

Arbitration Panel established pursuant to Article 307
of the Association Agreement between Ukraine, of the one part, and the European Union and
its Member States, of the other part

***UKRAINE – MEASURES RELATED TO CERTAIN UKRAINIAN EXPORT
RESTRICTIONS ON WOOD***

Written Submission of Ukraine

11 March 2020

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TABLE OF CASES CITED

Short title	Full Case Title and Citation
<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, p. 1779
<i>Argentina – Import Measures</i>	Appellate Body Reports, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R , adopted 26 January 2015, DSR 2015:II, p. 579
<i>Canada – Autos</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R , WT/DS142/AB/R , adopted 19 June 2000, DSR 2000:VI, p. 2985
<i>China – Rare Earths</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R , adopted 29 August 2014, DSR 2014:III, p. 805
<i>China – Rare Earths</i>	Panel Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/R and Add.1 / WT/DS432/R and Add.1 / WT/DS433/R and Add.1, adopted 29 August 2014, upheld by Appellate Body Reports WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R , DSR 2014:IV, p. 1127
<i>China – Raw Materials</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R , adopted 22 February 2012, DSR 2012:VII, p. 3295
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R , adopted 5 April 2001, DSR 2001:VII, p. 3243
<i>EC – Seal Products</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R , adopted 18 June 2014,

	DSR 2014:I, p. 7
<i>EU – Energy Package</i>	Panel Report, <i>European Union and its member States – Certain Measures Relating to the Energy Sector</i> , WT/DS476/R and Add.1, circulated to WTO Members 10 August 2018
<i>India – Quantitative Restrictions</i>	Panel Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , WT/DS90/R , adopted 22 September 1999, upheld by Appellate Body Report WT/DS90/AB/R , DSR 1999:V, p. 1799
<i>Indonesia – Import Licensing Regimes</i>	Appellate Body Report, <i>Indonesia – Importation of Horticultural Products, Animals and Animal Products</i> , WT/DS477/AB/R , WT/DS478/AB/R , and Add.1, adopted 22 November 2017, DSR 2017:VII, p. 3037
<i>Russia – Traffic in Transit</i>	Panel Report, <i>Russia – Measures Concerning Traffic in Transit</i> , WT/DS512/R and Add.1, adopted 26 April 2019
<i>Thailand – Cigarettes (Philippines)</i>	Panel Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/R , adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R , DSR 2011:IV, p. 2299
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R , adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R , adopted 20 May 1996, DSR 1996:I, p. 3
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R , adopted 6 November 1998, DSR 1998:VII, p. 2755

TABLE OF ABBREVIATIONS

Abbreviation	Definition
Association Agreement	Association Agreement between Ukraine, of the one part, and the European Union, European Community for Atomic Energy and its Member States, of the other part
CCIBIS	Carpathian Integrated Biodiversity Information System
DSB	WTO Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes or Dispute Settlement Understanding (Annex 2 to the WTO Agreement)
EURAC	Eurac Research, private research centre headquartered in Bozen, South Tyrol, Italy
EURATOM	The European Atomic Energy Community
EUTR	Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market
FLEGT	European Union Forest Law Enforcement, Governance and Trade Action Plan
GHG	Greenhouse gases
LULUCF	Land Use, Land-Use Change and Forestry
MFN	Most-Favoured Nation Treatment
ORDLO	The occupied territory of the certain areas of the Donetsk and Luhansk regions of Ukraine
OSCE	Organization for Security and Co-operation in Europe
GATT 1994	The General Agreement on Tariffs and Trade 1994
SAEE	The State Agency on Energy Efficiency and Energy Saving of Ukraine
UAH	The national currency of Ukraine — Ukrainian hryvnia
UCG FEA	Ukrainian Classification of Goods for Foreign Economic Activity
UNCCD	The United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1994)
UNECE	United Nations Economic Commission for Europe
UNEP	The United Nations Environment Programme
UNEP WCMC	The United Nations Environment World Conservation Monitoring

	Centre
UNFCCC	United Nations Framework Convention on Climate Change (1992)
USSR	Union of Soviet Socialist Republics
VCLT	Vienna Convention on the Law of Treaties
The Parliament of Ukraine	The Verkhovna Rada of Ukraine
WTO	World Trade Organization

TABLE OF EXHIBITS

Exhibit No.	Title
Exhibit UKR-01	Public Annual Report (2019) of the State Forest Resources Agency of Ukraine
Exhibit UKR-02	Law of Ukraine “On Elements of the State Regulation of Business Operators’ Activities Related to the Sale and Export of Timber”
Exhibit UKR-03	Law of Ukraine “On Amendments to the Law of Ukraine “On Elements of the State Regulation of Business Operators’ Activities Related to the Sale and Export of Timber” concerning the Temporary Prohibition of Export for Unprocessed Timber”
Exhibit UKR-04	Abstract from the Constitution of Ukraine
Exhibit UKR-05	Proposals of the President of Ukraine to the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine on the Preservation of Ukrainian Forests and Prevention of Illegal Removal of Raw Timber”
Exhibit UKR-06	Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine concerning the Preservation of Ukrainian Forests and preventing the Illegal Export of Unprocessed Timber”
Exhibit UKR-07	Abstracts from the Law of Ukraine “On the Rules of Procedure of the Verkhovna Rada of Ukraine”
Exhibit UKR-08	Abstracts from the Forest Code of Ukraine
Exhibit UKR-09	Resolution of the Cabinet of Ministers of Ukraine dated September 2, 2019, No. 829 “Some issues of optimization of the system of central executive authorities”
Exhibit UKR-10	Law of Ukraine “On ratification of the convention on biological diversity”, No. 257/94-BP, 29 November 1994
Exhibit UKR-11	Law of Ukraine “On Ukraine's Accession to the Convention on the Conservation of European Wildlife and Natural Habitats, 1979” No. 436/96-BP, 29 October 1996
Exhibit UKR-12	Law of Ukraine “On Ratification of the Kyoto Protocol to the United Nations Framework Convention on Climate Change”
Exhibit UKR-13	Law of Ukraine “On ratification of the Paris Agreement”
Exhibit UKR-14	Paris Agreement
Exhibit UKR-15	Law of Ukraine “On Ukraine’s Accession The United Nations Convention To Combat Desertification In Countries Experiencing Serious Drought and/or Desertification, Particularly In Africa”
Exhibit UKR-16	Law of Ukraine “On Ratification of the Framework Convention on the Protection and Sustainable Development of Carpathians”
Exhibit UKR-17	Law of Ukraine “On Ratification of the Protocol on Sustainable Forest Management to the Framework Convention on Protection and Sustainable Development of the Carpathians”
Exhibit UKR-18	The letter of the State Agency on Energy Efficiency and Energy

	Saving of Ukraine (SAEE) of 05.04.2019 No. 356-01/17/3-19
Exhibit UKR-19	Law of Ukraine “On Main Principles of State Environmental Policy of Ukraine for the Period of up to 2020”
Exhibit UKR-20	Law of Ukraine “On the Red Book of Ukraine”
Exhibit UKR-21	The letter of 22 July 2015 (no. NE/pcc/S(2015)3337275) to the Prime Minister of Ukraine of the European Commissioner for Trade
Exhibit UKR-22	Decree of the President of Ukraine “On the creation of the Natural Reserve “Gorgany”, No. 831/96, 12 September 1996
Exhibit UKR-23	Resolution of the Cabinet of Ministers of Ukraine No. 977 dated 16 September 2009 “On Approval of the State Target Program “Forests of Ukraine” for 2010 – 2015”
Exhibit UKR-24	Decree of the President of Ukraine №381 / 2017 “On additional measures for forestry development, rational use of nature and conservation of nature reserve fund objects”
Exhibit UKR-25	Resolution of the Cabinet Ministers of Ukraine “On Approval of the Rules of Reforestation and Afforestation”, No. 97, 16 January 1996
Exhibit UKR-26	Decree of the President of Ukraine “On biosphere reserves in Ukraine”
Exhibit UKR-27	Order of the State Forestry Committee of Ukraine No. 371 dated 29.12.2008 “On approval of indicators of the regional standards of the optimal woodland coverage of the territory of Ukraine”
Exhibit UKR-28	Resolution of the Cabinet Ministers of Ukraine of July 27, 1995 No. 559, The Rules of Final Felling Operations in the Forests of Ukraine
Exhibit UKR-29	Resolution of the Cabinet Ministers of Ukraine of July 27, 1995 No. 555, “On Approval of the Sanitary Rules in the Forests of Ukraine”
Exhibit UKR-30	Resolution of the Cabinet Ministers of Ukraine 26.10.2016 No. 756 “On Amendments to the Resolution of the Cabinet of Ministers of Ukraine of July 27, 1995 No. 555 and May 12, 2007 No. 724”
Exhibit UKR-31	Resolution of the Cabinet Ministers of Ukraine 23.05.2007 No. 761 “On the settlement of issues on special usage of forest resources”
Exhibit UKR-32	Resolution of the Cabinet Ministers of Ukraine 22.10.2008 No. 929 “On approval of the Rules of Principal felling in the Mountain Forests of the Carpathians”
Exhibit UKR-33	Law of Ukraine “On Moratorium on Clear Cutting on Mountain Slopes of Fir-Beech Forests in the Carpathian Region” No. 1436-III, dated 10 February 2000
Exhibit UKR-34	Decree of the Cabinet Ministers of Ukraine 18.04.2006 No. 208-r

	“On the approval of the Concept of Forestry Reform and Development”
Exhibit UKR-35	Law of Ukraine “On Nature Reserve Fund of Ukraine” No. 2456-XII, dated 16 June 1992
Exhibit UKR-36	Resolution of the Cabinet Ministers of Ukraine 29.04.2002 No. 581 “On approval of the State Program “Forests of Ukraine” for 2002-2015”

EXECUTIVE SUMMARY

1. In these proceedings the European Union claims that a “permanent prohibition on exports of timber and sawn wood species” (the “2005 export ban”) and a “temporary prohibition, for a period of 10 years, on exports of all other unprocessed timber” (the “2015 export ban”) constitute “prohibitions” on exports from Ukraine to the European Union within the meaning of both the first sentence of Article 35 of the Association Agreement and Article XI:1 of the GATT 1994 and as such, they are incompatible with Article 35 of the Association Agreement. In its Written Submission the European Union claims that mentioned above measures have a “manifest protectionist purposes” and “are not applied in conjunction with an effective restriction on domestic consumption.”
2. At the same time contradicting to its claims the European Union states that “the 2018 amendment” provided limitation on the domestic use of unprocessed timber arguing the absence of justification of such limitation.
3. Ukraine submits that “2005 export ban” was not adopted in the pursuit of commercial or economic aims, but for environmental reason. In 2005 valuable and rare wood species were considered as species that are threatened and therefore having a high risk of extinction. Deforestation, degradation, wood harvesting and urban development are other significant threats. For threatened species, livestock farming, land abandonment and other ecosystem modifications are the major threats, affecting the survival of trees and their habitats.
4. The important point is that mentioned wood species are not intended for the industrial production of sawn wood. As is apparent, their purpose is the production of fruits and nuts or other products from flowering.
5. Therefore “2005 export ban” prohibits the export of sawn wood only of valuable and rare wood species. Thus Ukraine has a responsibility to conserve these unique species that contribute so much to the landscapes, ecosystems of Ukraine. The “2005 export ban” was adopted in order to improve the status of Ukrainian trees, the attempt to develop policy to ensure that the species considered threatened are protected.
6. Referring to the “2015 export ban” Ukraine claims that there are three aspects of the “2015 temporary export ban” which should be considered by the Arbitration Panel: (i) exhaustion of the forests; (ii) the temporary nature of the measure; (iii) restrictions on domestic production or consumption.
7. In this regard Ukraine submits that the forests are exhaustible natural resources and that the “2015 temporary export ban” was introduced in order to stop intensive deforestation, which

could lead to unpredictable results (e.g. floods, habitat destruction, and general complicated ecological situation) and in order to protect these exhaustible natural resources.

8. Ukraine emphasizes that the measure under consideration is temporary as it was introduced “for 10 years”, therefore Ukraine defines this measure as “2015 temporary export ban”. Ukraine submits that it was to improve the effectiveness of the forest management and to stop widespread uncontrolled deforestation.

9. Intensive deforestation can cause exhausting of forests and have a negative impact on environment. The abovementioned “2015 temporary export ban” is also required to solve situation with uncontrolled deforestation and to gain time for developing relevant legislation and regulation in forestry management.

10. The “2015 temporary export ban” was made effective in conjunction with restrictions on domestic production or consumption in line with the requirements of point “g” of Article XX of GATT 1994 relating to the conservation of exhaustible natural resources.

11. Therefore, the European Union is mistaken when arguing that the measures are not applied in conjunction with an effective restriction on domestic consumption. Moreover, the “2018 Amendment” is not specified as a claim neither in the request for the establishment of an arbitration panel nor in the Written Submission, thus it is outside the Arbitration Panel’s terms of reference.

12. In its Written Submission the European Union bases its arguments regarding the lawmaker’s rationale on Explanatory Notes only. Ukraine claims that an Explanatory Note is an informational, analytical document, but not a legal one, which contains an explanation of the content of particular provisions of draft laws, the causes of an event or a situation but it does not become a part of the underlying law. The purposes of a particular law can only be found in the law itself.

13. Ukraine also submits that the measures at issue were necessary to protect human, animal or plant life or health because of the number of other additional reasons.

14. Thus Ukraine has continuously been increasing environmental standards aimed at sustainable forest management by way of implementing the state protection policy of forests through the adoption of a variety of agency rules dealing with the issues at hand.

15. Various administrative and statutory actions aimed at increasing environmental standards in logging, reducing the amount of continuous felling and introducing a total logging ban in particular forests were put in place as a part of Ukraine’s environmental safety policy

aimed at the preservation of forests but did not provide expected results in decrease of felling and the increase of the woodland.

16. Also due to the lack of budget during a long period of time governmental authorities did not manage to conduct an inventory of the forests in Ukraine as well as introduce the system of the monitoring of the state of forests and effective forest management.

17. Moreover, in the present case the Arbitration Panel should take into consideration the specific circumstances, in particular “*emergency in international relations*” within the meaning of Article XXI (b) of the GATT 1994 that has taken place between Ukraine and the Russian Federation since 2014 and *inter alia* has led to awful extermination of flora and fauna of the part of Ukraine where military actions are conducted, especially a great part of the forest was destroyed.

Article 35 of the Association Agreement and Article XI of the GATT 1994

18. Ukraine submits that what is not allowed under the provisions of Article 35 of the Association Agreement are measures characterized as having an “effect” “on the export” of “good destined for the territory of the other Party”. A measure which object appears to restrict exportation but which does not carry out such effect has no reason to be a concern. Article 35 of the Association Agreement is not about what Law makers think they do – which pertains to domestic political considerations, but about what the Laws do in terms of effect on trade.

19. In this regards Ukraine claims that contrary to what the European Union argues, Article XI:1 of the GATT 1994 is not “incorporated by reference” as a whole by Article 35 of the Association Agreement. What is incorporated by reference are the exceptions to the prohibition as set out in Article XI of the GATT 1994. The prohibition is the one indicated by Article 35 of the Association Agreement. The exact meaning of the prohibition as set out in Article 35 of the Association Agreement can therefore not be deemed a copy-cat of the interpretation of Article XI:1 of the GATT 1994.

20. Ukraine claims that the European Union failed to prove any of its claims in relation to the alleged violation of Article 35 of the Association Agreement and Article XI of the GATT 1994.

21. In paragraph 54 of its Written Submission the European Union just claims that the “2005 export ban” and “2015 temporary export ban” constitute “prohibitions” on exports from Ukraine to the European Union within the meaning of both the first sentence of Article 35 of the Association Agreement and Article XI:1 of the GATT 1994. But, despite the fact that what must be demonstrated is only an inconsistency with the first sentence of Article 35 of the

Association Agreement, the European Union does not proceed to such demonstration since it does not argue about the actual effects of the challenged legislations.

Article 36 of the Association Agreement (Article XX of the GATT 1994)

22. In case the Arbitration Panel finds that Ukraine acted inconsistently with Article 35 of the Association Agreement and Article XI of the GATT 1994 Ukraine submits that measures are justified under Article 36 of the Association Agreement and Article XX of the GATT 1994.

Ukraine recalls that the “2005 export ban” falls within the range of policies provided in sub-paragraph (b) while the “2015 temporary export ban” falls within the range of policies provided in sub-paragraph (g) and, at the same time, the requirements of the Chapeau of Article XX of the GATT 1994 are satisfied, taking into account that there are no less-trade restrictive alternatives available.

Trade and sustainable development

23. Ukraine wants to stress that this Arbitration Panel has the task not only to assess relevant WTO Agreements and case law, but to evaluate the conformity of the challenged measures with the Association Agreement which has in some areas broader obligations different from the WTO ones. Therefore, the Arbitration Panel when interpreting Article 36 of the Association Agreement has to take into account sustainable development obligations prescribed in Articles 290, 294 and 296 of the Association Agreement.

24. Therefore, Ukraine demonstrated (i) the “2005 export ban” and (ii) the “2015 temporary export ban” were applied in accordance with Article 35 of the Association Agreement (Article XI of the GATT 1994) or, in any case, consistently with Article 36 of the Association Agreement (Article XX of the GATT 1994) and requests the Arbitration Panel to reject the European Union’s claims and arguments.

1. INTRODUCTION

1. Ukraine welcomes this opportunity to present its views in the case brought by the European Union against the application of export restrictions by Ukraine of unprocessed timber (“the measure”).

2. This Submission sets out the response of Ukraine to the claims and allegations made in European Union’s Written Submission dated 17 February 2020. For the reasons set out in this Submission, Ukraine requests the Arbitration Panel to reject the European Union’s claims and arguments, and find instead that, with respect to each of them, Ukraine acted consistently with its rights and obligations under the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (“Association Agreement”) and the General Agreement on Tariffs and Trade 1994 (“GATT 1994”).

3. The case at issue contains a number of topics that are relatively complex and require a nuanced consideration, therefore before entering into the discussion of the legal aspects of this case, Ukraine wishes to provide the Arbitration Panel with some background information in respect of the substantive aspects of the dispute.

4. Human life and health are recognized as the highest constitutional value.¹ Bearing in mind the Chornobyl Nuclear Power Plant Disaster², the Ukrainian society is aware that the protection of human lives is inextricably linked to protection of animals and plants lives, and preservation of biodiversity.

5. Ukraine pursues a comprehensive environmental commitment over last twenty years. In particular, Ukraine – as a party to numerous environmental treaties – is committed to meeting sustainable development goals. The Association Agreement, like other agreements of the same kind,³ can surely be seen as one of those treaties aiming at contributing to these goals.⁴

6. As a progressive instrument, the Association Agreement encompasses the modern and necessary approach of international trade: obligations regarding trade cannot prevail on environmental, social or health policies, but must be interpreted in regard of these policies. Article 289 of the Association Agreement supports this view since it provides that:

¹ Article 3 of the Constitution of Ukraine, Exhibit UKR-04.

² https://en.wikipedia.org/wiki/Chernobyl_disaster

³ In most recent trade agreements concluded by the EU there are sustainable development chapters. Those chapters contain commitments to respect multilateral labour and environmental agreements and to ensure that labour and environment standards are not lowered in order to attract trade.

⁴ See Chapter 13 of the Association Agreement titled “Trade and Sustainable Development”.

“The Parties reaffirm their commitment to promoting the development of international trade, in such a way as to contribute to the objective of sustainable development and to ensuring that this objective is integrated and reflected at every level of their trade relationship.”

7. This language is straightforward: trade obligations cannot be interpreted in such a way as to degrade the objective of sustainable development. The progressive character of the Association Agreement does permit a sound accommodation between the aim of creating a free trade area where only strictly necessary restrictions to trade will be maintained, and the necessity to fully respect non-trade legitimate concerns. Article 25 of the Association Agreement is clear in this respect, providing for a period of 10 years for the parties to adapt their respective policies, in a process of cooperation, to achieve a free-trade area. Accordingly, since the Association Agreement has been in full force for three years only, the parties have allowed themselves for seven more years, until 2027, to achieve its goals. This is a key point in this case, since it highlights that the European Union, rather than putting in motion the realization of the free-trade area in a progressive way through cooperation, prefers to sue Ukraine and request the withdrawal of an important part of its environmental protection policy.

8. Under the Association Agreement the Parties have both specific rights and general trade obligations, not only trade obligations, as the European Union seems to consider. Trade obligations must, therefore, be understood and applied in light of the rights, and of course in such a way as to avoid depriving these rights of any substance.

9. Article 290 (1) of the Association Agreement recognizes the right of Ukraine to establish and regulate its own level of environmental protection and sustainable development policies and priorities insofar as it is “in line with relevant internationally recognised principles and agreements” – which is the case here.

10. The European Union fails to acknowledge that Ukraine cannot be required to lift the measures which it considers protective of the environment, with a view to export more timber to the European Union, since Article 296 of the Association Agreement provides that:

“A Party shall not weaken or reduce the environmental or labour protection afforded by its laws to encourage trade or investment, by waiving or otherwise derogating from, or offering to waive or otherwise derogate from, its laws, regulations or standards, in a manner affecting trade or investment between the Parties”.

11. As Ukraine will demonstrate in this Submission, the European Union’s claims are based on the erroneous understanding of an intentional misrepresentation of Ukrainian legislation.

Ukraine will demonstrate, based on legal arguments and evidence, that Ukraine's challenged measures are consistent with its commitments and rights under the Association Agreement and WTO law.

12. The case at issue concerns certain Ukrainian measures, adopted for the most part before the provisionsal of Title IV "Trade and trade-related matters" of the Association Agreement entered into force⁵. The measures listed in the request for establishment of an arbitration panel of the European Union predate 2016 for the most part.

13. They principally include:

(i) a permanent prohibition on exports of timber and sawn wood of ten wood species (the "2005 export ban"), which was enacted by the Law of Ukraine "On Elements of the State Regulation of Business Operators' Activities Related to the Sale and Export of Timber" of 08 September 2005, No. 2860-IV ("Law No. 2860-IV");

(ii) a temporary prohibition, for a period of 10 years, on exports of all other unprocessed timber (the "2015 temporary export ban"), which was enacted by the Law of Ukraine the Law of Ukraine "On Amendments to the Law of Ukraine "On Elements of the State Regulation of Business Operators' Activities Related to the Sale and Export of Timber" Concerning the Temporary Export Ban for Unprocessed Timber" of 09 April 2015, No. 325-VIII ("Law No. 325-VIII");

(iii) according to the European Union there is also a the third measure (the "2018 Amendment"), which introduced temporary prohibitions for a period of eight years on exports of fuel wood and placed the limit on the domestic use of unprocessed timber, but the European Union commits a factual error which will be corrected later in this Submission.

14. Ukraine considers the above measures to be a single measure as they both are aimed at regulating the national environmental protection. Namely, the main goal of the "measure" is primarily the regulation of the level of national environmental protection, the establishment of trends of environmental policies, the application of preventive measures to protect the environment, and the rational use of natural resources.⁶ But as the European Union considers

⁵ The Association Agreement was concluded on 21 March 2014 and entered into full force on 1st September 2017. The Part IV of the Association Agreement devoted to the trade relations entered provisionally into force on 1st January 2016.

the measures separately, Ukraine will consider and explain introduction and application of this unified measure as separate measures, despite its position in this issue.

15. For the reasons set out in this Submission, Ukraine considers that the measures are consistent with Ukraine’s obligations under the Association Agreement while Ukraine submits that the measures fall within the exception under paragraphs (b) and (g) of Article XX of the General Agreement on Tariffs and Trade 1994 (“GATT 1994”).

16. This submission is organized as follows: Section 2 addresses Procedural Issues; Section 3 addresses Main Factual Issues (Overview of the Forestry in Ukraine; measures at Issue; Policy for protection, Information on Ukrainian Market and “Necessity” to protect), Section 4 addresses Legal Arguments, Section 5 concludes this Submission.

2. PROCEDURAL BACKGROUND

17. On 15 January 2019, the European Union requested consultations with Ukraine pursuant to Article 305 of the Association Agreement. The request for consultations was circulated as the Verbal Note of 15 January 2019, No. 005/2019.

18. Consultations were held on 7 February 2019 with the aim of reaching a mutually agreed solution. Unfortunately, these consultations failed to settle the dispute.

19. On 20 June 2019, the European Union requested for the establishment of an arbitration panel pursuant to Article 306 of the Association Agreement, and according to the procedure for the composition of the arbitration panel pursuant to Article 307 of the Association Agreement and the relevant provisions in the Rules of Procedure for Dispute Settlement in Annex XXIV to Chapter 14 of the Association Agreement. The request for the establishment of an arbitration panel was circulated by the Verbal Note of 20 June 2019.

20. In the process of selecting the members of the arbitration panel in accordance with Article 307(2) of the Association Agreement, Ukraine and the European Union (“Parties”) confirmed the agreement (the exchange of diplomatic notes between the Parties of 9 August 2019, No. ARES(2019)5179780, and of 20 August 2019, No. 3111/31-200-1698) on the following composition of the Arbitration Panel:

Mr. Christian HABERLI, Chairperson;

Mr. Giorgio SACERDOTI;

Mr. Victor MURAVYOV.

21. The Parties reached the agreement to consider the Arbitration Panel as “established”, pursuant to Article 307(6) of the Association Agreement, on 28 January 2020.

22. On 29 January 2020, during the first meeting of the Parties with the Arbitration Panel, pursuant to paragraph 8 of Annex XXIV to Chapter 14 of the Association Agreement (“Rules of Procedure for Dispute Settlement”), the Arbitration Panel adopted its Working Procedures and Timetable for the Panel Proceedings.

23. On 17 February 2020, the European Union filed its Written Submission.

3. FACTUAL BACKGROUND

24. Forests, and of course the wood taken out of forests, is not a commercial product like others. This is because despite the adoption of several international environmental documents, the state of the environment is steadily deteriorating. Therefore, maintaining the stability of the climate system is one of major global issues.

25. Forests play an important role both in shaping the carbon balance of the atmosphere and in the conservation of biodiversity. And the importance of forests and forestry as a key resource in mitigating the effect of climate change is scientifically proven and beyond doubt. In this context, it is the case that the situation of forests in Ukraine is alarming and needs protective policies.

3.1. General overview of the forests in Ukraine

3.1.1. Forests of Ukraine. The structure of the forestry fund of Ukraine

26. Forests are the national treasure of Ukraine. According to purposes and localization they perform a wide array of environmental functions that restrict their commercial use (*e.g.* water management, protective, sanitary-hygienic, recreative and others).

27. Ukraine has a low percentage of forest cover and an overall deficiency of forest resources⁷. The total area of forest lands in Ukraine is 10.4 million ha, of which 9.4 million ha are stocked forests (15.9 % of the total area of Ukraine's territory)⁸.

28. The forest area per capita in Ukraine is in average 14 times less than in other Eastern European countries. Though Ukraine takes the 34th place in Europe in such parameter as forest area/total area.

29. As a result of natural conditions and anthropogenic influences over a long period of time, Ukrainian forests are irregularly distributed over the country. More than half of the country's forests are man-made and need enhanced care. The average age of forest in Ukraine is more than 60 years, so there is a gradual aging of forests. It results in deterioration of their sanitary status.

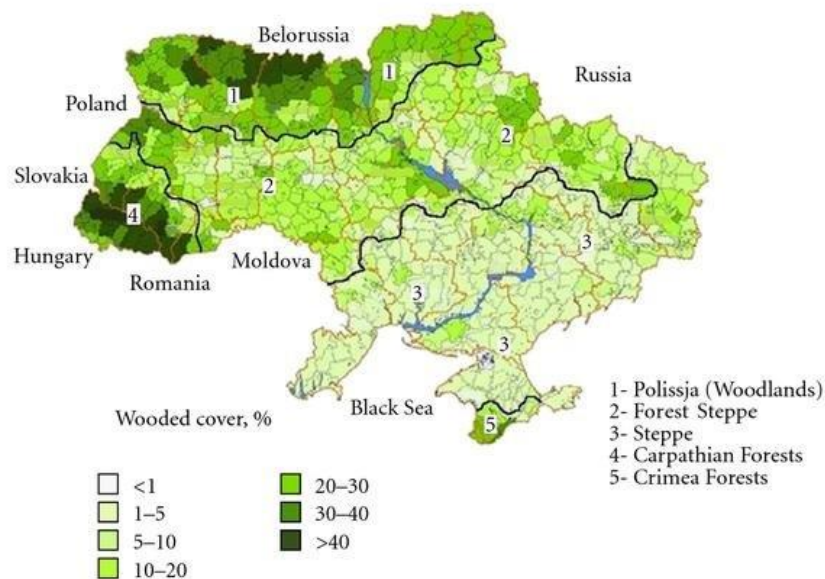
30. The forests of Ukraine grow in three natural zones (zone of mixed forests, forest-steppe, steppe), in Crimea and Carpathians mountains.

⁷ Geneva Timber and Forest Discussion Paper 32 "Forest and Forest Products Country Profile. Ukraine", 2003, available at <http://www.unece.org/fileadmin/DAM/timber/docs/dp/dp-32.pdf>

⁸ Public Annual Report (2019) of the State Forest Resources Agency of Ukraine, Exhibit UKR-01.

31. In different natural zones of Ukraine, the percentage of forest cover varies a lot and is not optimal.

32. While the optimal percentage of forest cover for the country constitutes 20,0 % out of the total territory of Ukraine (actual 15,9 %), it differs for Ukrainian natural zones: for Polissya (Forest zone) it amounts to 32,0 % out of the total area of this zone (actual 26,8 %), for Lisostep (Forest-steppe zone) – 18 % (actual 13 %), for Step (Steppe zone) – 9,0 % (actual 5,3 %), for the Carpathian Mountains – 45 % (actual 42,0 %), for the Crimean Mountains – 19 % (actual 10,4 %).



33. Around 3.5 million hectares of forest were contaminated after the Chornobyl Nuclear Power Plant Disaster. 157,000 hectares of forest have a high level of radioactive contamination of cesium-137 (above 15 Ki/square km). 43.8 % of the total contaminated territory is polluted by cesium-137 above 1 Ki/ square km, forest exploitation is limited there. The greatest territories of contaminated forest are situated in Zhytomyr region (60 %), Kyiv region (52.2 %), and Rivne region (56.2 %). In Volyn, Chernihiv, Cherkasy, Vinnytsya and Sumy Regions there are 20 % of contaminated forests. In the Red Forest, which is located within the 10-square-kilometer area surrounding the Chornobyl Nuclear Power Plant, the pines planted after the accident have grown without a central leading stem, rendering them odd-looking dwarfs more like bushes than trees⁹. Therefore, these forests are not exploited.

⁹ Environmental Health Perspectives. A Tale of Two Forests. Addressing Postnuclear Radiation at Chernobyl and Fukushima. Volume 121, number 3, March 2013.

34. In order to collect information on forest health, forest fund dynamics, damage to forests as a result of anthropogenic, biotic and abiotic factors, the State Forest Resources Agency of Ukraine organizes observation of forest covered territories.

35. Complicated ecological situation and a deficiency of wood resources defines a policy dilemma: to conserve forests or to supply wood.

3.1.2. Forest management in Ukraine

36. Currently, it is a difficult period for forestry in Ukraine. It is only gradually that forest planting and utilization, as well as the national economy in general, are in transition to modern market realities. Indeed, it must be recalled that the forest management systems developed under the USSR while no longer useful for Ukraine, has created habits and practices that are no more required. The legal and operational base of the forest management system is in the process of replacement with a new system based on Ukraine's international environmental obligations.

37. The forest policy of Ukraine is directed toward the increase of productivity of forest stands, enhancement of their useful natural properties, forest conservation and protection, and rational use of wood resources (see Section 3.5.1 of this Submission).

38. Ukraine has a well-developed legislative framework for forest management that includes the Forest Code (the "Forest Code") No. 3852-XII, dated 21 January 1994 and other laws and regulations. The main objective of the Forest Code is to regulate legal relations in order to improve productivity, protection, regeneration of forests, their useful properties, to meet social demands in forest resources by the sustainable forest management. The forestry is also governed by special legislation, for example environmental, administrative or criminal legislations.

39. The Forest Code designates the state authorities responsible for the implementation of the effective forest policy aimed at the preservation of forests and forest resources, slowing deforestation and forest degradation:

- (i). The Parliament of Ukraine - is responsible for the adoption of national programs aimed at protection, preservation, use and restoration of forests;¹⁰
- (ii). The Cabinet of Ministers of Ukraine (the Ukrainian Government) – develops as well as adopts national programs aimed at protection, preservation, usage and

¹⁰ Forest Code of Ukraine, No. 3852- XII, 21 January 1994, Article 26(3), Exhibit UKR- 08.

restoration of forests;¹¹

(iii). The State Forest Resources Agency of Ukraine is the central state authority in forest and hunting management responsible for implementation of the state policy in forest and hunting management, protection and preservation, sustainable forest management, restoration of forest resources and game animals; improvement of the efficiency of forest and hunting management;¹²

(iv). Ministry of Energy and Environmental Protection of Ukraine is also responsible for developing the state policy aimed at protection, preservation, usage and restoration of forests but as a part of the state environmental safety policy;¹³

(v). Law-enforcements institutions investigating crimes related to illegal logging and export of timber;

(vi). The regional and local authorities responsible for the implementation of the state forest and environmental policies.¹⁴

40. The structure of forestry fund by the types of management (in the table and graphic):

Table 1

	Total	
	million ha	%
Total area including:		100.0
State and public forest including:		
Forests belonging to State forestry authorities	7,6	73
Municipal forests	1,3	13
Forests not provided in use	0,8	7
Forests belonging to other users		6.6
Private forests		0.1
Forests belonging to the Ministry of Defence		>1

Source: Public Annual Report (2019) of the State Forest Resources Agency of Ukraine¹⁵

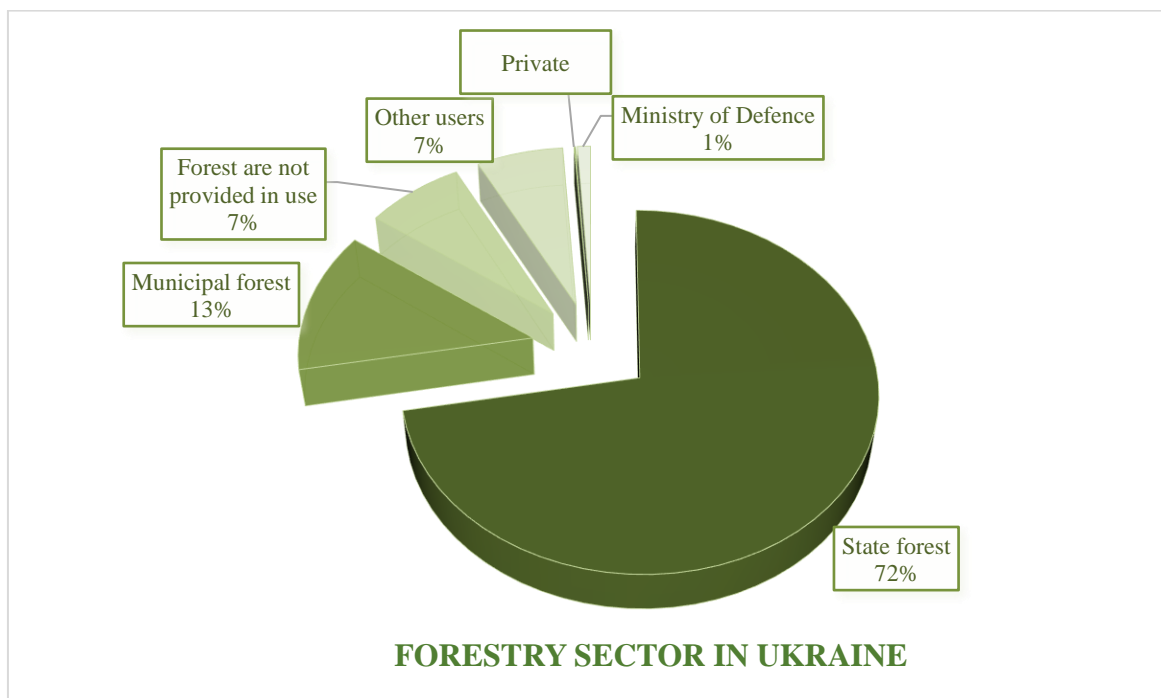
¹¹ Forest Code of Ukraine, No. 3852-XII, 21 January 1994, Articles 27(3) and 27(4), Exhibit UKR-08.

¹² Forest Code of Ukraine, No. 3852-XII, 21 January 1994, Articles 28 and 28-1, Exhibit UKR-08.

¹³ Forest Code of Ukraine, No. 3852-XII, 21 January 1994, Article 29(1), Exhibit UKR-08.

¹⁴ Forest Code of Ukraine, No. 3852-XII, 21 January 1994, Articles 30-33, Exhibit UKR-08.

¹⁵ Public Annual Report (2019) of the State Forest Resources Agency of Ukraine, Exhibit UKR-01.



41. The conservation and regeneration of forests are mainly regulated by the following legislation: Law of Ukraine “On Environmental Protection” No. 1264-XII, dated 25 June 1991, Law of Ukraine “On Moratorium on Clear Cutting on Mountain Slopes of Fir-Beech Forests in the Carpathian Region” No. 1436-III, dated 10 February 2000, and Law of Ukraine “On Nature-Reserve Fund in Ukraine” No. 2456-XII, dated 16 June 1992 and others.

42. The Land Code of Ukraine No. 2768-III, dated 25 October 2001, regulates land relations in forest, flora and fauna management. It incorporates all the aspects of land use: territorial basis, natural and production resource, sustainable management and land protection, requirements for ecological safety, non-intervention in activities of citizens, legal entities and local communities related to their ownership, exploitation and land use, etc.

43. The Law of Ukraine “On Environmental Protection” No. 1264-XII, dated 25 June 1991, regulates that rare and endangered species of flora and fauna that are permanently or temporarily (growing) in natural conditions within the territory of Ukraine, its continental shelf and exclusive (marine) economic zone are subject to special protection and are included in the Red Book of Ukraine.

44. The Law of Ukraine “On Nature-Reserve Fund of Ukraine” enumerates requirements for the development of the Ukrainian ecological network in order to conserve, regenerate and protect natural systems and territories preserving natural landscapes. To fulfil this law considering the prevailing ecological functions of Ukrainian forests, the State Committee of Forestry keeps on extending forest reserves and territories where forestry activities are restricted.

45. The main objectives of the Law of Ukraine “On Moratorium on Clear Cutting on Mountain Slopes of Fir-Beech Forests in the Carpathian Region” are to provide environmentally-sound forest management, health for local population in the Carpathian Region. This Law sets more severe requirements. It restricts some felling methods, introduces environmentally-friendly technologies in harvesting activities (restricts clear-cutting, enhances application of gradual, selective and narrow-strip felling methods), allows timber skidding by wheeled tractors and cable-yarding systems. In the region there were extended forest territories where forestry activities are restricted and territories where industrial felling is not allowed. In general, the volume of timber harvested has decreased. In four administrative divisions of Ukraine, *i.e.* regions (also known as “oblasts”) of the Carpathian Region, the reserved area makes up over 20% of its forest territory.

46. The Law of Ukraine “On Nature-Reserve Fund of Ukraine” enumerate requirements to develop the Ukrainian ecological network in order to conserve, regenerate and protect natural systems and territories preserving natural landscapes.

47. A lot of changes in forest policy development have been made in Ukraine recently:

- Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine on the Preservation of Ukrainian Forests and preventing the illegal export of rough timber” No. 2531-VIII, dated 6 September 2018 (“Law No. 2531-VIII”). This Law envisages a significant increase in the number of fines for illegal logging and destruction of forest cultures and young forests. The relevant amendments were introduced into the Code of Ukraine on Administrative Offenses, the Criminal Code of Ukraine, and the Law of Ukraine “On peculiarities of state regulation for activity of business entities related to the selling and exporting timber products”.
- Decree of the President of Ukraine “On Certain Measures for the Conservation of Forests and the Rational Use of Forest Resources” No. 511/2019, dated 9 July 2019, is aimed at combating the illegal circulation of wood. The reason for the adoption of this Decree was that the volume of illegal deforestation in 2018 reached 17.7 thousand cubic meters in Ukraine.
- Resolution of the Cabinet of Ministers of Ukraine “On Approval of the Procedure for Monitoring Internal Consumption of Domestic Raw Timber and Control of Excessive Domestic Consumption of Domestic Unprocessed Timber” No. 1142, dated 4 December 2019. This Resolution introduced the obligatory electronic accounting system for all forestry users of Ukraine, allowing the monitoring of consumption of domestic raw timber. Its aim is to ensure the control of consumption based on the systematization of information on origin, logging and realization of domestic raw timber.

- In addition, on 5 February 2020, the Parliament of Ukraine adopted in the first reading the draft law on amendments to the Forest Code for implementing the National Forestry Inventory. The implementation of the National Forestry Inventory will enable a reliable assessment of plantation shared stocks and indicators of its current growth rates required for the assessment of the level of the forest management intensity.

48. With a view to improving the forestry of Ukraine, draft regulatory acts will be prepared in 2020, which will regulate the following issues:

- Conduction of the National Forestry Inventory;
- Implementation of the Procedure of competitive basis for timber sales;
- The establishment of criminal liability for illegal logged timber trafficking;
- Adoption the Procedure of an issuance of the electronic logging tickets¹⁶;
- Adoption the Procedure of arrangements for the conservation and protection of forests.

49. Ukraine has significantly progressed in terms of ensuring the transparency of data on the usage of forest resources. The possibility to review the legitimacy of timber harvesting via a system called “Forest in the smartphone” (<https://lk.ukrforest.com/>) and perform online verification of timber by a sticker number, a consignment voucher number and a license plate is realized through the official website of the administrator of the single national system of timber electronic register SOC “Forestry innovative analytical centre” (<https://www.ukrforest.com>).

50. Forest companies certify the system of forestry management through the Forest Stewardship Council (FSC), increasing annually the area of certified forests, which already exceeds 4.4 million ha.

3.2. Measures at issue

51. In its Written Submission the European Union argues that Ukraine has imposed three prohibitions on export of forest products: (i) the “2005 export ban”; (ii) the “2015 export ban”; (iii) the “2018 Amendment”.

¹⁶ A logging ticket is permission to harvest wood and contains information about the location and volume of the workpiece. The document is issued by the regional forestry and hunting departments. The total forest area of Ukraine is about 10.4 million hectares. The forest cover of the country is 15.9%. Some 7.6 million ha of forests are within the supervision of the State Forest Resources Agency (73% of the Forest Fund of Ukraine).

3.2.1. The “2005 export ban”

52. The “2005 export ban”, as challenged by the European Union, was introduced by Law of Ukraine “On Elements of the State Regulation of Business Operators’ Activities Related to the Sale and Export of Timber” No. 2860-IV, dated 8 September 2005 (“Law No. 2860-IV”), as amended¹⁷.

53. The European Union argues that Ukraine has applied since 2005 a permanent and complete prohibition on all exports of timber and sawn wood of ten wood species (the “2005 export ban”).

54. Then, the European Union notes that the “2005 export ban” was applied since Law No. 2860-IV entered into force, and it is not subject to any temporary limitation¹⁸.

55. First, in its current version, Law No. 2860-IV prohibits the export of timber and sawn wood of the valuable and rare wood species: acacias, checker trees, cherry trees, pear trees, walnut trees, chestnuts, common yews, black cherries, acers, and junipers.

56. It must be noted that this law was not adopted in the pursuit of commercial or economic aims, but for environmental reason. Indeed, in 2005 the Legislator considered valuable and rare wood species, those defined in Article 1 of Law No. 2860-IV, as species which are threatened (i.e. assessed as Critically Endangered, Endangered or Vulnerable) and therefore having a high risk of extinction. Deforestation, degradation, wood harvesting and urban development are other significant threats. For threatened species, livestock farming, land abandonment and other ecosystem modifications are the major threats, affecting the survival of trees and their habitats.

57. Some of the abovementioned wood species (i.e. checker trees¹⁹, common yews²⁰) are “valuable and rare” and are on the list of the Red Book of Ukraine²¹.

58. Moreover, some of these wood species are included in the International Union for Conservation of Nature Red List of Threatened Species (also known as the International Union

¹⁷ Written Submission by the European Union, para. 18.

¹⁸ Written Submission by the European Union, para. 27.

¹⁹ The Red Book of Ukraine, available at: <https://redbook-ua.org/item/taxus-baccata-l/>

²⁰ The Red Book of Ukraine, available at: <https://redbook-ua.org/item/sorbus-torminalis/>

²¹ The Red Book of Ukraine is an official government document that contains the list of endangered species of animals, plants and fungi on the territory of Ukraine. The necessity of increasing the list of animals and plants of Ukraine, which are on the verge of extinction and must therefore be protected is extremely urgent, and it is the Red Book that assists to their preservation and gradual recovery. The Red Book contains general information about areas, current state and causes of the endangered and the possibilities of preservation of valuable and rare wood species. At the same time, it has no time frames concerning determination of period during which plants will be assessed as “endangered” and “valuable and rare”. But the Red Book alone cannot protect the listed species: there must be further actions in this regard, and the 2005 law is one of them.

for Conservation Red List or Red Data List)²²: acacias²³, junipers²⁴, acers²⁵, walnut trees²⁶, cherry trees²⁷.

59. Second, the important point is that the species listed in Article 1 of Law No. 2860-IV are not intended for the industrial production of sawn wood. As is apparent, their purpose is the production of fruits and nuts or other products from flowering.

60. Third, Law No. 2860-IV prohibits the export of sawn wood only of valuable and rare wood species.

61. The Ukrainian legislator's conceptual thought was included in the Explanatory Note thereto to Law No. 2860-IV, that which ascertains that the future law provides for a ban on export of timber and sawn wood of valuable and rare tree species because, as they were, and still are, "constantly diminishing in Ukraine". [...] As stated in the Explanatory Note: "Passing of this Law will allow to take a decisive fight against unauthorized felling in the forests of Ukraine, which in recent years have gained considerable size, will create conditions for better flood control".

62. Thus, it shows that Ukraine therefore has a responsibility to conserve these unique species that contribute so much to the landscapes, ecosystems and economies of Ukraine. The relevant provision of Law No. 2860-IV the Law was adopted in order to improve the status of Ukrainian trees, the attempt to develop policy to ensure that the species considered threatened are protected.

63. The issue and ethics surrounding the utilization of trees for lumber is oftentimes both expansive and ambiguous. Not only are there questions of sustainability (i.e., given the current rate of harvesting, can a particular species continue to reproduce at a sustainable rate so that demand will not outstrip supply), but there's also the matter of habitat destruction (i.e., even if a tree species can be sustainably harvested from the wild, would doing so destroy or endanger other species in the same habitat).

²² Established in 1964, the International Union for Conservation of Nature's Red List of Threatened Species has evolved to become the world's most comprehensive information source on the global conservation status of animal, fungi and plant species. The IUCN Red List is a critical indicator of the health of the world's biodiversity. Far more than a list of species and their status, it is a powerful tool to inform and catalyse action for biodiversity conservation and policy change, critical to protecting the natural resources we need to survive. It provides information about range, population size, habitat and ecology, use and/or trade, threats, and conservation actions that will help inform necessary conservation decisions.

²³ The IUCN Red List, available at: <https://www.iucnredlist.org/species/37917/99517641>

²⁴ The IUCN Red List, available at: <https://www.iucnredlist.org/species/42229/2963096>

²⁵ The IUCN Red List, available at: <https://www.iucnredlist.org/species/193523/2241515>

²⁶ The IUCN Red List, available at: <https://www.iucnredlist.org/species/63495/61526700>

²⁷ The IUCN Red List, available at: <https://www.iucnredlist.org/species/172064/50673544>

64. Should the Panel find that such measure exists, Ukraine would like avail itself of the provisions of Article XX (b) of the GATT 1994 (see Section 4.2.1 of this Submission).

3.2.2. The “2015 temporary export ban”

65. Article 2-1 of Law No. 2860-IV also challenged by the European Union as the “2015 export ban” prescribes the following²⁸:

“Temporarily, for 10 years, export outside the customs territory of Ukraine of unprocessed timber (Harmonized System Code 4403) is prohibited:

- for wood species other than pine from 1 November 2015;
- pine from 1 January 2017.”

66. This Article of Law No. 2860-IV was introduced by Law of Ukraine “On Amendments to the Law of Ukraine “On Elements of the State Regulation of Business Operators’ Activities Related to the Sale and Export of Timber” Concerning the Temporary Export Ban for Unprocessed Timber” No. 325-VIII, dated 9 April 2015 (“Law No. 325-VIII”)²⁹.

67. The term “unprocessed timber” is defined in Article 1 of Law No. 2860-IV and means “timber according to Harmonized System Code 4403 of section IX, group 44”.

68. There are three aspects of the “2015 temporary export ban” which should be considered by the Arbitration Panel:

- Exhaustion of the forests;
- The temporary nature of the measure;
- Restrictions on domestic production or consumption.

Exhaustion of the forests

Non-renewable resources are those resources, which do not have the potential renew. Such non-renewable resources are also called as exhaustible resources. In opposite, renewable resources are those resources which have the capability for renewal. However, the distinction between exhaustible and renewable resources is not altogether watertight. Renewable resources can be exhausted, destroyed or depleted like exhaustible resources. Forest are a case in point.

²⁸ Law of Ukraine “On Elements of the State Regulation of Business Operators’ Activities Related to the Sale and Export of Timber” of 08 September 2005, No. 2860-IV, Exhibit UKR-02.

²⁹ Law of Ukraine “On Elements of the State Regulation of Business Operators’ Activities Related to the Sale and Export of Timber” Concerning the Temporary Export Ban for Unprocessed Timber” No. 325-VIII, of 9 April 2015, Exhibit UKR-03.

The distinction generally adopted between renewable and exhaustible resources is based on the rate of formation or replenishment.

69. As an example, fossil fuels are created by their organic and geological process and this process still continues today. But the rate of formation is so slow that it is negligible in comparison with the time needed for regeneration.

70. The renewable resources have the following characteristics:

- *Renewability* is a critical concept which characterises the nature of renewable resources. As Ukraine stated above, all renewable resources are renewable in nature but their ability to renew themselves is of course dependent on the systems that supply moisture and nutrients and maintain the media of air and soil in which they grow. Apart from this, they also depend upon ecological efficiency and resilience of the ecosystem in which other renewable resources play a critical role.
- The second critical concept that characterises nature of renewable resources is *irreversibility*. If the forest ecosystem is used beyond its carrying capacity, then irreversible changes take place in the structure and function of the ecosystem to a different state with the loss or extinction of species. Economically, irreversibility leads to uncertainty in resource allocation in an ecosystem. As a result, it affects efficiency and productivity of ecosystem.
- There is always *a time gap between exploitation and regeneration* of renewable resources, this gap is the third critical concept that characterises nature of renewable resources. The resources are exhausted or depleted if the rate of exploitation is more than rate of regeneration.

71. Ukraine will demonstrate in this Submission that its forest ecosystem is used beyond its carrying capacity which causes irreversible changes in the structure and function of the ecosystem with the loss or extinction of species. Moreover, such irreversible changes occur in the situation when the rate of exploitation is more than rate of regeneration. And furthermore, it should not be forgotten that ecosystem of Ukraine is still in the recovery process after the Chernobyl Nuclear Power Plant Disaster.

72. There are only very few choices, which can be used to develop sustainable use of forests, particularly by undertaking suitable conservation measures, and by controlling wants of people (i.e. confining the resource use to limits of needs only). All these elements are present in the case at hand.

73. The first State strategy related to public policy in the forest management was adopted in 2002 by the Resolution of the Cabinet of Ministers of Ukraine “On approval of the State

Program “Forests of Ukraine” for 2002-2015” No. 581, dated 29 April 2002, and subsequently updated in 2009 by the Resolution of the Cabinet of Ministers of Ukraine “On approval of the State Targeted Program “Forests of Ukraine” for 2010-2015” No. 977, dated 16 September 2009.

74. However, the expected goals of this strategy were not achieved, as will be described further in Section 4.2.2.1.2.1 and “the 2015 temporary export ban” was applied as part of the “policy objective” of protection and conservation of Ukrainian forests.

75. With the aim to evaluate the effectiveness the “2015 temporary export ban” compared to other measures that could be introduced to substitute the export ban, the State Scientific Research Institute for Informatization and Economic Modelling concluded that at the end of 2016 the maintaining of the “2015 temporary export ban” would reduce the overall commercial logging by 44.3%, while its repealing would only increase the logging by 6.6%. In addition, it highlights the need to increase the total woodland to 20% by way of afforestation of 2.5 million hectares with new forests.

76. But the main message here is that that the “2015 temporary export ban” was introduced in order to stop intensive deforestation, which could lead to unpredictable results (e.g. floods, habitat destruction, and general complicated ecological situation) and in order to protect exhaustible natural resources.

The temporary nature of the measure

77. Ukraine would like to emphasize that the measure under consideration is temporary and it was introduced “for 10 years”, therefore Ukraine defines this measure as “2015 temporary export ban”.

78. Ukraine needs the temporary measure to improve the effectiveness of the forest management and to stop widespread uncontrolled deforestation.

79. Intensive deforestation can cause exhausting of forests and have a negative impact on environment. The abovementioned “2015 temporary export ban” is also required to solve situation with uncontrolled deforestation and to gain time for developing of relevant legislation and regulation in forestry management.

80. Besides, as the average age of forests in Ukraine is 60 years, the established period for the temporary prohibition of 10 years could be considered as a minimum needed period of time for forest restoration.

Restrictions on domestic production or consumption

81. The “2015 temporary export ban” was made effective in conjunction with restrictions on domestic production or consumption. In 2018 Law No. 2531-VIII introduced amendments to Law No. 2860-IV, by establishing the limitation of the domestic consumption of unprocessed timber in line with the requirements of sub-paragraph (g) of Article XX of GATT 1994 at the level of 25 million cubic meters per year, relating to the conservation of exhaustible natural resources.

82. Although Ukraine introduced a limitation to the domestic consumption of unprocessed timber only in 2018³⁰, such a limitation is not new for the Ukrainian forestry.

83. The Forest Code sets the limit for timber logging by way of final felling operations at the level of calculated wood cutting area³¹. The calculated wood cutting area has to be approved by central executive body, which ensures the formation of state policy in the field of environmental protection, in agreement with the central body of executive power, which implements state policy in the field of forestry³², based on the principles of continuous and non-exhaustible usage of forest resources in accordance with the rules of affirmation and approval of calculated wood cutting area³³.

84. In 2014, the State Forest Resources Agency of Ukraine reported³⁴ that in 2013 the total logging of harvestable timber in all types of felling had amounted to 18 million cubic meters.

85. In its turn, the Ministry of Ecology and Natural Resources of Ukraine (*currently – the Ministry of Energy and Environment Protection of Ukraine*) has reported the slight rise of the yearly limit of logging of final felling operations in 2015-2019 from 9.5 to 9.9 million cubic meters. The Ministry has also stated that the calculated wood cutting area will be falling in the nearest future because the age-old structure of trees is coming nearer to the optimal and the certain forests will be extracted from the woodland being under the final felling operations and transferred to the natural reserve fund and the Emerald network.

86. Further, according to the Ukrainian statistics of actual timber harvesting, there was a rise of logging in 2015-2018 from 21.9 to 22.5 million cubic meters. Despite this total rise of logging, the amount of timber harvested by way of continuous felling in the areas of final felling operations has substantively fallen down in 2018 in comparison to what had been harvested in 2017 (from 8.2 to 6.9 million cubic meters).

³⁰ Law of Ukraine “On Amends to Certain Legislative Acts of Ukraine Concerning the Preservation of Ukrainian Forests and Preventing the Illegal Export of Unprocessed Timber”, No. 2531-VIII, 6 September 2018, Exhibit UKR-02.

³¹ Forest Code of Ukraine, No. 3852-XII, 21 January 1994, Article 71, Exhibit UKR-8.

³² Forest Code of Ukraine, No. 3852-XII, 21 January 1994, Article 43, Exhibit UKR-8.

³³ Order of the Ministry of Environmental Protection of Ukraine, No. 38, 5 February 2007.

³⁴ http://dklg.kmu.gov.ua/forest/control/uk/publish/article?art_id=121197&cat_id=81209

87. Moreover, Ukraine would like to emphasize that natural resources within the territory of Ukraine, including forest, are objects of the right of property of the Ukrainian people and ownership rights on behalf of the Ukrainian people are exercised by bodies of state power and bodies of local self-government within the limits determined by the Constitution of Ukraine. Therefore, any internal restrictions on domestic production or consumption of natural resources within the territory of Ukraine cannot be put under arguments.

88. Just one example of the need to limit the consumption. There are 330 million cubic miles of water on Earth and, while it is difficult to say how much of that humans use annually, it would probably be fair to estimate that we use one million cubic miles. Let us assume that future humans will find a way to make all of the Earth's water usable, that human population stays as it is, but that per capita use of water grows one percent annually. By the year 2600 humans would be using every drop of water on the planet³⁵. The same with the wood species, first the instruments for the sustainable development of the forest, government regulation and effective protection management in the forest sector should be created and only after that forest can be used. To be sustainable, the use of non-renewable resources must proceed at a rate that is declining, and the rate of decline must be greater than or equal to the rate of depletion.

89. Should the Panel find that such measure exists, Ukraine would like avail itself of the provisions of Article 36 of the Association Agreement and Article XX (g) of the GATT 1994 (see Section 4.2 of this Submission).

3.2.3. The “2018 Amendment”

90. In its Written Submission the European Union notes “...Law No. 2480-VIII, which introduced a temporary prohibition, for a period for eight years, on exports of fuel wood”³⁶, should come with scrutiny of the Arbitration Panel.

91. In reality, and the European Union admits such a law never entered into force.

92. The legislative process in Ukraine is regulated by Article 94 of the Constitution of Ukraine³⁷. Under the Constitution of Ukraine, a draft law is to be signed by the Chairman of the Verkhovna Rada and sent to the President for signing. The President shall sign it or return to the Parliament of Ukraine for reconsideration if the President has any objections or proposals to the law.

³⁵ Richard Heinberg. *Peak Everything: Waking Up to the Century of Declines*.

³⁶ Written Submission by the European Union, para. 35.

³⁷ Abstract from the Constitution of Ukraine, Exhibit UKR-04, Article 94.

93. Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine Concerning the Preservation of Ukrainian Forests and Preventing the Illegal Export of Unprocessed Timber” No. 2480- VIII was adopted by the Verkhovna Rada on 9 July 2018 and sent to the President of Ukraine for signing. The President vetoed Law No. 2480-VIII in the part of an export ban on fuel wood and returned it to the Verkhovna Rada for reconsideration³⁸.

94. The Verkhovna Rada reconsidered this Law and accepted all the comments of the President.

95. Therefore, Law No. 2480-VIII was modified and introduced as Law No. 2531-VIII, dated 6 September 2018, which put amendments to Law No. 2680-IV.

96. These amendments to Law No. 2680-IV were adopted without any article on prohibition on exports of fuel wood³⁹, however introduced:

- strengthening of criminal liability for illegal logging and export of unprocessed timber.
- limitation of the domestic consumption of unprocessed timber.

97. The Law No. 2531-VIII introduced amendments concerning limitation of unprocessed timber domestic consumption in line with the requirements of sub-paragraph (g) of Article XX of GATT 1994, relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

98. The European Union notes that Law No. 2531-VIII establishes a cap on the domestic unprocessed timber⁴⁰ but does not provide any justification for placing the limit on the domestic use of domestic unprocessed timber at the level of 25 million cubic meters per year⁴¹.

99. In any event, the “2018 Amendment” is not specified as a claim neither in the request for the establishment of an arbitration panel nor in the Written Submission. The European Union does not rely on any provision of the Association Agreement or the GATT 1994 which would contain such a restriction or which would require the justification for placing the limit on the domestic use as well as does not substantiate its claim. The “2018 Amendment” cannot be reasonably derived from any other claim that is specified in the request for the establishment of an arbitration panel or in the Written Submission. Thus, Ukraine asks the Arbitration Panel to rule that this claim is outside the Arbitration Panel’s terms of reference.

³⁸ Proposals of the President of Ukraine to the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine on the Preservation of Ukrainian Forests and Prevention of Illegal Removal of Raw Timber”, Exhibit UKR-05.

³⁹ Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine Concerning the Preservation of Ukrainian Forests and Preventing the Illegal Export of Unprocessed Timber”, Exhibit UKR-06.

⁴⁰ Written Submission by the European Union, para. 37.

⁴¹ Written Submission by the European Union, para. 38.

100. Ukraine strongly believes that this dispute shall be resolved by examination of the matter in the light of the relevant provisions of the Association Agreement and the GATT 1994, and any inferences taking the Arbitration Panel beyond its terms of reference shall stay irrelevant.

3.2.4. Supporting documents to the legal acts

101. In its Written Submission the European Union bases its arguments regarding the lawmaker's rationale on Explanatory Notes only. Bearing those Explanatory Notes in mind, the European Union claims that the measures were introduced in order to protect and support national industry⁴².

102. The general rule, though, is that the measure by itself can be found only in the laws themselves as well as in the relevant auxiliary legislation and surrounding circumstances. Explanatory Notes are documents that typically accompany primary legislation (e.g. accompany an Act or Measure). The text is created by the government department or the Members of Parliament responsible for the subject matter of the Act (or Measure) to explain what the Act sets out to achieve and to make the Act accessible to readers who are not legally qualified.

103. In Ukraine an Explanatory Note is an informational, analytical document, but not a legal one, which contains an explanation of the content of particular provisions of draft laws, the causes of an event or a situation. In accordance with Article 91 of the Law of Ukraine "On the Rules of Procedure of the Verkhovna Rada of Ukraine"⁴³, the Explanatory Note is an accompanying document to the draft law or other acts, which is submitted for registration together with the draft. Therefore, it has no legal effect.

104. In its Written Submission, the European Union justifies some of its key conclusions regarding the unlawfulness of the measures on the Explanatory Notes accompanying the laws⁴⁴ and on conclusions of committees of the Parliament of Ukraine⁴⁵. A very careful reading of the European Union Written Submission shows that what the European Union claims is not so much that the laws as such are the measures contrary to the Association Agreement, but that the Explanatory Notes accompanying those laws, and the conclusion of a committee of the Parliament of Ukraine, are.

⁴² Written Submission by the European Union, paras. 32, 34, 40.

⁴³ The Law of Ukraine "On the Rules of Procedure of the Verkhovna Rada of Ukraine", Exhibit UKR-07.

⁴⁴ Written Submission by the European Union, paras. 32, 34, 40.

⁴⁵ Written Submission by the European Union, para. 33.

105. But what a law says is what a law does, notwithstanding the reasons why such or such Member of the Parliament thought about why it should vote for its adoption. An Explanatory Note may contain various explanations mainly designed for the Members of Parliament to vote for a particular draft law, but it does not become a part of the underlying law. Further, before voting the Members of Parliament may share their own reasons – including in the context of commissions, radically different from those that are the real motivation of a law, as to why a particular law should be adopted. In any event, the purposes of a particular law can only be found in the law itself.

106. The argumentative part of the mentioned in the European Union’s Written Submission Explanatory Notes in general starts with the repetition of the actual size of the woodland (16% or 10.78 million hectares out of the total area of Ukraine) and ends with the conclusion that the export of unprocessed timber harms the economic and ecological condition of the territory of Ukraine. The Explanatory Notes further defines that one of the main objectives of the measures is to take, at the legislative level, necessary measures aimed at preserving sustainable exploitation of the timber resources⁴⁶.

107. In addition, at the time of adopting the “2015 temporary export ban” in the first reading on 5 February 2015, Mr Oleh Lyashko, a Member of Parliament at that time, asked other Members of Parliament to vote for the draft law relying on *inter alia* that it would save the Carpathians from the exhaustive logging, prevent the occurrence of harmful and deadly floods (as one that had happened in 1998) and assist forest restoration⁴⁷.

108. Further, by insisting on further voting another Member of Parliament, Mr Yuri Solovei relied⁴⁸ on the deadly flood happened in the West of Ukraine in 2008⁴⁹. Ukrainian ecologists have argued that one of the main factors that caused such devastating effects of the flood was the extensive logging in the Carpathians, which forests could have absorbed or otherwise taken away a significant portion of rainwater. Following the disaster, in October 2008, the Ministry of Environmental Protection of Ukraine (*currently – known as the Ministry of Energy Ecology and Environment Protection Natural Resources of Ukraine*) at its offsite session announced the main reasons of the flood and held that there was (and still is) a need to pursue the state policy of forest preservation and afforestation.

⁴⁶ In his letter of 22 July 2015 (no. NE/pcc/S(2015)3337275, Exhibit UKR-21) to the Prime Minister of Ukraine, the European Commissioner for Trade took note “that the objectives of the measure are related to the depletion of natural resources and the development of rural industries based on the sustainable exploration of those very natural resources”.

⁴⁷ See Transcript of the Verkhovna Rada’s session on 5 February 2015, available at <https://portal.rada.gov.ua/meeting/stenogr/show/5783.html>

⁴⁸ Ibid.

⁴⁹ See http://dklg.kmu.gov.ua/forest/control/uk/publish/article?art_id=59718&cat_id=32888

109. Likewise, it is evident that a law can be said to pursue several objectives at the same time – and this is why coalitions of the Members of Parliament pertaining to different political parties are capable of voting laws, but it is also evident than an temporary export ban on forestry product pursues a straightforward environmental purpose. Many bans on the export of wood have been adopted around the World, and all have been adopted mainly – although perhaps not exclusively, but that makes no difference – for environmental purposes.

110. Meanwhile, the main goal of Law No. 2860-IV and amendments to this law are primarily the regulation of the level of national environmental protection, the establishment of trends of environmental policies, the application of preventive measures to protect the environment, and the rational use of natural resources.

3.3. Policy for the protection

3.3.1. Legal Framework

111. The policy of Ukraine in the field of protection of forest sector is based on the legislation of Ukraine, namely the Forest Code of Ukraine and international treaties which are the part of Ukrainian national legislation in line with the Constitution of Ukraine.

112. The Forest Code sets the legal framework, applicable to the state policy in the forests sector, namely Article 3 of the Forest Code⁵⁰ provides that the relations in the sphere of forestry are regulated by the Constitution of Ukraine, the Law of Ukraine “On the Environment Protection”, and the Forest Code. Relations on the use of land, natural resources, water and other fields where forest is involved, shall be regulated by the Forest Code or other legislation applicable in case Forest Code does not cover the issue.

113. Article 25 of the Forest Code⁵¹ stipulates that the main objective of government regulation and management in the forest sector is an effective protection, efficient use and reforestation of forests.

114. The first State strategy related to public policy in the forest management was adopted by the Resolution of the Cabinet of Ministers of Ukraine “On approval of the State Program “Forests of Ukraine” for 2002-2015” No. 581, dated 29 April 2002, and then substituted in 2009 by the Resolution of the Cabinet of Ministers of Ukraine “On approval of the State Targeted Program “Forests of Ukraine” for 2010-2015” No. 977, dated 16 September 2009.

⁵⁰ Article 3 of the Constitution of Ukraine, Exhibit UKR-04.

⁵¹ Article 25 of the Constitution of Ukraine, Exhibit UKR-04.

115. Due to the lack of budget during the whole period of duration of the program, governmental authorities did not manage to take an inventory of the forests in Ukraine as well as introduce the system of the monitoring of the state of forests.

3.3.2. International legal framework

116. Between 2002-2016, Ukraine acceded to a number of international treaties, which implied on Ukraine a significant amount of international obligations of global and regional nature, in particular, e.g. water protection, conservation of forestry.

117. In 2014-2015, Ukraine undertook additional obligations under the UN General Assembly Resolution of 25 of September 2015 “Transforming our world: the 2030 Agenda for Sustainable Development” (“the UN General Assembly Resolution”). In accordance with this Resolution, the Heads of State and Government and High Representatives declared their willingness to protect the planet from degradation, including through sustainable consumption and production, sustainably managing its natural resources and taking urgent action on climate change.

118. The UN General Assembly Resolution which provides that UN Member States:

- determined to conserve and sustainably use oceans and seas, freshwater resources, as well as forests, mountains and drylands;
- acknowledge the essential role of national parliaments through their enactment of legislation and adoption;
- recognize that each country faces specific challenges to achieve sustainable development. Countries in situations of conflict also need special attention.

119. Sustainable Development Goals under the UN General Assembly Resolution includes Goal 15 “Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss”⁵². To achieve this goal, the important steps in protection of forests are:

- By 2020, ensure the conservation, restoration and sustainable use of terrestrial and inland freshwater ecosystems and their services, in particular forests, wetlands, mountains and drylands, in line with obligations under international agreements;

⁵² <https://sustainabledevelopment.un.org/post2015/transformingourworld>

- By 2020, promote the implementation of sustainable management of all types of forests, halt deforestation, restore degraded forests and substantially increase afforestation and reforestation globally;
- Take urgent and significant action to reduce the degradation of natural habitats, halt the loss of biodiversity and, by 2020, protect and prevent the extinction of threatened species;
- Mobilize significant resources from all sources and at all levels to finance sustainable forest management and provide adequate incentives to developing countries to advance such management, including for conservation and reforestation.

120. Furthermore, Ukraine ratified by the Law of Ukraine “Convention on the Protection and Sustainable Development of the Carpathians” No. 1672, dated 7 April 2004, as well as by the Law of Ukraine No. 5432, dated 16 October 2012 was ratified “Protocol on Sustainable Forest Management to the Framework Convention on the Protection and Sustainable Development of the Carpathians”. With a view to fulfil its obligations and to strengthen local economies and communities, and conservation of natural wealth, resources and cultural heritage Ukraine assumed the obligation to take effective measures of precaution and prevention targeted to protection and sustainable development of the Carpathians and to form or align its sector policies and strategies in line with these activities.

121. According to Article 292 of the Association Agreement “Nothing in this Agreement shall limit the rights of a Party to adopt or maintain measures to implement the multilateral environmental agreements to which it is a Party. Such measures shall not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on trade. The Parties shall ensure that environmental policy shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay”.

122. Moreover, Article 294 of the Association Agreement headed “Trade in forest products” stipulates that in order to promote the sustainable management of forest resources, the Parties commit to work together to improve forest law enforcement and governance and promote trade in legal and sustainable forest products.

123. Ukraine has also become a party to international conventions whereby it has undertaken to maintain sustainable forest management and carry out forestry activities on afforestation, reforestation and combating deforestation:

- (i). In November 1994, Ukraine ratified the Convention on Biological Diversity

(1992)⁵³ which obliges each party to promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings⁵⁴.

(ii). In 1996, Ukraine became the Party to the Convention on the Conservation of European Wildlife and Natural Habitats (1979),⁵⁵ whereby Ukraine has agreed to take requisite measures to maintain the population of wild flora and fauna at, or adapt it to, a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational conditions and the needs of subspecies, varieties or forms at risk locally⁵⁶.

(iii). In 1997, Ukraine became the Party to the United Nations Framework Convention on Climate Change (1992) (the “UNFCCC”) undertaking *inter alia* to promote sustainable management of forests as the sinks and reservoirs of greenhouse gases, including their preservation and enhancement⁵⁷:

1. In 2004, Ukraine ratified⁵⁸ the Kyoto Protocol (1997) to the UNFCCC whereby it has undertaken to implement and/or further elaborate the policies of sustainable forest management, afforestation and reforestation⁵⁹ (Articles 3.3 and 3.4 of the Kyoto Protocol specifically allow the Parties to the UNFCCC to meet their commitments in reducing the carbon dioxide equivalent emissions of the greenhouse gases via carrying out the activities in the ‘land use, land-use change and forestry’ (“LULUCF”) sector either by increasing the removals of greenhouse gases from the atmosphere (e.g. by planting trees or managing forests), or by reducing emissions (e.g. by curbing deforestation).

2. According to the Kyoto Protocol, Ukraine undertook at least not to exceed its greenhouse gases (“GHG”) emissions above the base level established for 1990 (the assigned amount of quota for Ukraine)⁶⁰.

3. In 2012, the Parties to the Kyoto Protocol adopted an amendment to the Kyoto Protocol, known as the “Doha Amendment”⁶¹, amending the second

⁵³ Law of Ukraine, No. 257/94-BP, 29 November 1994, Exhibit UKR-10.

⁵⁴ The Convention on Biological Diversity (1992), Article 8(d).

Available at: <https://www.cbd.int/doc/legal/cbd-en.pdf>

⁵⁵ Law of Ukraine, No. 436/96-BP, 29 October 1996, Exhibit UKR-11.

⁵⁶ The Convention on the Conservation of European Wildlife and Natural Habitats (1979), Article 2.

Available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/104>

⁵⁷ The United Nations Framework Convention on Climate Change (1992), Article 4(d).

Available at: <https://unfccc.int/resource/docs/convkp/conveng.pdf>

⁵⁸ Law of Ukraine “On Ratification of the Kyoto Protocol to the United Nations Framework Convention on Climate Change”, No. 1430-IV, 4 February 2004, Exhibit UKR-12.

⁵⁹ The Kyoto Protocol (1997), Article 2(1)(a)(ii). Available at: <https://unfccc.int/resource/docs/convkp/kpeng.pdf>

⁶⁰ Kyoto Protocol, available at: <https://unfccc.int/resource/docs/convkp/kpeng.pdf>

⁶¹ Doha Amendment, available at: https://unfccc.int/files/kyoto_protocol/application/pdf/kp_doha_amendment_english.pdf

commitment period of the Kyoto Protocol for the years leading up to 2020. Pursuant to Annex B to Doha Amendment Ukraine to the Kyoto Protocol, Ukraine has been allowed for GHG emissions in the second commitment period (2013-2020) totalling to 76% of the 1990 level.

4. In 2016, Ukraine ratified⁶² the Paris Agreement (2015) that builds upon the UNFCCC and brings all nations into a common cause to undertake ambitious efforts to combat climate change and adapt to its effects, with enhanced support to assist developing countries to do so. According to the Paris Agreement.

5. The Paris Agreement *inter alia* encourages⁶³ the Parties to conserve and enhance, as appropriate, sinks and reservoirs of GHGs as referred to in Article 4, paragraph 1(d) of the UNFCCC, including forests.

6. The Paris Agreement⁶⁴ requires each Party to prepare, communicate and maintain successive nationally determined contributions (NDCs) that it intends to achieve. According to Ukraine's First Nationally Determined Contributions Report⁶⁵, the GHG emissions in Ukraine amounted to 944.4 million tons CO₂ equivalent in 1990 and 402.7 million tons CO₂ equivalent (excluding the LULUCF sector contribution to the absorption balance) in 2012. This means that Ukraine's GHG emissions amounted to 42.6% of the 1990 level. The report also shows that the LULUCF sector, where the forests are recognised as the main sink of GHG emissions, contributed to Ukraine's GHG balance 69.8 million tons CO₂ equivalent by way of the absorption of the total GHG emissions in 1990 and at least 27.3 million tons CO₂ equivalent in 2012.

7. The Paris Agreement also imposes⁶⁶ on the Parties to strive to formulate and communicate long-term low GHG emission development strategies. In compliance with its undertakings, Ukraine has developed and adopted⁶⁷ the Low Emission Development Strategy until 2050⁶⁸:

⁶² Law of Ukraine "On ratification of the Paris Agreement", No. 1469-VIII, 14 July 2016, Exhibit UKR-13.

⁶³ Paris Agreement (2015), Paris, 12 December 2015, available at unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement (last consulted on 4 March 2020), Exhibit UKR-14, Article 5.

⁶⁴ Paris Agreement (2015), Paris, 12 December 2015, available at unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement (last consulted on 4 March 2020), Exhibit UKR-14, Article 4(2).

⁶⁵ Ukraine's First Nationally Determined Contributions Report, available at: <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Ukraine%20First/Ukraine%20First%20NDC.pdf>

⁶⁶ Paris Agreement (2015), Paris, 12 December 2015, available at unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement (last consulted on 4 March 2020), Exhibit UKR-14, Article 4(19).

⁶⁷ The Ukrainian Government has approved the Strategy on 18 July 2018.

Available at: <https://www.kmu.gov.ua/ua/meetings/zasidannva-kabinetu-ministriv-ukravini-17-07-2018>.

⁶⁸ Ukraine's Low Emission Development Strategy until 2050.

Available at: https://unfccc.int/sites/default/files/resource/Ukraine_LEDs_en.pdf

- a) According to this Strategy, the LULUCF sector absorbed about 5% of the total GHG emissions in 2015;
- b) Since the woodland is recognised as a net carbon absorber, the level of absorption, in absolute terms, by forests amounted to 65.5 million tons of CO₂ equivalent per annum in the period 2010-2015;
- c) The Strategy sets a number of policies and measures to be taken by 2050 in the forestry to enhance the absorption of GHG by forests and contains three different scenarios to reach them:

(1) “business as usual” scenario developed on the basis of expert modifications of previous and modern trends in economic and social development in Ukraine (*i.e. including the increase in export of unprocessed wood to the European Union*) and shows a gradual decrease in phytomass growth in the forests is expected by 2050 mostly due to the age change in forest structure (*i.e. the rejuvenation of forests caused by extensive harvesting*), which will bring about a gradual decrease in the GHG absorption level. It is expected that by 2050 the annual GHG absorption level will decrease by 26% compared to 2012 and will amount to about 44.4 million tons CO₂ per year;

(2) “forward looking” scenario which envisions achievement of forestry and nature protection activities targets in accordance to government strategies defined priorities and programs; and

(3) “afforestation” scenario making it possible to estimate the scope of GHG absorption in the process of forest cultivation (afforestation) on the area of 1.4 million hectares, which woodland (if implemented) would cover up to 19.4% of the territory of Ukraine by 2050;

8. The analysis of all three scenarios shows that the most environmental-friendly is the last one, which forecasts that Ukraine may reach the stable absorption of GHG by forests of 85% of the 1990 level by 2035.

(iv). In 2002, Ukraine ratified The United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1994) (the “UNCCD”) aimed at combating desertification and mitigate the effects of drought through national action programs that incorporate long-term strategies supported by international cooperation and partnership arrangements.

Annex V “Regional Implementation Annex for Central and Eastern Europe” of the UNCCD provides guidelines and mechanisms for the effective implementation of the convention in an affected country of the Central and Eastern European region, in the light of its particular conditions, one of which includes forest coverage losses due to climatic factors, consequences of air pollution and frequent wildfires.

(v). In 2003, Ukraine adopted⁶⁹ the Framework Convention on the Protection and Sustainable Development of the Carpathians (“Carpathian Convention”). The Carpathian Convention prescribes that the Parties have to pursue policies aiming at designating protected areas in natural, especially virgin forests in sufficient size and number, with the purpose to restrict or adapt their use according to the objectives of preservation to be achieved⁷⁰. In 2012⁷¹, Ukraine ratified Protocol on Sustainable Forest Management to the Framework Convention on Protection and Sustainable Development of the Carpathians.

(vi). The Carpathians Convention whereby it has undertaken to implement measures in its national territory to promote restoration of close to nature forests.

(vii). In 2015, Ukraine joined the pan-European voluntary high-level political process for dialogue and cooperation on forest policies in Europe, known as the Ministerial Conference on the Protection of Forests in Europe under the brand name “FOREST EUROPE”. The Forest Europe develops common strategies for its 47 signatories (46 European countries and the European Union) on how to protect and sustainably manage their forests. At the 7th Ministerial Conference held on 20-21 October 2015 in Madrid, Ukraine, like all other signatories of the Forest Europe, committed itself *inter alia* to enhance the role of the sustainable forest management in a green economy⁷². During the conference the representative of Ukraine reported that after the military actions had begun in the East of Ukraine forest fires destroyed 5% of the total woodland in the Luhansk and Donetsk regions. Although it was focused on Ukraine’s efforts to prevent forest fires, and emphasised that sole conservation of forests without the sustainable forest management is not “*a panacea for forest protection*”.

3.4. Information on Ukraine market (Protection at State level, including statistics)

⁶⁹ Law of Ukraine “On Ratification of the Framework Convention on the Protection and Sustainable Development of Carpathians”, No. 1672-IV, 7 April 2004, Exhibit UKR-16.

⁷⁰ The Framework Convention on the Protection and Sustainable Development of the Carpathians, Article 7.5. Available at: <http://www2.ecolex.org/server2neu.php/libcat/docs/TRE/Full/En/TRE-001374.pdf>

⁷¹ Law of Ukraine “On Ratification of the Protocol on Sustainable Forest Management to the Framework Convention on Protection and Sustainable Development of the Carpathians”, No. 5432-VI, 16 October 2012, Exhibit UKR-17.

⁷² Madrid Ministerial Resolution 1.

Available at: https://www.foresteuropa.org/sites/default/files/ELM_7MC_2_2015_Madrid_Resolution1_GreenEconomy_adopied.pdf

3.4.1. General overview

124. In its Written Submission the European Union states that forests cover 15,9 % of Ukraine's surface and that Ukraine is the ninth country in Europe in terms of forested area and the sixth in terms of forest stocks.⁷³

125. It is worth drawing the Arbitration Panel's attention that 7 out of 10 European countries with the most forested area are member states of the European Union.⁷⁴

Table 2

No.	Country	Country area, thousand hectares	Territory of forest covered area, thousand hectares	% of total area covered with forests
1	Sweden	45218	30625	67,7
2	Spain	50596	27748	54,8
3	Finland	33814	23116	68,4
4	Turkey	77945	21702	27,8
5	France	54919	17572	32
6	Norway	32376	12884	38,3
7	Germany	35702	11076	31
8	Italy	30132	10916	36,2
9	Ukraine	60355	9574	15,9
10	Poland	31268	9319	29,8

Source: Public Annual Report (2019) of the State Forest Agency of Ukraine⁷⁵

126. Forests and wooded land cover over 182 million hectares in the European Union. This is about 42% of the European Union's total land area.⁷⁶

127. According to Eurostat, the largest forest areas are in Sweden (30 million hectares), Spain (27 million hectares) and Finland (24 million hectares).⁷⁷ Forest areas of Ukraine, on the opposite, amount to only 9,6 million hectares.⁷⁸

⁷³ Written Submission by the European Union, para. 11.

⁷⁴ Public Annual Report (2019) of the State Forest Resources Agency of Ukraine, table on page 3, Exhibit UKR-1.

⁷⁵ Ibid.

⁷⁶ See Article "Over 40% of the EU Covered with Forests", available at the European Commission Eurostat's web-site <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/EDN-20180321-1>

⁷⁷ See Article "Over 40% of the EU Covered with Forests", available at the European Commission Eurostat's web-site <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/EDN-20180321-1>

⁷⁸ Public Annual Report (2019) of the State Forest Resources Agency of Ukraine, table on page 3, Exhibit UKR-1.

128. Concerning the forest area as a proportion of a country's total land area, Finland (71 % of total land area) and Sweden (67 %) are the most heavily forested countries, followed by Slovenia (64 %), Estonia (58 %) and Latvia (56 %).⁷⁹ Ukraine, having covered only 15,9 %⁸⁰ of its total land area, may be compared to the 3 least wooded countries of the European Union – the Netherlands (8 %), Malta (11 %) and Denmark (16 %)⁸¹.

129. In terms of felling, both the continuous felling of final felling operations and continuous sanitary felling in Ukraine (i.e. clear-cutting whole areas of forest), which is the most common method of harvesting because it produces more unprocessed timber per one hectare, were increasing throughout 2005-2014.

Table 3

Thousand hectares										
	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014*
Continuous felling of final felling operations	23.1	24.0	24.9	24.1	22.4	24.8	27.7	26.3	26.7	28.2
Continuous sanitary felling	11.4	12.5	20.2	15.6	15.1	18.6	20.3	22.2	22.9	24.5
Total	34.5	36.5	45.1	39.7	37.5	43.4	48.0	48.5	49.6	52.7
* Data exclude the temporarily occupied territory of the Autonomous Republic of Crimea, the city of Sevastopol and a part of temporarily occupied territories in the Donetsk and Luhansk regions.										

Source: Data from the website of the State Statistics Service of Ukraine

130. As can be seen from the above statistics, the area of continuous felling in 2014 increased by 52.6% from 2005 or by 21.4% from 2010.

131. Now it is useful to see the dynamics of the forest restoration, which includes reforestation and afforestation.

⁷⁹ See Article "Over 40% of the EU Covered with Forests", available at the European Commission Eurostat's web-site <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/EDN-20180321-1>

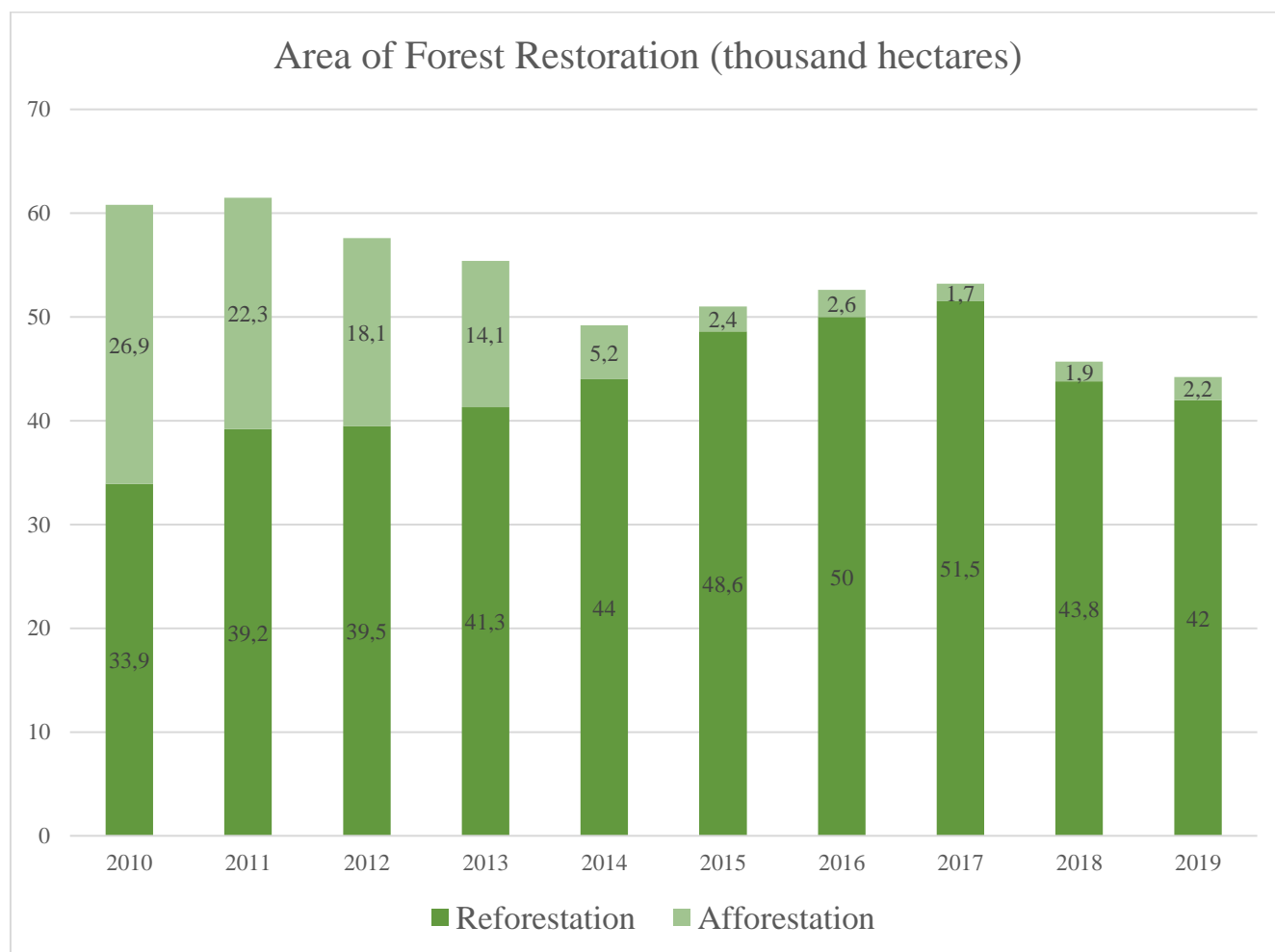
⁸⁰ Public Annual Report (2019) of the State Forest Resources Agency of Ukraine, table on page 3, Exhibit UKR-1.

⁸¹ See Article "Over 40% of the EU Covered with Forests", available at the European Commission Eurostat's web-site <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/EDN-20180321-1>

132. The main task of foresters is the cultivation and reproduction of forests. According to the legislation, two years are provided during which it is necessary to restore the forest at the site of continuous felling. Such a period is conditioned by the need to prepare the soil and carry out other measures to plant the forest or promote its natural regeneration.

133. Usually, foresters carry out reforestation the next year after felling, and sometimes, if all the conditions are met, even the same year.

Table 4



Source: Public Annual Report (2019) of the State Forest Agency of Ukraine.

134. The area of reforestation indicates that the forestry enterprises have discharged their duties to plant new trees on the area which was clear cut by means of the continuous felling. The figures for yearly reforestation correlate with the total figures of the clear-cut felling.

135. The main marker of the above statistics is the area of afforestation. The statistics show that there is a dramatical decrease of 80,7 % in the area of afforestation by 2014 in some

five years. This demonstrates that Ukraine did not reach its goal to enlarge the woodland from 15.6% to 20% of the total area of Ukraine, which was initially set in 2002.⁸²

136. In 2014, 49,2 thousand hectares of forests were restored (only 5.2 thousand hectares of new forests were created) and it was the lowest level of forest restoration in 5 years.

137. It should be noted that since 2017 there has been a steady tendency of decreasing the volumes of continuous felling, which is directly related to the reduction of forest restoration volumes. In addition, there is a consistently high level of natural restoration on felling areas (more than on a third of the territories), which was made possible after timely efforts to promote natural restoration. This is explained by the course taken for the gradual transition from continuous to gradual and selective felling systems, as is the case in European countries.⁸³

138. On the whole, the volume of forest restoration in the last five years (2015-2019) amounted to 246,7 thousand hectares. Thus, over the last 5 years, foresters have planted more than a billion new trees, and given that young trees have a greater capacity to absorb CO₂, it can be stated that the efforts of forestry management have made a significant contribution to mitigating climate change and benefit environmental safety.

139. It is now useful to see how things were with the actual harvesting of timber:

Table 5

Thousand cubic meters	
2005	17124.3
2006	17759.8
2007	19013.9
2008	17687.5
2009	15876.5
2010	18064.6
2011	19746.2
2012	19763.6

⁸² In 2002, the Ukrainian Government adopted the state program “Forests of Ukraine” for 2002-2015 (Resolution of the Cabinet Ministers of Ukraine, No. 581 dated 29.04.2002, Exhibit UKR-36). As one of the primary documents for the forest management in Ukraine, the program recognised the actual size of the woodland (15.6% of the total territory of Ukraine) was insufficient. It was established that the woodland should be expanded by 2-2.5 million hectares to meet an optimal coverage of 19-20%. The program forecasted that by 2015 the forest stands’ quality would enhance and the woodland would increase by 0.5 million hectares (or would reach 16.1% out of the total area of Ukraine). It was forecasted that the implementation of the program would strengthen the environmental protection attributes of forests which would lead to more absorption of GHG. The latter would increase Ukraine’s contribution into the world GHG balance under the UNFCCC. Other goals aimed at improving the Ukrainian sustainable forest management were also set.

⁸³ Public Annual Report (2019) of the State Forest Resources Agency of Ukraine, Exhibit UKR-01.

2013	20340.6
2014*	20672.4
* Data exclude the temporarily occupied territory of the Autonomous Republic of Crimea, the city of Sevastopol and a part of temporarily occupied territories in the Donetsk and Luhansk regions.	

Source: Data from the website of the State Statistics Service of Ukraine

140. The data shows that there was an increase of 20.7 % in the timber harvesting by 2014 in ten years.

141. According to the information from the Ministry of Ecology and Natural Resources of Ukraine (*currently – the Ministry of Energy and Environment Protection of Ukraine*) the limit of logging in the order of the ‘main use felling’ in Ukraine as a whole was:

Table 6

	Thousand cubic meters
2015	9562,8
2016	9620.6
2017	9821.4
2018	9947,0
2019	9952.8

142. On average, the growth of the calculated wood cutting area for 5 years is 78.0 thousand m³ per year with 5,8 thousand m³ in 2019, and in the coming years the calculated wood cutting area for the country will gradually decrease as the age structure of the plantations approaches the optimal level. In the following years, it is envisaged to exclude forests from the calculation of felling by way of shifting certain territories to the nature reserve fund and Emerald Network.

143. Significant increase in the volume of logging is not foreseen, since the forests of Ukraine by their purpose and location perform mainly water conservation, protective, sanitary-hygienic, wellness, recreational, aesthetic, educational and other functions and are a source of fulfilment of needs of the community in forest resources other than wood.

144. Thus, the area of operational forests in which the felling of the main use is conducted, for the period from 1996 to 2011 decreased by 10.6 %.

3.4.2. Important role of biofuel on Ukrainian market

145. According to the Article 1 of the Law of Ukraine “On Alternative Types of Fuels” No. 1391-XIV, dated 14 January 2000 biological fuels (biofuels) are solid, liquid and gas fuels made from biodegradable raw materials (biomass) that can be used as fuel or a component of other fuels.

146. According to the Article 5-1 of the Law of Ukraine “On Alternative Types of Fuels”, alternative types of solid fuels include:

- production and waste of agriculture (crop and livestock), forestry and technologically related industries, as well as granules, briquettes, charcoal and carbonaceous substance made from these products and waste that are used as fuel;
- organic part of industrial and household waste, as well as granules and briquettes made from them;
- peat, as well as granules and briquettes made from it.

147. Thus, production and waste of forestry and technologically related industries constitutes a part of solid fuels.

148. According to the Energy Balance of Ukraine, the volumes of final consumption of solid biofuels and transformation of solid biofuels during 2014-2018 were as follows⁸⁴:

Table 7

Terajoules		
	Volumes of final consumption of solid biofuels	Transformation of solid biofuels
2014	48587	30623
2015	52303	33652
2016	70632	45026
2017	74935	46601
2018	80129	50167

Source: Information from the State Agency on Energy Efficiency and Energy Saving of Ukraine (SAEE), data from the website of the State Statistics Service of Ukraine

149. As can be seen from the above statistics, the volumes of final consumption of solid biofuels in 2018 increased by 65% compared to 2014.

⁸⁴ Energy Balance of Ukraine, available at the web-site of State Statistics Service of Ukraine http://www.ukrstat.gov.ua/operativ/operativ2014/energ/en_bal_prod/arh_prod_2012.htm

150. According to information from the State Agency on Energy Efficiency and Energy Saving of Ukraine (SAEE), based on the information of Regional State Administrations and the Kyiv City State Administration (excluding the temporarily occupied territory of the Autonomous Republic of Crimea, the city of Sevastopol and a part of temporarily occupied territories in the Donetsk and Luhansk regions) as of 1 January 2019, the share of boiler-houses in Ukraine operating with the use of alternative fuels comprises 78 %. Compared to 2017, this indicator increased by 3,01 %.

151. Using sources of alternative energy has great capacity for solving environmental problems and the above statistics envisages the trend of increasing role of biofuel in Ukraine.

3.5. “Necessity” to protect

3.5.1. Policy for the protection of forests failed to fulfill its goals

152. At the outset, Ukraine has continuously been increasing environmental standards aimed at sustainable forest management by way of implementing the state protection policy of forests through the adoption of a variety of agency rules dealing with the issues at hand. The main rules are:

- *Rules governing the restoration of forests (reforestation and afforestation)*

153. In 1996, the Rules of Reforestation and Afforestation⁸⁵ were adopted in line with the state environmental safety policy to regulate what forest and agrotechnical measures aimed at afforestation were to be taken by permanent forest users, most of which are the state enterprises of forestry.

154. In 2007, the rules of 1996 were substituted by the Rules of Restoration of Forests that imposes on the permanent forest users to carry out more efficient and environmental-friendly measures aimed at the creation of high-yield stands with high-protective properties by way of reforestation and afforestation.

155. After the deadly flood happened in the West of Ukraine in 2008, the National Security and Defence Council of Ukraine passed the decision introducing the natural disaster action plan concerning the prevention of such emergency situations and liquidation of their consequences. One of the steps to be taken was to introduce regional standards of woodland coverage on the territory of Ukraine. To comply with that, the State Forestry Committee of Ukraine adopted⁸⁶

⁸⁵ Resolution of the Cabinet Ministers of Ukraine “On Approval of the Rules of Reforestation and Afforestation”, No. 97, 16 January 1996 (is no longer valid), Exhibit UKR-25.

⁸⁶ Order of the State Forestry Committee of Ukraine, No. 371, 29 December 2008, Exhibit UKR-27.

such standards which, again, has set out the whole optimal woodland coverage of Ukraine at the level of 20%.

- *Rules applicable to the felling and logging*

156. In 1995, the Rules of Final Felling Operations in the Forests of Ukraine were adopted⁸⁷ setting out that the final felling operations, which type of felling is aimed at cutting off the ready for harvesting stands, are prohibited in the mountain forests of the Carpathians.

157. Along with the Rules of Final Felling Operations, the Ukrainian Government also adopted⁸⁸ the Sanitary Rules in the forests of Ukraine one of the main purposes of which is to regulate the sanitary felling. In 2016, these rules were totally revised⁸⁹ with the main purpose to abolish the continuous sanitary felling.

158. In 2007, the Ukrainian Government adopted⁹⁰ the Rules of the Special Usage of Forest Resources. These rules have established that the logging during the final felling operations must be done in compliance with the principles of continuous, non-exhaustible and rational use of forest resources, preservation of conditions for reproduction of high-yielding stands, their ecological and other beneficial properties.

159. In 2008, the Rules of Principal felling in the Mountain Forests of the Carpathians were passed⁹¹ introducing *inter alia* a moratorium on felling in the beech forests in the period from 1 May to 30 September on a yearly basis. These Rules were adopted in compliance with the principles laid down in the Law of Ukraine “On Moratorium on Clear Cutting on Mountain Slopes of Fir-Beech Forests in the Carpathian Region” No. 1436-III, dated 10 February 2000.⁹²

160. In 2009, the State Forestry Committee of Ukraine adopted the Rules of Final Felling Operations⁹³ which reflects all the legacy of the Ukrainian environmental safety policy aimed at the preservation of forests and the enlargement of the woodland.

- *Rules aimed at sustainable forest management*

⁸⁷ Resolution of the Cabinet Ministers of Ukraine, No. 559, 27 July 1995 (is no longer valid), Exhibit UKR-28.

⁸⁸ Resolution of the Cabinet Ministers of Ukraine, No. 555, 27 July 1995, Exhibit UKR-29.

⁸⁹ Resolution of the Cabinet Ministers of Ukraine, No. 756, 26 October 2016, Exhibit UKR-30.

⁹⁰ Resolution of the Cabinet Ministers of Ukraine, No. 761, 23 May 2007, Exhibit UKR-31.

⁹¹ Resolution of the Cabinet Ministers of Ukraine, No. 929, 22 October 2008, Exhibit UKR-32.

⁹² Law of Ukraine, No. 1436-III, 10 February 2000, Exhibit UKR-33.

⁹³ The Rules of Principal Felling in the Forests of Ukraine passed by the Ukrainian Government in 1995 were repealed in 2010.

161. In 2006, the Ukrainian Government approved⁹⁴ the Concept of Forestry Reform and Development which highlights the main problems of the Ukrainian forest industry and sets the goals for the sustainable forest management and the rational usage of forest resources.

162. In 2017, the President of Ukraine set⁹⁵ the main tasks for the Ukrainian Government to take additional measures aimed at the development of the forestry, the rational exploitation of natural resources and the preservation of nature reserve fund.

- *Preservation of Forests as a part of nature reserve fund*

163. Since 1991, administrative and statutory actions have been taken to set aside the harvestable woodland for preservation purposes, mainly pursuant to the Law of Ukraine “On Nature Reserve Fund of Ukraine”⁹⁶.

164. For instance in 1993, the Carpathian Reserve, an area of approximately of 39 thousand hectares of woodland located in the Transcarpathian region, was put under additional environmental protection by acquiring the status of the Biosphere Reserve⁹⁷. Since its creation in 1968, the area of the Carpathian Biosphere Reserve has been expanded from 12 to 53 thousand hectares. The measures aimed at the preservation of forests have cut down, therefore, otherwise harvestable woodland.

165. In 1996, the Natural Reserve “Gorgany” was established⁹⁸ on the area of about 5.4 thousand hectares to put relic, primeval forests under additional state protection. In 1997, further administrative actions allocated a protective (buffer) zone width of 750-1100 meters around the perimeter of the five forests bordering the reserve⁹⁹, whereby the area of otherwise harvestable woodland was reduced.

166. According to the information from the Ministry of Ecology and Natural Resources of Ukraine (currently – the Ministry of Energy and Environment Protection of Ukraine), by way of various administrative and statutory actions taken by 2012 aimed at preserving the forests, the total area of the harvestable woodland, where the continuous felling was carried out or otherwise permitted, was reduced by 10.6% in the period from 1996 to 2011.

167. Given the above, all the mentioned rules aimed at increasing environmental standards in logging, reducing the amount of continuous felling and introducing a total logging ban in

⁹⁴ Order of the Cabinet Ministers of Ukraine, No. 208-r, 18 April 2006, Exhibit UKR-34.

⁹⁵ Decree of the President of Ukraine, No. 381/2017, 21 November 2017, Exhibit UKR-24.

⁹⁶ Law of Ukraine, No. 2456-XII, 16 June 1992 (amended by the Law on 21 November 2019) Exhibit UKR-35.

⁹⁷ Decree of the President of Ukraine, No. 563/93, 26 November 1993, Exhibit UKR-26.

⁹⁸ Decree of the President of Ukraine, No. 831/96, 12 September 1996, Exhibit UKR-22.

⁹⁹ Regulation of the Head of Ivano-Frankivsk Regional State Administration “On Protective Zone of the Natural Reserve “Gorgany”, No. 62, 3 February 1997.

particular forests were put in place as a part of Ukraine's environmental safety policy aimed at the preservation of forests but did not result in decrease of felling and the increase of the woodland.

168. Therefore, the Law No. 2860-IV was already put in place as a part of Ukraine's environmental safety policy aimed at the preservation of forests but did not result in decrease of felling and the increase of the woodland and did not achieve the main goals.

3.5.2. Absence of due investment

169. As it was already mentioned in this Submission, the first State strategy related to public policy in the forest management was adopted by the Resolution of the Cabinet of Ministers of Ukraine "On approval of the State Program "Forests of Ukraine" for 2002-2015" No. 581, dated 29 April 2002, and then substituted in 2009 by the Resolution of the Cabinet of Ministers of Ukraine "On approval of the State Targeted Program "Forests of Ukraine" for 2010-2015" No. 977, dated 16 September 2009 ("Forests of Ukraine" for 2010-2015").

170. Due to the lack of budget during the whole period of duration of the State Program, governmental authorities did not manage to take an inventory of the forests in Ukraine as well as introduce the system of the monitoring of the state of forests.

171. The Forest Code specifies¹⁰⁰ three main sources for financing the forestry activity including afforestation: (1) the state budget concerning the state-owned forests; (2) the state and local budgets concerning the communal-owned forests, and (3) private funds in relation to the privately-owned forests.

172. In 2011, the State Audit Service of Ukraine reported¹⁰¹ that although various state budget programs for forest industry were financed for 98%, the afforestation plan for 2002-2009 to create new forests on 213 thousand hectares was failed because it had been implemented only for 63% of the set goal.

173. In 2014, the State Forest Resources Agency of Ukraine reported about the status of financing¹⁰² and implementing¹⁰³ in 2014 of the state target-oriented program "Forests of Ukraine" for 2010-2015¹⁰⁴. The underinvestment caused the increase of the woodland only for 5200 hectares out of the planned 95100 hectares. In the following years, there were constant

¹⁰⁰ Forest Code of Ukraine, No. 3852-XII, 21 January 1994, Article 98, Exhibit UKR-08.

¹⁰¹ http://dklg.kmu.gov.ua/forest/control/uk/publish/article?art_id=190654&cat_id=32888

¹⁰² http://dklg.kmu.gov.ua/forest/document/142851/Lisy_Ukr_2014_finansuvannia.pdf

¹⁰³ http://dklg.kmu.gov.ua/forest/document/142852/Lisy_Ukr_2014_zahody_i_zavdannia.pdf

¹⁰⁴ Resolution of the Cabinet Ministers of Ukraine, No. 977, 16 September 2009, Exhibit UKR-23.

reports^{105 106} that the forest industry suffers from chronic underinvestment from the state budget.

174. Only in 2017¹⁰⁷, it was envisaged to set up a special state fund for the forestry development as a part of the state budget that would enable to finance the afforestation by redirecting to it rental fees for the special forest usage.

175. Therefore, at the time of imposing the “2015 temporary export ban”, Ukraine already put in place measures to encourage investment in the afforestation but those measures did not result in the planned increase of the woodland, and hence such measures could not put to an end intensive deforestation and gain time for forests restoration.

3.5.3. Circumstances of “emergency in international relations”

176. In the present case, the Arbitration Panel should take into consideration the specific circumstances, in particular “*emergency in international relations*” within the meaning of Article XXI (b) of the GATT. The determination and existence of such situation was alleged by the WTO Panel in *Russia – Traffic in Transit*¹⁰⁸. This “*emergency in international relations*” between Ukraine and the Russian Federation began in 2014 and inter alia has led to awful extermination of flora and fauna of the part of Ukraine where military actions are conducted, especially a great part of the wood was destroyed.¹⁰⁹

177. This situation has been multiple times recognized and analysed by the UN environment programme (‘UNEP’):

“The forests in the Donetsk and Lugansk provinces of Donbas region play a crucial role in the natural and man-made landscapes, by preventing wind and water erosion and by ensuring the stability of water supply bodies. Besides creating a favourable environment for the local fauna and flora, the region’s massive pine forests play a key social and economic role, as they are often used for recreation, hunting, and mushrooms, berries, and herbs picking.

According to an assessment carried out by UN Environment’s Science-Policy Platform on Environment and Security, the conflict has affected,

¹⁰⁵ <https://dailv.rbc.ua/ukr/show/tri-shaga-v-bezvvhodnost-21112014164400>

¹⁰⁶ http://dklg.kmu.gov.ua/forest/control/uk/publish/article?art_id=190654&cat_id=32888

¹⁰⁷ Decree of the President of Ukraine, No. 381/2017, 21 November 2017, Exhibit UKR-24.

¹⁰⁸ Panel Report, *Russia – Traffic in Transit*, para. 7.126.

¹⁰⁹ UN News, “*Human cost of Ukraine Conflict is growing, Security Council told*”, available at <https://news.un.org/en/story/2019/07/1042561>

damaged, or destroyed ecosystems within an area of at least 530,000 hectares, including 18 nature reserves covering an area of 80,000 hectares. Furthermore, 150,000 hectares of forests have been impacted, with 12,500 forest fires blazing through the military operations zone and adjacent areas.

In 2014 alone, the lack of forest protection and the fighting led to the near irreversible destruction of 479 hectares of forests. The fighting has had direct mechanical and chemical impacts on trees, including shrapnel damage of barks, branches, tops, ground vegetation, weakening or killing individual trees and entire plantations. The military operations zone has also been contaminated by unexploded ordnance whose elimination could take years or decades, based on the experience of other countries such as Bosnia and Herzegovina, Serbia, and Macedonia”.¹¹⁰

178. It is worth noting, the Panel in that case also cleared up that the GATT 1994 and the WTO Agreements prescribe that such a situation of “*emergency in international relations*” allows WTO Members to “*depart from their GATT and WTO obligations*”.¹¹¹

179. Ukraine submits that the situation of “*emergency in international relations*” that currently exists on its territory affects a great number of spheres of a daily life not only in the region but also in the entire country. Due to occupation of the considerable part of Ukraine in the rest of the country is increased consumption of wood products for purposes inter alia of warming the accommodations, especially regarding that not only significant part of forests leave in the occupied territory but also the biggest coal mines and plants stay there.

180. Before the war, Donetsk and Luhansk regions were among the oldest and most fully integrated industrial regions in Europe. However, for today in the occupied part of Donbas there are at least 35 mines, which are already flooded and are beyond repair. Another 70 are in the process of shutting down and will be inevitably flooded. Reasons for the closure of mines include economic insolvency, and damage or destruction from military operations.¹¹² All of that results in sustainable increase of consumption of wood products in the rest of country and consequently severe reduction of the forestation amount.

¹¹⁰ UN environment programme News and Stories, *Ukraine’s Donbas bears the brunt of toxic armed conflict*, available at <https://www.unenvironment.org/news-and-stories/story/ukraines-donbas-bears-brunt-toxic-armed-conflict>

¹¹¹ Panel Report, *Russia – Traffic in Transit*, para. 7.79.

¹¹² <https://www.fpri.org/article/2019/09/coal-mines-land-mines-and-nuclear-bombs-the-environmental-cost-of-the-war-in-eastern-ukraine/>

181. Furthermore, such situation has huge impact on the forestation, significant forest area and a large number of windbreak strips have been lost due to forest fires, mechanical damage related to the ongoing conflict in certain areas of the Donetsk and Luhansk regions (ORDLO). It has critically decreased forestation in the ORDLO and reduced the field-protective, soil-protective, water-protective, and recreational functions of the forests and green spaces¹¹³.

182. The Panel should consider that in Donetsk and Lugansk regions are situated 305 objects of the natural reserve fund. More than half of such facilities - in the Lugansk region, about a third – in the Donetsk region – now located or stayed in the occupied territory of the certain areas of the Donetsk and Luhansk regions. In particular, there are nature reserves in the region – Luhansky and Ukrainian Steppe, and the national natural parks – the Svyati Hory and Meotida.¹¹⁴

183. These objects of the Ukrainian natural wealth are suffered from the number of different factors and one of the greatest problems consists in the forest fires aroused from the explosions of ammunition or deliberate arsons connected with the tactics of warfare. As result of fires caused by military actions, the plantations along the collision line suffered the most. Furthermore, damage to the territories by shelling was found in the national natural park Svyati Hory, branches of the Ukrainian Steppe Kalmius and Kreydyana flora, regional landscape park Donetsk Kriaghgh and the Slavyansky Resort, Lugansk Natural Reserve, Belogorivsky and Perevalsky Reserves. The forest plantations in the ORDLO also are affected from the cutting down for the military needs, e.g. building dugout shelters, trenches.

184. Moreover, during the period of armed aggression by Russia in the territory of ORDLO the integral natural landscapes were tremendously destructed. Military actions led to pollution of water, soil, atmospheric air, forests cutting down. The impact on the bio resources is horrifying and expectations of experts demonstrate that the rehabilitation of these objects will continue for a considerable period. Unfortunately, the lack of full control over the entire territory, the actual lack of control bodies and constant shelling do not allow an objective assessment of the damage caused to the natural environment during the period of hostilities. Each and every following day of the war the natural wealth and resources of the occupied Donbas territory, especially forestry, are destructed, the scale of the environmental consequences increases exponentially, and their prevention or elimination becomes more complicated.

¹¹³ <https://menr.gov.ua/files/images/news/24012018/Environmental%20Damage%20in%20Eastern%20Ukraine%20and%20Recovery%20Priorities.pdf>

¹¹⁴ <https://www.dsns.gov.ua/en/Ostanni-novini/82386.html>

185. Contributing factor on such situation is the fact that, according to the information of representatives of the Donetsk and Lugansk regional forestry and hunting authorities, fire statistics is now only available in safe remote areas, and therefore the only safe way to estimate the number of fires in the zone of a military conflict is the analysis of satellite data. In general, in the Donetsk and Luhansk regions in 2014, Moderate Resolution Imaging Spectroradiometer recorded 12,518 plant fires, including 4,867 fires in the area of combat actions.¹¹⁵

186. In view of occupation and ongoing-armed aggression by Russia in the ORDLO, Ukraine has been already deprived of a huge part of its national forestry resources. In the conditions when the whole world is anxious about climate changes the nature of Ukraine is severely impacted and even for today scale of harmful consequences is terrifying. Conservation and recovery of the national forestry have a direct influence on the climate, water and air resources, landscapes, biodiversity in the region including the disappearance of some species, as well as the uncontrolled dispersion and population growth of others, including those that threaten the sanitary and epidemiological condition of the territory and its agriculture.

187. Ukraine needs to focus regulatory and legislative actions aimed at the protection of its territory and its nature and woods from total destruction at the maintenance of law and public order internally with respect to the current emergency situation, regarding the fact that for the moment of adoption of the Law No. 2860-IV amended, in particular, by the Law No. 325-VIII was absent any legislative regulation of that issue.

188. In sum, considering the fact that (i) a situation of emergency currently exists in Ukraine which allows it to prioritize the necessary actions to protect its territory and natural resources and to depart from its WTO obligations in doing so¹¹⁶ and (ii) the situation that a considerable part of Ukraine is occupied by Russia, hereupon significant part of forestry stayed there, substantial part of it was destructed because of military actions and severely increased the consumption of wood products in the rest of Ukraine.

189. Ukraine therefore respectfully asks the Arbitration Panel to take the situation as described above into account and consider the highly particular circumstances from which Ukraine has been severely suffering during the last years.

¹¹⁵ <https://www.dsns.gov.ua/en/Ostanni-novini/82386.html>

¹¹⁶ Panel Report, *Russia – Traffic in Transit*, para. 7.79.

4. LEGAL ARGUMENTS

4.1. Article 35 of the Association Agreement and Article XI of the GATT 1994

190. According to Article 35 of the Association Agreement:

“No Party shall adopt or maintain any prohibition or restriction or any measure having an equivalent effect on the import of any good of the other Party or on the export or sale for export of any good destined for the territory of the other Party, except as otherwise provided in this Agreement or in accordance with Article XI of GATT 1994 and its interpretative notes. To this end, Article XI of GATT 1994 and its interpretative notes are incorporated into, and made an integral part of, this Agreement.”

191. The key point in this provision is the notion of “effect”. Ukraine is of the view that what is not allowed under this provision are measures characterized as having an “effect” “on the export” of “good destined for the territory of the other Party”. The “object” of a measure is irrelevant. What counts is its “effect”. A measure which object is not to restrict or prohibit exportation, but which has such effect, is concerned. Likewise, and quite logically, a measure which object appears to be to restrict exportation but which does not carry out such effect has no reason to be concerned. Article 35 of the Association Agreement is not about what Law makers think they do – which pertains to domestic political considerations, but about what the Laws do in terms of effect on trade.

192. In this regards it should be clarified here that contrary to what the European Union argues, Article XI:1 of the GATT 1994 is not “incorporated by reference” as a whole by Article 35 of the Association Agreement. What is incorporated by reference are the exceptions to the prohibition as set out in Article XI of the GATT 1994. The prohibition is the one indicated by Article 35 of the Association Agreement. The exact meaning of the prohibition as set out in Article 35 of the Association Agreement can therefore not be deemed a copy-cat of the interpretation of Article XI:1 of the GATT 1994.

4.1.2. The European Union bears the burden of proof

193. In its Written Submission the European Union keeps repeating about the burden of proof of Ukraine in this dispute in order to benefit from the exceptions as set out in Article 35 of the Association Agreement, referring to Article XI of the GATT 1994, therefore failing to prove any of its claims in relation to the alleged violation of Article 35 of the Association Agreement. At no point the European Union demonstrates any actual “effect” of the measures it challenges.

194. In *India – Quantitative Restrictions*, the Panel stated on the issue of the burden of proof under Article XI of the GATT 1994:

“In all instances, each party has to provide evidence in support of each of its particular assertions. This implies that the United States has to prove any of its claims in relation to the alleged violation of Article XI:1 and XVIII:11. Similarly, India has to support its assertion that its measures are justified under Article XVIII:B. We also view the rules stated by the Appellate Body as requiring that the United States as the complainant cannot limit itself to stating its claim. It must present a *prima facie case* [...]”¹¹⁷

195. Therefore the relevant WTO case law has clarified that a complainant has to prove any of its claims in relation to the alleged violation of Article XI:1 of the GATT 1994 and must present a *prima facie case* that the measures are not justified. A complainant cannot limit itself to just stating its claim.

196. Only after examining whether the measures are inconsistent with Article XI of the GATT 1994, in case of inconsistency, the panel may proceed in its examination whether the measures are justified.

197. Ukraine refers to the paragraph 54 of the European Union’s Written Submission. The European Union just claims that the “2005 export ban” and “2015 temporary export ban” constitute “prohibitions” on exports from Ukraine to the European Union within the meaning of both the first sentence of Article 35 of the Association Agreement and Article XI:1 of the GATT 1994. But, despite the fact that what must be demonstrated is only an inconsistency with the first sentence of Article 35 of the Association Agreement, the European Union does not proceed to such demonstration since it does not argue about the actual effects of the challenged legislations.

198. In *EU – Energy Package* the Panel noted that:

“Based on the text of Article XI:1 of the GATT 1994, in order to establish that a challenged measure is inconsistent with Article XI:1 of the GATT 1994, the complaining Member must demonstrate the following elements: (i) the measure falls within the scope of the phrase ‘quotas, import or export licences or other

¹¹⁷ Panel Report, *India – Quantitative Restrictions*, para. 5.119. The Panel in *US – Shrimp* also allocated the burden of proof to the complainant, referring to the Appellate Body Report, *US – Wool Shirts and Blouses*. Panel Report, *US – Shrimp*, para. 7.14. Further, the Panel in *Argentina – Hides and Leather* followed this practice. Panel Report, *Argentina – Hides and Leather*, paras. 11.11-11.14.

measures’; and (ii) the measure constitutes a prohibition or restriction on the importation or on the exportation or sale for export of any product.”¹¹⁸

199. Thus, in order to prove that the measures at issue are inconsistent with Article XI:1 of the GATT 1994 the European Union must demonstrate that:

(i) the measure falls within the scope of the phrase ‘quotas, import or export licences or other measures’;

(ii) the measure constitutes a prohibition or restriction on the importation or on the exportation or sale for export of any product.

200. When referring to the terms ‘prohibition or restriction’ the term “prohibition” is defined as a ‘legal ban on the trade or importation of a specified commodity’. The second component of the phrase ‘[e]xport prohibitions or restrictions’ is the noun ‘restriction’, which is defined as ‘[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation’, and thus refers generally to something that has a limiting effect.¹¹⁹

201. Accordingly, Ukraine sets out that not every measure affecting the opportunities for entering the market would be covered by Article XI of the GATT 1994. Article XI of the GATT 1994 covers only those measures that constitute a prohibition or restriction that have a limiting effect on the quantity or amount of a product being imported or exported.

202. According to the provisions of Article 320 of the Association Agreement where an obligation under this Agreement is identical to an obligation under the WTO Agreement, the Arbitration Panel shall adopt an interpretation which is consistent with any relevant interpretation established in rulings of the WTO DSB.

203. Consequently, in view of the WTO case law the European Union has not satisfied its burden of proof and either demonstrated that the measure falls within the scope of the phrase ‘quotas, import or export licenses or other measures’ nor the measure constitutes a prohibition or restriction on the importation or on the exportation or sale for export of any product that have a limiting effect.

204. Therefore, Ukraine respectfully requests the Arbitration Panel to find that the European Union failed to prove any of its claims in relation to the alleged violation of Article 35 of the Association Agreement and Article XI of the GATT 1994 and reject its claims with respect to the measures at issue.

¹¹⁸ Panel Report, *EU – Energy Package*, para. 7.243. See also Appellate Body Reports, *Argentina – Import Measures*, paras. 5.216-5.218.

¹¹⁹ Appellate Body Reports, *China – Raw Materials*, paras. 319-320.

205. In case the Arbitration Panel finds that Ukraine acted inconsistently with Article 35 of the Association Agreement and Article XI of the GATT 1994 Ukraine justifies measures by Article 36 of the Association Agreement and Article XX of the GATT 1994.

4.2. Article 36 of the Association Agreement (Article XX of the GATT 1994)

206. The Appellate Body in *Indonesia – Import Licensing Regimes* summarized the operation of Article XX of the GATT 1994:

“Members can resort to Article XX as an exception to justify measures that would otherwise be inconsistent with GATT obligations. Article XX is made up of two main parts: (i) ten paragraphs, which enumerate the various categories of “governmental acts, laws or regulations which WTO Members may carry out or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalization”; and (ii) the *chapeau*, which imposes additional disciplines on measures that have been found to be provisionally justified under one of the paragraphs of Article XX.”¹²⁰

207. Starting from the report in *US – Gasoline*, the Appellate Body has established and then further confirmed that the appropriate order of analysis in a panel’s examination of a justification under Article XX of the GATT 1994 is to determine, first, whether a measure is “provisionally justified” under one of the sub-paragraphs, only then to assess whether its application is consistent with the test of the Chapeau.¹²¹

208. However, Ukraine wants to stress that this Arbitration Panel has the task not only to assess relevant WTO Agreements and case law, but to evaluate the conformity of the challenged measures with the Association Agreement which has in some areas broader obligations different from the WTO ones. Therefore, the Arbitration Panel when interpreting Article 36 of the Association Agreement has to take into account sustainable development obligations prescribed in Articles 290, 294 and 296 of the Association Agreement. Ukraine will further provide its arguments with regard to sustainable development in Section 4.3 of this Submission.

209. Ukraine is fully aware that the burden of proving that a measure found to be violated Article XI of the GATT 1994 (Article 35 of the Association Agreement) is justified under Article XX of the GATT 1994 (as incorporated by Article 36 of the Association Agreement)

¹²⁰ Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.94, citing Appellate Body Report, *US – Gasoline*, p. 17, DSR 1996:I, p. 16, Appellate Body Reports, *EC – Seal Products*, para. 5.296.

¹²¹ Appellate Body Report, *US – Gasoline*, p. 22; See also Appellate Body Reports, *EC – Seal Products*, para. 5.185; Appellate Body Report, *US – Shrimp*, paras. 119-120; Appellate Body Report, *Brazil – Retreaded Tyres*, para. 139.

rests on the respondent as was confirmed by the Appellate Body in a number of disputes.¹²² To satisfy its burden of proof, Ukraine will further show in this section that the “2005 export ban” falls within the range of policies provided in sub-paragraph (b) while the “2015 temporary export ban” falls within the range of policies provided in sub-paragraph (g) and, at the same time, the requirements of the Chapeau of Article XX of the GATT 1994 are satisfied, taking into account that there is no less-trade restrictive alternatives available.

210. However, Ukraine wants to stress and draws the Arbitration Panel’s attention that burden of proof to “identify any alternative measures that, in its view, the responding party should have taken”¹²³ rests on the complaining Party and that would accomplish the same objective as the originally imposed measure, to the same degree, while being less trade-restrictive in nature.

4.2.1. The “2005 export ban” is justified by Article XX (b) of the GATT 1994 because it is necessary to the protection of human, animal or plant life or health and applies in a manner that does not constitute arbitrary or unjustifiable discrimination or disguised restriction on international trade

211. Ukraine seeks to address “human, animal and plant life or health” concerns of the Ukrainian forests. The issue of forest has rarely been viewed as a matter of perspective of “animal and plant life or health” and Ukraine believes that it can actually make a material contribution to protect environment and accordingly the “human, animal and plant life or health” in Ukraine.

212. Therefore, in this section Ukraine gives an overview of its defence and related observations on the applicability of Article XX (b) of the GATT 1994, in particular the legal interpretation developed in WTO jurisprudence covering the “2005 export ban”.

4.2.1.1. The “2005 export ban” falls within the range of policies designed to protect human, animal or plant life or health under sub-paragraph (b) of Article XX of the GATT 1994

4.2.1.1.1. Legal standard

213. Article XX (b) of the GATT 1994 reads as follows:

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between

¹²² Appellate Body Report, *US – Gasoline*, p. 22; Appellate Body Reports, *EC – Seal Products*, para. 5.169.

¹²³ Appellate Body Reports, *EC – Seal Products*, para. 5.169.

countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

[...]

(b) necessary to protect human, animal or plant life or health;

[...].”

214. Article XX (b) of the GATT 1994 allows a Member to ‘adopt and enforce’ a measure, inter alia, necessary to protect human life or health, even though that measure is inconsistent with another provision of the GATT 1994.¹²⁴

215. To be justified under Article XX (b) of the GATT 1994, a measure must be “necessary to protect human, animal or plant life or health” and it must also meet the requirements of the Chapeau of Article XX of the GATT 1994.

216. It is well established that the party invoking exceptions bears the burden of proof. Therefore, Ukraine by invoking Article XX (b) of the GATT 1994 have to demonstrate that the challenged measure is “necessary to protect human, animal or plant life or health” and complies with the Chapeau of Article XX of the GATT 1994.

217. According to the Panel in *China – Rare Earths*, in examining a defence under Article XX (b) of the GATT 1994, the first issue is whether the challenged measure falls within the range of policies designed to protect human, animal or plant life or health.¹²⁵ Therefore, both the “design” and “structure” of a challenged measure have to be examined to decide whether its “objective” is the protection of life and health, generally showing a degree of deference to Members’ policies designed to “protect human, animal or plant life or health”. A broad range of policies have been recognized as protecting human, animal, and plant life or health.¹²⁶

218. Article XX (b) of the GATT 1994 requires that a challenged measure be “necessary” to achieve the objective it pursues. Therefore, if a panel finds that the objective of the challenged

¹²⁴ Appellate Body Report, *EC – Asbestos*, para. 115.

¹²⁵ Panel Reports, *China – Rare Earths*, footnote 240 to para. 7.145, which says: “For instance, the panel in *EC – Tariff Preferences* set out the requirements of Article XX (b) of the GATT 1994 in this way: “Following this jurisprudence, the Panel considers that, in order to determine whether the Drug Arrangements are justified under Article XX (b), the Panel needs to examine: (i) whether the policy reflected in the measure falls within the range of policies designed to achieve the objective of or, put differently, whether the policy objective is for the purpose of, ‘protect[ing] human ... life or health’. In other words, whether the measure is one designed to achieve that health policy objective ...”. Panel Report, *EC – Tariff Preferences*, para. 7.199”.

¹²⁶ Panel Reports, *China – Rare Earths*, para. 7.145.

measure is to protect human, animal or plant life or health, the next issue is whether the measure is “necessary” to fulfil this policy objective.¹²⁷

219. Where the analysis described above results in a preliminary conclusion that the measure is necessary, the next step is to compare the challenged measure with possible alternative measures identified by the complainants.¹²⁸ Thus, it is the complaining party who bears the burden of identifying possible alternative measures that could have been taken to achieve Ukraine’s objectives. As the Appellate Body indicated in *US – Gambling*, while the responding Member must show that a measure is necessary, it does not have to “show, in the first instance, that there are no reasonably available alternatives to achieve its objectives”.¹²⁹

220. The Panel in the *Thailand – Cigarettes (Philippines)* case borrowed the “least-trade restrictive” requirement from the *US – Section 337* panel report. The Panel defined the test of “necessity” applicable under Article XX (b) as follows: “[T]he import restrictions imposed by Thailand could be considered to be “necessary” in terms of Article XX (b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives”.¹³⁰

221. Finally, for a measure to be justified under Article XX (b) of the GATT 1994, the measure must comply with the Chapeau of Article XX.¹³¹

222. Therefore, in order to establish whether a measure can be justified under Article XX (b) of the GATT 1994, the Arbitration Panel will need to examine:

- (i) whether the policy objective reflected in the measure is for the purpose of “protect[ing] human, animal or plant life or health”. In other words, whether the measure is one designed to achieve that plant life policy objective;
- (ii) whether the measure is “necessary” to achieve said objective;
- (iii) whether a reasonably available alternative exists; and
- (iv) whether the measure is applied in a manner consistent with the Chapeau of Article XX of the GATT 1994.

4.2.1.1.2. Legal arguments

¹²⁷ Panel Reports, *China – Rare Earths*, para. 7.146.

¹²⁸ Appellate Body Reports, *US – Gambling*, para. 311.

¹²⁹ Appellate Body Report, *US – Gambling*, para. 311.

¹³⁰ <http://www.oas.org/dsd/Tool-kit/Documentos/MOduleII/GATT%20WTO%20Dispute%20Settlement%20Practice.pdf> referring to the Panel Report, *Thailand – Cigarettes (Philippines)*, para. 75.

¹³¹ Panel Reports, *China – Rare Earths*, para. 7.148.

223. Ukraine will further demonstrate that all requirements needed to justify the “2005 export ban” under Article XX (b) of the GATT 1994 are fulfilled, specifically: i) the policy objective reflected in the measure is for the purpose of “protect[ing] human, animal or plant life or health”; (ii) the measure is “necessary” to achieve said objective; and (iii) the measure is applied in a manner consistent with the chapeau of Article XX of the GATT 1994.

4.2.1.1.2.1. The policy objective reflected in the “2005 export ban” is for the purpose of “protect[ing] human, animal or plant life or health”

224. Ukraine has already explained in sections 3.2 “Measures at issue” and 3.3. “Policy for the protection” of this Submission the character and the content of the “2005 export ban”.

225. More specifically, the “2005 export ban” is introduced by Law No. 2860-IV. Article 2 of the Law No. 2860-IV prohibits the export of timber and sawn wood of the valuable and rare wood species, specifically: acacias, checker trees, cherry trees, pear trees, walnut trees, chestnuts, common yews, black cherries, acers, and junipers.

226. As was mentioned in section 3.2.1 “The “2005 export ban” of this Submission, the reasons to prohibit the export of timber and sawn wood of the valuable and rare wood species consists of: (i) some of the wood species have been assessed as a “valuable and rare” in the Red Book of Ukraine and some are included in the International Union for Conservation of Nature Red List of Threatened Species; (ii) the valuable and rare wood species are not intended for the industrial production and consumption.

227. According to the The Law of Ukraine “On Red Book of Ukraine”, the objective of the legislation on the Red Book of Ukraine is to regulate public relations in the field of protection, use and reproduction of rare and endangered species of fauna and flora listed in the Red Book of Ukraine, with the aim of preventing the disappearance of such species from nature, ensuring conservation, their gene pool.¹³² Nowadays awareness has risen surrounding the crucial role of plants – and especially trees – in providing ecosystem services and on the threats that they face. Trees are one of the essential foundations of healthy ecosystems that we depend on, including Ukrainian forest landscape, a mosaic largely shaped by people. However, significant gaps in knowledge still remain.

228. In this context, the Law No. 2860-IV provides the protection of valuable and rare wood species to avoid the extinction risk of these species, although policy aimed at protecting the natural environment was introduced long before the Law No. 2860-IV.

¹³² Article 2 of Law of Ukraine “On Red Book of Ukraine”, Exhibit UKR-20.

229. Ukraine has been developing its comprehensive environmental policy aimed at protecting forests as a valuable resource for human, animal and plant life and health. More specifically, Ukraine has adopted a number of the main legislative acts that have laid down the basis of the state policy to preserve forests, some of them were already mentioned in this Submission:

The Law of Ukraine “On Environmental Protection” (1991) setting out that forests are under the state protection and regulation (Article 5);

The Law of Ukraine “On Nature Reserve Fund of Ukraine” (1992) establishing the principles of the special protection for and the renewal of areas, including woodland, that form the Ukrainian Nature Reserve Fund;

The Law of Ukraine “On Fauna” imposing strict obligations on forest users (state forest enterprises, etc.) to preserve the fauna during their forestry activity;

The Forest Code of Ukraine (1994), the main legislative act establishing the principles aimed at preservation, improvement of wood quality and sustainable forest management;

The Law of Ukraine “On Flora” (1999) which allocates the forest resources to the flora and put them under the special state protection aimed at preserving biodiversity;

The Law of Ukraine “On Moratorium on Clear Cutting on Mountain Slopes of Fir-Beech Forests in the Carpathian Region” (2000) which was a natural governmental response to improve the forest management situation in mountain forests after the catastrophic floods had happened in Zakarpattia Region in November 1998;

The Law of Ukraine “On National Ukrainian Program of National Ecological Network for 2000-2015” declaring a need to expand the national ecological network by way of enlarging the area of the woodland;

The Law of Ukraine “On the Red Book of Ukraine” setting out the main principles aimed at the protection and reproduction of rare species of flora and fauna as well as those that are on the verge of extinction;

The Law of Ukraine “On the Main Principles (Strategy) of State Environmental Policy of Ukraine for the Period until 2020”. The strategy describes the existing environmental problems of Ukraine. Their main reasons are that in Ukraine environmental priorities are subordinated to economic viability, resource and energy intensive areas dominate in the structure of the economy with a predominantly negative impact on the environment. The strategy underlines that one of the main

threats to the Ukrainian biodiversity is inter alia the catastrophic decrease of the area of natural forests due to the extensive felling. The fundamentals of the public environmental policy provide for an increase in (i) the land area of the natural reserve fund from 3.2 million hectares in 2010 to almost 15% and (ii) the woodland up to 17% by 2020 out of the total territory of Ukraine.

230. Ukraine has also become a party to international conventions whereby it has undertaken to maintain sustainable forest management and carry out forestry activities on afforestation, reforestation and combating deforestation, mentioned in section 3.3.2. “International legal framework”.

231. Therefore, the “2005 export ban” is part of a comprehensive environmental protection framework of Ukraine and is adopted in line with Ukraine’s environment protection policy aimed against deforestation by way of reducing the scale of logging and expanding the woodland as an integral part of the complex state strategy.

232. Moreover, taking into account that the wood species covered under “2005 export ban” (i.e., valuable and rare) are not intended for the industrial production and consumption, there was a high risk of extinction of those species and this risk was directly related to the export of these wood species. In this context, according to Article 70 of the Forest Code of Ukraine, during the timber harvesting, harvesting and damage of valuable and rare trees and shrubs listed in the Red Book of Ukraine are not allowed.¹³³

4.2.1.1.2.2. The measure is “necessary” to achieve objective

233. Statement that “determination of whether a measure, which is not ‘indispensable’, may nevertheless be ‘necessary’” involves “weighing and balancing a series of factors”.¹³⁴

234. In order to determine whether a measure is “necessary” within the meaning of Article XX (b) of the GATT 1994, a panel must assess all the relevant factors, particularly the extent of the contribution to the achievement of a measure’s objective and its trade restrictiveness, in the light of the importance of the interests or values at stake. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued. It rests upon the

¹³³ Forest Code of Ukraine, No. 3852- XII, 21 January 1994, Article 70, Exhibit UKR- 08.

¹³⁴ Appellate Body Report on *Korea – Various Measures on Beef*, para. 164; See also Appellate Body Report on *US – Gambling*, para. 323; Appellate Body Report on *EC – Asbestos*, para. 172.

complaining Member to identify possible alternatives to the measure at issue that the responding Member could have taken.¹³⁵

235. The Appellate Body in *Brazil – Retreaded Tyres* explained that:

“... In order to justify an import ban under Article XX (b), a panel must be satisfied that it brings about a material contribution to the achievement of its objective. Such a demonstration can of course be made by resorting to evidence or data, pertaining to the past or the present, that establish that the import ban at issue makes a material contribution to the protection of public health or environmental objectives pursued. This is not, however, the only type of demonstration that could establish such a contribution. Thus, a panel might conclude that an import ban is necessary on the basis of a demonstration that the import ban at issue is apt to produce a material contribution to the achievement of its objective”.¹³⁶

236. Ukraine asserts that its “2005 export ban” is necessary to protect human health under Article XX (b) of the GATT 1994 and demonstrates in section 3.5 “Necessity” to protect” of this Submission that any of the measures either (1) pursues the objective of “2005 export ban” or (2) is “necessary” to the achievement of that objective.

237. Since 2002, Ukraine has constantly been setting a common goal to enlarge the woodland by way of reforestation and afforestation which was demonstrated in section 3.4 “Information on Ukraine market (Protection at State level, including statistics)” of this Submission.

238. The interests protected by the “2005 export ban” are fundamental, vital and important in the highest degree and weigh substantially in favour of the necessity of the measure.

239. The contribution of the “2005 export ban” lies in the fact that it prevents the industrial production and consumption and protects a “valuable and rare” wood species. As a result, despite it is for the European Union to demonstrate “alternative measures that could have been taken to achieve Ukraine’s objectives” Ukraine believes that there are no other practical alternative.

240. Ukraine prohibits the export of timber and sawn wood of the valuable and rare wood species (i.e. “2005 export ban”) because it is necessary and no other measure can “protect human, animal or plant life or health”. Ukraine clearly demonstrates that the ban is necessary,¹³⁷ and established that: the “2005 export ban” protects interests that are vital and

¹³⁵ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156, referring to the Appellate Body Report, *US – Gambling*, para. 311.

¹³⁶ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

¹³⁷ Section 3.5. (“Necessity” to protect) of this Submission.

important in the highest degree; it does not restrict trade unfairly; it makes a significant contribution to the goal pursued; and therefore, it is necessary within the meaning of Article XX(b) of the GATT 1994.

241. Therefore, Ukraine at the time of introducing the “2005 export ban”, it had the consistent protection policy of forests as a part of the unified state environmental policy and had implemented all available measures to achieve the objective.

4.2.1.2. The “2005 temporary export ban” is applied in a manner that satisfies the requirements of the Chapeau of Article XX of the GATT 1994

242. Ukraine has already shown that the “2005 export ban” fell under the exceptions in the sub-paragraph (b) of Article XX of the GATT 1994. Now, Ukraine will prove that its measure applies consistently with the requirements of the Chapeau of Article XX of the GATT 1994.

4.2.1.2.1. Legal standard

243. In order for a measure to be consistent with the Chapeau, the respondent is required to establish that it is not applied¹³⁸ to (i) constitute an arbitrary or unjustifiable discrimination or (ii) disguised restriction on international trade. This analysis must be made on a case-by-case basis, as the general exceptions under Article XX of the GATT 1994 reflect a legitimate balance between trade commitments and the right to pursue legitimate non-trade policy objectives.¹³⁹

244. First, in order for a measure to be applied in a manner, which would constitute “arbitrary or unjustifiable discrimination between countries where the same conditions prevail”, three elements must exist:¹⁴⁰

- the application of the measure must result in discrimination;
- the discrimination must be arbitrary or unjustifiable in character;
- the discrimination must occur between countries where the same conditions prevail.

245. The Chapeau of Article XX of the GATT 1994 made it clear that it was *the application* of the measure and not the measure itself that needed to be examined.

¹³⁸ Appellate Body Report, *US – Gasoline*, p. 22, citing *United States – Imports of Certain Automotive Spring Assemblies*, BISD 30S/107, para. 56.

¹³⁹ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 224, citing the Appellate Body Report, *US – Shrimp*, para. 159.

¹⁴⁰ Appellate Body Report, *US – Shrimp*, para. 150.

246. With regard to the requirement of discrimination, the Appellate Body stated that the nature and quality of this discrimination cannot logically refer to the same standard(s) by which a violation of a substantive obligation of the GATT 1994 has been determined to have occurred (e.g. under Article I – MFN principle – or Article III – national treatment principle – of the GATT 1994). The question of whether inconsistency with a substantive rule existed is different from the question arising under the Chapeau of Article XX of the GATT 1994 as to whether that inconsistency was nevertheless justified.¹⁴¹

247. With regard to the requirement of arbitrary or unjustifiable character, the Appellate Body in *Brazil – Retreaded Tyres* stated that the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination involves an analysis that relates primarily to the cause or the rationale of the discrimination.¹⁴² In addition, it held that there is arbitrary or unjustifiable discrimination when the reasons given for this discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX of the GATT 1994, or would go against that objective.¹⁴³ The effects of discrimination might be relevant, but is not the determinant factor.

248. In the *US – Gasoline* case, the Appellate Body found that an unjustifiable discrimination would be one that could have been “foreseen” and that was not “merely inadvertent or unavoidable”.¹⁴⁴

249. With respect to the requirement of countries where the same conditions prevail, the Appellate Body observed that the notion of discrimination under the Chapeau of Article XX of the GATT 1994 refers to conditions in importing or exporting countries (i.e. discrimination between foreign countries on the one hand and the home country on the other) or only to conditions in various exporting countries.¹⁴⁵

250. Second, panels and the Appellate Body developed the following reasoning of whether a measure is a disguised restriction on international trade:

- whether the contested measure is published or not;¹⁴⁶
- the consideration of whether the application of a measure also amounts to arbitrary or unjustifiable discrimination;¹⁴⁷

¹⁴¹ Appellate Body Report, *US – Gasoline*, pp. 22-23.

¹⁴² Appellate Body Report, *Brazil – Retreaded Tyres*, para. 225.

¹⁴³ Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 226-230.

¹⁴⁴ Appellate Body Report, *US – Gasoline*, p. 27.

¹⁴⁵ Appellate Body Report, *US – Shrimp*, para. 150.

¹⁴⁶ Appellate Body Report, *US – Gasoline*, p. 25.

- the examination of “the design, architecture and revealing structure” of the measure at issue.¹⁴⁸

4.2.1.2.2. Legal arguments

251. As set out by the Appellate Body, in *US – Shrimp and US – Shrimp (Article 21.5)*, three types of situations regarding the application of measures provisionally justified under a specific paragraph of Article XX of the GATT 1994 might lead to an inconsistency with the chapeau of Article XX: (a) arbitrary discrimination between countries where the same conditions prevail; (b) unjustifiable discrimination between countries where the same conditions prevail; and (c) a disguised restriction on international trade.

252. The existence of one of these situations would lead to the measure not being justified under Article XX of the GATT 1994.

253. The “2005 export ban” does not constitute either (i) a means of “arbitrary or unjustifiable discrimination” between countries where the same conditions prevail, nor (ii) a “disguised restriction on international trade”.

4.2.1.2.2.1. The “2005 export ban” is not applied in a manner that constitutes “arbitrary or unjustifiable” discrimination

254. The Chapeau Article XX of the GATT 1994 requires the responding party to demonstrate that the measures at issue are not “applied in a manner which would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”

255. The first two elements (“arbitrary” and “unjustifiable” discrimination), both of which relate to the existence of discrimination, will be considered together in light of the close relationship between them.¹⁴⁹

256. A measure should be considered to be applied in a manner which constitutes a means of “arbitrary or unjustifiable discrimination between countries where the same conditions prevail”, if three conditions are met: (a) the application of the measure results in discrimination; (b) the discrimination is arbitrary or unjustifiable in character; (c) this discrimination occurs between countries where the same conditions prevail.¹⁵⁰

¹⁴⁷ Appellate Body Report, *US – Gasoline*, p. 24.

¹⁴⁸ Panel Report, *EC – Asbestos*, para. 8.236.

¹⁴⁹ Panel Report, *Brazil – Retreaded Tyres*, para.7.225, referring that this approach has been followed in various previous cases. See the Appellate Body Report on *US – Gasoline*, the Appellate Body Report on *US – Shrimp (Article 21.5 – Malaysia)*, the Appellate Body Report on *US – Gambling*, and the Panel Report on *US – Gambling*, the Panel Report on *EC – Tariff Preferences* and the Panel Report on *EC – Asbestos*.

¹⁵⁰ Appellate Body Report on *US – Shrimp*, para. 150.

257. Ukraine has already explained in Section 3.2 “Measures at issue” (legal framework, product at issue)” that the “2005 export ban” does not discriminate “among like products originating in or destined for different countries”. More specifically, Article 2 of the Law No. 2860-IV prohibits the export of timber and sawn wood of the valuable and rare wood species, specifically and it is clear that the “2005 export ban” applies to all countries and not only to the European Union which means that any advantage, favour, privilege or immunity was not granted to any country while depriving the European Union.

258. Therefore, Ukraine submits that the “2005 export ban” does not result in “arbitrary or unjustifiable discrimination” between countries where the same conditions prevail.

4.2.1.2.2.2. The “2005 export ban” is not “disguised restriction on international trade”

259. The application of a measure “in a manner that would constitute ... a disguised restriction on international trade” is the third situation envisaged by the Chapeau of Article XX of the GATT 1994, which would lead a measure otherwise provisionally justified under one of the paragraphs of Article XX of the GATT 1994 to be in violation of that provision.

260. Ukraine considers that “2005 export ban” is not “disguised” because there is nothing disguised, deceptive or concealed about the ban’s application.

261. As to what constitutes such a “disguised restriction” within the meaning of the chapeau, the Appellate Body has clarified that: “arbitrary discrimination”, “unjustifiable discrimination” and “disguised restriction” on international trade may ... be read side-by-side; they impart meaning to one another. It is clear to us that “disguised restriction” includes disguised *discrimination* in international trade. It is equally clear that *concealed* or *unannounced* restriction or discrimination in international trade does *not* exhaust the meaning of ‘disguised restriction’.¹⁵¹

262. Ukraine has already explained in Section 3.2 “Measures at issue” that the “2005 export ban” introduced by Law No. 2860-IV is publicly available and were published at the official website of the Parliament of Ukraine, therefore, it can be found in public access.

263. From the above, we understand that a restriction need not be formally “hidden” or “dissimulated” in order to constitute a disguised restriction on international trade within the

¹⁵¹ Appellate Body Report on *US – Gasoline*, p. 25.

meaning of the chapeau.¹⁵² Thus, Ukraine has demonstrated that the “2005 export ban” is in compliance with Chapeau of Article XX of the GATT 1994.

4.2.2. The “2015 temporary export ban” is justified by Article XX(g) of the GATT 1994 because it relates to the conservation of exhaustible natural resources that was made effective in conjunction with restrictions on domestic production and applies in a manner that does not constitute arbitrary or unjustifiable discrimination or disguised restriction on international trade

4.2.2.1. The “2015 temporary export ban” falls within the range of policies designed to conserve exhaustible natural resources under sub-paragraph (g) of Article XX of the GATT 1994

4.2.2.1.1. Legal standard

264. Article XX (g) of the GATT 1994 concerns measures taken in pursuit of conservation of exhaustible natural resources, covering not only the conservation of “mineral” or “non-living” natural resources, but also living species, which are in principle “renewable”, and are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities.¹⁵³

265. The Appellate Body has held that a party invoking Article XX (g) must show that a measure:¹⁵⁴

- “relates to” the conservation of exhaustible natural resources;
- relates to the “conservation of exhaustible natural resources”; and
- is “made effective in conjunction with” restrictions on domestic production or consumption.

266. First, Article XX (g) of the GATT 1994 requires “a close and real” relationship between the measure and the policy objective.¹⁵⁵ The means employed, i.e. the measure, must be reasonably related to the end pursued, i.e. the conservation of an exhaustible natural resource. In *China – Rare Earths*, the panel stated that the assessment of whether a measure “relates to” conservation must focus on the design and structure of that measure and that the analysis under

¹⁵² Panel Report, *Brazil – Retreaded Tyres*, para. 7.319.

¹⁵³ Appellate Body Report, *US – Shrimp*, para. 128.

¹⁵⁴ Appellate Body Report, *US – Shrimp*, paras. 127, 135, 143-145. (italics added)

¹⁵⁵ Appellate Body Report, *US – Shrimp*, para. 141.

Article XX (g) of the GATT 1994 does not require an evaluation of the actual effects of the concerned measure.¹⁵⁶

267. Second, the term “conservation” in Article XX (g) of the GATT 1994 “does not simply mean placing a moratorium on the exploitation of natural resources, but includes also measures that regulate and control such exploitation in accordance with a Member’s development and conservation objectives”¹⁵⁷ being part of its “policy objective of protection and conservation”¹⁵⁸ of natural resources. The word “conservation” means “the preservation of the environment, especially of natural resources”.

268. At the same time, the analysis of the design and structure of the measure cannot be undertaken in isolation from the conditions of the market in which the measure operates. Under Article XX (g) of the GATT 1994, it is possible to design conservation policies that meet the development needs in a manner consistent with the sustainable development needs and the international obligations.¹⁵⁹

269. Third, the phrase “made effective in conjunction with” requires that, when international trade is restricted, effective restrictions are also imposed on domestic production or consumption.¹⁶⁰

270. The Appellate Body in *US – Gasoline* stated that:

“The ordinary or natural meaning of ‘made effective’ when used in connection with a measure – a governmental act or regulation – may be seen to refer to such measure being ‘operative’, as ‘in force’, or as having ‘come into effect.’ Similarly, the phrase ‘in conjunction with’ may be read quite plainly as ‘together with’ or ‘jointly with.’”¹⁶¹

271. Furthermore, there is a requirement of “even-handedness” in the imposition of restrictions on imported and domestic products. Article XX (g) of the GATT 1994 does not require imported and domestic products to be treated identically; it merely requires that they are treated in an “even-handed” manner.¹⁶²

¹⁵⁶ Panel Reports, *China – Rare Earths*, paras. 7.290 and 7.379.

¹⁵⁷ Panel Reports, *China – Rare Earths*, para. 7.266.

¹⁵⁸ Appellate Body Report, *US – Shrimp*, paras. 141 and 142.

¹⁵⁹ Panel Reports, *China – Rare Earths*, para. 7.267.

¹⁶⁰ Appellate Body Reports, *China – Rare Earths*, paras. 5.132 and 5.136.

¹⁶¹ Appellate Body Report, *US – Gasoline*, para. 19.

¹⁶² Appellate Body Report, *US – Shrimp*, paras. 143-145.

4.2.2.1.2. Legal arguments

272. Ukraine will demonstrate that all elements are satisfied in this case: (i) the “2015 temporary export ban” relates to the conservation of exhaustible natural resources; and (ii) it is made effective in conjunction with restrictions on domestic production or consumption.

4.2.2.1.2.1. The “2015 temporary export ban” “relates to” the conservation of exhaustible natural resources

273. Ukraine submits that the “2015 temporary export ban” relates to the conservation of exhaustible natural resources, because it was introduced as part of the State strategy related to public policy in the forest management. The development of policy of preservation and restoration of Ukrainian forests started in 2000s and described in more detail above.

274. Ukraine recalls that the first State strategy related to public policy in the forest management was adopted in 2002 by the Resolution of the Cabinet of Ministers of Ukraine “On approval of the State Program “Forests of Ukraine” for 2002-2015” No. 581, dated 29 April 2002,¹⁶³ and subsequently updated in 2009 by the Resolution of the Cabinet of Ministers of Ukraine “On approval of the State Targeted Program “Forests of Ukraine” for 2010-2015” No. 977, dated 16 September 2009.¹⁶⁴

275. Back in 2002 the State strategy already described overall state of the Ukrainian forests as “satisfactory”. It was also indicated that “over the past 40 years, the area of forest cover has increased by 31.8 %. The actual forest cover of Ukraine (15.6 %) is insufficient. In order to achieve optimal performance (within the range of 19-20 %), forest area should be increased by at least 2-2.5 million hectares. This will help to maintain ecological balance throughout the country, increasing the potential of forests’ resource.”¹⁶⁵

276. Further this State strategy expected that “the state of the Ukrainian forests will improve significantly, and the volume of harvested timber necessary for the country’s economy will increase. Estimated that the forest area will grow by 0.5 million hectares, forest cover will increase from 15.6 to 16.1%, and the total stock of timber stands will rise by 16.7%.”¹⁶⁶

277. However, the expected results were not achieved. Statistic from the Global Forest Watch database showed the trend of tree cover loss in Ukraine which estimated to 8.6 % loss during 8 years.

¹⁶³ Exhibit UKR-36.

¹⁶⁴ Exhibit UKR-23.

¹⁶⁵ Exhibit UKR-36, p. 3.

¹⁶⁶ Exhibit UKR-36, p. 8.

Table 8



Source: Data from the Global Forest Watch website.

278. Faced with such unsatisfactory results of the State strategy related to public policy in the forest management, Ukraine introduced the “2015 temporary export ban” which is aimed to preserve Ukrainian forests and is the only possible way to achieve the objective of conservation of exhaustible natural resource. Therefore, Ukraine has shown that the “2015 temporary export ban” was part of the “policy objective”¹⁶⁷ of protection and conservation of Ukrainian forests.

4.2.2.1.2.2. The “2015 temporary export ban” relates to the “conservation of exhaustible natural resources” as forest is within the meaning of an “exhaustible natural resource”

279. Ukraine turns to broad interpretation of the term “exhaustible natural resources” contained in Article XX (g) of the GATT 1994 by the Appellate Bod that the term “is not limited to the conservation of ‘mineral’ or ‘non-living’ natural resources. We do not believe that ‘exhaustible’ natural resources and ‘renewable’ natural resources are mutually exclusive. One lesson that modern biological sciences teach us is that living species, though in principle,

¹⁶⁷ Appellate Body Report, *US – Shrimp*, paras. 141-142.

capable of reproduction and, in that sense, ‘renewable’, are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities”.¹⁶⁸

280. Resources which get exhausted and are not available in plenty and are known as exhaustible natural resources. They take longer to get replenished. For example, coal, petroleum, forest, minerals, etc. Renewable resources are those resources which have the capability for renewal. A renewable resource is an organic natural resource which can replenish to overcome usage and consumption, either through biological reproduction or other naturally recurring processes. As a general rule, forests are renewable natural resources capable of providing several major and minor forest products and contribute substantially to economic development. The forests consist of a variety of flora and fauna, which form a rich bio-diversity and play a vital role in the environmental stability and ecological balance.

281. However, the distinction between non-renewable or exhaustible resources is not altogether watertight. Renewable resources can be exhausted, destroyed or depleted like exhaustible resources. Forest are a case in point. The distinction generally adopted between renewable and non-renewable resources is based on the rate of formation or replenishment.

282. Thus, taking into account all mentioned above, it is beyond dispute and needs no proof that forest, though in principle, is capable of reproduction and, in that sense, ‘renewable’, at the same time, is susceptible of depletion, exhaustion and extinction which is simply evident from the existence of the Red List of Threatened Species with already extinct species of plants. Ukraine submits that it is in exactly that situation where its forests need to be protected to be preserved from depletion.

283. Statistical data from the State Fiscal Service of Ukraine show that the huge areas of Ukrainian forests have been depleted over the last years. However, after the introduction of the “2015 temporary export ban” starting from 2016 depleted areas are gradually decreasing.

Table 9

	Hectares								
	2010	2011	2012	2013	2014*	2015*	2016*	2017*	2018*
Forest plantations’ death	20864	16414	20187	16428	17642	27768	19405	20111	15069

Source: Data from the website of the State Statics Service of Ukraine.

¹⁶⁸ Appellate Body Report, *US – Shrimp*, para. 128.

* Data exclude the temporarily occupied territory of the Autonomous Republic of Crimea, the City of Sevastopol and certain regions of temporarily occupied territories in the Donetsk and Luhansk regions.

284. Thus, from the reasons provided above, the “2015 temporary export ban” relates to the “conservation of exhaustible natural resources”.

4.2.2.1.2.3. The “2015 temporary export ban” was “made effective in conjunction with” restrictions on domestic production or consumption

285. For the sake of clarity, Ukraine would like to emphasize that the Law No. 325-VIII enacted the “2015 temporary export ban” while the Law No. 2531-VIII introduced restrictions on domestic consumption of unprocessed timber. Both Law No. 325-VIII and Law No. 2531-VIII amended the initial Law No. 2860-IV.

286. Article 4 of the Law No. 2531-VIII states as follows:

“In accordance with sub-paragraph “g” of Article XX “General Exceptions” of a General Agreement on Tariffs and Trade, for the period of validity of the temporary export ban on unprocessed timber (commodity position 4403 according to the UCG FEA), defined by the Article 2¹ of this Law, the domestic consumption of unprocessed timber is limited to the amount of 25 million cubic meters per year.

The amount of domestic consumption of unprocessed timber should not exceed 25 million cubic meters per year, regardless of the volume of domestic consumption of unprocessed timber per year.

Monitoring of domestic consumption of unprocessed timber, as well as the control over non-exceeding domestic consumption of unprocessed domestic timber established by this Article shall be carried out by the central executive authority implementing the state policy in forestry within the established by the Cabinet of Ministers of Ukraine procedures.”

287. Ukraine draws attention of the Arbitration Panel to the wording of Article 4 of the Law No. 2531-VIII which shows a clear and genuine relationship of the “2015 temporary export ban” with restriction on domestic consumption of unprocessed timber by imposing such domestic restriction “for the period of validity of the temporary export ban on unprocessed timber (commodity position 4403 according to the UCG FEA)”.

288. Ukraine submits that its domestic restriction applies in “even-handed” manner which may not be “identical”¹⁶⁹ with the 2015 temporary export ban, but provide real and effective

¹⁶⁹ Appellate Body Report, *US – Gasoline*, para. 19.

restriction on domestic consumption. This is evident from the last annual report of the State Agency of Forestry of Ukraine which stated that “in 2019, 15.6 million cubic meters of timber was harvested from all types of logs, which is 947 thousand cubic meters or 5.7 % less than in 2018, due to low demand in the domestic market.”¹⁷⁰

289. These data clearly show that the limit of domestic consumption of unprocessed timber of 25 million cubic meters per year is observed since 15.6 million cubic meters of harvested timber is below the established limit which was also true for previous years and not only for 2019.

290. The above cited passage from the annual report of the State Agency of Forestry of Ukraine not only demonstrates that restriction on domestic consumption is “brought into operation”¹⁷¹ and “real”¹⁷², it is also crucial for determining the purpose of the measure.

291. Contrary to the European Union’s allegations in paragraphs 32 and following of its Written Submission that the “2015 temporary export ban” was established to promote Ukrainian processing industry as provided in the Explanatory Note, Ukraine stresses again that explanatory notes are not legally binding or have legal force under Ukrainian legislation. And even with that in mind, the European Union presented only one-side view on the measure as in the same Explanatory Note, it is also stated that “the ban was taken to preserve rare specious” due to “harm to Ukrainian ecology”.¹⁷³

292. The European Union also neglected the reasoning of the Appellate Body in *China – Raw Materials* that the conservation measure may not “be “primarily aimed” at making effective the restrictions on domestic production or consumption”.¹⁷⁴ Now, turning back to the above cited passage, the real effect of the “2015 temporary export ban” which was made effective in conjunction with restriction on domestic consumption demonstrates that “demand for timber in domestic market is low”. Such effect clearly contradicts to the alleged purpose of “promotion of Ukrainian industry”.

293. Thus, Ukraine has demonstrated that the “2015 temporary export ban” relates to the conservation of exhaustible natural resources and it was made effective in conjunction with restrictions on domestic production or consumption according to Article XX (g) of the GATT 1994.

¹⁷⁰ Public Annual Report (2019) of the State Forest Resources Agency of Ukraine, Exhibit UKR-01, p. 14.

¹⁷¹ Appellate Body Reports, *China – Raw Materials*, para. 356.

¹⁷² Appellate Body Reports, *China – Rare Earths*, paras. 5.132 and 5.136.

¹⁷³ Explanatory Note to Law No. 325-VIII, Exhibit EU-1, p. 5.

¹⁷⁴ Appellate Body Reports, *China – Raw Materials*, para. 356.

4.2.2.2. The “2015 temporary export ban” is applied in a manner that satisfies the requirements of the Chapeau of Article XX of the GATT 1994

294. Ukraine has already shown that the “2015 temporary export ban” falls under the exceptions in the sub-paragraph (g) of Article XX of the GATT 1994. Now, Ukraine will prove that this measure applies consistently with the requirements of the Chapeau of Article XX of the GATT 1994.

4.2.2.2.1. Legal standard

295. Bearing in mind the legal standard of the Chapeau of Article XX of the GATT 1994 described in details in Section 4.2.1.2.1 of this submission, Ukraine now turns to the analysis of the “2015 temporary export ban”.

4.2.2.2.2. Legal arguments

296. The “2015 temporary export ban” does not constitute either (i) a means of “arbitrary or unjustifiable discrimination” between countries where the same conditions prevail, nor (ii) a “disguised restriction on international trade.”

4.2.2.2.2.1. The “2015 temporary export ban” is not applied in a manner that constitutes “arbitrary or unjustifiable” discrimination

297. Ukraine submits that the “2015 temporary export ban” does not result in “arbitrary or unjustifiable discrimination” between countries where the same conditions prevail.

298. First, the “2015 temporary export ban” does not discriminate “among like products originating in or destined for different countries”.¹⁷⁵ Article 2¹ of the Law No. 2860-IV introduced by the Law No. 325-VIII states as follow:

“Temporarily, for a 10-year period, it is prohibited to export unprocessed timber beyond the customs territory of Ukraine (code 4403 UCG FEA):

wood species, except pine – from November 1, 2015;

wood species of pine trees – from January 1, 2017.”

299. Therefore, it clearly follows from the text of the measure that the “2015 temporary export ban” applies to all countries and not only to the European Union which means that any advantage, favour, privilege or immunity was not granted to any country while depriving the European Union.

¹⁷⁵ Appellate Body Report, *Canada – Autos*, para. 84.

300. As Ukraine has already explained in Section 4.2.2.1.2.3 above, the domestic consumption of unprocessed timber was also restricted which is in line with the reasoning of the Appellate Body in *US – Gasoline* where it stated that there is “no textual basis for requiring identical treatment of domestic and imported products” when applying Article XX (g) of the GATT 1994.¹⁷⁶ Furthermore, the domestic restriction works effectively and has not raised above the established limit which means that Ukraine does not discriminate between its domestic and the European Union’s users. Thus, there is no discrimination with a meaning of Article XX of the GATT 1994.

301. Second, bearing in mind that “the assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure”¹⁷⁷ Ukraine recalls Section 4.2.2.1.2 of this submission and its arguments that the “2015 temporary export ban” is not accidental measure, but the part of the state policy aiming at preserving natural resources, namely Ukrainian forests.

302. Moreover, the Appellate Body recognized that “autonomy to determine policies on the environment (including its relationship with trade), environmental objectives and the environmental legislation”¹⁷⁸ that countries can enact. Ukraine is now simply trying to preserve its natural resource which is within its environmental policy. Thus, there is no arbitrary or unjustifiable discrimination with a meaning of Article XX of the GATT 1994.

303. Third, Ukraine submits that condition in Ukraine and the European Union different with regard to issue of forests’ preservation. The WTO has already recognized the situation in Ukraine as “emergency in international relations”.¹⁷⁹

304. Ukraine refers to the Section 3.5.3 where it has explained how this “emergency in international relations” relates to Ukrainian forests. Not for the sake of repetition, but for the sake of clarity, Ukraine wants once again to stress that due to the temporally occupation of Crimean peninsula and certain areas of Donetsk and Lugansk regions of Ukraine, first, Ukraine lost considerable part of its forest and, second, consumption of wood products have increased for purposes *inter alia* of warming the accommodations.

305. Ukraine does not see how conditions in the European Union can be presumed to be the same when the European Union is not faced extra burden that hangs on Ukraine to manage to preserve and restore the forests in time of occupation.

¹⁷⁶ Appellate Body Report, *US – Gasoline*, para. 19.

¹⁷⁷ Appellate Body Report, *US – Shrimp*, para. 227.

¹⁷⁸ Appellate Body Report, *US – Gasoline*, pp. 30-31.

¹⁷⁹ Panel Report, *Russia – Traffic in Transit*, para. 7.126.

306. Thus, for the reasons provided above, Ukraine has demonstrated that the “2015 temporary export ban” is not result in arbitrary or unjustifiable discrimination between countries where the same conditions prevail with a meaning of Article XX of the GATT 1994.

4.2.2.2.2. The “2015 temporary export ban” is not “disguised restriction on international trade”

307. The Chapeau of Article XX of the GATT 1994 also requires that the exceptions listed in sub-paragraphs (a) through (j) not be applied in a manner that constitutes a “disguised restriction on international trade”. The Appellate Body stated in *US – Gasoline* that:¹⁸⁰

“We consider that “disguised restriction”, whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to “arbitrary or unjustifiable discrimination”, may also be taken into account in determining the presence of a “disguised restriction” on international trade.”

308. Therefore, the interpretation of the “arbitrary or unjustifiable discrimination” is apt to the interpretation of the “disguised restriction” on international trade. For the reasons provided in the previous Section of this submission, Ukraine has already shown that the “2015 temporary export ban” is not result in arbitrary or unjustifiable discrimination which means that it is neither “disguised restriction” on international trade.

309. Moreover, all laws related to the “2015 temporary export ban” are publicly available and were published at the Ukrainian official website to give the opportunity to the interested parties to become aware with the changes in procedures. The “2015 temporary export ban” was also notified to the WTO.

310. Thus, Ukraine has demonstrated that the “2015 temporary export ban” functions in compliance with Chapeau of Article XX of the GATT 1994.

311. Moreover, it is the European Union and not Ukraine who bears the burden of identifying possible alternative measures that could have been taken to achieve Ukraine’s objectives. The Appellate Body has provided in this regard that:¹⁸¹

¹⁸⁰ Appellate Body Report, *US – Gasoline*, para. 25.

“it is not the responding party’s burden to show, in the first instance, that there are no reasonably available alternatives to achieve its objectives. In particular, a responding party need not identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective.”

312. As the European Union has failed in its submission to fulfil its burden of proof by proposing less trade-restrictive alternatives, Ukraine is not obliged to identify and explain why other measures do not achieve Ukraine’s objectives.

313. Thus, as demonstrated above, the “2005 export ban” and the “2015 temporary export ban” are justified under sub-paragraphs (b) and (g) of Article XX of the GATT 1994 accordingly and are applied in a manner consistent with the Chapeau of this Article.

4.3. Trade and sustainable development (Articles 290, 294, 296 of the Association Agreement)

314. In its Written Submission, the European Union builds its entire argumentation on the sole Article 35 of the Association Agreement, as if it were arguing under the GATT 1994 and seeming to consider that the unique purpose of this Agreement is to remove indiscriminately all impediments to any sort of commerce between the two parties. Yet, such an assumption is clearly misleading.¹⁸² The Association Agreement is not the GATT 1994, and the very text of Article 35 specifies that its provisions shall apply “except as otherwise provided in this Agreement or in accordance with Article XI of GATT 1994 and its interpretative notes”.¹⁸³

315. The Association Agreement does “provide otherwise”. Its Chapter 13 titled “Trade and sustainable development” and recalling at Article 289 the Parties’ commitment to “promoting the development of international trade in such a way as to contribute to the objective of sustainable development and to ensuring that this objective is integrated and reflected at every level of their trade relationship”, provides three provisions which make the measures at stake lawful under the Association Agreement: Articles 290 (“Right to regulate”), 292 (“Multilateral environmental agreements”) and 294 (“Trade in forest products”).

¹⁸¹ Appellate Body Report, *US – Gambling*, para. 309.

¹⁸² Article 35 of the Association Agreement (emphasis added).

¹⁸³ Article 35 of the Association Agreement (emphasis added).

4.3.1. The right of each Party, under Article 290 of the Association Agreement, to determine their own level of environmental protection under international law

316. Article 290 of the Association Agreement provides the Parties with a right to regulate in matters related to environmental policies, which is defined, in its relevant part, as follows:

“Recognising the right of the Parties to establish and regulate their own levels of domestic environmental and labour protection and sustainable development policies and priorities, in line with relevant internationally recognised principles and agreements, and to adopt or modify their legislation accordingly, the Parties shall ensure that their legislation provides for high levels of environmental and labour protection and shall strive to continue to improve that legislation”.

317. It allows for a party to implement internally even “high levels of environmental [...] protection”, as long as this protection is in line with “relevant internationally recognized principles and agreements”.¹⁸⁴ This right is actually consistent with the subsequent provisions of article 292 of the Association Agreement which explicitly refers to the need for the Parties’ “effective implementation in their laws and practices of the multilateral environmental agreements to which they are party”.¹⁸⁵

4.3.1.1. International principles of environmental protection applicable to the Ukrainian forestry

318. As it was already mentioned in section 3.3.2 “International legal framework” of this Submission, Ukraine and the European Union are both parties to several international instruments imposing or recommending high standards of environmental policies, including but not limited to:

- a. The 1992 Convention on biological diversity,¹⁸⁶ and the Rio Declaration on Environment and Development;¹⁸⁷
- b. the Paris Agreement,¹⁸⁸ and the United Nations Framework Convention on Climate Change,¹⁸⁹ and

¹⁸⁴ *Ibid.*

¹⁸⁵ Article 292 of the Association Agreement.

¹⁸⁶ Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, available at www.cbd.int/convention/ (last consulted on 4 March 2020).

¹⁸⁷ Rio Declaration on Environment and Development, 3 to 14 June 1992, available at www.cbd.int/doc/ref/rio-declaration.shtml (last consulted on 4 March 2020).

¹⁸⁸ Paris Agreement (2015), Paris, 12 December 2015, available at unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement, Exhibit UKR-14.

- c. the Bern Convention on the conservation of European wildlife and natural habitats.¹⁹⁰

319. These different sources promote some key principles of environmental policies, and notably:

- a. the conservation of natural resources: by “[r]egulat[ing] or manag[ing] biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use” and “promot[ing] the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings”;¹⁹¹
- b. the protection of natural habitat, by “tak[ing] appropriate and necessary legislative and administrative measures to ensure the conservation of the habitats of the wild flora and fauna species”;¹⁹² and
- c. the obligation related to the adoption of “precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects.”¹⁹³

320. These principles are reflected in the provisions of Article 292 of the Association Agreement which identify the general principles of international environmental law which must be respected by the Parties:

“The Parties shall ensure that environmental policy shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.”¹⁹⁴

321. Therefore, it is in light of these provisions and the specific challenges met by the Ukrainian forestry sector that the lawfulness of the legislation at stake in the present litigation must be assessed first and foremost.

¹⁸⁹ United Nations Framework Convention on Climate Change, New York, 9 May 1992, available at unfccc.int/process-and-meetings/the-convention/what-is-the-united-nations-framework-convention-on-climate-change (last consulted on 4 March 2020).

¹⁹⁰ Convention on the Conservation of European Wildlife and Natural Habitats, signed on 19 September 1979, available at www.coe.int/en/web/bern-convention (last consulted on 4 March 2020).

¹⁹¹ See for instance, article 8 of the 1992 Convention on biological diversity.

¹⁹² See for instance, art. 4 of the Bern Convention.

¹⁹³ See for instance, art. 3(3) in the United Nations Framework Convention on Climate Change 1992.

¹⁹⁴ This article reflects largely the provision of Article 191 of the Treaty on the Functioning of the European Union, which provides that “Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay”.

4.3.1.2. *The critical challenges met by the Ukrainian forestry sector*

322. A UNECE study of 2005 stated that:

“In the upper mountainous part of the Dniester Basin,^{195]} the forest has been severely affected by unsustainable cutting operations and large-scale transformation of forest areas into pasture. The area covered by forests has been halved in the past century as a result of human activities. The conversion of forest land to agricultural land has led to an increased risk of soil erosion and changes in the landscape which in turn have resulted in unstable agrosystems that are not capable of self-regulation. Other major consequences include increased levels of soil contamination and consequent deterioration of surface water quality”¹⁹⁶.

323. This study highlights the two issues that Ukraine is actually facing in the management and protection of its forests and assimilated wildlife areas: the necessity to reforest a country which has suffered from decades of unregulated exploitation or conversion of its wooded areas and the threat caused by the pursuance of illegal logging in some part of its territory.

324. As reported by the World Conservation Monitoring Centre of the United Nations, Ukraine forested areas represent 16,7 % of the total land area of the country.¹⁹⁷ This makes Ukraine one of the least forested of the large countries of Europe, with a forest coverage approximately 50 % less important than that of Germany, France, Italy or Spain and 75 % inferior to that of Sweden or Finland.¹⁹⁸

325. This limited forest cover (which is, in some Ukrainian regions, below by nearly 50 % the optimal forest cover¹⁹⁹) has induced the Ukrainian government to implement different measures to stop deforestation and reforest the country’s territory. The State Target Oriented Program “Forests of Ukraine” for the Years 2010 to 2015, which, along with other domestic

¹⁹⁵ The Dniester River, which rises in southwest Ukraine close to the border with Poland and flows toward the Black Sea, marks significant parts of the Moldova-Ukraine border.

¹⁹⁶ See UNECE and OSCE, Transboundary Diagnostic Study for the Dniester River Basin, OSCE/UNECE Project: Transboundary Co-operation and Sustainable Management of the Dniester River, November 2005, <https://www.osce.org/eea/38320?download=true>

¹⁹⁷ UN WCMC, “Ukraine, Country Overview to Aid Implementation of the EUTR”, last updated October 2019, available at www.unep-wcmc.org/system/dataset_file_fields/files/000/000/567/original/Country_overview_Ukraine_03_10_2018.pdf (last consulted on 4 March 2020).

¹⁹⁸ Site of the Convention on Biological Diversity, “Country Profiles”, available at www.cbd.int/countries/ (last consulted on 4 March 2020).

¹⁹⁹ Pavelko and Skrylnikov, “Illegal logging in Ukraine: A fact-finding study”, Regional Environment Centre, Grey Paper, June 2010, available at www.envsec.org/publications/fact_finding_study_illegal_logging_eng_feb_11.pdf (last consulted on 4 March 2020).

legislations, aims at, *inter alia*, increasing the forest cover, the resources and ecological potential of forest and the resistance of forest ecosystems.²⁰⁰

326. But the context complicates this policy since Ukraine's efforts to reforest its territory and guarantee more sustainable forest resources are critically hampered by irregular²⁰¹ and illegal²⁰² logging which has become a major issue in Ukraine during the last decade. According to some sources, in the Carpathian region only, the estimated illegal timber harvested annually could amount to up to 1 million m³.²⁰³

327. This mass deforestation is having devastating consequences; for instance, erosion, which can affect the rivers and water supply in the region;²⁰⁴ loss of wildlife as that region is the habitat of several rare species of plants – the Ukrainian Carpathians, for example, contains 30 percent of Europe's flora²⁰⁵ and threatened animals including wolves, bears, and lynx.²⁰⁶

328. In order to fulfil its commitment under the different international instruments related to the protection of the environment to which it is a party to, it was therefore indispensable for Ukraine to enact measures designed to control the exploitation – and, in reality, the destruction – of these natural resources.

4.3.1.3. The bans are the most effective answers, in context, to Ukraine forestry issues

329. Since 2005, Ukraine has been ensuring that its legislation concerning the exploitation of wood provides for high levels of environmental protection.²⁰⁷ Its “2005 export ban” and “2015 temporary export ban” demonstrate that in accordance with article 290 of the Association Agreement, Ukraine continuously strives to improve its legislation in view of the context of

²⁰⁰ State Target Oriented Program “Forests of Ukraine” for 2010-2015 was adopted by Ukrainian Government by Resolution of 16.09.09 No 977, available at zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=977-2009-%EF&p=1270642806762283 (last consulted on 4 March 2020). State Target Oriented Program “Forests of Ukraine” is the main normative document for forest management in Ukraine, which presents the main indicators of forest management within the largest permanent forest users. The main objective of a new program is ensuring sustainable forest management, enhancing environmental, social and economic functions of forests in Ukraine. The strategic objective is further increasing area, stability and productivity of forest stands (Exhibit UKR-23).

²⁰¹ World Wide Fund for Nature, Selective Field Assessment of Sanitary Logging Sites in Ukrainian Carpathians – Technical Report, 2018, available at: mobil.wwf.de/fileadmin/fm-wwf/Publikationen-PDF/WWF-Report-Sanitary-logging-Ukraine.pdf (last consulted on 4 march 2020).

²⁰² Pavelko and Skrylnikov, “Illegal logging in Ukraine: A fact-finding study”, see fn. 199.

²⁰³ UN WCMC, “Ukraine, Country Overview to Aid Implementation of the EUTR”, in “Key Risks for Illegality”, see fn. 197.

²⁰⁴ Pavelko and Skrylnikov, “Illegal logging in Ukraine: A fact-finding study”, see fn. 199.

²⁰⁵ CCIBIS, Heritage in the Carpathians, 2014. Available at <http://www.ccibis.org/carpathian-values/82-heritage-in-the-natural-environment>.

²⁰⁶ Regional Environmental Centre and EURAC, *Handbook on the Carpathian Convention*, The Regional Environmental Centre for Central and Eastern Europe, 2007, available at <http://www.rec.org/publication.php?id=85>

²⁰⁷ See Ukraine's State Target Oriented Program “Forests of Ukraine” for 2010-2015, at fn. 200.

illegal logging and the adverse effect it has in Ukraine and Ukraine's effort to reforest its territory.²⁰⁸ And this is despite the extraordinary difficult situation Ukraine has to face. In this regard, it can be recalled that the WTO Panel in case *Russia – Traffic in Transit* held that in the context of Ukraine-Russia relations since 2014, clearly correlated, according to the panel, to Ukraine's "decision to sign the Association Agreement in March 2014",²⁰⁹ "the emergency in international relations is very close to the "hard core" of war or armed conflict".²¹⁰ This context cannot be ignored when assessing the relevance of the measures adopted by Ukraine.

330. The Ukrainian ban objectively relates to the conservation of exhaustible natural resources. This ban is temporary and does not constitute an "arbitrary or unjustifiable" discrimination neither is it a "disguised restriction on international trade". Its aim is to ensure the prudent and rational utilization of natural resources which the parties must cooperate towards promoting²¹¹. It is a general ban and not one aimed specifically at the EU and was implemented in the context not only of the international situation mentioned above, but also of the massive illegal exportation of wood from Ukraine which is leading to the mass deforestation of the country.

331. The European Union maintains that "the sustainable management of forest resources can be most effectively pursued through other measures that do not restrict trade between the Parties".²¹²

332. However, it omits to share that such other measures have already been implemented by the European Union itself and have failed to curb the illegal import of wood in the European Union, including from Ukraine.²¹³ The current Ukrainian measures only temporarily restrict export of wood in an attempt to get a hold of a situation that will have an adverse effect not only on the territory of Ukraine but also on the surrounding countries.

333. The implementation of the "2015 temporary export ban" was the ultimate and only remedy that Ukraine had given the critical situation of its forests and the unsuccessful measures aimed at curbing illegal logging and deforestation. Hence, given the international obligations incumbent on Ukraine in the field of environmental protection for its territory and also other State's territory, given the risk at hand but also that the Agreement specifically recognizes the

²⁰⁸ See European Green Party, Resolution on Prevention of deforestation in Ukraine, EGP Council, Karlstad 24-26 November 2017.

²⁰⁹ Panel Report, *Russia – Traffic in Transit*, para. 7.142.

²¹⁰ Panel Report, *Russia – Traffic in Transit*, para. 7.136.

²¹¹ Article 292 paragraph 5 of the Association agreement ("The Parties shall cooperate in order to promote the prudent and rational utilisation of natural resources in accordance with the objective of sustainable development").

²¹² Written Submission by the European Union, para. 11.

²¹³ See under paras. 340-343.

right for a Party to regulate its domestic environmental legislation, Ukraine's measure is justified under Article 290 of the Association Agreement.

334. Instead of undermining Ukraine's effort, the European Union should continue to support these efforts.

4.3.2. The Ukrainian measures were allowed under Article 294 of the Association Agreement in order to ensure the promotion of the sustainable management of this party's forest resources

335. Article 292 of the Association Agreement provides that:

"The Parties shall cooperate in order to promote the prudent and rational utilization of natural resources in accordance with the objective of sustainable development"

336. This principle of cooperation is underlined in relation to "forest products", since Article 294 of the same Agreement reads:

"In order to promote the sustainable management of forest resources, Parties commit to work together to improve forest law enforcement and governance and promote trade in legal and sustainable forest products".²¹⁴

337. However, not only has the European Union honoured this principle of cooperation in the breach by failing to enact and implement the measures that would be necessary to assist Ukraine in promoting a sustainable management of its forest resources but by challenging the "2005 export ban" and the "2015 temporary export ban", this party to the Association Agreement is acting in violation of this principle of cooperation. Suing is quite far from cooperating.

4.3.2.1. The European Union has not cooperated with Ukraine to promote the sustainable management of the latter's forest resources

338. Being one of the world's largest importers of wood,²¹⁵ the European Union recognized in 2013 by implementing the European Union Timber Regulation or EUTR²¹⁶ that operators within its territory bear some responsibility in the scourge of illegal logging. This Regulation

²¹⁴ Article 294 of the Association Agreement; this article is consistent with the European Union's autonomous commitment to help develop international measures to ensure sustainable development. Article 21, paragraph 2 (f), of the Treaty on European Union provides that "[t]he Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (...) (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development".

²¹⁵ "Complicit In Corruption, How billion-dollar firms and EU governments are failing Ukraine's forests", Earthsight, fn. 219.

²¹⁶ Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010.

(EU) No. 995/2010 laying down the obligations of operators who place timber and timber products on the market is to be read together with two measures adopted to ensure its uniform implementation: Commission Regulation (EU) No. 363/2012, and Commission Regulation (EU) No. 607/2012, which sets out detailed rules of the due diligence system provided in the EUTR and the frequency and nature of checks to be carried out on monitoring organizations by competent authorities in the Member States. This legal corpus prohibits the import of wood which was illegally sourced in the country of origin. It also requires importers to carry out due diligence in order to minimize the risk of receiving illegal wood.

339. It is established that this law not only fails to address the issues of illegal logging, but it also has been unsuccessfully implemented by the European Union.

340. First of all, the European Union Timber Regulation is insufficient to handle the serious issue of illegal logging, which, as recalled above, is particularly dramatic to Ukraine. The only relevant obligations that it lays down are the prohibition of the placing on the market of illegally harvested timber, and obligations of traceability and “due diligence” by the European Union operators when they trade in forest products originating from third States. No effective label system is put in place to ensure that the origin of the forest products is identified with certainty, so that the prohibition of the placing on the market of illegally harvested timber remains virtual. The requirement of “due diligence” is only a procedural obligation, a mere obligation of means which by definition cannot achieve the result Ukraine, and Article 294 of the Association Agreement, are interested in: halting illegal logging and overexploitation of (Ukrainian) forests.²¹⁷

341. In addition, unlike similar laws in other jurisdictions,²¹⁸ the European Union Timber Regulation’s key requirements apply only to companies which do the importing, and not to those who process or sell that wood thus shielding them from legal responsibility. There is a clear distinction that has to be made here and which has not been made by the European Union.

342. What’s more, the Regulation has been unsuccessfully implemented by member states of the European Union. In 2015, almost two years after EUTR had become effective, several key

²¹⁷ The European Union most recently acknowledged such limited impact of EUTR regarding the Ukrainian situation, as the FLEGT/EUTR Expert Group qualified Ukraine as a “risk country of harvest”. See EUTR Briefing Note dated July-August 2019, p. 1, stating that “[r]egarding timber from Ukraine, it was concluded [during the 24th FLEGT/EUTR Expert Group meeting held on 21 June 2019] that the country as a whole should be considered a risk country of harvest, requiring the provision of adequate risk mitigating measures. In cases where a negligible risk assessment cannot be reached, timber from Ukraine should not be placed on the EU market”.

Available at https://ec.europa.eu/environment/forests/pdf/EUTR_Briefing_note_July-August_2019_final.pdf.

²¹⁸ See for instance the 1900 U.S. Lacey Act, <https://www.fws.gov/le/pdffiles/Lacey.pdf>.

countries that has borders with Ukraine, like Poland, had yet to implement it.²¹⁹ The European Commission was even forced to begin formal investigations and formal infringement procedures against Slovakia²²⁰ for its continued failure in implementing the EUTR whilst Romania is still being reprimanded by the European Union in 2020.²²¹

343. Therefore, the relevant legislative and regulatory activity of the European Union can hardly be seen as in compliance with the obligation of cooperation, which should be providing sound results and not mere “soft” obligations, provided for by Articles 292 and 294 of the Association Agreement.

4.3.2.2. The “2005 export ban” and “2015 temporary export ban” limiting the exportation of wood products fall within the ambit of Article 294 and the European Union has an obligation to cooperate with their implementation

344. The principle of effectivity (“*effet utile*”) must lead to construe Article 294 of the Association Agreement as not being deprived of object/effect when either party does not comply with the obligation to cooperate that the broad meaning of Article 294 encompasses. Otherwise, the breach of either Party to comply with this obligation would impede the other’s effort to implement the very measures that are contemplated by this Article, i.e. “forest law enforcement and governance”, and the promotion of “trade in legal and sustainable forest products”. As a result, Article 294 of the Association Agreement is to be read as allowing either Party to adopt the necessary measures, whatever the conduct of the other Party in this respect.

345. The “2005 export ban” and “the 2015 temporary export ban” qualify as such measures. They fall within the ambit of Article 294 of the Association Agreement because they target illegal logging and thus aim at “improve forest law governance” and “promote trade in legal and sustainable forest products”, and have been taken – as for “the 2015 temporary export ban” at least –, by contrast to EUTR, to effectively fight illegal logging. They are lawful under Article 294 of the Association Agreement. Therefore Article 35 does not apply.

346. In sum, this case involves environmental regulation, and the Association Agreement should not be used by the European Union – which, as illustrated by the extended range of its environmental policies and measures, is committed to improve sustainable development as a key priority, yet did not work with Ukraine pursuant to Article 294 of the Association

²¹⁹ Complicit In Corruption, How billion-dollar firms and EU governments are failing Ukraine’s forests, Earthsight, page 53.

²²⁰ Client Earth, EUTR News, March 2016-March 2017, 3rd March 2017, <https://www.clientearth.org/eutr-news-march-2016-to-march-2017/#1d>.

²²¹ February infringements package: key decisions, European Commission.
https://ec.europa.eu/commission/presscorner/detail/en/inf_20_202

Agreement – as an obstacle to the implementation of the high standards of protection of environmental (forest) integrity that the measures at stake pursue.

Exceptions foreseen by the Association Agreement

347. The text of the Association Agreement does not contain explicit grounds for the imposition of rough wood products export prohibition. However, Articles 290, 292-294 of the Association Agreement provide principles which may be interpreted in favour of the Ukrainian Party and become an additional argument if the *environmental defence logic* is chosen.

- **Principles:**

- right of the Parties to establish and regulate their *own levels of national environmental protection* (Article 290(1) of the Association Agreement).
- *precaution* of the Parties in environmental policy and application of *preventive actions* for environment protection (Article 292 (4) of the Association Agreement).
- cooperation of the Parties for the purpose of contribution to *prudent and rational utilization of natural resources* (Article 292 (5) of the Association Agreement).
- trade between the Parties should promote sustainable development, including the achievement of UN's *sustainable development Aim No. 15* – “Protection and recovery of land ecosystems, and contribution to their rational utilization, *rational utilization of forest*, combat desertisation, termination and reversal of land degradation process and termination of biodiversity loss”²²² (Article 293(1) of the Association Agreement).
- obligation of the Parties to promote trade in *legal forest products*

348. Regarding the implementation of our international obligations, including Article 294 of the Association Agreement regarding the obligations of the Parties to promote trade in legal and sustainable forest products, as well as fulfilling obligations of the Madrid Ministerial Resolution 1 on the protection of forests in Europe under the Ministerial Conference on the Protection of Forests in Europe (to which Ukraine has been a party since 2015), we would like to emphasize the importance of counteracting illegal logging, illicit trade, trafficking in timber, corruption, and establishing trade between the Parties that would contribute to sustainable development, including sustainable forest management and halting the loss of biodiversity.

²²² <https://www.un.org/sustainabledevelopment/ru/biodiversity/>

5. CONCLUSION

350. For the reasons set out in this Submission, Ukraine respectfully requests the Arbitration Panel to issue a ruling in accordance with Article 310 of the Association Agreement to the effect that (i) the “2005 export ban” and (ii) the “2015 temporary export ban” are in accordance with Article 35 of the Association Agreement (Article XI of the GATT 1994) or, in any case, apply consistently with Article 36 of the Association Agreement (Article XX of the GATT 1994).

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