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

Responses of the United States of America
to Questions from the Panel to the Third Parties

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September 11, 2017

GENERAL INTERPRETIVE QUESTIONS

1. With respect to the Appellate Body's statement in paragraph 6.36 of the Appellate Body Report in *Argentina – Financial Services*, please indicate whether you consider that measures allowing the application of a presumption of "likeness" could involve a *de facto* distinction between products of different origin?

1. Where a provision of a covered agreement calls for a comparison of the treatment accorded to "like products," a complaining party must provide the basis for conducting an analysis adequate for determining whether the products at issue are "like." Establishing likeness is not a simple formality. It is the first step in conducting an accurate and complete comparison of the treatment accorded by a challenged measure that is alleged to breach a most favored nation or national treatment obligation.

2. In analyzing whether two categories of products are "like products" under provisions of the GATT 1994 and other covered agreements, past reports have often referred to the following criteria: (i) "the products' properties, nature, and quality"; (ii) "the products' end-uses"; (iii) "consumers' tastes and habits – more comprehensively termed consumers' perceptions and behavior – in respect of the products"; and (iv) "the products' tariff classification."[1] If the products are found not to be "like," the most-favored nation and national treatment obligations do not attach and the analysis is at an end.

3. In certain disputes involving origin-based discrimination, panels have conducted a "hypothetical like product analysis."[2] In such disputes, the measure at issue, on its face, discriminated between products expressly on the basis of national origin. Because the measure distinguished between products exclusively based on origin, the measure necessarily would apply to any foreign product that were "like" any domestic product or product of another Member covered by the measure.[3] Such measures provided for no other product distinction, so no further analysis of likeness was required. Thus, it was not that the panels assumed that particular, identified products were "like products"; rather, they analyzed whether the challenged measure discriminated because the measure itself would not permit an identical product of a different origin to qualify for a particular treatment.

4. We note that whether a measure is written or unwritten may not be a decisive factor with respect to whether a hypothetical like products analysis is possible. Rather, the key question is whether the measure involves a "*de jure* distinction between products of different origin,"[4] or, in

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[1] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.408; *Japan – Alcoholic Beverages II (AB)*, p. 20; *US – Poultry (China)*, para. 7.425 (citing reports).

[2] *See US – Poultry (China)*, paras. 7.426-432. A hypothetical analysis has also been employed in cases where a like product analysis was impossible due to, for example, a ban on imports. *See id.*

[3] *See US – Poultry (China)*, paras. 7.427-428 ("[W]hen origin is the sole criterion distinguishing the products, it has been sufficient for the complainant to demonstrate that there can or will be domestic and imported products that are 'like'"); *Argentina – Hides and Leather (Panel)*, paras. 11.168-169; *China – Auto Parts (Panel)*, paras. 7.216-217; *Canada – Autos (Panel)*, para. 10.74; *Canada – Wheat Exports and Grain Imports (Panel)*, paras. 6.164; *China – Audiovisuals (Panel)*, para. 7.1447; *US – FSC (Article 21.5 – EC) (Panel)*, paras. 8.132-135.

[4] *Argentina – Financial Services (AB)*, para. 6.36.

other words, whether "origin is the sole criterion distinguishing the products."[5] In *Argentina – Import Measures*, for example, the panel relied on a hypothetical like products analysis in its analysis under Article III:4 of the GATT 1994 of an unwritten measure.[6] However, the panel had already found that the measure challenged by complainants existed and drew a distinction between domestic products and imports based solely on origin.[7] Therefore, the panel could analyze whether the measure discriminated based on presuming the existence of like products.

5. By contrast, is difficult to imagine how a hypothetical like products analysis could be applied where the complainant's claim is one of *de facto* discrimination. Unlike where a measure *de jure* distinguishes based expressly on product origin, in a *de facto* discrimination claim, there is the possibility that the challenged measure draws distinctions based on real product differences, *i.e.*, because the products are not "like." To establish a successful most favored nation or national treatment claim, a complaining Member would need to prove that this is not the case by showing that the products at issue are "like products," for example, based on the criteria identified above.[8] A panel conducting a hypothetical like products analysis in such a dispute would in effect be presuming that there is no basis in product differences for different treatment – relieving the complaining Member of its burden of proof.

6. The United States does not take a position on whether it is possible to appropriately employ a hypothetical like products analysis based on the facts in this dispute. Generally, however, for a panel to employ such an approach, the complaining Member must have shown that the content of the challenged measure draws distinctions exclusively based on the origin of the products at issue.

2. Article 2(15) and the accompanying footnote 3 of the Agreement on Preshipment Inspection indicates that a preshipment inspection must take place on the agreed date, unless, *inter alia*, the preshipment inspection entity "is prevented from doing so by … *force majeure*." The footnote then provides a definition of "*force majeure*." Could the third parties please provide their views regarding whether:

(a) Article 2(15) supports the view that, although not specified explicitly in Article 5 of the TBT Agreement, *force majeure* could be a justifiable reason preventing a competent authority of an importing Member from conducting a conformity assessment inspection under Article 5 in the territory of the exporting Member; and

(b) A security situation in the territory of the exporting Member would constitute *force majeure* or something akin to it?

7. Article 2(15) concerns the execution of contracts for preshipment inspections between, on the one hand, the entities that perform preshipment inspection activities required by Members and, on the other, exporters whose products are inspected. It states that a contract for

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[5] *US – Poultry (China)*, para. 7.427.

[6] *See Argentina – Import Measures (Panel)*, paras. 6.274-276.

[7] *Argentina – Import Measures (Panel)*, para. 6.275 (explaining that "The only distinguishing feature between an imported product and a domestic one, in terms of the application of this requirement, is its origin").

[8] *See e.g. US – Gasoline (Panel)*, paras. 6.6-6.16.

preshipment inspection must be fulfilled on the agreed upon day, unless the inspection is rescheduled by mutual consent or the entity is prevented from conducting the inspection by *force majeure*. *Force majeure* is a legal doctrine that excuses the non-fulfillment of a contract under certain circumstances. Therefore, it is not surprising that it was included in Article 2(15).

8. Article 5 of the TBT Agreement concerns the preparation, adoption, and application by central government bodies of conformity assessment procedures. *Force majeure* as a legal doctrine would not, as the Panel's question reflects, appear applicable through the text of Article 5. Considerations relating to circumstances preventing the preparation, adoption, or application of conformity assessment procedures would need to be based on the text of Article 5. In that regard, relevant text would include Article 5.2.1, which states that, when implementing Article 5.1, a Member shall ensure that "conformity assessment procedures are undertaken and completed as expeditiously as possible."

3. With reference to paragraph 93 of the Russian Federation's first written submission, could the third parties please comment on whether and how the "conditions for visiting Ukraine by Russian citizens" are relevant to the "level of protection sought" by the Russian Federation?

9. The "conditions for visiting Ukraine by Russian citizens" would not appear to be relevant to the "level of protection sought" by Russia. However, it is not clear that, in paragraph 93 of its first written submission, Russia was suggesting that the conditions for visiting Ukraine were relevant to the level of protection sought by Russia, or whether Russia considered that they were relevant to another aspect of the analysis under Article 5.1.2. Such conditions could, in theory, be relevant to whether a conformity assessment procedure is more "strict" or "applied more strictly than is necessary" to give the Member the level of confidence of conformity that the Member, based on an objective assessment of the relevant evidence, deems "adequate."[9]

10. With respect to the Panel's question, as explained in the U.S. third party submission, in the context of Article 5.1.2, the "level of protection sought" by Russia refers to the level of "confidence" the challenged conformity assessment procedure measure provides that products conform with the relevant technical regulation or standard.[10] It is an objective analysis, based on the measure's design, structure, and operation, and any other relevant evidence,[11] that refers to the level of "confidence" achieved by the measure generally, not with respect to products from any particular country. The "conditions" for Russian citizens visiting Ukraine thus do not seem relevant to this inquiry.

Suspension of Old Certificates and Rejections of New Certificates

4. Could the third parties please comment on whether, and why, in their view it would be appropriate to take into account the security situation in Ukraine in an assessment of whether Ukraine's suppliers of like products were in a "comparable

[9] *See* U.S. third party submission, paras. 42-43.

[10] *See* U.S. third party submission, para. 41.

[11] *See US – Tuna II (Mexico) (AB)*, para. 314; U.S. third party submission, para. 42.

situation" to suppliers in the Russian Federation, Belarus, the European Union and Kazakhstan, under Article 5.1.1 of the TBT Agreement?

11. Whether the security situation in Ukraine is relevant to an assessment of the challenged measures under Article 5.1.1 could depend on factual findings concerning the reason suppliers of Ukrainian products have not received access to the relevant conformity assessment procedure.

12. Article 5.1.1 provides that "access" to conformity assessment procedures must be granted to suppliers of products originating in the territory of a Member under conditions "no less favourable" than those under which it is granted to suppliers of like products of other Members, "in a comparable situation." For purposes of this provision, "access" entails suppliers' "right to an assessment of conformity under the rules of the procedure." Thus, Article 5.1.1 does not require a free-standing assessment of whether suppliers of like products of different Members are "in a comparable situation." Rather, the relevant inquiry is whether suppliers of products of the complaining Member are given equal rights to an assessment as suppliers of products of other Members, in a comparable situation.

13. Therefore, in the context of this dispute, the "security situation in Ukraine" might or might not be relevant to the Article 5.1.1 analysis, depending on the Panel's assessment of the arguments and evidence put forward by the parties. Ukraine alleges that Russia has a policy of denying suppliers of Ukrainian products positive assessments of conformity, *irrespective* of the quality of the products and the situations of the suppliers.[12] Russia disagrees, arguing that the "security situation" in Ukraine is the reason for its decisions concerning performing conformity assessments for suppliers of Ukrainian products.[13] Ukraine alleges, however, that suppliers of Ukrainian products are *per se* denied the right to an assessment of conformity while suppliers of "like products" of other Members would have access to those procedures, irrespective of their "security situation." In that case, their "right to an assessment of conformity under the rules of the procedure" would be "less favourable" than the right of suppliers of like products of other Members. If the Panel agrees with Ukraine as to the scope of Russia's policy and the *per se* limitation on access to the conformity assessment procedures for suppliers of Ukrainian products, the "security situation" would not be relevant to the analysis under Article 5.1.1.[14]

5. In paragraph 44 of its third party submission, the U.S. states that "…the Committee on Technical Barriers to Trade has outlined a number of approaches to facilitate the acceptance of conformity assessment results. These may be relevant as indicating approaches that other WTO Members have considered not to hinder trade, relatively speaking, and that can provide a high level of confidence that products

[12] *See* Ukraine's first written submission, paras. 253-259.

[13] *See* Russia's first written submission, paras. 78-84.

[14] In this regard, we also take note of the statement that "it appears that on-site inspections continue to take place and certificates continue to be issued for products originating in certain Ukrainian territories." EU third party submission, para. 43 (also noting "the fact that safety concerns were not invoked by Russia and it appears that on-site inspections continue to take place and certificates continue to be issued for products originating in certain Ukrainian territories").

conform to the requirements of technical regulations and standards." Could the third parties please provide your views on of this statement?

14. The United States reiterates that, for purposes of analyzing the alternative measures Ukraine has identified, the relevant level of protection is that "sought by Russia," but that this does not mean that any differences between Russia's practices and those of other countries can be characterized as reflecting a different level of protection. Rather, the inquiry is whether the proposed alternative measures reflect the same level of "confidence" of conformity as that reflected in the relevant challenged measure, based on an objective analysis of the measure's design, structure, and operation.[15]

15. The United States noted the Decisions and Recommendations of the TBT Committee as providing examples of approaches to facilitate the acceptance of conformity assessment results, in light of the fact that one of Ukraine's proposed alternative measures is Russia's allowing remote inspections, including accepting conformity assessment results from other Customs Union (CU) members. Several of the proposals set out in the Decisions and Recommendations – including mutual recognition agreements, cooperative arrangements between conformity assessment bodies, use of accreditation to qualify conformity assessment bodies, and government designation of specific conformity assessment bodies – could be relevant to an assessment of whether Ukraine has identified an alternative measure that preserves for Russia its chosen level of protection.

16. To be clear, and with regard to Question 23 below, the United States referred to the Decisions and Recommendations of the TBT Committee as potentially relevant factual evidence. They do not set out, or provide authoritative interpretations of, WTO obligations. WTO Members have agreed that, in the WTO, the Ministerial Conference (or General Council) have the exclusive authority to reach authoritative interpretations of the covered agreements (WTO Agreement Art. IX:2).

9. With reference to paragraph 42 of the United States' third-party submission, could the United States please further elaborate on how a "measure's contribution to a chosen level of confidence" could be assessed under Article 5.1.2 of the TBT Agreement?

17. Paragraph 42 of the U.S. third party submission concerns an analysis of the challenged measure, compared to the alternative measure proposed by Ukraine. As explained previously, this analysis would involve assessing the level of "confidence" that the challenged measure provides that products conform to the relevant technical regulation, as well as the trade restrictiveness or strictness / strictness of application of the challenged measure (depending on whether the first or second sentence of Article 5.1.2 was at issue), compared with the level of "confidence" and trade restrictiveness or strictness / strictness of application provided by the proposed alternative measures.[16]

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[15] *See* U.S. third party submission, paras. 42-43.

[16] *See* U.S. third party submission, para. 41.

18. The degree to which a measure, or a proposed alternative measure, contributes to ("achieve[s]") its objective can, as the Appellate Body recognized in the context of Article 2.2 of the TBT Agreement, "be discerned from the design, structure, and operation of the technical regulation, as well as from evidence relating to the application of the measure."[17] It is an objective assessment, and a panel is not bound by a Member's assertion that it pursues a particular level of protection or that a measure contributes to its objective to a certain degree.[18] Further, it is not necessary to quantify the level of a measure's contribution to its objective; past panels have assessed and described such contribution in qualitative terms.[19]

19. Further, in the context of analyzing proposed alternative measures, the critical inquiry is the *relative* levels of contribution achieved by the challenged measure and the proposed alternative measure. In this regard, panels and the Appellate Body analyzing Article 2.1 of the TBT Agreement and Article XX of the GATT 1994[20] have relied on the design, structure, and actual or likely operation of the challenged measure and the proposed alternative measure to compare the relative levels of protection achieved by each.[21]

10. With reference to paragraph 21, last sentence, of the United States' third-party submission, could the United States please elaborate on how its interpretation that the phrase "positive assurance of conformity […] is required" in Article 5.1 means a situation in which "an explicit, definitive assurance of conformity […] is *necessary*" (emphasis added) relates to the notions of "unnecessary" and "necessary" in the first and second sentences of Article 5.1.2 of the TBT Agreement?

20. The United States used "necessary" in paragraph 21 as a synonym for "required," in light of the ordinary meaning of both words. The critical issue, for purposes of this element of Article 5.1 of the TBT Agreement, is that a "positive assurance of conformity" is required (*i.e.*, mandated) by the importing Member. As noted in the parenthetical following "necessary" in the quoted sentence, this could be, for example, where a positive assessment of conformity is required as a condition for importation into or sale in the importing Member's market.

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[17] *US – Tuna II (Mexico) (AB)*, para. 314; *US – COOL (AB)*, para. 471.

[18] *See US – Tuna II (Mexico) (AB)*, paras. 314, 317.

[19] *See, e.g., EC – Seal Products (AB)*, para. 5.227 (upholding the panel's finding that the measure "contributes to a certain extent" to its objective as an appropriate finding on the contribution of the measure to its objective under the "necessary" element of Article XX(a) of the GATT 1994); *US – Tuna II (Mexico) (AB)*, para. 327 (noting the panel finding, under Article 2.2 of the TBT Agreement, that the challenged measure "*partially* ensure[s] that consumers are informed about whether tuna caught by using a method that adversely affects dolphins" and that the measure "only partially fulfill[s] [its] stated objective"); *US – COOL (Article 21.5) (AB)*, para. 5.240, (describing the panel's finding that the challenged measure "makes a considerable but necessarily partial contribution to its objective").

[20] *See US – COOL (Article 21.5) (AB)*, n.679 (drawing an analogy between the analysis under Article 2.2 of the TBT Agreement and the analysis of "necessity" in the context of Article XX of the GATT 1994 and Article XIV of the GATS); *US – Tuna II (Mexico) (AB)*, n.645.

[21] *See, e.g., US – Tuna II (Mexico) (AB)*, para. 330; *EC – Seal Products (AB)*, para. 5.266; *Korea – Various Measures on Beef (AB)*, para. 168.

ADDITIONAL GENERAL INTERPRETIVE QUESTIONS

12. With reference to the sixth recital of the preamble of the TBT Agreement, could the third parties please provide their views on whether the term "measures" is intended to address all TBT measures, rather than just a subset of these measures, such as "technical regulations"?

21. The relevant dictionary definition of "measure" is "[a] plan or course of action intended to attain some object, a suitable action; *spec.* a legislative enactment proposed or adopted."[22] The term is used in different ways throughout the TBT Agreement, referring to more and less specific categories of "actions" or "legislative enactments." The text of the sixth preambular recital of the TBT Agreement suggests that word "measures," as used there, does not include conformity assessment procedures.

22. As mentioned in the U.S. third party submission, Article 5.1.2 of the TBT Agreement establishes that the legitimate objective of conformity assessment procedures is "to give the importing Member . . . confidence that products conform with the applicable technical regulations or standards."[23] The sixth preambular recital, on the other hand, refers to a closed list of legitimate objectives that does not include ensuring compliance with applicable technical regulations or standards.[24] Thus, the sixth preambular recital would seem to refer to a type of "measure" that does not include conformity assessment procedures.

13. Article 5.1.1 of the TBT Agreement clarifies that "access", for the purpose of that article "entails suppliers' right to an assessment of conformity under the rules of the procedure". It goes on to state that this "includ[es], when foreseen by this procedure, *the possibility to have conformity assessment activities undertaken at the site of facilities* …" (emphasis added). Could the third parties please address the following points:

(a) The meaning of "*conformity assessment activities*": does it include "inspection", as included in the Explanatory Note to the definition of Conformity assessment procedures in Annex 1.3 of the TBT Agreement?

(b) The meaning of "*site of facilities*": does it mean site of facilities of the "supplier" or "applicant" in the exporting country or the "supplier" or "applicant" in the importing country, or both? Please, respond in light of the references in Articles 5.2.5 and 5.2.6 to "location of facilities of the applicant and "the siting of facilities used in conformity assessment procedures", respectively.

(c) The relevance, if any, of the fact that, under Article 5.1.1, "access" entails suppliers' right to the "*possibility* to have" – as opposed to suppliers' right "to

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[22] *Shorter Oxford English Dictionary*, vol. 1, p. 1726, 4th edn, (1993).

[23] *See* U.S. third party submission, para. 42.

[24] *See* TBT Agreement, preamble ("*Recognizing* that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at levels it considers appropriate . . . .").

have" – conformity assessment activities undertaken at the site of facilities, when foreseen by the procedure. Could the fact that suppliers' right is only to the "*possibility* to have" such conformity assessment activities at the site of facilities mean that this provision recognizes that having these activities at the site of facilities is not always possible?

23. With respect to part (a), Article 5.1.1 refers to "conformity assessment activities" as "foreseen by [the] procedure" at issue. Thus, "conformity assessment activities" refers to the activities comprising the conformity assessment, as set out in the conformity assessment procedure at issue. These "activities" could potentially include all the activities described in the explanatory note to Annex 1.3. However, a particular conformity assessment procedure may not, in fact, cover all the activities described in the explanatory note. Therefore, the "activities" referred to in Article 5.1.1 would not necessarily extend to all the listed activities for a particular conformity assessment procedure.

24. With respect to part (b), the United States considers that, in the context of Article 5.1.1, "site of facilities" refers to the facilities of the supplier or applicant in the exporting country. Article 5.2.5 also contemplates conformity assessment activities taking place in the territory of the Members where the products originate.

25. With respect to part (c), Article 5.1.1 does not address whether conducting activities at the site of facilities is always possible. Article 5.1.1 is a non-discrimination provision, not a provision requiring a certain procedural content for a conformity assessment procedure. Thus, Article 5.1.1 does not establish a right of Members to have conformity assessment activities undertaken at the site of facilities or a right to have this occur whenever possible. It simply requires that, where the "possibility" of having conformity assessment activities undertaken at the site of facilities is contemplated by the conformity assessment procedures, that "possibility" be extended on a non-discriminatory basis to suppliers of like products of all Members.

14. With reference to Canada's (paragraphs 11-15), the European Union's (paragraphs 38 and 66), Japan's (paragraphs 12-14 and 18-22), and the United States' (paragraphs 6-9) third-party statements, could the third parties please provide their views on whether and to what extent the two-step analysis developed by the Appellate Body under Article 2.1 can be applied to Article 5.1.1, in light of the phrase "in a comparable situation"? In this respect, could the third parties please refer to cases of alleged *de facto* discrimination?

26. As the United States has explained, the obligation set out in Article 5.1.1 of the TBT Agreement is substantively different from that set out in Article 2.1.[25] The phrase "in a comparable situation" is just one of the textual differences between the provisions that render the two-step analysis applied in certain reports under Article 2.1 not appropriate in the context of Article 5.1.1.

27. Article 2.1 of the TBT Agreement provides that Members shall ensure that, in respect of technical regulations, like products from one Member are "accorded treatment no less

[25] *See* U.S. third party statement, paras. 6-9.

favourable" than like products of another Member. In certain disputes, the Appellate Body found that "'treatment no less favourable'" should be "assessed by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products."[26] It also found, however, that not all technical regulations that have a "detrimental impact" on imports are inconsistent with Article 2.1. Rather, if the detrimental impact "stems exclusively from a legitimate regulatory distinction," the technical regulation is not inconsistent with Article 2.1.[27]

28. Thus, Article 2.1 is an outcome-oriented provision. It addresses the "treatment" accorded products of different Members, and it requires that, if the products of one Member receive less favorable treatment under a measure than the products of another Member, that the difference be explained entirely by a "legitimate regulatory distinction." Unsurprisingly, in every report in which the Appellate Body explained this standard, it emphasized that the critical basis for the standard it articulated under Article 2.1 was the phrase "treatment no less favourable."[28]

29. Article 5.1.1 of the TBT Agreement, by contrast, does not concern the "treatment" accorded products of different Members or suppliers of those products. Rather, it concerns the "access" to conformity assessment procedures accorded to suppliers of like products originating in different Members "in a comparable situation." "Access" is defined as entailing "suppliers' right to an assessment of conformity under the rules of the procedure." Thus, Article 5.1.1 is about the rights of suppliers of products originating in different Members to an assessment of conformity, "*under the rules of the procedure*" established by the Member. It does not require any particular outcome in terms of the rate at which suppliers receive assessments under the procedure or the results of those assessments.

30. This means that an apparent negative impact on the competitive opportunities of products originating in a particular country does not have the same meaning or place in the analysis under Article 5.1.1 as under Article 2.1. Specifically, the critical inquiry under Article 5.1.1 is not whether there is a "detrimental impact"; it is whether suppliers of a Member are granted less favorable "right[s] to an assessment of conformity" under the rules of the procedure as are suppliers of like products of other Members in comparable situations.

31. For example, suppose suppliers of products originating in the territory of a Member, as a group, were failing to receive assessments under the relevant conformity assessment procedure, while suppliers of like products originating in other Members were receiving such assessments. Article 5.1.1 provides that the relevant inquiry is *not* whether the suppliers of products of the first Member are receiving less favorable "treatment" under the rules of the procedure. Rather, it is whether their rights to an assessment of conformity, under the rules of the procedure, are less favorable than those of suppliers of like products of other Members, in a comparable situation. A critical inquiry in this regard could be whether the suppliers of products of the Member that

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[26] *See US – Clove Cigarettes (AB)*, para. 180; *US – Tuna II (Mexico) (AB)*, para. 215; *US – COOL (AB)*, paras. 268, 272; *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.27.

[27] *See US – Clove Cigarettes (AB)*, paras. 181-182; *US – Tuna II (Mexico) (AB)*, para. 215; *US – COOL (AB)*, paras. 268, 272; *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.30.

[28] *See US – Clove Cigarettes (AB)*, paras. 100, 176-182; *US – Tuna II (Mexico) (AB)*, paras. 214-215; *US – COOL (AB)*, paras. 269-271; *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.26, 7.29-30.

were failing to receive assessments were "in a comparable situation" as the suppliers of like products of national origin or originating in another Member. But the mere fact that the rule of the conformity assessment procedure at issue resulted in a detrimental impact on the suppliers of products of a Member would not be necessarily suggest a potential claim under Article 5.1.1.

32. Conversely, there could be a breach of Article 5.1.1 even in the absence of any detrimental impact. For example, if suppliers originating in the territory of a Member, as a group, were failing to receive assessments under the relevant conformity assessment procedures and suppliers of products of other Members were receiving conformity assessments but, as a group, were invariably failing to receive positive assessments, there may be no detrimental impact on the products of the first Member. There might, however, be a breach of Article 5.1.1 (depending on whether the suppliers of the products of the Member and other Members were "in a comparable situation") because "access" to the CAP is not given on a "no less favourable" basis to suppliers of products of all Members. In this regard, we note that situations where a measure, including a conformity assessment procedure, causes a detrimental impact on the products of a Member could still be addressed under Articles I:1 and III:4 of the GATT 1994.[29] Article 5.1.1 thus sets out an additional obligation concerning the "access" to the conformity assessment procedures accorded to suppliers of products of different Members.

33. In short, the text of Article 5.1.1 sets out a different standard than the one past Appellate Body reports have applied under Article 2.1. As discussed in the U.S. third party statement, none of the third parties that have proposed importing this Article 2.1 analysis have reconciled that approach with the text of Article 5.1.1.[30]

15. With reference to Article 5.1.1 of the TBT Agreement, could the third parties please provide their views on the pertinence of findings made by the Appellate Body and previous panels regarding:

(a) the terms "where the same conditions prevail" in the chapeau of Article XX of the GATT 1994 (e.g. Appellate Body Reports, *US – Tuna II (Article 21.5 – Mexico)*, paragraphs 7.301-7.308; and *EC – Seal Products*, paragraphs 5.296-5.306),

(b) the terms "discriminatory quantitative restrictions" in the Ad Note to Article XXVIII:1 of the GATT 1994 (e.g. Panel Report , *EU — Poultry Meat (China)*, paragraphs 7.193-7.199),

[29] *See US – Tuna II (Mexico) (AB)*, para. 405. Situations where the rules of a conformity assessment procedure resulted in a detrimental impact on the competitive opportunities of suppliers of products of certain Members might also be addressed under Article 5.1.2 of the TBT Agreement. For example, suppose a Member maintained a conformity assessment procedure that required assessments to be done in a location that was more convenient for suppliers of domestic products than for suppliers of like products of other Members, such that there was an impact on the competitive opportunities of the products of other Members. In that situation, there might not be a successful claim under Article 5.1.1, if suppliers of products of all Members had "no less favourable" rights to an assessment, under the rules of the procedure, as suppliers of like products of the importing Member, in a comparable situation. However, the conformity assessment procedure at issue might breach Article 5.1.2, in that it might be "more strict" or "applied more strictly" than necessary to give the importing Member its chosen level of confidence that products conform with the applicable technical regulation.

[30] *See* U.S. third party statement, para. 8.

(c) the terms "where the same conditions prevail" in the sixth recital of the preamble of the TBT Agreement (e.g. Appellate Body Reports, *US – Tuna II (Article 21.5 – Mexico)*, paragraph 7.89; *US – Tuna II (Mexico)*, paragraphs 213 and 339; and *US – Clove Cigarettes*, paragraph 173),

(d) the terms "where identical or similar conditions prevail" in Article 2.3 of the SPS Agreement (e.g. Appellate Body Report, *India – Agricultural Products*, paragraph 5.261; and Panel Reports, *Russia – Pigs (EU)*, paragraphs 7.1302-7.1312; *US – Animals*, paragraphs 7.572 and 7.579-7.584; and *India – Agricultural Products*, paragraphs 7.458-7.460),

(e) the concept of "comparable", when interpreting the terms "in different situations" in Article 5.5 of the SPS Agreement (e.g. Appellate Body Report, *EC – Hormones*, paragraph 216), and

(f) the concept of "similarly-situated", when interpreting the terms "non discriminatory" in footnote to paragraph 2(a) of the Enabling Clause (GATT Document L/4903, 28 November 1979, BISD 26S/203) (e.g. Appellate Body Report, *EC – Tariff Preferences*, *inter alia*, paragraphs 153-154 and 173-174)

when interpreting the terms "in a comparable situation"?

34. As the United States discussed in its third party submission and in response to the previous question, the phrase "in a comparable situation," as used in Article 5.1.1 of the TBT Agreement, should be interpreted based on the ordinary meaning of the terms in their context.[31] The reports cited state that the ordinary meaning of terms and the context in which they appear in a particular provision and in the relevant covered agreement inform the interpretation and application of the provision.[32]

35. Additionally, the reports state that the factual context of the dispute – in particular, the content of the measures at issue – can affect the "conditions" or "situations" that are relevant to the analysis under a particular provision.[33] As discussed above in response to question 4, the United States considers that the content of and evidence concerning the challenged measures in this dispute may be relevant to interpreting "in a comparable situation" in Article 5.1.1.[34]

16. Could the third parties please comment on whether and to what extent the likeness analysis under Article 2.1 of the TBT Agreement is relevant to Article 5.1.1, noting

[31] *See supra* U.S. response to question no. 14 to the third parties; U.S. third party submission, paras. 31-32.

[32] *See, e.g., EC – Seal Products (AB)*, para. 5.299; *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.301; *EU – Poultry Meat (China)*, para. 7.199; *India – Agricultural Products (AB)*, para. 5.261; *EC – Tariff Preferences (AB)*, paras. 153, 173.

[33] *See, e.g., EC – Seal Products (AB)*, para. 5.300; *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.307; *Russia – Pigs (Panel)*, paras. 7.1303-1311.

[34] *See supra* U.S. response to question 4 to the third parties.

in particular that Article 5.1.1 concerns "access for *suppliers* of like products" (emphasis added)?

36. As explained in the U.S. third party submission, the second element of the analysis under Article 5.1.1 of the TBT agreement is whether the products at issue are "like products." The fact that Article 5.1.1 refers to "suppliers of like products" does not change the nature of the relevant inquiry, namely, whether the products at issue are "like."

37. Consequently, the criteria that previous panel reports have considered under Articles I:1 and III:4 of the GATT 1994 and under Article 2.1 of the TBT Agreement may be relevant to an analysis of whether products are "like products" under Article 5.1.1 of the TBT Agreement. These criteria include: (i) "the products' properties, nature, and quality"; (ii) "the products' end-uses"; (iii) "consumers' tastes and habits – more comprehensively termed consumers' perceptions and behavior – in respect of the products"; and (iv) "the products' tariff classification."[35] As the Appellate Body has found, however, whether products are "like" is a fact-specific analysis that must be done on a case-by-case basis, and the key criteria on which this determination is based are not necessarily the same in every dispute.[36]

17. At paragraphs 590 and 591 of the Appellate Body Reports in *US – Continued Suspension / Canada – Continued Suspension*, which concerned, *inter alia*, the application of Article 5.1 of the SPS Agreement, the Appellate Body emphasised the limited mandate of panels and stated that it is the importing Member's task to perform a risk assessment and the panel's task to review that risk assessment and not to substitute its own scientific judgment for that of the importing Member's risk assessor. In the light of this, could the third parties please address the standard of review to be applied by a panel when reviewing a Member's application of its conformity assessment procedure(s) under Article 5.1.1 of the TBT Agreement? Is it for the Panel to determine whether the factual determinations made by the Russian Federation's authorities when suspending old certificates or rejecting new applications were correct, or rather whether the authorities' determinations were supported by sufficient reasoning and evidence?

38. Article 5.1 of the SPS Agreement imposes the requirement that Members' SPS measures be based on a risk assessment while other provisions of the SPS Agreement relate to the sufficiency of scientific evidence and other requirements of substance. By contrast, Article 5.1.1 of the TBT Agreement is a non-discrimination provision. Conceivably, Article 5.1.1 could be satisfied by any number of ways of granting "access" to conformity assessment procedures, provided that such access is granted to suppliers of like products originating in the territories of all Members on a non-discriminatory basis (*i.e.*, under "conditions no less favourable" to suppliers in a comparable situation).

39. Therefore, as discussed above, the focus of the Panel's analysis should be whether the "access" to the relevant conformity assessment procedures that Russia grants to suppliers of

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

[36] *See EC – Asbestos (AB)*, para. 102.

Ukrainian products is on a "less favourable" basis than the access granted to suppliers of like products of other Members in comparable situations. In undertaking its objective assessment, the Panel should examine whether each party has brought forward evidence to support the factual assertions that it makes in relation to the measure and circumstances relating to its operation.

18. With reference to Japan's (paragraphs 40-41), Canada's (paragraphs 23-40) and the United States' (paragraphs (39-42) third-party submissions, and Japan's (paragraphs 19-24) and the United States' (paragraph 11) third-party statements, could the third parties please provide their views on whether, and if so, to what extent the elements of the legal test developed under Article 2.2 of the TBT Agreement are applicable in the context of Article 5.1.2 of the TBT Agreement? In this regard, please comment on whether the differences in the text as well as the object and purpose of Articles 2.2 and 5.1.2 have any bearing on this issue, including the role, if any, that the subparagraphs of Article 5.2 (e.g. Articles 5.2.3, 5.2.6, 5.2.7) may have as context to understanding Article 5.1.2?

40. As the United States has explained, the starting point and critical guide for interpreting Article 5.1.2 is the text of that provision.[37] Article 5.1.2 is a distinct obligation and contains several important differences from the text of Article 2.2.[38] In light of these differences, reliance on an analogy to Article 2.2 seems unlikely to clarify the task of interpreting Article 5.1.2.

41. The first and second sentences of Article 5.1.2 refer, respectively, to conformity assessment procedures not "creating unnecessary obstacles to international trade" and not being "more strict or be applied more strictly than is necessary." Thus, if a conformity assessment procedure creates an "unnecessary" obstacle to trade, or if it is "more strict" or "more strictly applied" than "necessary" to give the importing Member adequate confidence of product conformity, the conformity assessment procedure breaches Article 5.1.2. Past reports examining whether a measure is "necessary" to a particular objective under different covered agreements, including Article 2.2 of the TBT Agreement, have examined the measure's contribution to its asserted objective, along with the trade-restrictiveness of the measure,[39] and compared it with any less trade-restrictive alternatives identified by the complaining Member.[40]

42. Beyond this, it is not clear why further analogizing to Article 2.2 is appropriate or helpful for purposes of interpreting Article 5.1.2. The text of Article 5.1.2 provides specific guidance as to the content of the relevant analysis and the standard for proposed alternative measures that is different from that provide by Article 2.2.

43. As the United States explained previously, Article 5.1.2 differs from Article 2.2 in several significant ways.[41] First, Article 2.2 refers to an undefined category of "legitimate

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[37] *See* U.S. third party statement, para. 11.

[38] *See* U.S. third party submission, paras. 39-40.

[39] *See US – COOL (AB)*, para. 374; *US – Tuna (Mexico) (AB)*, paras. 318-320; *US – Gambling (AB)*, paras. 306-308; *Brazil – Retreaded Tyres*, para. 178; *EC – Seal Products (Panel)*, para. 7.539.

[40] *See US – COOL (Article 21.5) (AB)*, paras. 5.200, 5.231; *US – Tuna II (Mexico) (AB)*, paras. 320, 322; *Korea – Various Measures on Beef (AB)*, para. 166.

[41] U.S. third party submission, para. 41; U.S. third party statement, para. 11.

objective[s]," whereas Article 5.1.2 indicates that the objective of a CAP is to assure that products conform to the relevant technical regulation. Second, Article 2.2 refers to the "fulfill[ment]" of objectives, which refers to a Member's right to achieve legitimate objectives "at the levels it considers appropriate," whereas Article 5.1.2 refers to the "adequate confidence" of a Member that products conform with a technical regulation or standard. Third, the second sentence of Article 2.2 refers to technical regulations being not "more trade-restrictive than necessary." In Article 5.1.2, by contrast, the first sentence refers to "unnecessary obstacles to international trade," but the second refers to measures not being "more strict or . . . applied more strictly than necessary." Finally, Article 5.2 provides further specificity concerning the obligation of Article 5.1.2, whereas there is no analogous provision for Article 2.2.

44. All these differences have bearing on the analysis of Article 5.1.2. For example, identification and analysis of the objective of a measure falling under Article 5.1.2 would be different than such an analysis under Article 2.2, because the former provision defines the relevant objective, while the latter does not. Further, the relationship between "unnecessary obstacles to international trade" in the first sentence and "more strict" or "more strictly applied than is necessary" in the second sentence is an issue unique to Article 5.1.2. The United States therefore reiterates that the text of Article 5.1.2 must be the starting point for interpretation of that provision.

19. With reference to the concepts of "risks non-conformity would create" and "adequate confidence" in Article 5.1.2 of the TBT Agreement, could the third parties please provide their views as to whether the analysis under Article 5.1.2 should take into account "the risks non-fulfilment would create" as foreseen in Article 2.2 of the TBT Agreement?

45. The phrase "taking account of the risks non-conformity would create" modifies the phrase "adequate confidence." As the United States explained previously, the relevant level of confidence, for purposes of analyzing the second sentence of Article 5.1.2, is the level of confidence of conformity sought by Russia, as reflected in the measure at issue.[42] This is the level that the responding Member has deemed "adequate . . . taking account of the risks non-conformity would create." The Panel should determine what this level is, based on the "design, structure, and operation" of the challenged measure, and any other relevant "evidence relating to the application of the measure."[43]

20. With reference to Article 5.2.2 of the TBT Agreement, could the third parties please provide their views as to the type of "corrective action" contemplated there, and who would take such action?

46. The United States understands the reference to "corrective action" in Article 5.2.2 of the TBT Agreement to refer to action that an applicant for an assessment under a conformity assessment procedure would take to correct deficiencies in their application. Such "corrective

[42] *See* U.S. third party submission, paras. 41-43.

[43] *US – Tuna II (Mexico) (AB)*, para. 314; *US – COOL (Article 21.5) (AB)*, para. 5.253.

action[s]" could include providing required information that was missing from the original application or correcting ministerial errors in the application.

21. With reference to Article 5.3 of the TBT Agreement, could the third parties please provide their views as to whether the TBT Agreement covers conformity assessment activities that take place after a certificate of conformity has been issued, such as inspection of production facilities or testing of products on the market (market surveillance), as a condition for maintaining that certificate?

47. Article 5.3 provides that nothing in Articles 5.1 or 5.2 prevents Members "from carrying out reasonable spot checks within their territories." However, it does not carve out conformity assessment activities that take place after a certificate of conformity has been issued from the scope of Articles 5.1 and 5.2 or other provisions of the TBT Agreement. Consequently, the United States considers that, to the extent such activities fall within the scope of Articles 5.1 or 5.2 or other provisions, such activities are covered by the TBT Agreement.

22. With reference to paragraph 5.327 of the Appellate Body Report in *US – COOL (Article 21.5 – Canada and Mexico)*, which concerns Article 2.2 of the TBT Agreement, could the third parties please provide their views regarding the distribution of the burden of proof with respect to the identification of, and substantiation with regard to, a less strict conformity assessment procedure or less strict application of a conformity assessment procedure under Article 5.1.2 of the TBT Agreement?

48. As numerous panels and the Appellate Body have found, "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."[44] Thus, the burden is on the complaining Member asserting an Article 5.1.2 claim to prove the elements of that provision.

49. As discussed in the U.S. third party submission, it is not necessary for a complainant making a claim under Article 5.1.2 to attempt to substantiate that claim by invoking the second sentence of Article 5.1.2.[45] And, where a complaining Member does refer to the second sentence, it is not necessary for it to seek to identify a less strict or less strictly applied alternative measure. Where an alternative has been identified, it would be for the complaining party to provide evidence and explanation as to the "strictness" of the identified alternative conformity assessment procedure.

23. With reference to question No. 5 of the list of questions sent by the Panel to the third parties on 14 July 2017, could the third parties please provide their views on

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[44] *US – Wool Shirts and Blouses (AB)*, p. 14, *EC – Seal Products (AB)*, para. 5.302.

[45] U.S. third party submission, paras. 38. 40; *cf. US – COOL (Article 21.5) (AB)*, para. 5.200 (finding, in the context of Article 2.2 of the TBT Agreement, that "comparison with proposed alternative measures should be understood as a 'conceptual tool' for the purpose of assessing whether a challenged technical regulation is more trade restrictive than necessary"); *US – Tuna II (Mexico) (AB)*, para. 322 (same).

whether *TBT Committee* instruments could be considered as evidence for factual findings (see e.g. *EC - Seal Products*, Panel Report, para. 7.295 fn 475)?

50. As mentioned above, the United States referred to the Decisions and Recommendations of the TBT Committee as potentially relevant factual evidence, not as "set[ting] out WTO obligations *per se*" or as interpreting those obligations.[46] WTO Members have agreed that, in the WTO, the Ministerial Conference (or General Council) have the exclusive authority to reach authoritative interpretations of the covered agreements (WTO Agreement Art. IX:2).

QUESTIONS FROM RUSSIA TO THE THIRD PARTIES

1. Is the concept of the level of protection applicable in the context of Article 2 and Article 5 of the TBT Agreement? Please explain why?

51. Please see the responses to questions 3, 5, 9, and 19 above, as well as paragraphs 41 to 43 of the U.S. third party submission.

2. With reference to the Appellate Body clarification in Argentina – Financial Services (para. 6.36) "that measures allowing the application of a presumption of 'likeness' will typically be measures involving a de jure distinction between products of different origin" would you express your view what does the words "solely based on origin" mean? What would be the basis for determination of such "origin"? Would it mean a "territory of a Member"? Or else? Would it be correct to interpret the said clarification as allowing the term "different origin" been replaced by "particular location within the territory of a Member"? In case of an affirmative answer, what will be a criterion for determination whether products are "of different location"? Please provide the relevant WTO provisions and jurisprudence on this matter.

52. Please see the response to question 1 above.

3. Can an unwritten measure be *de jure* inconsistent with WTO obligations? In case of affirmative answer, under what circumstances?

53. Please see the response to question 1 above.

[46] *See EC – Seal Products (Panel)*, para. 7.295, n.475.