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

REPORT OF THE APPELLATE BODY (WT/DS499/AB/R)

- The Russian Federation thanks the Appellate Body, and the Secretariat staff assisting it, for their hard work throughout the course of this dispute.

- Russia would like to raise certain concerns and share some views regarding particular findings by the Appellate body.

- First, in respect of part of paragraph 5.148 of the Appellate Body report which refers to Crimea we would like to note that, Russia views relevant part of the paragraph as no more than a quote by the Appellate Body of the content of the UN High Commissioner for Human Rights Report rather than the Appellate Body’s own conclusions or statements. Russia firmly stands on the position that questions of political nature, including those concerning state sovereignty over certain territories, are outside the mandate of the WTO, are not and cannot be governed by the WTO agreements, thus they cannot be subject matter of the WTO dispute and, consequently, cannot be subject to assessment or review by the WTO or any of its bodies, including the Appellate Body.

- Second, we would also like to raise particular concerns regarding certain substantive findings of the Appellate Body. However, before proceeding with specific comments, Russia would take this opportunity to remind on the relevant aspects of the dispute.

- In August 2018 Ukraine notified the DSB of its decision to appeal, among others, the Panel`s conclusions in respect of the instructions suspending certificates and the decisions rejecting applications for certificates. The Panel concluded that Ukraine had failed to establish inconsistency of Russia`s actions with its obligations under Articles 5.1.1 and 5.1.2 of the TBT Agreement. In this respect, the Appellate Body found numerous errors made by the Panel during objective assessment of the matter before it. In particular, the Appellate Body found that the Panel had erred in its application of Article 5.1.1 of the TBT Agreement to the facts of the present case as well as it had failed to make an objective assessment in allocating the burden of proof under Article 5.1.2 of the TBT Agreement. Therefore, the Appellate Body reversed the relevant Panel’s findings. However, it was not
in a position to complete the legal analysis due to the absence of sufficient factual findings and undisputed facts on the record.

- After several years of intensive work and defense of Russia’s legitimate interests, conclusions with “no decision” is something that can hardly be considered a satisfactory solution of the dispute.

- Russia welcomes the Appellate Body’s statement that a threat to the life and health of governmental employees in performing part of the conformity assessment procedure can be a relevant factor in comparing the situations for purposes of Article 5.1.1 of the TBT Agreement in a particular case. In the light of this statement the Russian Federation notes that Federal Budgetary Organization "Register of Certification on the Federal Railway Transport" would be in a position to conduct the inspections in the territory of Ukraine subject to safety of Russian officials, including absence of any threat of criminal prosecution of Russian officials pursuant to Criminal Code of Ukraine as amended by Laws of Ukraine dated 15 April 2014 № 1207-VII and dated 18 October 2018 № 2599-VIII as well as any similar procedures existing, or established in future, in Ukraine.

- Russia is disappointed by the manner in which the Appellate Body analyzed Russia’s claim pertaining to particular conduct by the Panel when the Panel stepped into the shoes of the complainant when identifying one of the measures at issue, describing the measure in a manner that Ukraine never presented, consequently, examining this measure from the perspective that was never put forward by the complainant, and, therefore, acting inconsistently with Article 11 of the DSU. The Appellate Body failed to address this separate claim based on the separate legal ground, simply stating that it is rejected on the same basis as Russia’s preliminary ruling claims, even though the matter at hand was substantively different from the one raised and examined in the context of the preliminary ruling claims.

- However, despite these concerns, Russia’s position is that overall examination of this dispute by the Appellate Body and its outcomes more than ever underline the importance of the Appellate Body in the WTO dispute settlement system and the need for the Membership to resolve the Appellate Body crisis in order to ensure security and predictability to the multilateral trading system and attainment of the objectives of the WTO Agreements for the benefit of all Members.
• Therefore, we welcome report by the Appellate Body in DS499. We would also like to state that most of the measures found by the Panel to be inconsistent with Russia’s WTO obligations have already been brought into conformity with the WTO rules.

• With respect to the so-called “non-recognition of the certificates of conformity” we note that the Protocol of the Ministry of Transport and the letters of Federal Railway Transport Administration challenged by Ukraine in accordance with its Panel Request were terminated in 2018 and revoked in March 2020, respectively. Thus, the existing legal framework applied in Russia does not contain any recognition requirements.

• With respect to the decisions rejecting the applications for certificates, Russian certification authorities have informed the respective Ukrainian producers by mail on particular requirements to be satisfied and the procedure to be followed in order to obtain the necessary certificates.

• Therefore, on this date the Russian Federation would like to inform the Membership that it has already complied with the recommendations by the Panel and the Appellate Body and brought all of its measures at issue into consistency with Russia’s obligations under the WTO Agreements.

• As a final note, Russia is obliged to draw Ukraine’s attention to Article 17.10 of the DSU, which establishes that the proceedings of the Appellate Body shall be confidential. In simple terms, it means that before official circulation of the Appellate Body report to the Members, as determined by the Appellate Body, any disclosure of information and/or any comments related to the substance of the report in media constitute explicit violation of the WTO confidentiality requirements.

• However, Ukraine repeatedly disrespects these requirements. In this particular case, Ukraine’s trade representative and deputy Minister felt compelled to share the outcomes of the dispute on his Facebook page before the official issuance of the report. This is not the first time when confidentiality requirements mean nothing to the Ukrainian side. We ask the DSB to condemn the continued violation by Ukraine of the basic WTO rules of procedure.