

import trade data submitted by Ukraine, also led the Panel to conclude that there was no sufficient evidence demonstrating the existence of the alleged systematic import prevention.

5.248. Finally, we recall that, in reviewing a panel's assessment of the measure at issue, the Appellate Body "will not lightly interfere" with the panel's factual findings, including those concerning "how a municipal law has been applied, the opinions of experts, administrative practice, or pronouncements of domestic courts".⁶³⁰ Instead, for a claim under Article 11 to succeed, the Appellate Body must be satisfied that the panel "has exceeded its authority as trier of facts".⁶³¹ In the present case, the Panel thoroughly examined both parties' evidence, assessed the credibility of that evidence, and reached its findings on this basis. For its part, Ukraine does not explain how a different approach by the Panel to examining the evidence on the record would have led to a different conclusion.

5.249. In sum, given the characteristics of the alleged unwritten measure, as presented by Ukraine, and the Panel's assessment of the evidence on the record, we do not consider that the Panel erred in its objective assessment of the matter before it under Article 11 of the DSU in finding that Ukraine failed to demonstrate that Russia systematically prevented the importation of Ukrainian railway products into Russia.

5.5.4 Conclusion

5.250. The Panel properly considered whether the individual components of the alleged unwritten measure form part of a common plan to prevent imports of Ukrainian products into Russia. The Panel also did not err in taking into consideration the rationale underlying these individual suspensions and rejections.

5.251. We therefore find that Ukraine has not established that the Panel failed to make an objective assessment of the matter before it under Article 11 of the DSU in finding that Ukraine failed to demonstrate that Russia systematically prevented the importation of Ukrainian railway products into Russia.

6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions:

6.1 The Panel's preliminary ruling

6.2. Russia has not established that the Panel erred in determining the scope of its terms of reference in this dispute.

- a. We therefore uphold the Panel's finding, in paragraphs 8.1.a.i, 8.1.d.iv, and 8.1.d.v of the Panel Report, that Russia has failed to establish that Ukraine's panel request is inconsistent with Article 6.2 of the DSU.

6.2 The third measure as a "general" non-recognition requirement

6.3. Russia has not established that the Panel acted inconsistently with Article 11 of the DSU in finding that the third measure is of a "general" character and flows from CU Technical Regulation 001/2011.

- a. We therefore uphold the Panel's finding, in paragraph 7.861 of the Panel Report, that the third measure as a general non-recognition requirement, which the relevant Russian

⁶³⁰ Appellate Body Report, *China – Publications and Audiovisual Products*, para. 177. See also e.g. Appellate Body Reports, *US – Wheat Gluten*, para. 151; *US – Carbon Steel*, para. 142; *US – Upland Cotton*, para. 399.

⁶³¹ Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 713. See also e.g. Appellate Body Report, *US – Wheat Gluten*, para. 151.

authorities considered to flow from CU Technical Regulation 001/2011, had been demonstrated to exist.

6.3 The third measure as a single measure

6.4. Russia has not established that Ukraine failed to meet its *prima facie* burden to establish the existence of the third measure as a single measure.

- a. We therefore uphold the Panel's finding, in paragraph 7.861 of the Panel Report, that the third measure had been demonstrated to exist.

6.4 The third measure and the Panel's terms of reference

6.5. Russia's claim regarding the terms of reference concerning the third measure is based on the premise that the Panel erred in its preliminary ruling. We have rejected that allegation of error and upheld the Panel's preliminary ruling.

- a. Consequently, we uphold the Panel's finding, in paragraphs 7.823 and 8.1.d.i of the Panel Report, that the non-recognition requirement based on the local production condition is properly before the Panel.

6.5 The third measure and the local registration condition

6.6. The Panel's statements challenged by Russia as constituting "findings" concerning the local registration condition were either merely descriptive statements or concerned the third measure within the Panel's terms of reference.

- a. Consequently, we find that Russia has failed to establish that the Panel acted inconsistently with Article 11 of the DSU by continuing to make findings with respect to a matter that was not within its terms of reference.

6.6 Article 5.1.1 of the TBT Agreement

6.7. Under Article 5.1.1 of the TBT Agreement, the assessment of whether access is granted under conditions no less favourable "in a comparable situation" should focus on factors having a bearing on the conditions for granting access to conformity assessment to suppliers of like products and the ability of the regulating Member to ensure compliance with the requirements in the underlying technical regulation or standard. Thus, factors relevant to the inquiry of whether a "comparable situation" exists have to affect the specific suppliers to which the conditions for access to conformity assessment granted by the importing Member relate.

6.8. We consider that the Panel did not err in its interpretation of the phrase "in a comparable situation" in Article 5.1.1 of the TBT Agreement. However, in examining factors relevant for establishing the existence of a "comparable situation" in the particular circumstances of this case, the Panel relied too much on information concerning the security situation in Ukraine generally, and did not focus sufficiently on aspects specific to the suppliers who are claimed to have been granted access under less favourable conditions or to the location of the suppliers' facilities. We therefore find that the Panel erred in its application of Article 5.1.1 of the TBT Agreement to the facts of the present case in finding that, between April 2014 and December 2016, Ukrainian suppliers of railway products were denied no less favourable access in a situation that was not comparable to the situation in which Russia granted access to suppliers of Russian railway products and suppliers of railway products from other countries. For the same reasons, we find that the Panel erred in its application of Article 5.1.1 of the TBT Agreement to the facts of the present case in finding that less favourable access conditions were granted to Ukrainian suppliers of railway products in a situation that was not comparable also in the context of the two decisions through which the FBO rejected applications submitted by Ukrainian suppliers under CU Technical Regulation 001/2011 (i.e. decisions 1 and 2).

- a. Consequently, we reverse the Panel's finding, in paragraphs 7.394 and 8.1.b.i of the Panel Report, that Ukraine failed to establish, with respect to each of the 14 challenged

instructions suspending certificates, that Russia acted inconsistently with its obligations under Article 5.1.1 of the TBT Agreement.

- b. We also reverse the Panel's finding, in paragraphs 7.638 and 8.1.c.i of the Panel Report, that Ukraine failed to establish, with respect to the two decisions through which the FBO "returned without consideration" applications for certificates submitted by Ukrainian producers under CU Technical Regulation 001/2011, i.e. decisions 1 and 2, that Russia acted inconsistently with its obligations under Article 5.1.1 of the TBT Agreement.

6.7 Article 5.1.2 of the TBT Agreement

6.9. Ukraine was not required to demonstrate, for purposes of showing that the proposed alternative measure consisting in the conduct of off-site inspections was *prima facie* reasonably available, whether the measure described in Article 5.3 of CS FRT 12-2003 and Article 7.4.1 of PC-FZT 08-2013 could have applied in the specific instances related to the suspensions of certificates at issue. However, the Panel reasoned that, because information on the absence of non-conformities and consumer complaints was in principle available to Ukraine, it was for Ukraine to submit evidence relating to the application of these conditions to the products covered by the suspensions at issue. We therefore find that the Panel failed to make an objective assessment of the matter before it under Article 11 of the DSU in allocating the burden of proof under Article 5.1.2 of the TBT Agreement in its analysis of this alternative measure. We also find that Ukraine failed to establish that the Panel erred in making an objective assessment of the matter before it pursuant to Article 11 of the DSU in finding that Ukraine failed to establish that the other three proposed alternatives were reasonably available.

- a. Consequently, we reverse the Panel's finding, in paragraphs 7.544 and 8.1.b.ii of the Panel Report, that Ukraine failed to establish, with respect to each of the 14 instructions suspending certificates, that Russia has acted inconsistently with its obligations under Article 5.1.2, first and second sentences, of the TBT Agreement.

6.8 Systematic prevention of imports

6.10. The Panel properly considered whether the individual components of the alleged unwritten measure form part of a common plan to prevent imports of Ukrainian products into Russia. The Panel also did not err in taking into consideration the rationale underlying these individual suspensions and rejections.

- a. We therefore find that Ukraine has not established that the Panel failed to make an objective assessment of the matter before it under Article 11 of the DSU in finding that Ukraine failed to demonstrate that Russia systematically prevented the importation of Ukrainian railway products into Russia.

6.9 Recommendation

6.11. The Appellate Body recommends that the DSB request Russia to bring its measures found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the TBT Agreement and the GATT 1994, into conformity with its obligations under those Agreements.

Signed in the original in Geneva this 6th day of December 2019 by:

Thomas R. Graham
Presiding Member

Hong Zhao
Member

Shree B. C. Servansing
Member