly identified in the Panel Request to fall within the Panel's terms of reference.

11. Based on the foregoing, the Russian Federation requests that the Appellate Body reverse the Panel's conclusion in paragraph 8.1(a)(i) that the Russian Federation has failed to establish that the Panel Request is inconsistent with Article 6.2 of the DSU.

12. As a consequence, the Russian Federation also requests that the Appellate Body reverse the Panel's findings and conclusions on Ukraine's claims under Article I:1 of the GATT 1994 and Article III:4 of the GATT 1994 (Sections 7.5.3 – 7.5.3.4 and 7.5.4 – 7.5.4.4, and corresponding paragraphs 8.1(d)(iv) and 8.1(d)(v) of the Panel Report).

II. Appeal of the Panel's error in interpreting and applying Articles 6.2, 7.1, and 11 of the DSU in the Panel's findings that Ukraine's third measure was within the Panel's terms of reference

13. This part of the Russian Federation's appeal concerns several findings made by the Panel in the course of its analysis of the third measure, described by Ukraine in its first written submission ("FWS"), in response to the Russian Federation's claim that this measure is not within the Panel's terms of reference. The Panel erred in its conclusion and related findings that Ukraine's third measure as it was described in Ukraine's FWS, determined and further modified by the Panel was within the Panel's terms of reference, in particular:

14. First, the Panel committed legal errors under Articles 6.2, 7.1 of the DSU in making the following findings related to its analysis of whether the measure described by Ukraine in its FWS is within the Panel's terms of reference:

- any challenge to the alleged non-recognition requirement is within the Panel's terms of reference;
- Ukraine's third measure concerns an alleged requirement that Russia's authorities consider to flow from CU Technical Regulation 001/2011; that 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 specifically identifies this production condition;

- the description of the measure in Ukraine's FWS is only "somewhat" different in comparison with the third measure in the Panel Report;
- Ukraine's reference to the Russian Federation's "decision" was not sufficient, in and of itself, for finding that the measure challenged by Ukraine is outside the terms of reference.

15. Accordingly, the Russian Federation requests that the Appellate Body:

- conclude that the measure described by Ukraine in its FWS as "the [alleged] decision of the Russian Federation not to accept in its territory the validity of the conformity assessment certificates issued to Ukrainian producers in other CU countries" is not within the Panel's terms of reference;
- reverse the Panel's findings in paragraph 7.823;
- modify the Panel's finding in the second sentence of paragraph 7.827 by deleting the term "somewhat";
- reverse the Panel's finding in the fourth sentence of paragraph 7.828 that Ukraine's reference "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 the terms of reference and not examining the evidence submitted by Ukraine in support of the third measure".

16. As a consequence of the finding that the third measure described by Ukraine in its FWS was not within the Panel's terms of reference the Russian Federation requests that the Appellate Body reverse the Panel's findings on the existence of the measure at issue in Section 7.5.1.2 and particularly in paragraph 7.861 of the Panel Report.

17. Second, with respect to the Panel's determination of the third measure and further modification of its descriptions, the Panel committed legal errors under Articles 6.2, 7.1, and 11 of the DSU in making the following determination and findings:

- the determination that the third measure should be referred to as "the alleged non-recognition requirement flowing from CU Technical Regulation 001/2011", "a general non-recognition requirement, which Russia's Ministry of Transport and its Federal Agency for Railway Transport considered to flow from CU Technical Regulation 001/2011 as they interpreted it", "the general non-recognition requirement (as applied by the identified by the identified Russian authorities in situations where a product certified in another CU country had not been produced in a CU country)";
- the finding that Ukraine has identified the third measure as "the alleged non-recognition requirement flowing from CU Technical Regulation 001/2011";
- the finding that "the non-recognition requirement is properly before the Panel".

18. Accordingly, the Russian Federation requests that the Appellate Body:

- reverse the Panel's determination in the first sentence of paragraph 7.828 that the third measure should be referred to as "the alleged non-recognition requirement flowing from CU Technical Regulation 001/2011" as well as findings in paragraphs 7.850, 7.853, 7.854, 7.861, and 7.881 that the third measures is: "a general non-recognition requirement, which Russia's Ministry of Transport and its Federal Agency for Railway Transport considered to flow from CU Technical Regulation 001/2011 as they interpreted it" and "the general non-recognition requirement (as applied by the identified by the identified Russian authorities in situations where a product certified in another CU country had not been produced in a CU country)";

- reverse the Panel's finding in the third sentence of paragraph 7.828 that Ukraine has identified the third measure as "the alleged non-recognition requirement flowing from CU Technical Regulation 001/2011";
- reverse the Panel's conclusion in paragraph 8.1(d)(i) that "the non-recognition requirement is properly before the Panel".

19. As a consequence of the finding that the measure described by Ukraine in its FWS or "the non-recognition requirement" was not within the Panel's terms of reference (under the first or the second points in this part of the appeal), the Russian Federation also requests the Appellate Body to reverse the Panel's findings and conclusions on the existence of the measure at issue (Sections 7.5.1.2 – 7.5.1.2.1 of the Panel Report) on Ukraine's claims under Article I:1 of the GATT 1994 and Article III:4 of the GATT 1994 (Sections 7.5.3 and 7.5.4 and corresponding paragraphs 8.1(d)(iv) and 8.1(d)(v) of the Panel Report).

III. Appeal of the Panel's error in interpreting and applying Article 11 of the DSU to the circumstances of the dispute

20. First, the Panel erred under Article 11 of the DSU since it continued making findings with respect to the alleged registration condition and taking these findings into account after it found that this requirement was not within its terms of reference.

21. Second, the Panel erred under Article 11 of the DSU since it relieved Ukraine from the necessity of establishing of a *prima facie* case in respect to the existence of the third measure as a single measure capable of being challenged under the DSU as identified in the Panel Request.

22. Accordingly, the Russian Federation requests that the Appellate Body reverse the Panel's findings in respect of the third measure as contained in paragraphs 7.847, 7.849, 7.850 (the third and the fourth sentences), 7.853, 7.854, 7.861, 7.897, 7.899, 7.917, 7.926 of its Report.

23. As a consequence, the Russian Federation also requests that the Appellate Body reverse the Panel's findings and conclusions on Ukraine's claims under Article I:1 of the GATT 1994 and Article III:4 of the GATT 1994 (Sections 7.5.3 – 7.5.3.4 and 7.5.4 – 7.5.4.4, and corresponding paragraphs 8.1(d)(iv) and 8.1(d)(v) of the Panel Report).

24. Third, the Panel erred in its finding that the third measure as determined by the Panel exists by finding that the "general" non-recognition requirement flows from CU Technical Regulation 001/2011, and in particular:

- the Panel erred in the assessment of the third measure as determined by the Panel by not examining the text of CU Technical Regulation 001/2011;
- the Panel erred by neglecting to find that the assessment of CU Technical Regulation 001/2011 reveals the non-existence of the third measure as determined by the Panel.

25. As a result, the Russian Federation requests that the Appellate Body:

- reverse the Panel's findings in paragraphs 7.823 (the second and the third sentences), 7.846, 7.850 (the third and the fourth sentences), 7.851 to the extent that "[w]hether 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 [Panel] analysis"; 7.852, 7.853, and 7.854;
- reverse the Panel's finding in paragraph 7.861 of the Panel Report that "the third measure has been demonstrated to exist" and the finding in the same paragraph that "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 Regulation 001/2011 as they interpreted it".

26. Finally, should the Appellate Body find that the Panel erred in its conclusions regarding the existence of the third measure, the Russian Federation requests to reverse the Panel's findings and conclusions on Ukraine's claims under Article I:1 of the GATT 1994 and Article III:4 of the GATT 1994 (Sections 7.5.3 – 7.5.3.4 and 7.5.4 – 7.5.4.4, and corresponding paragraphs 8.1(d)(iv) and 8.1(d)(v) of the Panel Report).
