

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

Third-Party Oral Statement
of the United States of America

July 10, 2017

Mr. Chairman, members of the Panel:

1. Thank you for this opportunity to present the views of the United States. In this statement, we will briefly address several interpretative issues concerning various articles of the *Agreement on Technical Barriers to Trade* (TBT Agreement). We address first the scopes of Articles 2.1 and 5.1, respectively, and second the relationship between the proper interpretations of Articles 5.1.1 and 5.1.2, on the one hand, and Articles 2.1 and 2.2, on the other. Finally, we address the inapplicability of the principle of *lex specialis* to the claims before the Panel.

I. Scope of Article 2.1 and Article 5.1 of the TBT Agreement

2. Articles 2 and 5 of the TBT Agreement concern two different categories of measures covered by the agreement. By its terms, Article 2 concerns the preparation, adoption, and applications of technical regulations. To fall within the scope of Article 2.1, a particular claim must be “in respect of” one or more “technical regulations,” as defined in Annex 1.1 of the TBT Agreement. By contrast, Article 5 concerns conformity assessment procedures, which are defined in Annex 1.3 of the TBT Agreement as a procedure “to determine that relevant requirements in technical regulations or standards are fulfilled.” To fall within the scope of Article 5.1, a claim must address the preparation, adoption, or application of a “conformity assessment procedure” where a “positive assurance of conformity” with a technical regulation or standard is required. Thus, while a single legal instrument may contain both a technical regulation and an applicable conformity assessment procedure, Articles 2 and 5 cover distinct matters through distinct disciplines.

3. Ukraine has challenged Measure III – which it describes as Russia’s “decision . . . not to accept in its territory the validity of the certificates issued to producers of Ukrainian railway

products in other CU countries”¹ – under both Article 2.1 and Article 5.1, raising different aspects of the measure in its claims under the two articles. Under Article 2.1, Ukraine argues that Russia interprets Technical Regulation 001/2011 as “apply[ing] only to goods produced in [Customs Union] countries,” and thereby imposes an “additional requirement of place of manufacture” in respect of the technical regulation that makes goods produced in Ukraine ineligible for importation into Russia.² Under Article 5.1, Ukraine argues that Russia requires “that only entities registered in the same country as the relevant certification body can apply for certification” and that this discriminates against suppliers of Ukrainian products and is an unnecessary obstacle to international trade.³

4. The United States recalls that panels need address only those claims and legal issues that “must be addressed in order to resolve the matter in issue in the dispute.”⁴ Here, Ukraine seemingly has advanced two competing explanations for the same conduct: (1) that Technical Regulation 001/2011, as applied by Russia, precludes the importation of Ukrainian products because they are not produced in the CU (under Article 2.1); and (2) that Ukrainian entities are afforded less favorable conditions of access to the conformity assessment procedure because they must be registered in the CU country issuing the conformity assessment certificate (under Article 5.1). Therefore, the Panel must assess, as a matter of fact, whether Russia interprets Technical Regulation 001/2011 or the related conformity assessment procedure as Ukraine alleges, *i.e.*, whether the conduct described by Ukraine reflects application of the technical regulation itself or

¹ Ukraine’s First Written Submission, para. 228.

² Ukraine’s First Written Submission, para. 315.

³ Ukraine’s First Written Submission, paras. 338, 347.

⁴ *US – Wool Shirts and Blouses*, p. 19; *US – Upland Cotton (AB)*, paras. 510-511, 747; *India – Solar Cells (AB)*, paras. 5.156-5.163.

a condition on access to the conformity assessment procedure. Resolution of this factual issue under municipal law will make it clear whether Ukraine’s claim against Measure III can be resolved under Article 2 or Article 5. If the Panel finds, for example, that as a factual matter, Russia does not apply Technical Regulation 001/2011 only to products produced within the CU, that would dispose of Ukraine’s claim under Article 2.1.⁵

II. Article 5.1.1 of the TBT Agreement

5. As the United States, other third parties, and the parties themselves have pointed out, the text of Article 5.1.1 requires that three elements must be established, in addition to the two elements in Article 5.1, to prove a measure is inconsistent with this provision. Specifically, the complaining Member must demonstrate that: (1) the measure concerns a “conformity assessment procedure”; (2) the products at issue are “like products”; and, (3) access to the conformity assessment procedure is granted to suppliers of products originating in the territory of a Member 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.”⁶

6. With respect to the third element, the text of Article 5.1.1 suggests that the analysis must cover several components. Specifically, a panel must assess whether “access” to the conformity assessment procedure is granted to suppliers of the products of the complaining 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.” In this regard, the United States agrees with the

⁵ See also Canada’s Third Party Submission, para. 55.

⁶ See U.S. Third Party Submission, para. 27; EU Third Party Submission, para. 37; Ukraine’s First Written Submission, para. 251; Russia’s Written Submission, para. 72.

formulation of this element set out in the written submissions of Ukraine⁷ and Russia.⁸ Some third parties have suggested that, for *de facto* discrimination claims, the Panel, in interpreting this element of Article 5.1.1, should apply the two-step analysis the Appellate Body has set out in the context of Article 2.1.⁹ The United States considers that such an analysis is not appropriate, given the significant differences in text and structure between Article 5.1.1 and Article 2.1.

7. As discussed above, Articles 5.1.1 and 2.1 have different scopes of coverage, which affect the analysis under each provision. Article 5.1.1 disciplines “access” to conformity assessment procedures, providing that Members should grant access to suppliers of like products originating in any Member under “conditions no less favourable” than those under which access is granted to suppliers of like products of other Members. “Access,” in Article 5.1.1, refers to the “right to an assessment of conformity under the rules of the procedure.” The ordinary meaning of “conditions” is “[c]ircumstances, *esp.* those necessary for a thing’s existence.”¹⁰ Thus, Article 5.1.1 requires an analysis of whether suppliers of like products of the complaining Member are granted the “right to an assessment of conformity under the rules of the procedure” under “circumstances” (and especially preconditions) that are “no less favorable” than the circumstances under which suppliers of like products of other Members are granted the right to an assessment. Article 2.1, on the other hand, disciplines the “treatment” accorded to like products “in respect of technical regulations.”

8. Further, Article 5.1.1 addresses the granting of access to conformity assessment procedures under “conditions no less favourable” only as between suppliers of products

⁷ See Ukraine’s First Written Submission, para. 251.

⁸ See Russia’s Written Submission, paras. 72, 77.

⁹ See Japan’s Third Party Submission, para. 22; EU’s Third Party Submission, para. 66.

¹⁰ See *Shorter Oxford English Dictionary*, vol. 1, p. 472, 4th edn. (1993).

originating in the complaining Member and suppliers of like products originating in any other Member, “in a comparable situation.” Article 5.1.1 requires an assessment of whether the “conditions” are “comparable” as between the suppliers of products of different Members accorded different access to the conformity assessment procedure. In this regard, importing the Article 2.1 analysis into Article 5.1.1 does not assist in interpreting the phrase “in a comparable situation,” and no meaning for that phrase is suggested by those third parties suggesting adoption of the Article 2.1 approach.¹¹

9. Finally, Article 5.1.1 concerns conformity assessment procedures, which have a defined objective, set out in Annex 1.3 of the TBT Agreement, as “determin[ing] whether the relevant requirements in technical regulations or standards are fulfilled.” Article 2.1, on the other hand, concerns technical regulations, which the Appellate Body has found may draw “legitimate regulatory distinctions” based on “legitimate objectives.”¹² Consequently, it would be inappropriate to transpose the second analytical step of the Article 2.1 analysis, as set out by the Appellate Body (*i.e.*, whether the detrimental impact “stems exclusively from a legitimate regulatory distinction”), to Article 5.1.1.

III. Article 5.1.2 of the TBT Agreement

10. As the United States explained in its written submission, Article 5.1.2 requires a complaining Member to demonstrate, in addition to the elements of Article 5.1, that the challenged measure involves a conformity assessment procedure that is “prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.” The second sentence of Article 5.1.2 explains that, under this obligation, conformity assessment

¹¹ See Japan’s Third Party Submission, para. 27; EU’s Third Party Submission, para. 67.

¹² See *US – Clove Cigarettes (AB)*, paras. 182, 225; *US – COOL (AB)*, para. 346; *US – Tuna II (Mexico) (AB)*, para. 297.

procedures must not be “more strict or be applied more strictly than is necessary” to give an importing Member “adequate confidence” of products’ conformity with the relevant technical regulation, “taking account of the risks non-conformity would create.” Thus, the text of Article 5.1.2 does not require a complaining Member to identify and establish a less *trade-restrictive* alternative measure that provides “adequate confidence” of conformity.¹³ However, in referring to “necessary,” the second sentence provides that proving the existence of an available, less “strict” or “strictly applied” alternative conformity assessment procedure that provides such “adequate confidence” would establish that a challenged conformity assessment procedure is inconsistent with Article 5.1.2.

11. Several parties and third parties have argued that Article 2.2 is an important guide in interpreting Article 5.1.2.¹⁴ The United States considers that, again, while similarities in the language of the two provisions may exist, the text of Article 5.1.2 must be the starting point for interpreting that provision. In this regard, there are key differences in the language of the two provisions that will distinguish the analyses. Article 5.1.2 and Annex 1.3 specify the purpose of conformity assessment procedures as being to ensure that products conform to the relevant technical regulation or standard, while Article 2.2 refers to an open list of “legitimate objectives.”¹⁵ Also, Article 5.1.2 refers to “adequate confidence” of conformity with a technical regulation, while Article 2.2 employs different language, addressing a technical regulation’s

¹³ See U.S. Third Party Submission, para. 40; *US – Tuna II (Mexico) (AB)*, para. 322; *but see* Russia’s Written Submission, para. 93.

¹⁴ See Japan’s Third Party Submission, para. 41; Canada’s Third Party Submission, paras. 39-40.

¹⁵ See U.S. Third Party Written Submission, para. 41.

contribution to the Member’s chosen objective.¹⁶ When interpreting Article 5.1.2, meaning must be given to the differences in language with Article 2.2.

IV. The Inapplicability of the Principle of *Lex Specialis*

12. In its third-party submission, the EU argues that Article 6 of the TBT Agreement constitutes *lex specialis* with regard to “the recognition of certificates of conformity issued by other countries,” and, for that reason, “excludes the application of Article 2.1” in this dispute.¹⁷ The EU points to no conflict between Article 2.1 and Article 6, merely stating that conflict theoretically could occur and that this, combined with the alleged greater specificity of Article 6, is sufficient to preclude application of Article 2.1.¹⁸ In fact, both articles set out positive obligations, and therefore no conflict is apparent, nor is it clear how a conflict could occur. As explained below, the argument is inconsistent with the text of the WTO Agreement concerning the structure of commitments Members have undertaken. Further, while the principle of *lex specialis* is not itself a customary rule of interpretation of public international law and cannot be applied to produce a different outcome than that under the text of the WTO Agreement, in any event the EU’s argument is not supported by the principle of *lex specialis*.

13. First, the argument is not consistent with Article II:2 of the WTO Agreement – a fundamental principle of the WTO Agreement – which provides that, “[t]he agreements and associated legal instruments included in Annexes 1, 2 and 3 . . . are integral parts of this Agreement, binding on all Members.” Under this provision, “the Multilateral Trade Agreements contained in the annexes are all necessary components of the ‘same treaty’ and they, together,

¹⁶ See U.S. Third Party Submission, paras. 41-42.

¹⁷ See EU’s Third Party Submission, para. 56.

¹⁸ EU’s Third Party Submission, para. 56.

form a single package of WTO rights and obligations.”¹⁹ Consequently, “a single measure may be subject, at the same time, to several WTO provisions imposing different disciplines.”²⁰

Therefore, “a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously.”²¹ Indeed, the interpretative note to Annex 1A to the WTO Agreement makes it clear that a provision of one covered agreement overrides another only “[i]n the event of conflict” and then only “to the extent of the conflict.”

14. As noted, the principle of *lex specialis* is not itself a customary rule of interpretation of public international law (referred to in DSU Article 3.2) and cannot produce a different outcome than the text of the WTO Agreement. Even aside from this, the principle would provide no support for the EU’s position. *Lex specialis* is a guide for what rule should be observed where there is a conflict between two provisions such that they cannot apply simultaneously; it does not apply where there is no conflict. As the panel in *Indonesia – Autos* found, *lex specialis* is “inseparably linked with the question of conflict . . . between two treaties or between two provisions” and “does not apply if the two treaties . . . deal with the same subject from different point[s] of view or [are] applicable in different circumstances, or one provision is more far-reaching than but not inconsistent with . . . the other” because “in such a case it is possible . . . to comply with both treaties at the same time.”²² Thus, because the text of these provisions do not reflect an actual conflict, *lex specialis* does not suggest that either must apply to the exclusion of the other.

¹⁹ *China – Raw Materials (AB)*, para. 5.47; see also *US – Upland Cotton (AB)*, para. 549; *EC – Asbestos (Panel)*, para. 8.16.

²⁰ *China – Rare Earths (Panel)*, para. 7.124; see, e.g., *EC – Bananas III (AB)*, para. 204; *US – Softwood Lumber IV (AB)*, para. 134.

²¹ *US – Upland Cotton (AB)*, para. 549; see also *Argentina – Footwear (AB)*, para. 81; *Japan – Alcoholic Beverages II (AB)*, p. 12..

²² *Indonesia – Autos*, para. 14.28, n.649; see *Thailand – Cigarettes (Panel)*, para. 7.1047.

V. Conclusion

15. This concludes the U.S. oral statement. We thank the Panel for its consideration of the views of the United States and look forward to answering any questions the Panel may have.