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

REQUEST FOR CONSULTATIONS BY UKRAINE

The following communication, dated 21 October 2015, from the delegation of Ukraine to the delegation of the Russian Federation and to the Chairperson of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with the Government of the Russian Federation pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and Article 14 of the *Agreement on Technical Barriers to Trade 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 (hereinafter – "railway products") from Ukraine.

I. Background

As a result of several measures undertaken by the Russian Federation with regard to importation of certain railway products, Ukrainian producers have been effectively banned from exporting to the Russian Federation. Consequently, exports of railway products from Ukraine to the Russian Federation reached USD 1,7 billion in 2013, decreased significantly in 2014 (USD 600 million) and continue to decrease further: the value of exports amounted to only USD 51 million during the first half of 2015.

On 15 July 2011 the Commission of the Customs Union of Belarus, Kazakhstan and Russian Federation¹ ("CU") adopted Decision No.710 concerning Technical Regulations No.01/2011,² No.002/2011,³ and No.003/2011⁴ ("Technical Regulations") setting safety and technical requirements for placing into the market of "railway rolling stock", "high-speed railway" and "rail transportation infrastructure" (the "Decision No.710"). According to the Decision No.710, the new Technical Regulations entered into force 3 years after their adoption, i.e. on 2 August 2014,⁵ and since that date all conformity assessment certificates for railway products have to be registered with the Federal Budgetary Organization "Register of Certification on the Federal Railway Transport" (FBO "RC FRT") in accordance with the new procedures set forth in the Technical Regulations.

¹ Presently, the Eurasian Economic Commission.

² Available at:

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

³ Available at:

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

⁴ Available at:

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

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

The Decision No.710 was then amended by Decision of the CU No.285 of 2 December 2013 "On Amendment of the Decision of the Commission of the CU No.710 of 15 July 2011"⁶ allowing for a transitional period of application, i.e. until 1 August 2016, of the conformity assessment certificates issued to producers of railway products prior to entry into force of the above-mentioned Technical Regulations. The amendment also established a transitional period until 1 August 2016 for the railway products which were not previously subject to mandatory conformity assessment procedures.

Importantly, the conformity assessment certificates previously registered with the FBO "RCFRT" to Ukrainian producers of railway products started being suspended as of late 2013. The suspension was justified by the Russian Federation authorities as "*technical issues*" and "*absence of appropriate conditions for the performance of [the required yearly] inspections*" of the production facilities of the Ukrainian producers. In spite of the repeated requests, no reasonable explanations for these unwarranted suspensions of the certificates have been provided by the Russian Federation authorities to Ukrainian exporters and to the Ukrainian authorities.

It is further submitted that the difficulties with obtaining the certificates does not occur in other countries of the CU. Indeed, with respect to the railway rolling stock products, the conformity assessment bodies of the CU located in the Republic of Belarus and in the Republic of Kazakhstan have already issued the conformity assessment certificates based on the CU Technical Regulation 001/2011 to Ukrainian producers of railway rolling stock products.

However, these certificates were considered not valid by the authorities of the Russian Federation. These authorities also determined that the product at stake could not be registered for operation in the territory of the Russian Federation.

As far as the railway transport infrastructure products are concerned, the Ukrainian producers of railroad switches affected by the suspension of their conformity assessment certificates, have submitted in December 2014 new applications for certificates pursuant to the new procedures set forth in the CU Technical Regulation 003/2011. However, in February 2015 these applications of the Ukrainian producers have been rejected by the Russian Federation authorities also without any reasonable explanation for the grounds of the rejection.

As a result of the above-mentioned suspensions of conformity assessment certificates and the impediment to apply for new certificates pursuant to the newly adopted CU Technical Regulations, the Ukrainian producers can no longer export their railroad products to the Russian Federation.

Ukraine has addressed on several occasions its concerns with regard to this matter in the WTO Committee of Technical Barriers to Trade as well as bilaterally with the Russian Federation. However, its efforts to resolve this matter failed to reach a mutually agreed solution.

II. Measures at issue

The legal instruments through which the Russian Federation imposes and administers the above-mentioned measures in a manner that affects Ukraine's rights under the WTO are the following:

- 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" and "On Safety of Railway Transportation Infrastructure";
- Decision of the Commission of the Customs Union 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" adopted by the Decision of the Commission of the Customs Union No.710 of 15 July 2011;

⁶ Available at: <http://www.eurasiancommission.org/docs/Download.aspx?IsDIg=0&ID=5008&print=1>

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- Customs Union Technical Regulation No.001/2011 "On Safety of Railway Transportation Infrastructure" adopted by the Decision of the Commission of the Customs Union No.710 of 15 July 2011;
 - Federal Law of the Russian Federation No. 184-FZ "On Technical Regulation";
 - Chapter 10 and Protocol on Technical Regulation to the Treaty on the Eurasian Economic Union of 29 May 2015;
 - 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");
 - Instructions of the Russian Federal Budget Organization Register of Certificates for the Federal Railway Transportation concerning the suspensions of certificates of Ukrainian producers ;
 - Protocol of the Ministry of Transport of the Russian Federation No. ATS-3 adopted on 20 January 2015 concerning invalidation of the certificates issued to certain railroad products of Ukrainian origin;
 - Letter of the Russian Federal Budget Organization Register of Certificates for the Federal Railway Transportation of 9 February 2015 No. 01305 rejecting the application for issuing conformity assessment certificates for certain railroad products (switches).

In addition, this request also covers in whatever form: any amendments, supplements, or extensions to or of the measures referred to in Section II, above; any measures replacing, renewing or implementing the measures referred to in Section II, above; and, any measures related to the measures referred to in Section II, above.

III. Legal basis for the complaint

In Ukraine's view, these measures appear to be inconsistent with the Russian Federation's obligations under the following provisions of the covered agreements:

1. 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 Member;
2. 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;
3. Article X:3(a) of the GATT 1994, because the laws, regulations, decisions and rulings with regard to the measures at issue were not administered in a uniform, impartial and reasonable manner;
4. Article XI:1 of the GATT 1994, because the Russian Federation instituted prohibitions or restrictions other than duties, taxes or other charges;
5. Article XIII:1 of the GATT 1994, because the Russian Federation instituted prohibitions or restrictions on imports from Ukraine, while importation of the like product from all other third countries or exportation of the like product to all other third countries was not similarly prohibited or restricted;
6. 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;

7. Article 2.2 of the TBT Agreement, because the measures at issue were prepared, adopted and applied with a view to or with the effect of creating unnecessary obstacles to trade;
8. Article 2.5 of the TBT Agreement, because the Russian Federation did not, upon request from the Ukrainian authorities, explain the justification for adoption of the measures at issue;
9. Article 5.1.1 of the TBT Agreement, because the procedures for assessing conformity prepared, adopted and applied by the Russian Federation accord less favourable treatment to like products originating in Ukraine than to like products of national origin or originating in any other country, in a comparable situation;
10. Article 5.1.2 of the TBT Agreement, because the procedures for assessing conformity contained in the measures at issue create unnecessary obstacles to international trade;
11. Article 5.2.1 of the TBT Agreement, because the conformity assessment procedures were not completed as expeditiously as possible and were undertaken in less favourable manner for products originating in the territories of other Members than for like domestic products;
12. Article 5.2.2 of the TBT Agreement, because the competent Russian Federation authorities have not promptly examined the completeness of the documentation of Ukrainian producers applying for conformity assessment certificates and have not informed these applicants in a precise and complete manner of all deficiencies; and because the competent authorities of the Russian Federation have not transmitted as soon as possible the results of the assessment in a precise and complete manner to the applicant so that corrective action may be taken if necessary;
13. Article 5.2.3 of the TBT Agreement, because the information requirements were not limited to what is necessary to assess conformity and determine the fees;
14. Article 5.2.5 of the TBT Agreement, because the fees imposed for assessing conformity of products originating in the territory of Ukraine are not equitable in relation to any fees chargeable for assessing the conformity of like products of Russian Federation origin or originating in any other country; and
15. Article 5.2.6 of the TBT Agreement, because the siting of facilities used in conformity assessment procedures and the selection of samples caused unnecessary inconvenience to applicants or their agents.

These violations appear to 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 reserves the right to raise further factual and legal claims regarding these measures in the course of the consultations. Ukraine also reserves its right to raise additional matters during the course of these consultations and in any future request for panel proceedings.

Ukraine looks forward to receiving response from the Russian Federation to this request and to fixing a mutually convenient date for consultations.
