

*Restrictions applied by Ukraine on exports of certain wood products
to the European Union*

Final Report of the 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

Lugano (Switzerland), 11 December 2020

TABLE OF CONTENTS

<i>CASES CITED IN THIS REPORT</i>	6
<i>SHORT TITLES USED IN THIS REPORT</i>	10
<i>ABBREVIATIONS USED IN THIS REPORT</i>	12
<i>SHORT TITLES OF FREQUENTLY CITED MEASURES AND OTHER INSTRUMENTS REFERRED TO IN THIS REPORT</i>	13
1. INTRODUCTION	14
1.1. Complaint by the European Union	14
1.2. Arbitration Panel establishment and composition	14
1.3. Arbitration Panel proceedings.....	15
1.3.1 General.....	15
1.3.2 Terms of reference	17
2. FACTUAL ASPECTS	19
2.1 General information provided by the European Union on forest protection in Ukraine 20	
2.2 General information about Ukraine’s forests, as provided by the Respondent.....	21
2.3 The Products at issue	26
2.3.1 “Rare and valuable” species.....	26
2.3.2 Unprocessed timber products	28
2.4 The measures at issue.....	28
2.4.1 The “2005 export ban”	29
2.4.2 The “2015 temporary export ban”	29
2.5 Measures other than “measures at issue”	29
3. ARGUMENTS OF THE PARTIES	30
3.1 European Union	30
3.2 Ukraine	31
3.3 Additional arguments made during the Hearing	32
3.3.1 Ukraine.....	32
3.3.2 Comments by the European Union	33
4. FINDINGS	33
4.1 Preliminary issues	34
4.1.1 Whether the present dispute arises under Chapter 13 or Chapter 14 of the AA	34
4.1.1.1 The Parties’ arguments	34
4.1.1.1.1 Ukraine.....	34
4.1.1.1.2 The European Union	35
4.1.1.2 The Arbitration Panel’s findings.....	37
4.1.1.2.1 On the timeliness of the jurisdictional objection.....	37
4.1.1.2.2 On the merit of the jurisdictional objection	41
4.1.2 Applicability of Article 35 of the AA during the 10-year transitional period	44
4.1.2.1 The Parties’ arguments	44
4.1.2.2 The Arbitration Panel’s findings.....	45
4.1.3 The emergency situation in international relations affecting Ukraine.....	46

4.1.3.1	The Parties' arguments	46
4.1.3.2	The Arbitration Panel's findings	48
4.2	Whether the bans are incompatible with Article 35 of the AA	49
4.2.1	Introduction	49
4.2.1.1	Article 35 of the AA and Article XI:1 of the GATT 1994	49
4.2.1.2	The Arbitration Panel's sequence of analysis	50
4.2.2	On the relationship between Article 35 of the AA and Article XI:1 of the GATT 1994	51
4.2.2.1	The Parties' arguments	51
4.2.2.1.1	Whether the obligations under Article 35 of the AA are different from those under Article XI of the GATT 1994	51
4.2.2.1.2	Actual effects	52
4.2.2.2	The Arbitration Panel's analysis	53
4.2.2.2.1	Whether Article XI:1 of the GATT 1994 is incorporated into Article 35 of the AA	53
4.2.2.2.2	Whether Article 35 of the AA and Article XI:1 of the GATT 1994 impose identical obligations	55
4.2.2.2.2.1	Requirement of an "actual effects" test	55
4.2.2.2.2.2	Whether Article 35 of the AA applies exclusively to goods "destined to the other Party"	58
4.2.2.3	The Arbitration Panel's findings on the compatibility of the export bans with Article 35 of the AA	60
4.2.3	On the relation between Article 35 of the AA and Chapter 13 of the AA	61
4.2.3.1	The Parties' arguments	61
4.2.3.1.1	Ukraine	61
4.2.3.1.2	The European Union	63
4.2.3.2	The Arbitration Panel's analysis and finding	65
4.2.3.3	Conclusions on the relationship between Article 35 of the AA and Chapter 13	68
4.2.4	Overall finding on the compatibility of the bans with Article 35 of the AA	68
4.3	Whether the bans are justified under Article 36 of the AA and Article XX of the GATT 1994	68
4.3.1	Introduction	68
4.3.2	Whether the 2005 export ban is justified by Article XX(b) of the GATT 1994	69
4.3.2.1	"Provisional" justification by Article XX(b) of the GATT 1994	70
4.3.2.1.1	The Parties' arguments	70
4.3.2.1.1.1	Ukraine	70
4.3.2.1.1.2	The EU	72
4.3.2.1.2	Whether the 2005 export ban is designed to protect plant life or health	73
4.3.2.1.2.1	Applicable principles	73
4.3.2.1.2.2	The Arbitration Panel's analysis	74
<i>Whether the claimed objective of the measures is a "plant life or health" objective within the meaning of Article XX(b) of the GATT 1994</i>	<i>74</i>	
<i>Whether the 2005 export ban is designed to protect plant life or health</i>	<i>76</i>	
4.3.2.1.3	Whether the 2005 export ban is necessary to protect plant life or health	79
4.3.2.1.3.1	Applicable principles	79
4.3.2.1.3.2	The Arbitration Panel's analysis	80
<i>The importance of the interests or values at stake</i>	<i>81</i>	
<i>Existence of a material contribution</i>	<i>81</i>	
<i>The trade restrictiveness of the measure</i>	<i>86</i>	
<i>Existence of alternative measures</i>	<i>87</i>	
4.3.2.1.4	The Arbitration Panel's finding	90
4.3.2.2	The requirements of the chapeau of Article XX of the GATT 1994	90
4.3.2.2.1	Applicable principles	90
4.3.2.2.2	The Arbitration Panel's analysis	92
4.3.2.2.3	The Arbitration Panel's finding	96

4.3.2.3 Overall finding on whether the 2005 export ban is justified by Article XX(b) of the GATT 1994	96
4.3.3 Whether the 2015 temporary export ban is justified by Article XX(g) of the GATT 1994	96
4.3.3.1 The nature of the 2015 temporary export ban.....	97
4.3.3.2 “Provisional” justification under Article XX(g) of the GATT 1994	100
4.3.3.2.1 Introduction	100
4.3.3.2.2 Whether the measure relates to “the conservation of exhaustible natural resources”	101
4.3.3.2.2.1 The Parties’ positions.....	102
<i>Ukraine</i>	102
<i>The EU</i>	104
4.3.3.2.2.2 The Arbitration Panel’s analysis.....	107
<i>Introduction</i>	107
<i>Applicable principles</i>	107
<i>The conservation of exhaustible natural resources</i>	109
4.3.3.2.3 Whether the measure is “made effective in conjunction with restrictions on domestic production or consumption”	111
4.3.3.2.3.1 The Parties’ positions	111
<i>Ukraine</i>	111
<i>The EU</i>	112
4.3.3.2.3.2 The Arbitration Panel’s analysis.....	114
<i>Applicable principles</i>	114
<i>Whether the measure is “made effective in conjunction with restrictions on domestic production or consumption”</i>	115
4.3.3.2.4 On the relevance of Chapter 13 for justifying the 2015 temporary export ban	117
4.3.3.3 Overall finding on whether the 2015 temporary export ban is justified by Article XX(g) of the GATT 1994.....	118
5. INTERIM REVIEW	118
Section 1.2 Arbitration Panel establishment and composition	119
Section 1.3.1 Arbitration Panel proceedings –General	119
Section 2 Factual Aspects.....	120
Section 2.2.1 Rare and valuable species (now Section 2.3.1).....	120
Section 2.2.2 Unprocessed timber products (now Section 2.3.2)	120
Section 4 Findings.....	120
Section 4.1.1.2.1 On the timeliness of the jurisdictional objection	120
Section 4.1.1.2.2 On the merit of the jurisdictional objection.....	121
Section 4.1.2 Applicability of Article 35 AA during the 10-year transitional period.....	121
Section 4.1.3 The emergency situation in international relations affecting Ukraine	121
Section 4.2.2.2.2 Whether Article 35 AA applies exclusively to goods “destined to the other Party”	122
Section 4.3.2.1 “Provisional” justification of the 2005 export ban under Article XX (b) of the GATT 1994	122
Section 4.3.2.1.2 Whether the 2005 export ban is designed to protect plant life or health.....	122
Section 5 Clarifications requested by Ukraine.....	123
Section 6.2 Recommendations	124
6. CONCLUSIONS AND RECOMMENDATIONS	125
6.1 Conclusions	125
6.2 Recommendations	126
<i>ANNEX A - Working Procedures of the Arbitration Panel (with Timetable)</i>	128
Working Procedures.....	128
Final Amended Timetable for Arbitration Panel Proceedings	133

Answers to Questions between the Parties	133
<i>ANNEX B - List of Exhibits</i>	134
<i>ANNEX C - Executive Summaries</i>	140
Executive Summary of the European Union.....	140
Executive Summary of Ukraine	147

CASES CITED IN THIS REPORT

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>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
<i>Brazil – Taxation</i>	Panel Reports, <i>Brazil – Certain Measures Concerning Taxation and Charges</i> , WT/DS472/R, Add.1 and Corr.1 / WT/DS497/R, Add.1 and Corr.1, adopted 11 January 2019, as modified by Appellate Body Reports WT/DS472/AB/R / WT/DS497/AB/R
<i>Canada – Dairy</i>	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products</i> , WT/DS103/AB/R, WT/DS113/AB/R, and Corr.1, adopted 27 October 1999, DSR 1999:V, p. 2057
<i>China – Publications and Audiovisual Products</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, p. 3
<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>China – Raw Materials</i>	Panel Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/R, Add.1 and Corr.1 / WT/DS395/R, Add.1 and Corr.1 / WT/DS398/R, Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, DSR 2012:VII, p. 3501

Short Title	Full Case Title and Citation
<i>Colombia – Ports of Entry</i>	Panel Report, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry</i> , WT/DS366/R and Corr.1, adopted 20 May 2009, DSR 2009:VI, p. 2535
<i>Colombia – Textiles</i>	Appellate Body Report, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear</i> , WT/DS461/AB/R and Add.1, adopted 22 June 2016, DSR 2016:III, p. 1131
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, p. 7367
<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 – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
<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>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
<i>Guatemala – Cement I</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
<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>India – Solar Cells</i>	Appellate Body Report, <i>India – Certain Measures Relating to Solar Cells and Solar Modules</i> , WT/DS456/AB/R and Add.1, adopted 14 October 2016, DSR 2016:IV, p. 1827

Short Title	Full Case Title and Citation
<i>India – Solar Cells</i>	Panel Report, <i>India – Certain Measures Relating to Solar Cells and Solar Modules</i> , WT/DS456/R and Add.1, adopted 14 October 2016, as modified by Appellate Body Report WT/DS456/AB/R, DSR 2016:IV, p. 1941
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
<i>Japan – Apples</i>	Panel Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/R, adopted 10 December 2003, upheld by Appellate Body Report WT/DS245/AB/R, DSR 2003:IX, p. 4481
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5
<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675
<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>US – 1916 Act (EC)</i>	Appellate Body Report, <i>United States – Anti-Dumping Act of 1916</i> , WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, p. 4793
<i>US - FSC</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619
<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

Short Title	Full Case Title and Citation
<i>US – Gasoline</i>	Panel Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R, DSR 1996:I, p. 29
<i>US – Poultry (China)</i>	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909
<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
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> . WT/DS33/AB/R. adopted 23 May 1997, and Corr. 1, DSR 1997:1, p. 323

SHORT TITLES USED IN THIS REPORT

European Union	
<i>EU's Written Submission</i>	Written Submission by the European Union “To the Arbitration Panel established pursuant to Article 306 of the Association Agreement between the European Union and the European Atomic Energy and their Member States and Ukraine in the dispute “Ukraine - Export prohibitions on wood products”, 17 February 2020
<i>EU's Responses to Ukraine's Questions</i>	Responses by the European Union to Ukraine’s Questions “To the Arbitration Panel established pursuant to Article 306 of the Association Agreement between the European Union and its Member States of the one part, and Ukraine, of the other part in the dispute “Ukraine - Export prohibitions on wood products”, 4 June 2020
<i>EU's Responses to the Arbitration Panel's Questions</i>	Responses by the European Union to the First List of Questions to the Parties from the Arbitration Panel “To the Arbitration Panel established pursuant to Article 306 of the Association Agreement between the European Union and its Member States of the one part, and Ukraine, of the other part in the dispute “Ukraine - Export prohibitions on wood products”, 15 May 2020
<i>EU's Opening Statement</i>	Opening Oral Statement of the European Union “To the Arbitration Panel established pursuant to Article 306 of the Association Agreement between the European Union and the European Atomic Energy and their Member States and Ukraine in the dispute “Ukraine - Export prohibitions on wood products”, 22 September 2020
<i>EU's Closing Statement</i>	Closing Statement of the European Union “To the Arbitration Panel established pursuant to Article 306 of the Association Agreement between the European Union and the European Atomic Energy and their Member States and Ukraine in the dispute “Ukraine - Export prohibitions on wood products”, 23 September 2020
<i>EU's Responses at the Hearings</i>	Responses by the European Union to the questions of the Arbitration Panel at the hearing “To the Arbitration Panel established pursuant to Article 306 of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part in the dispute “Ukraine - Export prohibitions on wood products”, 7 October 2020
<i>EU's Executive Summary</i>	Integrated Executive Summary of the European Union “To the Arbitration Panel established pursuant to Article 306 of the Association Agreement between the European Union and the European Atomic Energy and their Member States and Ukraine in the dispute “Ukraine - Export prohibitions on wood products”, 7 October 2020 (Annex C)
<i>EU's Comments on the Interim Report</i>	Comments on the Interim Report by the European Union to the Arbitration Panel established pursuant to Article 306 of the Association Agreement between the European Union and the European Atomic Energy and their Member States and Ukraine in the dispute “Ukraine - Export prohibitions on wood products”, 27 November 2020
Ukraine	
<i>Ukraine's Written Submission</i>	Written Submission of Ukraine “Ukraine – Measures related to Certain Ukrainian Export Restrictions on Wood”, 11 March 2020

<i>Ukraine's Answers to the Arbitration Panel's Questions</i>	Ukraine's Answers to the First List of Questions to the Parties from the Arbitration Panel "Ukraine – Measures related to Certain Ukrainian Export Restrictions on Wood, 15 May 2020
<i>Ukraine's Opening Statement</i>	Opening Oral Statement of Ukraine "Ukraine – Measures related to Certain Ukrainian Export Restrictions on Wood", 22-23 September 2020
<i>Ukraine's Closing Statement</i>	Closing Statement of Ukraine "Ukraine – Measures related to Certain Ukrainian Export Restrictions on Wood", 22-23 September 2020
<i>Ukraine's Responses at the Hearings</i>	Ukraine's Answers to the Arbitration Panel's Questions Addressed at the Hearings "Ukraine – Measures related to Certain Ukrainian Export Restrictions on Wood", 22-23 September 2020
<i>Ukraine's Executive Summary</i>	Ukraine's Executive Summary of the Opening Statement of Ukraine made during the Hearings "Ukraine – Measures related to Certain Ukrainian Export Restrictions on Wood", 22-23 September 2020 (Annex C)
<i>Ukraine's Request to Review the Interim Report</i>	Request of Ukraine for the Arbitration Panel to Review Precise Aspects of the Interim Report circulated on 13 November 2020, "Ukraine – Measures related to Certain Ukrainian Export Restrictions on Wood", 27 November 2020

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Agency	Ukraine's State Agency for Forest Resources
Association Agreement (AA)	Association Agreement between the European Union and their Member States, of one part, and Ukraine, of the other part
DCFTA	Deep and Comprehensive Free Trade Area
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes or Dispute Settlement Understanding (Annex 2 to the WTO Agreement)
CJEU	Court of Justice of the European Union (formerly European Court of Justice)
EU	European Union
IUCN	International Union for Conservation of Nature
FAO	Food and Agriculture Organization
FTA	Free Trade Agreement
GATT 1994	General Agreement on Tariffs and Trade 1994
HS	Harmonized Commodity Description and Coding System
MEA	Multilateral Environmental Agreement
MFN	Most-Favored Nation
ORDLO	Occupied territory of certain areas of the Donetsk and Luhansk regions of Ukraine
OSCE	Organization for Security and Co-operation in Europe
TFEU	Treaty on the Functioning of the European Union
UAH	Ukrainian hryvnia (National currency of Ukraine)
UKR	Ukraine
UKTZED/UCG FEA	Ukrainian Classification of Goods and Foreign Economic Activity
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
VCLT	Vienna Convention on the Law of Treaties, 23 May 1969
VRU	Verkhovna Rada of Ukraine (Parliament of Ukraine)
WTO	World Trade Organization

SHORT TITLES OF FREQUENTLY CITED MEASURES AND OTHER INSTRUMENTS REFERRED TO IN THIS REPORT

Abbreviation	Definition
2005 export ban	Law of Ukraine No. 2860-IV of 8 September 2005, On Elements of the State Regulation of Business Operators' Activities Related to the Sale and Export of Timber, Information from the Verkhovna Rada of Ukraine, 2006, No. 2-3, p. 34
2015 temporary export ban	Law of Ukraine No. 325-VIII of 9 April 2015, 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, Information from the Verkhovna Rada of Ukraine, 2015, No 31, p. 291
2018 Amendment	Law of Ukraine No. 2531-VIII of 6 September 2018, On Amendments to Certain Legislative Acts of Ukraine on the Preservation of Ukrainian Forests and preventing the Illegal Export of Unprocessed Timber , Information from the Verkhovna Rada of Ukraine, 2018, No. 42, p. 327
Law 2860-IV	Law of Ukraine No. 2860-IV, of 8 September 2005, On Elements of the State Regulation of Business Operators' Activities Related to the Sale and Export of Timber, Information from the Verkhovna Rada of Ukraine, 2006, No. 2-3, p. 34
Law 325-VIII	Law of Ukraine No. 325-VIII of 9 April 2015, On Amendments to the Law of Ukraine on "Elements of the State Regulation of the Business Operators' Activities Related to the Sale and Export of Timber" Concerning the Temporary Export Ban for Unprocessed Timber, Information from the Verkhovna Rada of Ukraine, 2015, No 31, p. 291
Law 2531-VIII	Law of Ukraine No. 2531-VIII of 6 September 2018 On Amendments to Certain Legislative Acts of Ukraine on the Preservation of Ukrainian Forests and preventing the Illegal Export of Unprocessed Timber, Information from the Verkhovna Rada of Ukraine, 2018, No. 42, p. 327
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, OJ L 295, 12 October 2010, pp. 23–34
Flood Directive	Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks, OJ L 288, 6 November 2007, pp. 27–34

1. INTRODUCTION

1.1. Complaint by the European Union

1. On 15 January 2019, the European Union (“the complaining Party” in the AA or “the Complainant” in this Report) requested consultations with Ukraine (“the Party complained against” in the AA or “the Respondent” in this Report) pursuant to Article 305 of the AA with respect to the measures and claims set out below.¹
2. Consultations were held on 7 February 2019 with the aim of reaching a mutually agreed solution. The consultations did not resolve the dispute.

1.2. Arbitration Panel establishment and composition

3. On 20 June 2019, the European Union requested the establishment of an arbitration panel pursuant to Article 306 of the AA, and in accordance with the procedure for the composition of the arbitration panel set out in Article 307 of the AA and the relevant provisions of the Rules of Procedure for Dispute Settlement in Annex XXIV to the Association Agreement.²
4. By diplomatic note of 9 August 2019, the European Union proposed to Ukraine the nomination of three members of the Arbitration Panel together with the terms for remuneration and reimbursements necessary to comply with the formal requirements for concluding the nomination process.³ On 20 August 2019, Ukraine accepted by diplomatic note the proposal of the European Union.⁴
5. By this exchange of diplomatic notes both Parties agreed, in accordance with paragraph 41 of Annex XXIV to the Association Agreement, to use the English language for the dispute settlement proceedings and, in accordance with paragraph 43 of the same Annex, to instruct the members of the Arbitration Panel to deliver the interim report and the final ruling in that language.
6. On 28 January 2020, the Parties exchanged diplomatic notes confirming for each Party the completion of the Arbitration Panel selection procedure.⁵ The Parties confirmed that the deadlines applicable under Chapter 14 of the Association Agreement, including the issuance

¹ Note Verbale of 15 January 2019, No. 005/2019.

² Note Verbale of 20 June 2019, No. ARES(2019)3929269.

³ Diplomatic Note of 9 August 2019, No. ARES(2019)5179780.

⁴ Diplomatic Note of 20 August 2019, No. 3111/31-200-1698.

⁵ Diplomatic Note of 28 January 2020, No. ARES(2020)520694 and Diplomatic Note of 28 January 2020, No. 3111/31-210/144.

of the Interim Panel Report⁶ and the Arbitration Panel Ruling,⁷ would be counted as of 28 January 2020.⁸

7. The Parties also confirmed therein the establishment of the Arbitration Panel pursuant to Article 307(6) of the AA as of 28 January 2020 with the following composition:

Chairperson: Mr Christian Häberli

Members: Mr Giorgio Sacerdoti
Mr Victor Muraviov

8. The Arbitrators were not supported by a Secretariat.⁹ Therefore, they made use of the possibility to appoint personal assistants, as provided for in paragraph 4 of the Arbitration Panel's Working Procedures.¹⁰ The Arbitrators appointed two assistants who provided substantial inputs, research, translation, and logistics support.

Assistants: Ms Ilaria Espa
Ms Nataliia Mushak

1.3 Arbitration Panel proceedings

1.3.1 General

9. On 29 January 2020, the organisational meeting of the Parties with the Arbitration Panel was held in Brussels. The Working Procedures¹¹ and the Timetable for the proceedings were adopted pursuant to paragraph 8 of Annex XXIV to the Association Agreement.
10. On 4 February 2020, the European Union published on the website of the European Commission a notice concerning the establishment of the Arbitration Panel, which indicated that the deadline for *amicus curiae* submission was 27 February 2020.¹² On 4 February 2020, Ukraine published a similar notice on the website of the Ministry for Development of Economy, Trade and Agriculture of Ukraine.¹³ One *amicus curiae* submission was

⁶ See Article 308(1) of the AA.

⁷ See Article 310(1) of the AA.

⁸ Diplomatic Note of 28 January 2020, No. ARES(2020)520694 and Diplomatic Note of 28 January 2020, No. 3111/31-210/144.

⁹ The Parties agreed that the arbitrators would be remunerated according to the WTO scale for a maximum of 44.5 days of work each, including assistant work, to be shared by each Party equally.

¹⁰ See below, Annex A.

¹¹ See the Arbitration Panel's Working Procedures in Annex A.

¹² See <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2109>.

¹³ See <https://www.me.gov.ua/Documents/Detail?lang=en-GB&id=60f5e990-629b-49cd-9a53-ff97a9f22b21&title=AmicusCuriaeSubmissionInTheDisputeBetweenUkraineAndTheEuOnRestrictionsAppliedByUkraineOnExportsOfCertainWoodProducts>.

received by the non-governmental organization “Ukrainian Association of the Club of Rome” on 20 February 2020 in Ukrainian language. This submission was informally translated into English by the Arbitration Panel and is part of the record. However, neither of the Parties referred to it in their submissions.¹⁴

11. On 17 February 2020, the European Union filed its written submission (*EU’s Written Submission*).
12. On 11 March 2020, Ukraine submitted its written submission (*Ukraine’s Written Submission*).
13. In those documents, and throughout the proceedings, the Parties kept referring to the dispute using different names: *Ukraine – Export prohibitions on wood products* (European Union) and *Ukraine – Measures Related to Certain Ukrainian Export Restrictions on Wood* (Ukraine). The Arbitration Panel has consistently used the name *Restrictions applied by Ukraine on export of certain wood products to the European Union*, as referred to in the Note Verbale of 20 June 2019.¹⁵
14. Following the outbreak of the Covid-19 pandemic and the subsequent travel restrictions, the Timetable had to be revised, pursuant to Rules 14 and 15 of Annex XXIV and to paragraph 31 of the Working Procedures, a first time on 17 March 2020 and shortly thereafter on 6 April 2020. The original dates of the Hearing (30-31 March 2020) were thereby postponed, first to 19 May 2020, and then 16-17 June 2020. In parallel, the deadlines for the submission of the Arbitration Panel’s questions to the Parties and the Parties’ answers were also postponed. The Arbitration Panel sent questions to the Parties on 27 April 2020 and the Parties answered on 15 May 2020. Parties exchanged questions on 20 May 2020, with answers made available on 4 June 2020. A list of issues that the Panel suggested could be addressed by the Parties during the Hearing was sent to the Parties on 16 June 2020.
15. Due to the prolongation of travel restrictions as a result of the continuation of the pandemic situation, the Timetable had to be further adjusted on 18 July 2020 and on 14 September 2020, respectively. The modifications mainly postponed the Hearing foreseen in paragraphs 21-31 of Annex XXIV to a time when it would be possible to hold them in person (22-23 September 2020).
16. Against the backdrop of a prolonged period of travel restrictions in the wake of the Covid-19 pandemic and the prospect of significant further delays, however, the hearings had to be

¹⁴ See paragraphs 478-79 below.

¹⁵ See Note Verbale of 20 June 2019, No. ARES(2019)3929269.

held in a virtual mode. This was not an easy decision to take. Especially the Respondent deserves credit for accepting to hold an online hearing, whereas the hearing should have taken place in Kyiv in accordance with Article 22 of the Rules of Procedure (Annex XXIV to the AA).

17. Both Parties published the notice regarding dates and time of the Hearing on the relevant websites of the European Commission and of the Ministry for Development of Economy, Trade and Agriculture of Ukraine, respectively, pursuant to Article 318(2) of the AA and the Rules of Procedure.
18. On 22 and 23 September 2020, the Arbitration Panel held the hearing with the Parties virtually, via Webex. This implied considerable technical challenges. The Hearing could not be open to the public, as it would have been difficult to arrange live public access to the hearing without potentially compromising the server capacities and thus the technical quality of the meeting. However, pursuant to Article 318(2) of the AA and the Rules of Procedure, both Parties published their oral opening statement, oral closing statement, responses to the Arbitration Panel's questions at the Hearing, and the executive summary on the relevant websites of the Parties.
19. After the oral opening statements, the Arbitrators and their assistants invited the Parties to reply to a set of oral questions. Initial replies were provided by the Parties during the hearing. On 7 October, both Parties submitted the final versions of their oral opening and closing statements, together with their executive summaries and their written replies to the oral questions of the Arbitration Panel.
20. The Parties did not ask questions to each other, but Ukraine raised a number of new procedural issues. Those issues will be addressed in paragraphs 26-28 below and in Section 4.1.
21. On 13 November 2020 the Arbitration Panel issued its Interim Report. The issuance of the final report was scheduled for either 11 December 2020 (without a review meeting) or 18 December 2020 (with a review meeting).
22. Since the Parties did not request a review meeting, the final report was is being issued on 11 December 2020.

1.3.2 Terms of reference

23. In its written submission, the Complainant requested the Arbitration Panel to rule on the matter in accordance with the standard terms of reference set out in Article 306(3) of the

AA. This had been agreed by the Parties in their exchange of Notes of 9 and 20 August 2019 (see above, para. 4).¹⁶ Article 306(3) of the AA reads as follows:

Unless the Parties agree otherwise within five days of the establishment of the panel the terms of reference of the arbitration panel shall be: “to examine the matter referred to in the request for establishment of the arbitration panel, to rule on the compatibility of the measure in question with the provision of this Agreement referred to in Article 304 of this Agreement and to make a ruling in accordance with Article 310 of the Agreement.”

24. Accordingly, the European Union requested the Arbitration Panel to issue a ruling in accordance with Article 310 of the AA to the effect that:

- 1) the 2005 export ban and the 2015 export ban are inconsistent with Ukraine’s obligations under Article 35 of the Association Agreement [under Title IV, Chapter 1 of the Association Agreement]; and
- 2) therefore, Ukraine is required to take any measure necessary to comply with those obligations.¹⁷

25. During the Hearing, the Respondent raised a new point in its oral statement concerning “the rules applicable to the subject matter of this case.”¹⁸ According to Ukraine, the European Union erred in seizing the standard dispute settlement procedures under Chapter 14 of the AA, instead of invoking the procedures set out in Chapter 13 [“Trade and Sustainable Development”]. In addition, Ukraine contended that the Arbitration Panel “is not competent to address the dispute brought before it by the European Union because this dispute is a matter arising under Chapter 13 of the Association Agreement”¹⁹ and not under Chapter 14, in conjunction with Article 35 of the AA.²⁰ Accordingly, Ukraine submitted that the European Union should have brought its claims “according to the procedures provided for in Articles 300 and 301 of the Association Agreement.”²¹ It therefore requested the Arbitration Panel to rule that:

1. Since the European Union did not bring its case before the relevant body, in accordance with the Association Agreement relevant provisions, its claim should be rejected as inadmissible, or rejected for lack of jurisdiction of the Arbitration Panel;
2. should the Arbitration Panel consider that the matter pertains to its jurisdiction under the Association Agreement, to reject the European Union’s conclusions on the merits;

¹⁶ *EU’s Written Submission*, para. 10.

¹⁷ *EU’s Written Submission*, para. 60.

¹⁸ *Ukraine’s Opening Statement*, para. 67.

¹⁹ *Ukraine’s Executive Summary*, para. 3.

²⁰ *Ukraine’s Opening Statement*, para. 93.

²¹ *Ukraine’s Opening Statement*, para. 96.

or;

3. should the Arbitration Panel find that the European Union's claim is not devoid of merit, to clarify what measures would be required to comply with the Association Agreement.²²

26. The EU objected to Ukraine's arguments by raising two main counter-arguments. Firstly, on the procedural side the EU considered Ukraine's objection to jurisdiction as "manifestly untimely", because Ukraine has failed to raise the objection "seasonably and promptly" in the proceedings in accordance with the principle of good faith and due process.²³ Secondly, from a substantive point of view, the EU considers Ukraine's objection as being without merit. In the EU's view, its claims are based on Article 35 of the AA (which is found in Title IV of the AA, "Trade and Trade-Related Matters"). Accordingly, the EU contends that Article 304 of the AA, which is included in Chapter 14 on "Dispute settlement", applies:

The provision of this Chapter apply in respect of any dispute concerning the interpretation and application of the provisions of Title IV of this Agreement except as otherwise expressly provided.

27. The EU further points out that neither Article 300(7) of the AA nor any other provision excludes "expressly" disputes concerning the interpretation and application of Article 35 of the AA from the scope of Chapter 14. According to the EU, the present dispute does not involve a "matter" under Chapter 13 because the EU has not brought claims on the basis of a provision included in Chapter 13 with regard to a "measure" within the scope of the same Chapter.²⁴

28. The findings of the Arbitration Panel in respect of these preliminary issues are in Section 4.1.

2. FACTUAL ASPECTS

29. This Section, first, takes note of the presentation of certain facts, by both Parties, in relation to the protection of Ukrainian forests and their importance for this case (Sections 2.1 and 2.2). Secondly, the products at issue are presented in their context (Section 2.3). Section 2.4 then lists the measures at issue indicated in the claims made by the EU. Finally, Section 2.5 lists a number of measures brought forward by Ukraine that have possible relevance in the present case, but are different from the "measures at issue" in Section 2.4. This somewhat

²² *Ukraine's Opening Statement*, para. 132.

²³ *EU's Responses at the Hearings*, paras 3-5.

²⁴ *Ibidem*, paras 19-20 with reference to Appellate Body Report, *Guatemala-Cement I*, para. 72.

unusual upfront listing allows us to look at the arguments made by the Parties in a dynamic context of ongoing and envisaged reforms (Section 3).

2.1 General information provided by the European Union on forest protection in Ukraine

30. The European Union recalls that, according to the Ukraine Forest Agency, over the last fifty years Ukraine forests have increased by almost half and that Ukraine is the ninth country in Europe according to forested area and the sixth in terms of forest stocks.²⁵ Moreover, according to the Agency, the stock of standing timber is increasing by an average of 35 million cubic meter annually²⁶ and there is “a steady tendency to increase the area of forests in the whole country.”²⁷
31. Ukraine has clarified that more than 44% of Ukraine forested areas has been already assessed and certified based on the international requirements towards forest management and forest exploitation subject to the principles of sustainable development and that, in any event, the lack of a certification does not indicate any problems²⁸. In this connection, the European Union outlined that it supports Ukraine’s efforts to protect its forests and that it has constantly encouraged Ukraine to strengthen those efforts, in particular by ensuring an adequate enforcement of its forest management regime.²⁹
32. The European Union emphasised that the present case is not about whether Ukraine is entitled to adopt measures for protecting its forests, which is beyond question.³⁰ The European Union acknowledged the persistent challenges faced by Ukraine’s forestry sector, including illicit felling activities and corruption.³¹ The European Union has stressed that it fully cooperates with Ukraine in order to support Ukraine’s efforts to meet those challenges and protect effectively its forests. It has provided in Annex EU-1 to its Responses to the First List of Questions from the Panel an extensive overview of such past and ongoing European Union cooperation and assistance measures.³²
33. At same time, the European Union outlined that – in parallel with the 2015 Export Ban on all unprocessed timber – Ukrainian exports of sawn wood picked up, thereby confirming that the measure is essentially concerned with supporting Ukraine’s domestic wood

²⁵ *EU’s Written Submission*, para. 11.

²⁶ *EU’s Written Submission*, para. 14.

²⁷ Public Annual Report of the State Forest Resources Agency of Ukraine, page 8.

²⁸ *Ukraine’s Answers to the Panel’s Questions*, paras 73-75.

²⁹ *EU’s Closing Statement*, para. 4.

³⁰ *EU’s Closing Statement*, para. 3.

³¹ *Ibidem*, para. 4.

³² *Ibidem*, para. 4.

processing industry, rather than protecting Ukrainian forests, or aiming at an overall reduction of domestic felling or wood production.³³

2.2 General information about Ukraine's forests, as provided by the Respondent

34. Forests are a national treasure of Ukraine. Depending on purposes and localisation, Ukrainian forests perform a wide array of environmental and other functions that restrict their commercial use (water management, protective, sanitary-hygienic, recreative and others).³⁴
35. The total area covered by forests in Ukraine is 10.4 million hectares, of which 9.4 million hectares are stocked forests (15.9 % of the total area of Ukraine's territory).³⁵ The forest area per capita in Ukraine is on average 14 times smaller compared to other Eastern European countries. Ukraine takes only 34th place in Europe in parameters such as forest area in relation to the total area.³⁶
36. As a result of natural conditions and anthropogenic influences over a long period of time, Ukrainian forests today are irregularly distributed over the country. More than half of the country's forests are human-made and need enhanced care. The average age of the forests in Ukraine is more than 60 years, resulting in over-aging and in deterioration of their sanitary status.³⁷
37. The forests grow in three natural zones (zone of mixed forests, forest-steppe, steppe), in Crimea and in the Carpathians mountains. While the optimal percentage of forest cover for the country should constitute 20% of the total territory of Ukraine (presently 15.9 %), the planned and the actual forest covers differ widely for the different zones: for Polissya (Forest zone) it should amount to 32.0% of the total area of this zone (actually 26.8 %), for Lisostep (Forest-steppe zone) it should be 18% (presently 13%), while for Step (Steppe zone) it is presently 5.3% instead of 9.0%.³⁸
38. The Chernobyl Nuclear Power Plant Disaster contaminated around 3.5 million hectares of forest. Today, 157 000 hectares of forest have a high level of radioactive contamination of Caesium-137. Forest exploitation is limited there. The largest territories of contaminated forest are situated in the Zhytomyr region (60%), Kyiv region (52.2%), and Rivne region

³³ *EU's Opening Statement*, para. 10; *EU's Responses to the Arbitration Panel's Questions*, para. 6, Exhibit EU-18.

³⁴ *Ukraine's Written Submission*, para. 26.

³⁵ Public Annual Report (2019) of the State Forest Resources Agency of Ukraine (Exhibit UKR-01), p. 4.

³⁶ *Ukraine's Written Submission*, para. 28.

³⁷ *Ukraine's Written Submission*, para. 29

³⁸ *Ukraine's Written Submission*, para. 32.

(56.2 %). In Volyn, Chernihiv, Cherkasy, Vinnytsya and Sumy Regions 20% of forests are contaminated. In the Red Forest, which is located within the 10km² area surrounding the Chernobyl 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 trees.³⁹ Therefore, these forests are not exploited.⁴⁰

39. In 2002, the State Programme “Forests of Ukraine” for 2002-2015 was adopted as one of the basic plans for the forest management in Ukraine.⁴¹ The programme recognised that the actual size of the woodland (15.6% of the total territory of Ukraine) was insufficient and the woodland should be expanded by 2 to 2.5 million hectares in order to meet the above-mentioned optimal coverage of 20%.⁴²
40. In 2010, the Ukrainian Parliament adopted the Law “On Main Principles of State Environmental Policy of Ukraine for the Period until 2020.”⁴³ According to this law, the total woodland should expand by more than 2 million hectares of new forests in order to meet the optimal coverage of 20%. This optimal woodland coverage would thus be reached in 20 years.⁴⁴
41. This law was replaced by the Law “On Main Principles of State Environmental Policy of Ukraine for the Period of up to 2030.”⁴⁵
42. The State Forest Resources Agency of Ukraine reported the same level of annual increment for 2018 and 2019 (35 million cubic metres).⁴⁶ The forest utilisation rate (i.e., the ratio of the average annual felling relative to the average annual increment) was 63% in 2018 and 60% in 2019. Ukraine writes that, according to the European Environment Agency “a felling-to-annual-increment ratio of approximately 70 % is recommended to ensure the sustainable management of forests.”⁴⁷
43. The State Forest Resources Agency of Ukraine also recalls that the average age of Ukrainian forests is over 60 years and that this age is still increasing. This should be seen as an

³⁹ Environmental Health Perspectives. A Tale of Two Forests. Addressing Postnuclear Radiation at Chernobyl and Fukushima. Volume 121, Number 3, March 2013.

⁴⁰ *Ukraine’s Written Submission*, para. 33.

⁴¹ Resolution of the Cabinet Ministers of Ukraine “On approval of the State Program “Forests of Ukraine” for 2002-2015”, No. 581, 29.04.2002, Exhibit UKR-36; see *Ukraine’s Written Submission*, para. 135, footnote 82, paras, 274-276.

⁴² See footnote 82 to paragraph 135 of *Ukraine’s Written Submission*.

⁴³ See Law No. 2818-VI, 21 December 2010 (Exhibit UKR-19).

⁴⁴ *Ukraine’s Opening Statement*, para. 10.

⁴⁵ Law No. 2697-VIII, 28 February 2019.

⁴⁶ *EU’s Written Submission*, para. 14; Public Annual Report (2019) of the State Forest Resources Agency of Ukraine, Chapter I (p. 5), Exhibit UKR-01.

⁴⁷ European Environment Agency, *Forest: growing stock, increment and fellings*, available at: <https://www.eea.europa.eu/data-and-maps/indicators/forest-growing-stock-increment-and-fellings-3/assessment>

opportunity from an environmental point of view since, as the European Commission has acknowledged that “newly planted forests cannot replace primary forests, which have high carbon stocks, and are characterised by their great age, unique ecological features and the established protection they provide to biodiversity.”⁴⁸ However, protecting the biodiversity of primary forests, and the carbon stocks they contain, also implies that harvests must be strictly controlled, especially where their age leads to a deterioration of their sanitary status.⁴⁹ Depending on the type of forest, it could take decades for carbon stocks in harvested areas to return to prior levels. An increase in the harvest is therefore equivalent to an increase in carbon dioxide emissions to the atmosphere, which is the opposite of what should be done in terms of protection of the environment.⁵⁰ Hence, the quality and sustainability of the stock of standing timber in Ukrainian forests remains a source of concern.⁵¹

44. One of the main challenges are illegal logging and smuggling practices.⁵² In 2019, the total volume of illegal logging was reported at 118 thousand cubic metres with the total damage amounting to UAH 814.2m. The ineffectiveness of measures taken to ensure the proper protection of forests is evidenced by the fact that in 2019 the State Forest Resources Agency of Ukraine detected illegal logging of 6 446 cubic metres in the forests of Kharkiv Region, with a total damage amounting to UAH 51.7m; of 1 333 cubic metres in the forests of Kherson Region Administration with a total damage of UAH 16.9m; and of 1000 cubic metres in the forests of Zhytomyr Region Administration with a total damage of UAH 5m.
45. The causes for illegal logging are, first and foremost, social: a low level of social and economic development of rural regions (high unemployment rate among the population that harvests timber to meet vital needs, low salaries, low investment activity etc.). The second cause is economic: obtaining quick profits by individual citizens or organised groups that harvest large size and valuable wood for further processing or commercial sale. The main consumers of such timber are sawmills, operating beyond the law. Investigations into the circumstances of illegal logging show that the main reasons for their increase are the activities of technically well-equipped criminal groups, the low level of financial support

⁴⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Stepping up EU Action to Protect and Restore the World’s Forests, COM/2019/352 final, 23.07.2019, p. 2.

⁴⁹ *Ukraine’s Written Submission*, para. 29; Public Annual Report (2019) of the State Forest Resources Agency of Ukraine, *Chapter I* (p. 4) (Exhibit UKR-01).

⁵⁰ *Ukraine’s Opening Statement*, para. 17.

⁵¹ *Ukraine’s Opening Statement*, para. 18.

⁵² Cf. 2019 Annual Report of the State Forest Resources Agency of Ukraine (in UA version), Exhibit UKR-01.

of the population, which is forced to meet their basic needs in an illegal way, and the large number of uncontrolled private sawmills, purchasing illegally harvested wood. To a large extent, the spread of illegal logging in the southern and eastern regions of Ukraine is facilitated by the lack of budgetary funding to finance the work of state forest protection workers, which prompts them to leave their jobs and, as a result, large forest areas are left unattended.⁵³

46. With a view to increasing the effectiveness of work on the prevention of, and fight against, illegal logging, the prevention of the theft of forest products and other violations of forest legislation of Ukraine, the territorial bodies of the State Forest Resources Agency held joint meetings with the representatives of the regional state administrations, territorial bodies of the prosecutor's offices, police, the Security Service of Ukraine and the State Environmental Inspectorate of Ukraine in order to develop, approve and carry out joint measures for the protection of forests and carrying out systematic inspections of sawmills and other wood processing enterprises to check the legality of timber purchases.⁵⁴ Based on the result of such meetings, the police officers became involved in joint raids conducted by mobile raid groups established by enterprises belonging to the State Forest Resources Agency.⁵⁵
47. For a country facing since 2014 an “emergency in its international relations”, Ukraine considers that is difficult to focus efficiently on the fight against illegal logging and felling, when the absolute priority is the recovery of territorial integrity, and access to sufficient energy. Ukraine claims that it does as much as it can.⁵⁶ This “emergency in international relations” between Ukraine and the Russian Federation began in 2014 and has led *inter alia* to the extermination of flora and fauna of the part of Ukraine where military actions are conducted; a great part of the forests was destroyed.⁵⁷
48. In support of its position, Ukraine notes that the “emergency in international relations” has been recognised multiple times 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,

⁵³ UKR-Exhibit 1, pp. 10-11, para. 2.2.1.

⁵⁴ Instructions of Prime Minister of Ukraine O.V. Goncharuk No. 1419/1/1-20 dated 21 January 2020 (UKR-Exhibit 1, p. 11, para. 2.2.1).

⁵⁵ *Ibidem*.

⁵⁶ *Ukraine’s Answers to the Arbitration Panel’s Questions*, paras 102-106.

⁵⁷ UN News, “Human cost of Ukraine Conflict is growing, Security Council told” (referred to in *Ukraine’s Written Submission*, para. 176).

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, 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.⁵⁸

49. Ukraine submits that the “emergency in international relations” that currently exists on its territory affects a great number of spheres of daily life not only in the region but also in the entire country. Due to the occupation of a considerable part of Ukraine the rest of the country resorts to an increased consumption of wood products for the purpose inter alia of heating. Moreover, not only significant parts of forests are located in the occupied territory but this is also the case for some of the biggest coal mines and plants.⁵⁹
50. Altogether 305 objects of the natural reserve fund are situated in the Donetsk and Lugansk regions.⁶⁰ More than half of such objects in the Donetsk region - in the Lugansk region, about a third - are now located in the occupied territory. In particular, there are many nature reserves in the region (Luhansky and Ukrainian Steppe), as well as the national natural parks Svyati Hory and Meotida.⁶¹ These objects of the Ukrainian natural wealth have suffered from a number of different factors. One of the greatest problems is the forest fires caused by the explosions of ammunition or deliberate arson connected with warfare tactics. As a result of fires caused by military action, the plantations along the collision line suffered the most. Furthermore, damage to the territories by shelling was found in the national natural

⁵⁸ *Ukraine's Written Submission*, para. 177 (referring to 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>).

⁵⁹ *Ukraine's Written Submission*, para. 179.

⁶⁰ *Ukraine's Written Submission*, para. 182.

⁶¹ The State Emergency Service of Ukraine: Ecological aspect of the reintegration of the occupied territories of Donetsk and Lugansk regions, available at <https://www.dsns.gov.ua/en/Ostanni-novini/82386.html> (last accessed 6 November 2020).

park Svyati Hory, branches of the Ukrainian Steppe Kalmius and Kreydyana flora, the regional landscape park Donetsk Kriaghgh and the Slavyansky Resort, the Lugansk Natural Reserve, and the Belogorivsky and Perevalsky Reserves. The forest plantations in the ORDLO also are affected by the cutting down of forest for military needs, e.g. building dugout shelters and trenches.⁶²

51. Ukraine notes that during the period of armed aggression by Russia in the territory of ORDLO some natural landscapes were totally destroyed. Military action led to the pollution of water, soil, air and to forest cutting. The impact on the natural resources is horrifying and the expectations of experts are that the rehabilitation of these landscapes will take a considerable period of time. Unfortunately, the lack of full control of Ukraine over the entire territory, the lack of control bodies and the constant shelling do not allow for an objective assessment of the damage caused to the natural environment during the period of hostilities. Each and every day of the war, the natural wealth and resources of the occupied Donbass territory, especially forestry, are further destroyed, the scale of the environmental consequences increases exponentially, and their prevention or elimination becomes more complicated.⁶³

52. According to Ukraine, these data demonstrate both the ongoing efforts made by Ukraine to improve the protection of its environment in a difficult context, and the need to achieve better results.⁶⁴

2.3 The Products at issue

53. In the present dispute, two main categories of products are at issue: raw timber and sawn wood of ten specific wood species which are referred to in the relevant Ukrainian law as (i) “rare and valuable species” and (ii) all “unprocessed timber”.

2.3.1 “Rare and valuable” species

54. The first category consists of timber and sawn wood of ten species listed in Article 1 of 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 (hereinafter Law 2860-IV) and referred to in that law as “rare and valuable”.⁶⁵

⁶² *Ukraine’s Written Submission*, para. 183.

⁶³ *Ukraine’s Written Submission*, para. 184.

⁶⁴ *Ukraine’s Opening Statement*, para. 42.

⁶⁵ (Exhibit UKR-02). See also the Law of Ukraine No. 2531-VIII of 6 September 2018, On Amendments to Certain Legislative Acts of Ukraine on the Preservation of Ukrainian Forests and preventing the Illegal Export of Unprocessed Timber, Information from the Verkhovna Rada of Ukraine, 2018, No 42, p.327 (Exhibit EU-5).

55. These ten species consist of six wood genera⁶⁶ and four wood species.⁶⁷ All of them fall within the UKTZED Code 4403. According to Article 2 of Law 2860-IV, “sawn wood” made from such “rare and valuable” species falls within the UKTZED Code 4407.
56. Ukraine regulates these products as part of its forestry resources and its biodiversity.⁶⁸ Five species are listed in the Red Book of Ukraine.⁶⁹ Ukraine explains that “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. By listing the animals and plants of Ukraine, which are on the verge of extinction and must therefore be protected, the Red Book assists in their preservation and gradual recovery. The Red Book contains general information about areas, the current state and causes of endangered species and the possibilities for preserving valuable and rare wood species. At the same time, it does not set time frames for determining the period during which plants will be assessed as “endangered” and “valuable and rare.” However, the Red Book alone cannot protect the listed species: there must be further action in this regard, and the 2005 law is one of them.⁷⁰
57. Overall, the industrial exploitation of the species concerned is limited. A number of them are cultivated especially in view of the production of fruits and nuts or other products from

⁶⁶ The genera, including one sub-genus, include:

- (1) “акація” / “acacia” / “*Acacia* Mill.”;
- (2) “вишня” / “cherry tree” / “*Prunus subg. Cerasus* Mill.” (sub-genus);
- (3) “груша” / “pear tree” / “*Pyrus* L.”;
- (4) “горіх” / “walnut tree” / “*Juglans* L.”;
- (5) “каштан” / “chestnut” / “*Castanea* Mill.”;
- (6) “ялівець” / “juniper” / “*Juniperus* L.”

⁶⁷ The wood species include:

- (1) “берека” / “checker tree / beech” / “*Sorbus torminalis* (L.) Crantz”
- (2) “тис ягідний” / “common yew” / “*Taxus baccata* L.”;
- (3) “черешня” / “black cherry tree” / “*Prunus avium* L.”;
- (4) “явір” / “acer” / “*Acer pseudoplatanus* L.”

⁶⁸ This objective falls within the ambit of numerous international conventions to which Ukraine is a party, including the Convention on Biological Diversity and the Convention on the Conservation of European Wildlife and Natural Habitat.

⁶⁹ Checker trees (*Sorbus torminalis* (L.)), common yews (*Taxus baccata* (L.)) (see, the EU’s answer to Panel’s Question No. 52, para. 163, referring to para. 57 to Ukraine’s Written Submission), some of the species of juniper (*Juniperus Excelsa m.Bieb* and *Juniperus Foetidissima Willd*) and one species of cherry tree (*Cerasus klokovii* Sobko). See the List of Plant and Mushroom Species that are included in the Red Book of Ukraine (Plant Life), approved by Order of the Ministry of Environmental Protection of Ukraine “On Approval of the Lists of Plant and Mushroom Species that are included to the Red Book of Ukraine (Plant Life) and Plant and Mushroom Species that are excluded from the Red Book of Ukraine (Plant Life)” No. 312, 17 June 2009, items Nos. (in order of appearance) 569, 38, 32, 33 and 563 (Exhibit UKR-53).

In paragraph 157 of its answer to Panel’s Question No. 52, the European Union submitted that “Ukraine has confirmed that “Law No. 2860-IV prohibits the export of timber and sawn wood of [...] junipers (*Juniperus* (L.) or *Juniperus communis* (L.))...” (emphasis added).

⁷⁰ Ukraine’s Written Submission, para. 58, footnote 21.

flowering and for landscaping. Article 70 of the Forest Code of Ukraine provides that “valuable and rare wood” is to be preserved during felling operations.⁷¹

58. Some of the wood species concerned are also included in the International Union for Conservation of Nature *Red List of Threatened Species* (also known as the IUCN Red List or Red Data List).⁷² This is the case of acacias, junipers, acers, walnut trees, cherry trees. However, the EU argues that they are not included under a category that would suggest that their existence is currently under serious threat at a global level.⁷³
59. All ten “rare and valuable” species are covered by the “2005 export ban” described in Section 2.4.1.

2.3.2 Unprocessed timber products

60. The second category of products at issue consists of unprocessed timber products (UKTZED Code 4403), also found in Article 1 of Law 2860-IV.
61. The Parties consistently define “timber” as “[w]ood materials that are extracted by dividing into parts felled trees and logs (along and across) further processing.”⁷⁴ “Sawn wood” is defined in Article 1 of Law 2860-IV as “[s]awn goods of a certain size and quality that have at least two planar parallel layers.”⁷⁵
62. Unprocessed timber products are covered by the “2015 temporary export ban” which will be described in Section 2.4.2.

2.4 The measures at issue

63. The European Union identified two measures in its request for the establishment of the Arbitration Panel in connection with its claims: the “2005 export ban” and the “2015 temporary export ban”.⁷⁶ Since also Ukraine has used these terms, the Arbitration Panel will use them as well for reasons of expediency.

⁷¹ *Ukraine’s Written Submission*, para. 59.

⁷² As per the IUCN website, the International Union for Conservation of Nature’s Red List of Threatened Species was established in 1964 and “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”. See <https://www.iucnredlist.org/> (last accessed 11 December 2020). On the IUCN Red List, see for instance the description for cherry trees at <https://www.iucnredlist.org/species/172064/50673544> (last accessed 11 December 2020).

⁷³ See *EU’s Responses to the Arbitration Panel’s Questions*, paras 161-162.

⁷⁴ Cf. Exhibit EU-5.

⁷⁵ Cf. Section IX, group 44, code 4407 of the Ukrainian Classification of Goods for Foreign Economic Activity (584a-18).

⁷⁶ *EU’s Written Submission*, paras 23-27.

2.4.1 The “2005 export ban”

64. The Complainant asserts that Ukraine prohibits the exportation of both timber and sawn wood of ten “rare and valuable” species since 2005 (the “2005 export ban”).

65. The EU indicates that the “2005 export ban” is reflected in Article 2 of Law 2860-IV, which states:

Export of timber and sawn wood of valuable and rare wood species beyond the customs territory of Ukraine is prohibited.

66. The EU also notes that the prohibition instituted by the “2005 export ban” is permanent. It has been applied since Law 2860-IV entered into force (13 December 2005) and is not subject to any temporary limitation.

2.4.2 The “2015 temporary export ban”

67. The EU further asserts that Ukraine introduced a temporary prohibition, for a period of ten years, on all exports of unprocessed timber since 2015 (the “2015 temporary export ban”). In the case of wood species other than pine, the temporary prohibition applies from 1 November 2015. In the case of wood species of pine trees, it applies from 1 January 2017.

68. The EU indicates that the “2015 temporary export ban” is described in Article 2⁻¹ of Law No. 325-VIII:

- 1) temporarily, for a 10-year period, it is prohibited to export unprocessed timber outside the customs territory of Ukraine [Harmonized System Code 4403 of section IX, group 44];
- 2) for wood species other than pine – from November 1, 2015; and
- 3) for wood species of pine – from January 1, 2017.⁷⁷

2.5 Measures other than “measures at issue”

69. In order to comprehend the context of these proceedings, it is useful to list a number of other measures with possible relevance in the present case but different from the measures at issue in Section 2.4. In the course of the proceedings, Ukraine referred to the following measures as being part of its forestry policy:

- 1) Law of Ukraine No. 2531-VIII of 6 September 2018 “On Amendments to Certain Legislative Acts of Ukraine on the Preservation of Ukrainian Forests and preventing the Illegal Export of Unprocessed Timber” No. 2531-VIII, dated 6 September 2018, Information from the Verkhovna Rada of Ukraine, 2018, No. 42, p.

⁷⁷ Law of Ukraine No. 325-VIII of 9 April 2015, 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”, Information from the Verkhovna Rada of Ukraine, 2015, No. 31, p. 291 (Exhibit UKR-03).

- 327);
- 2) Decree of the President of Ukraine “On Certain Measures for the Conservation of Forests and the Rational Use of Forest Resources” No. 511/2019, of 9 July 2019;
 - 3) 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, of 4 December 2019; and
 - 4) the draft law on amendments to the Forest Code for implementing the National Forestry Inventory, adopted on 5 February 2020 in the first reading the Parliament of Ukraine.⁷⁸

70. Ukraine also recalls that in order to effectively prevent illegal logging in Ukraine, the following measures have been taken:

- 1) Introduction of an electronic timber tracking system;
- 2) Increased penalties for illegal logging and criminal liability for illegal logging and illegal timber exports;
- 3) Transition to European standards as of January 1, 2019, which makes it impossible to differentiate the allocation of quality categories in Ukraine and the European Union;
- 4) Increased area of certified forests;
- 5) Improved public access to information on the legality of logging and harvesting permits;
- 6) Possibility of verifying the legality of timber harvesting on the official site of the administrator of the unified state electronic timber tracking system of the State Forest Innovation and Analytical Centre through the Forest in Smartphone system;
- 7) Online checking of timber legality by label number, waybill and vehicle number.⁷⁹

3. ARGUMENTS OF THE PARTIES

71. This Section summarises the arguments of each Party in accordance with paragraph 8 of the Working Procedures adopted by the Arbitration Panel.⁸⁰

3.1 European Union

72. The EU makes the following claims with respect to the two measures referred to in Section 2.4 above.

⁷⁸ *Ukraine’s Written Submission*, para. 47.

⁷⁹ *Ukraine’s Answers to the Arbitration Panel’s Questions*, para. 104.

⁸⁰ See the Arbitration Panel’s Working Procedures in Annex A. Annex B contains the Executive Summaries of the Parties.

73. The 2005 export ban is a “prohibition” inconsistent with Article 35 of the AA.⁸¹ Moreover, Ukraine “has not showed that it is designed and it is necessary to protect plant life or health” in accordance with Article XX(b) of the GATT 1994 and therefore the measure cannot be justified under Article 36 AA.⁸²
74. The 2015 temporary export ban is also a “prohibition” inconsistent with Article 35 AA.⁸³ Furthermore, Ukraine “has not demonstrated that it is part of its policy for the preservation and sustainable exploitation of its forests, and that it contributes to the declared conservationist objective” in accordance with Article XX(g) of the GATT 1994.⁸⁴ Ukraine could not demonstrate that “it is ...even-handed because it imposed a complete ban on export, while allowing for a very high and unprecedented level of domestic consumption” in contrast to what is required pursuant to Article XX(g) of the GATT 1994.⁸⁵ Therefore, the measure cannot be justified under Article 36 of the AA.
75. The Complainant concludes that both measures cannot be justified under Article 290(1) of the AA as a self-standing exception because “the ‘right to regulate’ recognised in Article 290(1) of the AA must be exercised in accordance with the requirements of other provisions of the AA that give expression and operationalise the ‘right to regulate’, including the policy exceptions mentioned in Article 36 of the AA”.⁸⁶ The same holds true for any of the provisions of Chapter 13 of the Association Agreement that Ukraine invoked as defences.⁸⁷
76. Besides, this “right to regulate” is not at issue in this case.⁸⁸ In any case, it is not an unqualified right.⁸⁹
77. The EU adds that should Ukraine contend that the bans are justified by Article XX of the GATT 1994, the burden of proof would be on Ukraine.⁹⁰

3.2 Ukraine

78. Ukraine contends that the measures at issue “are not inconsistent with Article 35 of the Association Agreement *per se*.”⁹¹ The European Union was not able to prove that they have

⁸¹ *EU’s Executive Summary*, para. 6.

⁸² *EU’s Executive Summary*, para. 18.

⁸³ *Ibidem*, para. 6.

⁸⁴ *Ibidem*, para. 22.

⁸⁵ *Ibidem*, para. 22.

⁸⁶ *EU’s Opening Statement*, para. 196.

⁸⁷ *Ibidem*, paras 183-195.

⁸⁸ *EU’s Responses to the Arbitration Panel’s Questions*, para. 284.

⁸⁹ *EU’s Opening Statement*, paras 64 ff.

⁹⁰ *EU’s Written Statement*, paras 55-59.

⁹¹ *Ukraine’s Executive Summary*, para. 3.

the “effect” of restricting exports of the products concerned “destined for the territory of the other party” (that is, the European Union) as therein provided.⁹²

79. Even if Article 35 of the AA is applicable, the 2005 export ban and the 2015 temporary export ban are justified in accordance with Article 36 of the AA. The two measures are justified by Article XX(b) and Article XX(g) of the GATT 1994, respectively.⁹³

80. Indeed, the measures at issue “are a mere exercise of [Ukraine’s] right to regulate its own level of environmental protection [as] recognized in... Article 290” of the AA.⁹⁴ They must be read in conjunction with Articles 294 and 296(2) in Chapter 13 of the Association Agreement (“Trade and Sustainable Development”).⁹⁵

3.3 Additional arguments made during the Hearing

3.3.1 Ukraine

81. During the Hearing, Ukraine raised additional arguments, which called into question the admissibility of the European Union’s claims based on Article 35 of the AA.

82. In the first place, Ukraine argued that the Arbitration Panel lacks jurisdiction to address the dispute brought before it by the European Union, because “this case is *plainly* a Chapter 13 of the Association Agreement case”⁹⁶ and thus “must be resolved only according to the procedures provided for in Articles 300 and 301 of the Association Agreement.”⁹⁷

83. Ukraine remarks that Chapter 13 has its own consultation mechanism for handling differences in addressing sustainability issues, “the procedures of which have not been activated by the European Union.”⁹⁸

The European Union has therefore erred in seizing the current Arbitration Panel for addressing a matter arising under Chapter 13 of the Association Agreement. As a consequence, the Arbitration Panel cannot address this matter, because it has no jurisdiction, or because the request for the establishment of an arbitration panel is inadmissible.⁹⁹

84. Secondly, even if the EU’s claim is considered admissible, Article 35 of the AA is inapplicable “in any arbitration proceedings until the end of the 10-year period agreed

⁹² *Ukraine’s Opening Statement*, paras 101-106.

⁹³ *Ukraine’s Executive Summary*, para. 3.

⁹⁴ *Ukraine’s Opening Statement*, para. 68.

⁹⁵ *Ibidem*, paras 82-93.

⁹⁶ *Ukraine’s Executive Summary*, para. 22 (emphasis not added).

⁹⁷ *Ukraine’s Opening Statement*, para. 96.

⁹⁸ *Ukraine’s Executive Summary*, para. 16.

⁹⁹ *Ibidem*, para. 24.

between the Parties to progressively establish a free trade area, i.e. by the end of 2025.”¹⁰⁰
This is laid down in Article 25 of the Association Agreement.¹⁰¹

85. Finally, Ukraine has asked the Arbitration Panel “to take into consideration”, in the present case, “the specific circumstances, in particular the “emergency in international relations” within the meaning of Article XXI(b) of GATT 1994 which began in 2014 between Ukraine and the Russian Federation.¹⁰² According to Ukraine, this “emergency in international relations [...] has lead, inter alia, to the destruction of a great part of the forests.”¹⁰³

3.3.2 Comments by the European Union

86. During the Hearing and thereafter, in its responses to the oral questions of the Arbitration Panel at the Hearing, the EU counter-argued that Ukraine’s jurisdictional objection is “manifestly untimely and, in any event, ‘manifestly without merit’.”¹⁰⁴

87. Ukraine’s objections would imply that “all measures ‘relating to trade in forest products’ and more generally all measures ‘relating’ to the protection of the environment would be subject exclusively to the disciplines of Chapter 13, to the exclusion of any other provisions of the AA.”¹⁰⁵

88. In addition, Ukraine’s reading of Article 25 of the AA would run counter to Article XXIV(8)(b) of the GATT 1994 and lead to “manifestly unreasonable ... consequences.”¹⁰⁶ Moreover, Article 35 of the AA clearly states that “Article XI of the GATT 1994 [...] are incorporated into, and made an integral part of, this Agreement.”¹⁰⁷

89. The Arbitration Panel will address all these claims and additional arguments in its findings in Section 4.1.

4. FINDINGS

90. Before considering the Complainant’s claims about the two export bans in their context, we will address the “preliminary” issues arising from the Hearing (Section 4.1). We will then examine whether the measures at issue are compatible with Article 35 of the AA, having

¹⁰⁰ *Ukraine’s Executive Summary*, para. 3.

¹⁰¹ *Ukraine’s Opening Statement*, para. 54.

¹⁰² *Ukraine’s Written Submission*, paras 176-189.

¹⁰³ *Ibidem*, para. 176.

¹⁰⁴ *EU’s Responses at the Hearings*, para. 2.

¹⁰⁵ *Ibidem*, para. 22.

¹⁰⁶ *Ibidem*, paras 36-37 and para. 45.

¹⁰⁷ *Ibidem*, para. 39.

due regard to its relation with the provisions of Chapter 13 of the AA (Section 4.2). We will finally turn to the analysis of whether the measures at issue are justified under Article 36 AA, should they be found incompatible with Article 35 of the AA (Section 4.3).

4.1 Preliminary issues

91. In the course of the Hearing, three issues have been raised by the Respondent:

1. That the dispute arises under Chapter 13 of the AA (Trade and Sustainable Development, Articles 289-302) instead of under Chapter 14 (Dispute settlement, Articles 303 -326) (Sub-Section 4.1.1).
2. That Article 35 of the AA invoked by the EU is inapplicable during the 10-year transitional period provided for in Article 25 of the AA (Sub-Section 4.1.2).
3. The emergency situation in international relations affecting Ukraine (Sub-Section 4.1.3).

92. The Arbitration Panel now addresses each of these issues in turn.

4.1.1 Whether the present dispute arises under Chapter 13 or Chapter 14 of the AA

4.1.1.1 The Parties' arguments

4.1.1.1.1 Ukraine

93. Ukraine, as recalled above, has postulated for the first time in its oral opening statement at the Hearing of 23 September 2020, that this Arbitration Panel “cannot address” the matter submitted to it by the EU because “the current dispute definitely relates to the trade in forest products (unprocessed timber; timber and sawn wood from 10 valuable and rare species listed in Article 1 of Law 2860-IV). It is therefore arising under Chapter 13 of the AA and it must be resolved only according to the procedures provided for in Articles 300 and 301 of the Association Agreement.”¹⁰⁸

94. According to Ukraine, “the European Union has therefore erred in seizing the current Arbitration Panel, for addressing a matter arising under Chapter 13 of the Association Agreement. Consequently, the Arbitration Panel cannot address this matter because it has no jurisdiction or the request for the establishment of an arbitration panel is inadmissible.”¹⁰⁹

95. To support its argument Ukraine refers to Article 300(7) of the AA which is part of Chapter 13 and has as its title “Institutional and monitoring mechanism”:

¹⁰⁸ *Ukraine's Opening Statement*, para. 96.

¹⁰⁹ *Ibidem*, para. 97.

For any matter arising under this Chapter [on “Trade and sustainable development”], the Parties shall only have recourse to the procedures provided for in Articles 300 and 301 of this Agreement.

96. In turn, Articles 300 and 301 of the AA provide for consultations “regarding any matter arising under this Chapter”, followed, if the matter is not satisfactorily resolved through such governmental consultations, by referral of the matter to a Group of Experts entrusted to present a report to the Parties. Thereupon “[t]he Parties shall make their best efforts to accommodate advice or recommendations of the Group on the implementation of this Chapter.”¹¹⁰
97. Ukraine further notes that “there is no rule in the Association Agreement, nor in the Working Procedures, that prohibits a Party to raise a jurisdictional/admissibility issue at any time during the procedure”.¹¹¹
98. Finally, Ukraine also submits that the examination by the Arbitration Panel of the jurisdictional objection raised by Ukraine in the present case would be consistent with WTO jurisprudence and international practice.¹¹²

4.1.1.1.2 The European Union

99. The EU raises two objections to the above position of Ukraine. The first objection is procedural and the second one is on the merits.
100. Procedurally, the EU submits that Ukraine’s objection to jurisdiction is “manifestly untimely”, because Ukraine has failed to raise it “seasonably and promptly” in the proceedings.¹¹³ In the EU’s view, previous DSB rulings clearly indicate that claims over “procedural deficiencies” shall be brought in accordance with the principle of good faith and due process.¹¹⁴ As Ukraine did not file this objection in a timely manner the consequence is that Ukraine “may be deemed to have waived its right to have a panel consider such objections.”¹¹⁵
101. On the substance, the EU considers that Ukraine’s objection to jurisdiction is without merit.¹¹⁶ The EU stresses that its claims are based on Article 35 of the AA (which is found

¹¹⁰ Article 301(2) of the AA.

¹¹¹ *Ukraine’s Responses at the Hearings*, para. 5.

¹¹² *Ukraine’s Responses at the Hearings*, paras 6-15, citing, in addition to a number of ICJ and ICSDI cases, the following WTO cases: Appellate Body Report, *EC – Fasteners (China)*, para. 561; Appellate Body Report, *United States – Anti-Dumping Act of 1916*, para. 54; Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36; and Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 791.

¹¹³ *EU’s Responses at the Hearings*, paras 2 and 5.

¹¹⁴ *EU’s Responses at the Hearings*, paras 3-5.

¹¹⁵ *Ibidem*, para.4, with reference to Appellate Body Report, *Mexico – HFCS*, Article 21.5, paras 49-50.

¹¹⁶ *EU’s Responses at the Hearings*, paras 7-24.

in Title IV AA, “Trade and Trade-Related Matters”), so that Article 304 of the AA, which is included in Chapter 14 (“Dispute settlement”), applies.¹¹⁷ Article 304 of the AA states:

The provision of this Chapter apply in respect of any dispute concerning the interpretation and application of the provisions of Title IV of this Agreement except as otherwise expressly provided.

102. The EU further points out that neither Article 300(7) of the AA nor any other provision expressly excludes disputes concerning the interpretation and application of Article 35 of the AA from the scope of Chapter 14. Article 300(7) of the AA alludes to “matters arising under Chapter 13”. In this respect, the EU contends that:

For a “matter” to “arise” under Chapter 13 within the meaning of Article 300(7), it is not enough to show that a measure “relates” to “trade in forest products” or the “protection of the environment”. Rather a “measure arises” under Chapter 13 where the complaining party brings a “claim” on the basis of a provision included in Chapter 13 with regard to a “measure” within the scope of the same Chapter.¹¹⁸

103. The EU submits that it has not brought any claims on the basis of any provision included in Chapter 13 so that Article 300(7) of the AA is not relevant *in casu*.¹¹⁹

104. Even if it were correct that, as Ukraine claims, the current dispute “definitely relates to trade in forest products,” the subject matter of the dispute is that raised by the EU in its request for the establishment of the Arbitration Panel pursuant to Article 306(3) of the AA.¹²⁰ In this respect, the EU recalls that the “matter” referred to the Arbitration Panel is whether the measures at issue (the 2005 and 2015 export bans) are in breach of the provision invoked by the EU, i.e. Article 35 of the AA.

105. The EU further points out that Ukraine’s jurisdictional objection is based on the assumption that “all measures ‘relating to trade in forests’ and more generally all measures ‘relating’ to the protection of the environment would be subject exclusively to the disciplines of Chapter 13, to the exclusion of any other provisions of the AA.”¹²¹ According to the EU, however, the provisions of Chapter 13 “do not seek to replace the provisions of other Chapters of Title IV, but rather to complement those provisions by imposing additional obligations on the Parties with regard to the protection of the environment.”¹²² The EU does support Ukraine’s efforts to protect its forests, in particular by ensuring the adequate enforcement of its forest management regime. The EU also acknowledges the

¹¹⁷ *EU’s Responses at the Hearings*, paras 10-13.

¹¹⁸ *EU’s Responses at the Hearings*, para. 20.

¹¹⁹ *Ibidem*, par. 19-20 with reference to Appellate Body Report, *Guatemala-Cement I*, para. 72.

¹²⁰ *EU’s Responses at the Hearings*, paras 17-18.

¹²¹ *EU’s Responses at the Hearings*, para. 22.

¹²² *Ibidem*, para. 23.

persistent challenges faced by Ukraine, including illicit felling activities and systemic corruption.¹²³

106. However, in this case the Parties disagree on whether the two disputed specific measures, that is, the 2005 and the 2015 export bans can be regarded as adequate measures to achieve the alleged objective of protecting Ukraine’s forests. The EU believes that “Ukraine’s position that the measures at issue are not export prohibitions or restrictions incompatible with Article 35 is untenable and disingenuous.”¹²⁴ In conclusion “[t]he EU cannot accept that measures whose essential objective is to protect a domestic industry be shielded from scrutiny under the guise of environmental measures.”¹²⁵

4.1.1.2 The Arbitration Panel’s findings

4.1.1.2.1 On the timeliness of the jurisdictional objection

107. The Arbitrators first note Ukraine’s *acceptance*, at the time of the establishment of the Arbitration Panel, of its competence to examine the matter of the compatibility of Ukraine’s restrictions with Article 35 of the AA as discussed hereunder.

108. In the Note Verbale of the EU of 20 June 2019 the EU requested “the establishment of an arbitration panel pursuant to Article 306 of the Association Agreement”.¹²⁶ The Note states that “the request concerns restrictions applied by Ukraine on exports of certain wood products to the European Union, specified in the following sentences” and goes on to state that:

The export restriction applied by Ukraine appear to be incompatible with Article 35 of the Association Agreement, which sets out a prohibition of export restrictions and measures having an equivalent effect.

109. The Note further states that consultations between the Parties “with regard to the measures at issue with a view to reaching a mutually agreed solution of the matter” held in Kyiv on 7 February 2019 had unfortunately not resolved the matter. Therefore, the EU was requesting the establishment of an arbitration panel to examine the matter, with the standard terms of reference as set out in Article 306(3) AA, and according to the procedure for the composition of the arbitration panel pursuant to Article 307 AA and the relevant provisions

¹²³ *EU’s Closing Statement*, para. 4.

¹²⁴ *Ibidem*, para.7.

¹²⁵ *Ibidem*, para.15.

¹²⁶ Note Verbale of 20 June 2019, No. ARES(2019)3929269.

in the Rules of Procedure for Dispute Settlement in Annex XXIV to the Association Agreement.

110. Ukraine confirmed the receipt of the request in its Note Verbale of 27 June 2019.¹²⁷

111. In the subsequent Note Verbale of 9 August 2019 the EU confirmed the agreement between the Parties reached pursuant to Article 307(2) of the AA on the composition of the Arbitration Panel and stated, *inter alia*, that the terms of reference of the Arbitration Panel shall be as set out in Article 306(3) of the AA:

to examine the matter referred to in the request for establishment of the arbitration panel, to rule on the compatibility of the measure in question with the provisions of this Agreement referred to in Article 304 of this Agreement and to make a ruling in accordance with Article 310 of this Agreement.

112. Ukraine answered by Note Verbale of 20 August 2019 referring to the Note Verbale of the EU dated 9 August 2019:

concerning the arbitration procedure on temporary restrictions applied by Ukraine on export of certain wood products to the European Union, pursuant to Section 1 of Chapter 14 of Title IV of the Association Agreement.¹²⁸

113. In the same Note Verbale, Ukraine confirmed the agreement with the EU as to the composition of the Arbitration Panel and other related procedural matters set out in the Note Verbale of 9 August 2019 of the EU, and specifically that the terms of reference of the Arbitration Panel would be those set out in Article 306(3) of the AA.

114. Second, the Arbitrators note that Ukraine's position has remained unchanged during the proceedings in its various submissions up until the Hearing of 22-23 September 2020, when it raised the jurisdictional objection.

115. Specifically, in its (first) written submission of 11 March 2020, Ukraine did not object to the subject matter of the dispute brought to arbitration by the EU, nor to the competence of this Arbitration Panel to rule on it according to the terms of reference agreed by the Parties and the procedure laid down in Section 1 of Chapter 14 of the AA (Articles 303 to 310 of the AA). Rather, it opposed the EU claims on their merits. It argued in particular that the measures at issue were adopted for environmental reasons and conservation purposes and invoked the defences available pursuant to Article XX (b) and (g) of the GATT 1994, as

¹²⁷ As mentioned in the EU Note Verbale of 9 August 2019, see above footnote 3.

¹²⁸ See Verbal Note of 20 August 2020 No 3111/31-200-1698, p. 2.

applicable by virtue of the reference to Article XX of the GATT 1994 contained in Article 36 of the AA.¹²⁹

116. The Arbitration Panel concludes from the above review of relevant statements and defences of Ukraine that Ukraine has never challenged the subject matter of the dispute as defined by the EU since the Note Verbale of 20 June 2019, which requested the establishment of an Arbitration Panel concerning the alleged conflict of Ukraine's 2005 and 2015 export bans with Article 35 of the AA. On the contrary, Ukraine has explicitly accepted to engage in the proceedings concerning the above matter as raised by the EU without any further reservations.
117. Having consistently accepted to engage in the dispute as defined in the Notes Verbales by the EU, and to enter in the merits, Ukraine has implicitly waived its right to raise the jurisdictional objection at issue. The Arbitration Panel therefore concludes that Ukraine is thereby precluded from raising, at the Hearing, the alleged lack of jurisdiction of the Arbitration Panel.¹³⁰
118. Irrespective of the above conclusion, the Arbitration Panel will now consider whether the fact that Ukraine has waited until a late stage in the proceedings to raise this jurisdictional objection makes the objection inadmissible by itself. The Arbitration Panel will do so both for the sake of completeness of its analysis and because the Parties have discussed this point at some length. For the same reasons, the Arbitration Panel will also examine thereafter the merit of Ukraine's jurisdictional objection (Section 4.1.1.2.2).
119. As to the the issue of timing for raising such a jurisdictional exception, the Arbitration Panel notes that neither the AA in its Chapter 14, nor the Rules of Procedure for Dispute Settlement provide language on this issue. However, Rule 18 of the Working Procedures, adopted by the Parties in agreement with the Arbitration Panel to govern this arbitration, following their drafting at the organisational session held in Brussels on 29 January 2020, states:

Any request for a preliminary ruling (including rulings on jurisdictional issues) shall be submitted at the earliest possible moment, and in any event no later than in a Party's first written submission. If a Party requests such a preliminary ruling, the other Party shall submit its comments within a time limit specified by the Panel. Exceptions to this procedure may be granted in exceptional circumstances.

¹²⁹ *Ukraine's Written Submission*, para. 23.

¹³⁰ The general principles "*nemo audietur venire contra factum proprium*" or *estoppel* can be referred to in this respect. See N. Shaw, *International Law*, 8th ed., Cambridge University Press, 2017, pp. 384-385.

120. Respect of procedural rules, notably those that the Parties have explicitly agreed to, is important for due process reasons. Compliance with these rules is especially important where due process is at stake, since what is at issue here is the proper timing to raise an objection on jurisdiction, which is inherently of a preliminary nature. In this respect, the Panel considers that the statement in Rule 18, which states that “[a]ny request for preliminary rulings (including rulings on jurisdictional issues) shall be submitted as early as possible,” indicates that objections to the jurisdiction of the Arbitration Panel must be raised at the earliest possible stage of the proceedings, and not a late stage as Ukraine did. *In casu*, the earliest possible opportunity would have been Ukraine’s first written submissions.

121. This temporal requirement is in line with the provisions applicable to, and the rulings made on, this issue in other international adjudicatory proceedings.¹³¹ More specifically, as for the proceedings under the DSU, the EU recalled that the rulings of the WTO Dispute Settlement Body – which this Arbitration Panel has taken into account in accordance with Article 320 of the AA – are clear and consistent in this respect.¹³² The Appellate Body has more than once stated that the requirements of good faith and due process demand that a respondent raise procedural objections “seasonably and promptly” in order to promote “the fair, prompt and effective resolution of trade disputes”:¹³³

A Member that fails to raise its objections in a timely manner, notwithstanding one or more opportunities to do so, may be deemed to have waived its right to have a panel consider such objections.¹³⁴

122. Respect of timeliness is especially important in respect of jurisdictional objections because of judicial economy reasons. Should such an objection, though logically preliminary, be admissible and admitted only at a late stage in the proceedings, it would render previous activities useless.

¹³¹ In fact several international arbitration rules require that jurisdictional objections be raised at an early stage of the proceedings. Cf. Permanent Court of Arbitration (PCA), *Optional Rules for Arbitrating Disputes between Two States* (1992), Rule 22(3): “A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim”. To the same effect see ICSID, *Arbitration Rules*, Rule 41(1) on “Preliminary Objections” providing that “Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the tribunal shall be made as early as possible”, so to allow, i.a., an early separate determination of the jurisdiction of the arbitral tribunal to entertain the dispute.

¹³² *EU’s Responses at the Hearings*, paras 3-5.

¹³³ Appellate Body Report, *United States – FSC*, footnote 24, para. 166. See also Appellate Body Report, *Korea – Dairy Safeguard*, footnote 19, paras 127-131; and Appellate Body Report, *United States – 1916 Act*, footnote 32, para. 54

¹³⁴ Appellate Body Report, *Mexico – HFCS*, Article 21.5, paras 49-50.

123. In conclusion, Rule 18 of the Working Procedures provides for an additional reason for holding that Ukraine’s jurisdictional objection is inadmissible because it has not been made in a timely manner.

124. In the light of the foregoing, we conclude that Ukraine explicitly accepted that this Arbitration Panel has been duly established on 28 January 2020, in accordance with Section 1 of Chapter 14 of Title IV of the Association Agreement to rule on the matter raised by the EU, namely the compatibility of the measures at issue with Article 35 of the AA.

125. The Arbitration Panel therefore **finds** that Ukraine’s jurisdictional objection is untimely.¹³⁵

4.1.1.2.2 On the merit of the jurisdictional objection

126. Notwithstanding the above findings that Ukraine’s jurisdictional objection is inadmissible, for the sake of completeness of our analysis we will now examine whether the jurisdictional objection of Ukraine is grounded in the merit for the reasons outlined above (Section 4.1.1.2.1).

127. The Arbitration Panel first notes that the relevant provisions of Chapter 14 of the AA make it clear that in case of a dispute concerning the provisions of Title IV (“Trade and Trade Related Matters”), which could not be resolved by consultation, a Party may request the establishment of an arbitration panel to settle such dispute under Chapter 14, “except as otherwise expressly provided” (Article 304 of the AA).

128. The Arbitration Panel notes that Article 302(2) of the AA provides that in the request for the establishment of an arbitration panel, to be made in writing to the Party complained against and to the Trade Committee,

The complaining Party shall identify in its request the specific measure at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

129. This is what the EU did in its Note Verbale of 20 June 2019. The alleged breach of Article 35 of the AA by Ukraine’s 2005 and 2015 export bans is clearly identified. As already recalled in Section 4.1.1.2.1, pursuant to Article 306(3) of the AA the Parties agreed in the exchange of Notes Verbales of 9 and 20 August 2019 to establish the present Arbitration Panel with the following standard terms of reference:

to examine the matter referred to in the request for establishment of the arbitration panel of this Agreement, to rule on the compatibility of the

¹³⁵ The general principles “*nemo audietur venire contra factum proprium*” or *estoppel* can be referred to in this respect. See N. Shaw, *International Law*, 8th ed., Cambridge Un. Press, 2017, pp. 384-385.

measure in question with the provisions of Title IV in compliance with Article 304 and to make a ruling in accordance with Article 310 of this Agreement.

130. The matter as identified in the EU request, namely the compatibility of the 2005 and 2015 export bans with Article 35 of the AA, is therefore the subject of the present dispute on which the Arbitration Panel has jurisdiction.
131. Ukraine objects nevertheless that the present dispute can still arise under Chapter 13 of the AA by virtue of Article 304 of the AA, which provides that disputes under Title IV are covered by the dispute settlement provisions of Chapter 14 of the AA “except as otherwise expressly provided”. Ukraine argues that such an express exclusion is found in Article 300(7) of the AA in Chapter 13, according to which “For any matter arising under this Chapter, the Parties shall only have recourse to the procedures provided for in Articles 300 and 301 of this Agreement.” The EU in contrast argues that Article 300(7) of the AA is not an express provision to the contrary, referring, as an example of such an exclusion, to Article 52 of the AA: “Chapter 14 of Title IV of this Agreement shall not apply to Sections 1, 4, 5, 6 and 7 of this Chapter.”
132. In the Arbitration Panel’s view, the provisions governing the issues mentioned above indicate that the decisive factor for determining whether a dispute falls under the alternative mechanism set out in Article 300(7) of the AA envisaged for Chapter 13 disputes is not so much the language used, but the “matter” which is the subject of the dispute as raised and defined by the complaining Party. The Arbitration Panel considers that it cannot question the identification of the matter raised by the Complainant, as long as the Respondent has not made a timely objection to that identification.
133. In this respect, the relevant provisions of Title IV are those whose “interpretation and application” the complaining Party has identified as being in dispute in accordance with Article 304 of the AA, firstly in its request for consultation, and thereafter in its request for the establishment of the arbitration panel.¹³⁶ Thus Article 305(2) of the AA on the initial prescribed consultations in case of a dispute, requires that a Party seeking consultations shall do so by means of a written request “identifying the measure at issue and the

¹³⁶ In this respect the relevant provisions of the AA conform with Article 7 DSU according to which, in case of standard terms of reference, a WTO panel shall examine, in the light of the relevant provisions cited by the parties, “the matter referred to the DSB by (name of the party) in document [...]”. This approach is also in conformity with the principle followed in international adjudication generally, according to which the identification of the subject matter of a dispute is based on the claimant’s request. Cf. Article 38 of the Rules of the International Court of Justice which requires that any application shall indicate i.a. “the subject of the dispute” and “specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based; it shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based.”

- provisions of this Agreement referred to in Article 304 of this Agreement that it considers applicable,” namely provisions included in Title IV on “Trade and Trade-Related Matters.”
134. If consultations fail to resolve the matter, as in the present case, in the subsequent written request for the establishment of an arbitration panel according to Article 306(2) of the AA “[T]he complaining Party shall identify in its request the specific measure at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.” This is in turn the “matter” on which the arbitration panel must rule when standard terms of reference are agreed by the Parties as in the present case, in accordance with Article 306(3) of the AA.
135. With reference to the two relevant elements of a matter in dispute, that is, the measure alleged to breach a treaty obligation and the claim identifying the provision thereby allegedly breached, the EU has clearly identified them as, respectively, the 2005 and 2015 export bans adopted by Ukraine, and the alleged breach thereby of Article 35 of the AA. This is therefore the “matter” on which the present Arbitration Panel must rule and which falls within its jurisdiction because it concerns the breach of a provision in Title IV, namely Article 35 of the AA, for which the dispute settlement mechanism is that provided in Chapter 14.¹³⁷ There is no explicit provision in Article 304 of the AA that excludes such a dispute from the purview of Chapter 14.
136. Ukraine’s contention that the measures at issue “relate” to trade in forest products and were enacted for environmental and conservation purposes cannot, as a matter of procedure, suffice to make the present dispute a Chapter 13 case to be resolved in accordance with Articles 300 to 301 of the AA.
137. Ukraine is of course perfectly entitled, and it has consistently done so in its submissions, to argue on the merits that the 2005 and the 2015 export bans are not in breach of Article 35 of the AA, inter alia, because provisions of Chapter 13 of the AA may justify the measures challenged by the EU.¹³⁸ The Arbitration Panel will examine such defences on their merit in the relevant parts of the present Report.

¹³⁷ See also Art. 477(1) of the AA dealing with Dispute Settlement in general under the AA: “When a dispute arises between the Parties concerning the interpretation, implementation, or good faith application of this Agreement, any Party shall submit to the other Party and the Association Council a formal request that the matter in dispute be resolved. By way of derogation, disputes concerning the interpretation, implementation, or good faith application of Title IV (Trade and Trade-related Matters) of this Agreement shall be exclusively governed by Chapter 14 (Dispute Settlement) of Title IV (Trade and Trade-related Matters) of this Agreement” (emphasis added).

¹³⁸ This has been admitted by the EU in its *Responses to Ukraine’s Questions* of 20 May 2020, Question 14, para. 65: “The European Union, nevertheless, does not contest that the Panel has competence to examine whether Article 294 AA (or other provisions of Chapter 13) may provide such an exception or affirmative defence to Article 35 AA.”

138. In light of the foregoing, the Arbitration Panel therefore **rejects** Ukraine’s objections to the jurisdiction of the Arbitration Panel and finds that it is competent in accordance with Chapter 14 of the AA to resolve the present dispute.

4.1.2 Applicability of Article 35 of the AA during the 10-year transitional period

4.1.2.1 The Parties’ arguments

139. Ukraine has raised a second objection of a preliminary character, namely that Article 35 of the AA becomes applicable only at the end of a 10-year transitional period provided for in Article 25 of the AA for the full establishment of a free trade area between the EU and Ukraine.

140. This objection, or rather exception or defence since it concerns the merits of the case, can be seen as “preliminary” because, should the Arbitration Panel accept it as applicable, the dispute would be thereby resolved without the need to go further into the merits. As is the case for the previous objection, the Respondent has raised this objection for the first time in its oral opening statement at the Hearing. In Ukraine’s view, “Article 35 of the Association Agreement cannot be opposed by one Party against another, in any arbitration proceeding, until they agree to consider that Article 35 is in full force, or at the end of the 10-year period agreed between the Parties to progressively establish a free-trade area.”¹³⁹

141. In support of its position, Ukraine mainly relies on textual arguments, referring to certain articles of Title IV that expressly provide that they become applicable “upon entry into force of this Agreement.”¹⁴⁰ Ukraine submits that “since the obligation of Article 35 does not take its full effects “upon entry into force” of the Agreement, it does so at the expiry of the 10-year period.”¹⁴¹

142. The EU opposes Ukraine’s contention, which it defines as “novel” and having “manifestly unreasonable and unacceptable consequences for the Parties”.¹⁴² The EU points out that Article 25, the first provision in Title IV, sets out in its very title (“Objectives”), and in its content, the commitment of the Parties to establish between them a free trade area in conformity with Article XXIV of the GATT 1994 “over a transitional period of a maximum of 10 years.”¹⁴³

¹³⁹ *Ukraine’s Opening Statement*, para. 61. The Arbitration Panel recalls that, as provided for in Article 486(5) of the AA, the provisions of the AA at issue in this dispute have been provisionally applied since 1 January 2016. Therefore, the a 10-year transitional period would not expire in 2027, but rather on 31 December 2025.

¹⁴⁰ Ukraine refers to the text of Arts 32, 69, 88, 145 of the AA.

¹⁴¹ *Ukraine’s Opening Statement*, para. 60.

¹⁴² *EU’s Responses at the Hearings*, para. 45.

¹⁴³ *Ibidem*, para. 33 ff.

143. The EU points out that the elimination of customs duties is subject to a transitional period within the outer limit of Article 25, the length of which varies according to the product concerned, as is normal in the establishment of FTAs in conformity with Article XXIV of the GATT 1994.

144. All other provisions of Chapter I of Title IV are not subject to any transitional period. The rationale therefore is straightforward in the view of the EU, since “those provisions restate previous obligations of both Parties under the GATT 1994. Accordingly, there was no reason to delay the application of those provisions beyond the date of entry into force of the AA.”¹⁴⁴

4.1.2.2 The Arbitration Panel’s findings

145. The Arbitration Panel has to look first at Ukraine’s textual arguments in support of its reading of the basic provisions on trade in goods in Chapter 1 of Title IV of the AA. The question here is whether under such a reading the entry into force of all provisions not specifically qualified by the terms “upon the entry into force of this Agreement” would be postponed to the end of the transitional period.

146. First of all, the textual references made by Ukraine do not support its position because most of articles it mentions do not belong to Chapter 1.¹⁴⁵ Moreover, the proposed interpretation would be in direct contradiction with provisions that, although not containing the words “upon the entry into force of this Agreement”, are clearly meant to enter into force immediately. This is the case of Article 30 (“Standstill”), Article 31 (“Custom duties on exports”), Article 33 (“Fees and other charges”) and Article 34 (“National Treatment”) of the AA. These provisions are, as is the case of Article 35 of the AA, all part of Sections 2 and 3 of Chapter 14 where the basic rules on trade in goods are set out.

147. More generally, one has to take into account the fact that the Association Agreement intends to establish between the Parties a Deep and Comprehensive Free Trade Area that goes beyond the GATT 1994 as to liberalisation of trade.¹⁴⁶ In the absence of an explicit provision to the contrary, it would run counter to the object and purpose of the Agreement

¹⁴⁴ *Ibidem*, para. 39.

¹⁴⁵ This is the case of Articles 67, 88 and 145. The EU explains that the prohibition of export subsidies “upon the entry into force of this Agreement” in Article 32 goes beyond pre-existing rights and obligations under the WTO Agreement on Agriculture and that the Parties decided to abolish them immediately *inter se*. See *EU’s Responses at the Hearings*, para. 37.

¹⁴⁶ See Art. 1(d) of the AA.

to hold that the entry in force of provisions that replicate pre-existing GATT 1994 obligations would be postponed to a future date.

148. The Arbitrators further consider that such an interpretation appears contrary to the obligation laid down in Article 35 of the AA, which not only prevents the Parties from adopting but also from maintaining any export prohibition and restriction. In this context, the fact that the prohibition is temporary and is due to expire at the end of the transitional period is not relevant.¹⁴⁷

149. The statement in Article 35 that “Article XI of the GATT 1994 and its interpretative notes are incorporated into, and made an integral part of this Agreement” reinforces this conclusion since the prohibition of export restrictions contained in Article XI:1 of the GATT 1994 is unconditional (notwithstanding the exceptions listed in Article XI:2 of the GATT 1994, which Ukraine has not invoked here).

150. The Arbitration Panel therefore **finds** that, in order to determine whether Ukraine’s measures at issue challenged by the EU are in conformity with the Association Agreement or not, Article 35 of the AA is fully applicable.

4.1.3 The emergency situation in international relations affecting Ukraine

4.1.3.1 The Parties’ arguments

151. Ukraine has asked the Arbitration Panel “to take into consideration”, in the present case, “the specific circumstances, in particular the “emergency in international relations” within the meaning of Article XXI(b) of GATT 1994 which began in 2014 between Ukraine and the Russian Federation.¹⁴⁸ The determination and existence of a such situation was recognised by the WTO Panel in *Russia – Traffic in Transit*.¹⁴⁹ As relevant in this case, this “emergency in international relations [...] has lead, inter alia, to the destruction of a great part of the forests.”¹⁵⁰

152. Ukraine further explains that this situation has been recognised in many instances, and analysed by the UN Environment Programme (UNEP). In 2018, UNEP reported that:

the conflict has damaged, or destroyed ecosystems within an area of at least 530,000 hectares, including 18 nature reserves covering an area of

¹⁴⁷ In its *Answers to the Arbitration Panel’s Questions* (paras 132-134), Ukraine has clarified that the enactment of the export ban for a 10-year period is without prejudice to any subsequent decision as to its duration (prolongation or reconsideration) by the competent authorities of Ukraine.

¹⁴⁸ *Ukraine’s Written Submission*, paras 176-189.

¹⁴⁹ Panel Report, *Russia – Traffic in Transit*, para. 7.126.

¹⁵⁰ *Ukraine’s Written Submission*, para. 176.

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.¹⁵¹

153. Ukraine submits that the situation of “emergency in international relations” which 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. Some of the biggest coal mines and plants were situated in those occupied territories.¹⁵²

154. In this respect Ukraine recalls that the panel in *Russia-Traffic in Transit* recognised that such a situation of emergency in international relations allows WTO Members to “depart from their GATT 1994 and WTO obligations.”¹⁵³ Ukraine submits that such a situation “does not restrict the right of a Party to take action under Article XXI(b)(iii) having effect only vis-à-vis the Party or Parties directly involved in the situation of emergency.”¹⁵⁴

155. Finally, in its Answer to the Arbitration Panel’s questions, Ukraine has clarified its claims in this respect as follows

It is important to clarify that by speaking of an “emergency in international relations” in the context of Article XXI of GATT 1994, Ukraine does not justify the contested restrictions with the provisions of this Article. Ukraine mentions the “emergency situation in international relations”, the existence of which was confirmed by the Panel in the case of *Russia – Traffic in Transit* in order to emphasize that the situation affects, in particular, on the state of Ukraine’s forest.¹⁵⁵

156. The EU recognises the existence of an emergency situation between Ukraine and Russia. The EU however opposes Ukraine’s argument that these circumstances are objectively connected with the 2015 temporary export ban and should be considered by the Arbitration Panel in its assessment of Ukraine’s defence. The EU considers that “this argument is simply an ex-post rationalisation.”¹⁵⁶

¹⁵¹ *Ukraine’s Written Submission*, para. 177, quoting UN Environment Programme, News and Stories, *Ukraine’s Donbas bears the brunt of toxic armed conflict*, dated 25 July 2018, available at <https://www.unenvironment.org/news-and-stories/story/ukraines-donbas-bears-brunt-toxic-armed-conflict> (last accessed 13 November 2020).

¹⁵² *Ukraine’s Written Submission* cit. para. 179.

¹⁵³ *Ukraine’s Written Submission* cit. para. 178 with reference to para. 7.79 of the *Russia-Traffic in Transit* Panel Report.

¹⁵⁴ *Ukraine’s Opening Statement*, para. 40.

¹⁵⁵ *Ukraine’s Answers to the Arbitration Panel’s Questions*, para. 221.

¹⁵⁶ *EU’s Opening Statement*, para. 129.

157. Firstly, there is no mention of the conflict with Russia neither in any of the parliamentary documents which describe the objectives and causes of the 2015 temporary export ban, nor in the legislative instrument that laid out the ban.”¹⁵⁷

158. Secondly, according to the EU Ukraine never argued during the “institutional dialogue” concerning the 2015 temporary export ban that this ban was related to the consequence of the conflict with Russia.¹⁵⁸

159. Thirdly, if it were true that as a consequence of the conflict wood consumption in the rest of Ukraine increased and this threatens the conservation of forests, the EU wonders why Ukraine did not introduce a real and effective limitation on domestic consumption together with the temporary export ban in 2015 but waited until 2018 before doing so.¹⁵⁹

4.1.3.2 The Arbitration Panel’s findings

160. The Arbitration Panel starts by looking at the above arguments by Ukraine. As a matter of fact, if Ukraine had invoked Article XXI of the GATT 1994 (referred to by Article 36 of the AA) as a “Security Exception” to its obligations under the Association Agreement, and pleaded that its measures at issue were taken in time of emergency in international relations as necessary for the protection of its essential security interests, we would have had to analyse in light of relevant DSB rulings whether the conditions for the application of this exception were fulfilled.¹⁶⁰ In case of a positive determination, the Arbitration Panel should have dismissed the EU claims without entering into the merits.

161. It is however clear from the above arguments that Ukraine has not invoked Article XXI of the GATT 1994 as a defence. Ukraine has instead asked 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.”¹⁶¹

¹⁵⁷ *Ibidem*.

¹⁵⁸ *Ibidem*, with reference to Exhibits EU-24-28.

¹⁵⁹ *EU’s Opening Statement*, para. 129.

¹⁶⁰ This approach conforms with the one adopted by the WTO Panel in *Russia – Traffic in Transit*, that is, the first case dealing with Article XXI GATT (and whose report is the only one that has been adopted by the DSB on the issue), which reasoned as follows: “The novel and exceptional features of this dispute, including Russia’s argument that the Panel lacks jurisdiction to evaluate the WTO-consistency of the measures, owing to Russia’s invocation of Article XXI(b)(iii) of the GATT 1994, require that the Panel first determine the order of analysis that it deems most appropriate for the present dispute. See also P. Van den Bossche, ‘The National Security Exception in International Trade Law Today: Can We Avoid Abuse’, *Vereeniging ‘Handelsrecht’ Preadviezen 2020: Toetsing van buitenlandse investeringen in geopolitiek en juridisch perspectief* (2020), pp. 111-143. Accordingly, the Panel considers that it must address the jurisdictional issues first before going into the merits.” (see para. 7.24). The Panel also cites with approval the Appellate Body’s repeated holdings that “panels are free to structure the order of their analysis as they see fit, unless there is a mandatory sequence of analysis which, if not followed, would amount to an error of law” or would “affect the substance of the analysis itself.” See Panel Report, *Russia – Traffic in Transit*, footnote 59 (referring to Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109 and Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.5).

¹⁶¹ *Ukraine’s Written Submission*, para. 189.

162. Ukraine further explained that:

the situation of emergency in international relations that Ukraine was facing in 2014 and is still facing is the relevant factual background to be taken into account when assessing whether Ukraine could have adopted measures other than the erga omnes temporary ban to implement its legitimate environmental protection policy.¹⁶²

163. Ukraine also argues that:

The factual background, demonstrating both the ongoing efforts made by Ukraine to improve the protection of its environment in a difficult context and the need to achieve better results, is the one against which the measures challenged by the European Union must be assessed. Ukraine claims that they are part and parcel of this overall policy and that they were the only workable measures that Ukraine could take in the situation it was confronted to.¹⁶³

164. Based on Ukraine's Answers to the Arbitration Panel's Questions, the Arbitration Panel is satisfied that Ukraine has not raised the above mentioned "emergency situation" as an exception under Article XXI of the GATT 1994.¹⁶⁴ Consequently, the Arbitration Panel's competence to rule in the present dispute in the merit remains intact. On the other hand, the above situation should be taken into account as far as relevant in the Arbitration Panel's further analysis, as factual context affecting the situation of Ukraine's forests which may influence its conservation policies.

4.2 Whether the bans are incompatible with Article 35 of the AA

4.2.1 Introduction

4.2.1.1 Article 35 of the AA and Article XI:1 of the GATT 1994

165. The Complainant asserts that the 2005 export ban and the 2015 temporary export ban are inconsistent with Article 35 of the AA because they constitute a *de iure* "prohibition" on exports from Ukraine to the European Union, which is incompatible with Article 35 of the AA, first sentence, and Article XI:1 of the GATT 1994, as incorporated in Article 35 of the AA, second sentence.¹⁶⁵

166. Article 35 of the AA provides that:

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

¹⁶² *Ukraine's Opening Statement*, para. 41.

¹⁶³ *Ibidem*, para. 42.

¹⁶⁴ See *Ukraine's Answers to the Arbitration Panel's Questions*, para. 221.

¹⁶⁵ *EU's Executive Summary*, para. 6.

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.

167. Article XI:1 of the GATT 1994 states in its relevant part that:

No prohibitions or restrictions [...] shall be instituted or maintained by any contracting party on the [...] on the exportation or sale for export of any product destined for the territory of any other contracting party [...].

168. Ukraine does not dispute that the measures at issue prohibit all exports of the products concerned from Ukraine to the European Union.¹⁶⁶ It contends, however, that Article 35 of the AA only outlaws those export prohibitions or restrictions that have the “actual effect” of restricting trade.¹⁶⁷ This effect was not successfully demonstrated by the European Union.¹⁶⁸ It furthermore argues that only those export prohibitions or restrictions that apply specifically to trade to the other Party, as opposed to those applied *erga omnes*, fall within the remit of Article 35 of the AA so that Article 35 of the AA would not be applicable in the present case.¹⁶⁹ Accordingly, Ukraine contends that the measures at issue are not incompatible with Article 35 of the AA.¹⁷⁰

169. Ukraine’s interpretation of Article 35 of the AA stems from its contention that:

- (i) Article XI of the GATT 1994 is not incorporated in its entirety into Article 35 of the AA,¹⁷¹ and
- (ii) Article 35 AA and Article XI:1 of GATT 1994 do not establish identical obligations.¹⁷²

4.2.1.2 The Arbitration Panel’s sequence of analysis

170. The Arbitration Panel first of all observes that a preliminary issue discussed by the Parties in respect of the interpretation and application of Article 35 of the AA concerns its relation with Article XI of the GATT 1994. This issue is equally relevant in respect of the 2005 export ban and the 2015 temporary export ban.

¹⁶⁶ *Ukraine’s Written Submission*, paras 55 and 65.

¹⁶⁷ *Ukraine’s Opening Statement*, para. 101.

¹⁶⁸ *Ibidem*, para. 108.

¹⁶⁹ *Ibidem*, paras 104-105.

¹⁷⁰ *Ibidem*, paras 104-107.

¹⁷¹ *Ukraine’s Answers to the Arbitration Panel’s Questions*, paras 173-178.

¹⁷² *Ibidem*, paras 179-182.

171. The Arbitration Panel will therefore begin its analysis with a brief review of the scope of the obligation contained in Article 35 of the AA as compared to Article XI:1 of the GATT 1994, and then turn to the examination of the compatibility of each ban with Article 35 of the AA (Section 4.2.2).

172. The Arbitration Panel will then examine the effects that the provisions of Chapter 13 on trade and sustainable development may have on the compatibility of Ukraine's export prohibitions with Article 35 of the AA (Section 4.2.3).

173. Finally, the Arbitration Panel will present its overall findings on the compatibility of the measures at issue with Article 35 of the AA (Section 4.2.4).

4.2.2 On the relationship between Article 35 of the AA and Article XI:1 of the GATT 1994

4.2.2.1 The Parties' arguments

4.2.2.1.1 Whether the obligations under Article 35 of the AA are different from those under Article XI of the GATT 1994

174. In its submissions Ukraine claims that

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 AA can therefore not be deemed "a copy-cat of the interpretation of Article XI:1 of the GATT 1994."¹⁷³

175. According to Ukraine, this excludes Article XI:1 of the GATT 1994 as an applicable "legal standard" for this case. Article XI of the GATT 1994 is relevant "to the sole extent that it provides exceptions to the basic rule set out in Article 35 of the Association Agreement, as provided for in the Article XI:2 of GATT 1994."¹⁷⁴

176. The EU objects to the above position of Ukraine. The European Union considers that Article 35 of the AA incorporates by reference Article XI of GATT 1994 in its entirety, and not just the exclusions listed in Article XI:2 of the GATT 1994. According to the European Union, all measures that are inherently trade restrictive are incompatible per se with Article XI of GATT 1994. The EU submits that "Ukraine's narrow interpretation of the obligations imposed by Article 35 of the AA would be inconsistent with the object and purpose of the AA. In the first place, it would be inconsistent with the objective to build

¹⁷³ *Ibidem*, para. 192.

¹⁷⁴ *Ukraine's Executive Summary*, para. 13.

upon the Parties' pre-existing WTO obligations in order to establish a DCFTA "leading towards Ukraine's gradual integration in the EU Internal Market" as per Article 1(2) of the AA, because it would allow the Parties to maintain between them export restrictions that are incompatible with Article XI:1 of GATT 1994. For the same reason, it would also be inconsistent with the specific objective expressed in Article 25 of the AA to establish a FTA in accordance with Article XXIV of GATT 1994."¹⁷⁵

4.2.2.1.2 Actual effects

177. Ukraine considers that Article 35 AA prohibits measures characterised as having an "effect" "on the export" of a good destined for the territory of the other Party. A measure which restricts exportation but which does not have such an effect is allowed.¹⁷⁶ In Ukraine's view, this is due to the fact that Article 35 of the AA is not identical to Article XI:1 of the GATT 1994. The difference stems from the inclusion in the text of Article 35 of the AA of the words "any measure having an equivalent effect" which are not present in the text of Article XI of the GATT 1994.¹⁷⁷
178. The EU rejects this argumentation and claims that the effect of the measure is irrelevant. According to the EU, it is well-established that in order to substantiate a violation of Article XI:1 of the GATT 1994, it is not necessary to show that a measure has actually the effect of restricting exports or imports.¹⁷⁸
179. Ukraine rebuts that this position is not convincing because customs duties, taxes, and other charges mentioned are "inherently trade restrictive," but not incompatible *eo ipso* with Article XI of GATT 1994.¹⁷⁹
180. The European Union concludes instead that the 2005 export ban constitutes a *de iure* prohibition on exports from Ukraine to the European Union. It is therefore incompatible with Article 35 of the AA, first sentence, and Article XI:1 of the GATT 1994, as incorporated in Article of the 35 AA, second sentence.¹⁸⁰
181. Finally, the EU contends that Ukraine's interpretation of Article 35 of the AA would call into question the compatibility of the Association Agreement with Article XXIV of the GATT 1994 to the extent that paragraph 8(b) reads:

¹⁷⁵ *EU's Opening Statement*, para. 38.

¹⁷⁶ *Ukraine's Opening Statement*, para. 101.

¹⁷⁷ *Ukraine's Opening Statement*, para. 109.

¹⁷⁸ See *EU's Responses to the Arbitration Panel's Questions*, paras 77-82 (citing in particular Appellate Body Report, *China – Raw Materials*, para. 319; Panel Report, *Canada – Periodicals*, para. 5.5; Panel Report, *Brazil – Retreaded Tyres*, para. 7.29; Panel Report, *China – Rare Earths*, para. 7.200, and Panel Report, *China – Raw Materials*, para. 7.207).

¹⁷⁹ *Ukraine's Opening Statement*, para. 110.

¹⁸⁰ *EU's Opening Statement*, para. 43.

A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

4.2.2.2 The Arbitration Panel's analysis

182. The Arbitration Panel refers to the text of Article 35 of the AA and of Article XI of the GATT 1994. Article 35 of the AA provides that:

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.

183. Article XI:1 of the GATT 1994 states in its relevant part that:

No prohibitions or restrictions [...] shall be instituted or maintained by any contracting party on the [...] on the exportation or sale for export of any product destined for the territory of any other contracting party [...].

184. The Arbitration Panel now examines first whether Article 35 of the AA incorporates Article XI of the GATT 1994 in its entirety. Based on that analysis, the Arbitrators will then turn to the question of whether the obligation contained in Article 35 AA is identical with the obligation imposed by Article XI:1 of the GATT 1994 or should be interpreted more narrowly, as suggested by Ukraine.

4.2.2.2.1 Whether Article XI:1 of the GATT 1994 is incorporated into Article 35 of the AA

185. Article 35 of the AA is composed of two sentences. The first sentence provides the general rule on the elimination of import and export restrictions, followed by the exceptions to this rule. Article XI of the GATT 1994 is referred to in this first sentence insofar as it provides for exceptions (“except as otherwise provided in this Agreement or in accordance with Article XI of the GATT 1994 and its interpretative notes”). Both Parties agree that Article 35 of the AA, first sentence, incorporates by reference the exclusions listed in Article XI:2 of the GATT 1994.¹⁸¹

¹⁸¹ *Ukraine's Executive Summary*, para. 13 and *EU's Opening Statement*, paras 28-29.

186. Article XI of the GATT 1994 is also referred to in the second sentence of Article 35 of the AA:

To this end, Article XI of GATT 1994 and its interpretative notes are incorporated into, and made an integral part of, this Agreement.

187. According to Ukraine, the term “to this end” which introduces the second sentence of Article 35 of the AA refers only to the last part of the first sentence.¹⁸² The European Union argues instead that it refers to the first sentence as a whole.¹⁸³

188. In examining the wording of Article 35 of the AA, second sentence, the Arbitration Panel notes that it refers to “Article XI of the GATT 1994” without distinguishing between the first and the second paragraph of Article XI of the GATT 1994. This is in contrast to Article 35 of the AA, first sentence, which explicitly refers to Article XI:2 of the GATT 1994. Furthermore, the Arbitration Panel considers that interpreting the words “to this end” that introduce the second sentence of Article 35 of the AA as referring only to the last part of the first sentence of Article 35 of the AA would make the second sentence of Article 35 of the AA redundant and deprive it of its *effet utile*.¹⁸⁴ In conclusion, the Arbitration Panel is not persuaded that the wording of Article 35 of the AA, second sentence, as interpreted in the context of Article 35 of the AA, first sentence, lends itself to the conclusion that the drafters intended to limit the incorporation by reference to the second paragraph of Article XI of the GATT 1994.

189. The Arbitration Panel further notes that this conclusion that Article 35 of the AA, second sentence, incorporates by reference Article XI of the GATT 1994 as a whole is consistent with the object and purpose of the Association Agreement. Based on Article 1(2) of the AA, the Association Agreement aims at setting up a Deep and Comprehensive Free Trade Area (DCFTA) “leading towards Ukraine’s gradual integration in the EU Internal Market”.

190. The Arbitration Panel considers that a removal of (import and) export restrictions as of the entry into force of the Association Agreement would be congruent with an ambitious level of trade liberalisation. It seems therefore logic that the Parties intended to build on their pre-existing WTO obligations in order to facilitate Ukraine’s integration in the EU Internal Market.¹⁸⁵ In the absence of transitional provisions stating the contrary, a different

¹⁸² *Ukraine’s Answers to the Arbitration Panel’s Questions*, paras 177-178.

¹⁸³ *EU’s Opening Statement*, para. 29.

¹⁸⁴ According to the principle of *effet utile*, a treaty provision shall be interpreted in a way that would not reduce it to redundancy or inutility. See Appellate Body Report, *Canada – Dairy*, para.133 with reference to Appellate Body Report, *US – Gasoline*, p. 23; Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, p. 12.

¹⁸⁵ The incorporation of basic provisions such as Article III, Article XI or Article XX into FTAs is a common technique in FTAs and serve to ensure that the Parties do not fall below the levels of trade liberalization already achieved in WTO Agreements in accordance with Article XXIV of the GATT 1994.

interpretation of Article 35 of the AA, allowing the introduction of export bans, would lead to a result that is at odds with the object and purpose of the Association Agreement.

4.2.2.2 Whether Article 35 of the AA and Article XI:1 of the GATT 1994 impose identical obligations

191. As discussed in the previous subsection, Article 35 of the AA incorporates Article XI of the GATT 1994 as a whole. Ukraine argues that, even in the case the Arbitration Panel considers Article XI of the GATT 1994 to be fully incorporated into Article 35 of the AA, the different wording of Article 35 of the AA, first sentence, calls for a different interpretation of the word “prohibition” in Article 35 of the AA as compared to Article XI:1 of the GATT 1994.

192. The Arbitration Panel recalls that Article 35 AA incorporates Article XI of the GATT 1994 in its entirety, as discussed in Section 4.2.2.2.1. It therefore considers that the obligations stemming from Article 35 of the AA cannot logically be a *quid minus* than those contained in Article XI:1 of the GATT 1994.

193. Based on this interpretation the Arbitration Panel will now consider each argument made by Ukraine on their merits.

4.2.2.2.1 Requirement of an “actual effects” test

194. Ukraine argues that only measures having the “actual effect” to limit trade and applying specifically to trade “to the other Party” (*in casu*, the European Union) are covered by Article 35 of the AA, since the Association Agreement is bilateral and applicable only between the two Parties.

195. Firstly, Ukraine contends that the notion of “effect” is central to Article 35 of the AA because it qualifies the three different categories of measures prohibited by the Article (“prohibitions”, “restrictions” and “measures having equivalent effect”).¹⁸⁶ Secondly, Ukraine argues that the European Union has the burden of proof with regard to the effect of the 2005 export ban and that the EU has failed to provide facts to this end.¹⁸⁷

196. According to the EU, the term “effect” in Article 35 of the AA does not qualify the term “prohibitions” and “restrictions”, which are measures that prohibit or restrict (import and) exports *de iure*, but only the third category of measures (“measures having an equivalent

¹⁸⁶ *Ukraine’s Opening Statement*, para. 101.

¹⁸⁷ *Ibidem*, para. 108.

effect”).¹⁸⁸ The EU contends that this third category of measures borrows from Article 35 of the Treaty on the Functioning of the European Union.¹⁸⁹ Its aim is to explicitly prohibit *de facto* (import and) export prohibitions and restrictions by Article 35 of the AA.¹⁹⁰ The EU furthermore observes that this would be in line with the legal reasoning by WTO panels and the Appellate Body on Article XI:1 of the GATT 1994.¹⁹¹ Accordingly, the EU argues that Article 35 of the AA and Article XI:1 of the GATT 1994 impose identical obligations, so that it is not necessary to demonstrate the “actual effect” of a *de iure* export prohibition to substantiate its claim under Article 35 of the AA.¹⁹²

197. The Arbitration Panel will first consider whether Article 35 of the AA should be interpreted as to preclude only export prohibitions or restrictions that are shown to have “actual effects”.

198. The Arbitration Panel recalls that Article 35 of the AA provides in relevant part that:

No Party shall adopt or maintain any prohibition or restriction or any measure having an equivalent effect on [...] export or sale for export of any good destined for the territory of the other Party [...].

199. In turn, Article XI of the GATT 1994 states in the relevant part that:

No prohibitions or restrictions [...] shall be instituted or maintained by any contracting party on the [...] on the exportation or sale for export of any product destined for the territory of any other contracting party [...].

200. The Arbitration Panel notes that both Article 35 of the AA and Article XI:1 of the GATT 1994 capture any “prohibitions” or “restrictions” on (import and) exports. In addition, Article of the 35 AA includes the words “or any measure having an equivalent effect”). The Arbitration Panel furthermore recalls that Article 35 of the AA, second sentence, incorporates by reference Article XI of the GATT 1994 as a whole, as it found in Section 4.2.2.2.1. It follows that the terms “or any measures having an equivalent effect” cannot be interpreted as to allow for a limitation in the scope of the obligation imposed by Article 35 of the AA as compared to Article XI:1 of the GATT 1994.¹⁹³ Accordingly, the Arbitration Panel is not persuaded by Ukraine’s interpretation that Article 35 of the AA only prohibits

¹⁸⁸ *EU’s Opening Statement*, para. 37.

¹⁸⁹ *Ibidem*, para. 48. Article 35 of the TFEU reads: “Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States”.

¹⁹⁰ *EU’s Opening Statement*, para. 40.

¹⁹¹ *Ibidem*, para. 48.

¹⁹² *Ibidem*, paras 38-39.

¹⁹³ This interpretation would lead to a manifestly absurd result in contrast with the customary rules of interpretation of public international law to which the Arbitration Panel is bound, in accordance with Article 320 of the Association Agreement.

those measures, including “prohibitions” or “restrictions”, that are shown to have the actual “effect” of prohibiting or restricting exports.

201. The Arbitration Panel considers that Ukraine’s interpretation is not supported by the wording of Article 35 of the AA because this provision expressly prohibits three categories of measures: “prohibitions”, “restrictions” and “measures having an equivalent effect”. Article 35 of the AA clearly distinguishes between those three categories by separating them through the conjunction “or”. The Arbitration Panel thus interprets the term “effect” as a qualifier of the third category of measures only (“measures having an equivalent effect”).

202. The Arbitration Panel further notes that this third category replicates Article 35 of the TFEU and has consistently been interpreted by the Court of Justice of the European Union in the sense of prohibiting measures that limit (imports and) exports *de facto*.¹⁹⁴ Even though the CJEU has no jurisdiction on Ukraine, the Arbitration Panel considers this aspect relevant insofar as it aligns Article 35 of the AA with the interpretation of Article XI:1 of the GATT 1994 that is consistently given in several WTO disputes.¹⁹⁵ There is no record of Ukraine having objected to this reading by the EU before the ratification of the AA. In other words, the Arbitration Panel is satisfied that the wording “or measures having equivalent effects” serves to make explicit that Article 35 of the AA is about prohibiting both *de iure* and *de facto* prohibitions and restrictions in line with the scope of the obligations contained in Article XI:1 of the GATT 1994 as interpreted by WTO jurisprudence.

203. The Arbitration Panel does not see how the different, broader objectives of the Association Agreement (to establish a DCFTA between the Parties), as compared to GATT’s objective to reduce barriers to trade, would justify a more restrictive interpretation of the term “prohibition.” Measures having equivalent effect have been included in Article 35 of the AA as compared to Article XI of the GATT 1994 to the list of prohibitions and restrictions which Parties shall not adopt or maintain. If anything, the broader trade liberalisation objectives of the Association Agreement justify a more rigorous scrutiny of restrictive measures which go against those objectives. This addition does not make a difference for the purposes of applying Article 320 to the interpretation of Article 35 of the AA.

¹⁹⁴ See e.g. judgment of 21 June 2016, *New Valmar*, C-15/15, EU:C:2016:464, para. 36 and the case-law cited therein (“The Court has held that a national measure applicable to all traders active in the national territory whose actual effect is greater on goods leaving the market of the exporting Member State than on the marketing of goods in the domestic market of that Member State is covered by the prohibition laid down by Article 35.”)

¹⁹⁵ See e.g. Panel Report, *Argentina – Hides and Leather*, para. 11.17 (“There can be no doubt, in our view, that the disciplines of Article XI:1 extend to restrictions of a *de facto* nature.”).

204. In light of the foregoing, the Arbitration Panel concludes that Article 35 of the AA and Article XI:1 of the GATT 1994 impose identical obligations. Article 320 AA requires that Article 35 of the AA shall be interpreted in a way that is “consistent with any relevant interpretation established in rulings of the WTO Dispute Settlement Body.”
205. The Arbitration Panel further notes that it is well-established in tWTO jurisprudence that in order to substantiate a violation of Article XI:1 of the GATT 1994, it is not necessary to show that a measure has had the actual effect of restricting exports or imports.¹⁹⁶ The Arbitration Panel therefore concludes that interpreting Article 35 of the AA as requiring the complainant to prove the actual effect of a *de iure* (import and) export prohibition would create a significant divergence between Article XI:1 of GATT 1994 and Article 35 of the AA in violation of the consistency obligation imposed by Article 320 of the AA.
206. The Arbitration Panel also concludes that Article 35 of the AA does not imply that the European Union bears the burden of proving that the 2005 export ban has an actual effect of restricting exports to the European Union, over and above all trade regulations taken to this effect by Ukraine.
207. As concerns the 2015 temporary export ban, the Arbitration Panel notes that the data provided by the Parties on exports of unprocessed timber from Ukraine (HS 4403) shows that, after the entry into force and full application of the ban in 1 January 2017, such exports to the EU have in fact ceased.¹⁹⁷ Thus, even Ukraine’s alleged requirement that an export prohibition should actually have a trade restrictive effect in order to be covered by the prohibition of Article 35 of the AA would be met in any case.

4.2.2.2.2 Whether Article 35 of the AA applies exclusively to goods “destined to the other Party”

208. The Arbitration Panel now turns to Ukraine’s claim that Article 35 of the AA only addresses prohibitions or restrictions specifically aimed at exports of goods “destined for the territory of the other Party” (*in casu*, the European Union), to the exclusion of

¹⁹⁶ According to WTO jurisprudence, even in the case of *de facto* export restrictions, evidence of the actual effects of the measure may be relevant, but neither necessary nor dispositive to substantiate an Article XI:1 of the GATT 1994 violation. See e.g. Panel Report, *Argentina – Hides and Leather*, paras 11.20-11.21. Rather, the existence of a *de facto* restriction can be demonstrated on the basis of the design of the measure and its potential to adversely affect importation, as opposed to the actual resulting impact of the measure on trade flows. See e.g. Panel Report, *Colombia – Ports of Entry*, paras 7.252-7.253. See also *India-Quantitative Restrictions*, Panel Report, para. 5.142 as upheld by the Appellate Body, and more generally I. Espa, *Export Restrictions on Critical Minerals and Metals: Testing the Adequacy of WTO Disciplines*, Cambridge University Press, 2015, pp. 169-175 and R. Wolfrum, P.-T. Stoll, H. Hestermeyer, *WTO. Trade in Goods, Commentary to Article XI* (by R. Wolfrum), Max Planck Commentaries on World Trade Law, M. Nijhoff, 2011, p. 286.

¹⁹⁷ See *Ukraine’s Written Submission*, Table 3 and EU Exh-18.

prohibitions or restrictions on goods that apply to any good shipped “beyond the customs territory of Ukraine” (that is *erga omnes*).¹⁹⁸

209. The Arbitration Panel notes that Ukraine’s interpretation is based on the words “destined for” in Article 35 of the AA. According to Ukraine, the terms “destined for” suggest an “actual destination, that is the intended destination of the exportation of a certain good.”¹⁹⁹ In other words, export prohibitions would only be caught by Article 35 of the AA to the extent that they are applied to goods that are “destined to” the European Union.

210. The European Union contends that Article 35 of the AA includes the term “destined for the territory of the other party” because the obligation concerns exclusively trade between the Parties. This does not imply that only those export restrictions that apply exclusively to exports to the territory of the other Party are prohibited by Article 35 of the AA.²⁰⁰ According to the European Union, the term “destined for the territory of the other party” paraphrases the wording of Article XI:1 of the GATT 1994, which forbids prohibitions or restrictions on exports of goods “destined for the territory of any other contracting party” and which has consistently been interpreted as covering non-discriminatory export (or import) restrictions.²⁰¹

211. The Arbitration Panel recalls that, as discussed in Section 4.2.2.2.1, Article 35 of the AA, second sentence, incorporates by reference Article XI of the GATT 1994 as a whole. The Arbitration Panel further recalls that, as discussed in Section 4.2.2.2.2.1, Article 35 of the AA and Article XI:1 of the GATT 1994 impose identical obligations, so that the former has to be interpreted in accordance with the consistency obligation imposed by Article 320 of the AA. The Arbitration Panel is satisfied that the difference in wording between Article 35 of the AA (“destined for the territory of the other Party”) and Article XI:1 of the GATT 1994 (“destined for the territory of any other contracting party”) is attributable to the bilateral nature of the Association Agreement between the European Union and Ukraine, as opposed to the GATT 1994 which is a multilateral agreement. The slightly different wording does not have further implications.

212. The Arbitration Panel further notes that Article XI:1 of the GATT 1994 has never been interpreted as targeting discriminatory export (or import) restrictions only. On the contrary, WTO jurisprudence is consistent in considering that export (or import) restrictions in

¹⁹⁸ *Ukraine’s Executive Summary*, para. 28 and *Ukraine’s Opening Statement*, para. 106.

¹⁹⁹ *Ukraine’s Executive Summary*, para. 28 and *Ukraine’s Opening Statement*, para. 105.

²⁰⁰ *EU’s Opening Statement*, paras 54-55.

²⁰¹ *EU’s Opening Statement*, para. 56.

general fall within the scope of application of, and are thus prohibited by, Article XI:1 of the GATT 1994 irrespective of whether they are discriminatory or not. This does not preclude that further compatibility issues with Articles I:1 of the 1994 or XIII of the GATT 1994 may arise in the case of discriminatory export (or import) restrictions.²⁰²

213. The scope of the obligation set out in Article 35 of the AA is thus not limited to measures that apply exclusively to goods “destined to the other Party”, but also covers measures that are applied *erga omnes*, notwithstanding any more favourable agreement applicable between the Parties.

214. In light of the foregoing, the Arbitration Panel concludes that Article 35 of the AA applies regardless of whether the prohibitions apply only to goods destined to the European Union (“to the other Party”) or also to like goods destined to other countries.

4.2.2.3 The Arbitration Panel’s findings on the compatibility of the export bans with Article 35 of the AA

215. The Arbitration Panel is now in a position to draw conclusions and make findings on the compatibility of the 2005 and 2015 bans with Article 35 of the AA.

216. The Arbitration Panel recalls that, as concluded in Section 4.2.2.2.1, Article 35 of the AA incorporates by reference Article XI:1 of the GATT 1994. The Arbitration Panel further recalls that Article 35 of the AA contains an obligation to eliminate, inter alia, (import and) export “prohibitions” irrespective of whether they are *de iure* or *de facto*, discriminatory or not discriminatory, which is identical to the obligation contained in Article XI:1 of the GATT 1994.

217. The Arbitration Panel notes that it is undisputed by the Parties that the 2005 and 2015 export bans are *de iure* export prohibitions specifically designed to ban all exports of the goods concerned. The Arbitration Panel further recalls that, in accordance with the consistency obligation in Article 320 of the AA, there is no requirement for the complainant to demonstrate actual effects, nor for the Arbitration Panel to consider such evidence of actual trade effects of the 2005 and 2015 export ban under Article 35 of the AA.

218. The above considerations bring the Arbitration Panel to **find** that the 2005 and 2015 export bans are incompatible with Article 35 of the AA, without prejudice to the Arbitration

²⁰² See, for instance, Panel Report, *US – Poultry (China)*, para. 7.410. More generally, however, WTO adjudicatory bodies have generally been hesitant to make findings under Article I:1 of the GATT 1994 after condemning a measure under Article XI:1 of the GATT 1994 for judicial economy reasons. See Appellate Body Report, *US – Wool Shirt and Blouses*, p. 19 and Panel Report, *US – Shrimp*, paras 7.22-23. See also I. Espa, *Export Restrictions on Critical Minerals and Metals*, op. cit., p. 176 and references cited therein.

Panel's further analysis taking into account Chapter 13 of the AA and the defences available and invoked by Ukraine under Article 36 of the AA which includes Article XX of the GATT 1994.

4.2.3 On the relation between Article 35 of the AA and Chapter 13 of the AA

219. Having found that the measures at issue are incompatible with Article 35 AA, the Arbitration Panel now turns to the analysis of the effects that the provisions of Chapter 13 of the on trade and sustainable development may have on the compatibility with the Agreement of Ukraine's export prohibitions.

220. In this respect the Arbitration Panel is called to examine a further defence raised by Ukraine against the incompatibility of the 2005 and 2015 export bans with Article 35 of the AA based on the invocation of Articles 290, 292, 294, and 296 of Chapter 13 of the AA.

221. The Arbitration Panel considers that this defence raises more generally the issue of the relation between the provisions of Chapter 13 on trade and sustainable development and Article 35 of the AA.

4.2.3.1 The Parties' arguments

4.2.3.1.1 Ukraine

222. Ukraine criticises the EU for building "its entire argumentation on the sole Article 35 of the Association Agreement, as if it were arguing under the GATT 1994 and seeming it to consider that the unique purpose of this Agreement is to remove indiscriminately all impediments to any sort of commerce between the two Parties", that is, ignoring the presence in the Agreement of Chapter 13 on Trade and Sustainable Development.²⁰³

223. In respect of the 2005 export ban, Ukraine invokes as justification that "this law was not adopted in the pursuit of commercial or economic aims, but for environmental reason".²⁰⁴ Ukraine submits in this context that "in 2005 the Legislator considered as 'rare and valuable' 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

²⁰³ *Ukraine's Written Submission*, para. 314.

²⁰⁴ *Ibidem*, para. 56.

- therefore having a high risk of extinction.”²⁰⁵ It further argues that some of the above-mentioned wood species (i.e. checker trees, common yews) are listed on the Red Book of Ukraine, whereas other species are included in the IUCN Red List.²⁰⁶
224. Another point made by Ukraine 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.”²⁰⁷
225. As to the 2015 temporary export ban, Ukraine claims that maintaining this ban reduced the “overall commercial logging by 44.3%” and thus contributes to develop the sustainable use of its forests.²⁰⁸
226. For these reasons, Ukraine submits that “the challenged measures are a mere exercise of its right to regulate its own level of environmental protection, a right which is duly recognised in Chapter 13 of the Agreement, at Article 290.”²⁰⁹
227. Ukraine also refers specifically to Article 296(2) AA as “a standstill clause.”²¹⁰ Ukraine derives from this clause that “Ukraine cannot reduce the level of its existing environmental protections as established before the entry into force of the Association Agreement, as is the case of the 2005 export ban and of the 2015 temporary export ban, with a view to encourage trade of wood with the European Union.”²¹¹
228. Furthermore, Ukraine contends that the measures at issue must be considered in the context of the wide range of international obligations arising from the many multilateral environmental agreements that Ukraine has acceded to, and hence have to be assessed in light of Article 292 of the AA.²¹²
229. Finally, with reference to Article 294 of the AA (“Trade in forest products”) Ukraine complains that “[t]he European Union has not cooperated with Ukraine to promote the sustainable management of the latter’s forest resources.” Specifically, the EU has not effectively implemented EU Regulations No. 995/2010 and No. 363/2012 to address the “dramatic” issue of illegal logging in Ukraine.²¹³

²⁰⁵ *Ibidem*.

²⁰⁶ *Ibidem*, paras 57-58. For a complete recollection, see above Section 2.3.1.

²⁰⁷ *Ukraine’s Written Submission*, para. 59.

²⁰⁸ *Ibidem*, para. 75 (referring to a model by the State Scientific Research Institute for information and Economic Modelling, not filed as an exhibit). See also *ibidem*, paras 68-69 and 76.

²⁰⁹ *Ukraine’s Opening Statement*, para. 68.

²¹⁰ *Ibidem*, para. 86.

²¹¹ *Ibidem*, para. 87.

²¹² *Ukraine’s Written Submission*, paras 116 ff.

²¹³ *Ukraine’s Written Submission*, paras 338-343

230. Ukraine concludes that “the bans are the most effective answers, in context, to Ukraine’s forestry issues.”²¹⁴

4.2.3.1.2 The European Union

231. The EU opposes as misleading Ukraine’s suggestion that the European Union builds its entire argumentation solely on Article 35 of the AA, as if it were arguing under GATT 1994 alone. The EU recognises that the Association Agreement is different from GATT 1994, but contests Ukraine’s claim that Chapter 13 is covered by the sentence in Article 35 of the AA specifying that its provisions shall apply “except as otherwise provided in this Agreement.”²¹⁵ In the EU’s view, “none of the provisions of Chapter 13 invoked by Ukraine provides an exception or affirmative defence with regard to Ukraine’s obligations in accordance with Article 35 AA.”²¹⁶

232. With regard to Article 290 of the AA, the EU recognises that each Party has the right to establish and regulate its own level of environmental protection but it submits that

Such recognition, however, cannot be construed as conferring an unlimited right to derogate from any other provision of the Association Agreement, including Article 35. Rather, the right to regulate recognised in Article 290(1) must be exercised in accordance with the requirements of other provisions of the Association Agreement that give expression and operationalise the “right to regulate”, including the policy exceptions mentioned in Article 36.²¹⁷

233. The EU also contests that Article 296(1) of the AA could be considered as a “standstill clause”. According to the EU, Article 296(1) of the AA does not prevent a Party from introducing new measures that provide for a higher level of environmental protection. However, in the view of the EU, Article 296 of the AA does not seek to derogate from the Parties’ obligations under other provisions of the AA, but instead to ensure that each Party upholds its own environmental laws, regulations and standards.²¹⁸ Nonetheless, those laws, regulations or standards must be compatible with that Party’s obligations under any other provision of the Association Agreement, including Article 35 of the AA.²¹⁹

²¹⁴ *Ibidem*, paras 329-330.

²¹⁵ Article 35 of the AA (emphasis added).

²¹⁶ *EU’s Responses to the Arbitration Panel’s Questions*, para. 282.

²¹⁷ *Ibidem*, para. 284.

²¹⁸ See *EU’s Responses to the Arbitration Panel’s Question 62*, para. 288 ff. See also *EU’s Opening Statement*, paras 190-193.

²¹⁹ *EU’s Opening Statement*, para. 193.

234. The EU further denies that complying with the EU’s request to lift the export bans would create a conflict with Ukraine’s obligations set out in Article 296(2) of the AA, which enjoins the Parties to refrain from weakening or reducing the environmental or labour protection afforded by its laws in order to encourage trade or investment.²²⁰
235. According to the EU, the interdiction of Article 296(2) of the AA covers exclusively the granting of “waivers” and “derogations” from generally applicable rules with a view to encouraging trade or foreign investment. Thus, Article 296(2) of the AA does not concern the enactment of new generally applicable measures which amend or replace such previous measures. Indeed, such a view would be in contradiction with Article 290(1) of the AA which recognises each Party’s right to “establish and regulate [its] own levels of domestic environmental [...] protection.” The European Union does not claim that Ukraine should “waive” or “derogate from” a generally applicable measure (the 2005 and 2015 export bans) only in order to confer a benefit on certain exporters to the European Union, but rather that Ukraine should repeal altogether the 2005 and 2015 export bans.²²¹
236. In the view of the EU, Article 35 and Article 296(2) of the AA “can and must be interpreted in a harmonious manner.”²²² For the EU, this presupposes that the “laws, regulations or standards” mentioned therein must be compatible with a Party’s obligations under any other provisions of the Association Agreement.²²³
237. With reference to Article 294 of the AA (“Trade in forest products”), the European Union underlines that it has already provided vast support to Ukraine. In particular, the EU notes that its support consisted of the transfer of best practices in the establishment of a sustainable Forestry Policy Strategy²²⁴ and a Forest Policy Action Plan.²²⁵ The EU still hopes that Ukraine will finally adopt these legal documents. Furthermore, the EU supports the institutional reform of the State Forest Resources Agency of Ukraine. The Forestry Policy Strategy was in fact approved by the Cabinet of Ministers of Ukraine in May 2018, but has so far not been endorsed by the Prime Minister. Some of the measures recently adopted or planned by Ukraine to which Ukraine refers in its written submission are mentioned in those documents.²²⁶

²²⁰ *EU’s Responses to the Arbitration Panel’s Questions*, para. 289.

²²¹ *EU’s Opening Statement*, para. 194.

²²² *EU’s Responses to the Arbitration Panel’s Questions*, para. 292.

²²³ *Ibidem*.

²²⁴ Strategy 2030 on Restructuring Forestry of Ukraine (Exhibit EU-12).

²²⁵ Ukraine - Reviewed Forest road map time frame 2020-2025 (Exhibit EU-13).

²²⁶ *EU’s Responses to the Arbitration Panel’s Questions*, para. 119.

238. Finally, as to Ukraine's reference to multilateral environmental agreements, the EU accepts that "in assessing whether a measure is 'designed' to achieve the objectives of Article XX(b) or Article XX(g) of the GATT 1994, it may be relevant whether the measure's objective can be sustained within the objectives pursued by a multilateral environmental agreement or by an environmental principle referred to in Article 292 of the Association Agreement."²²⁷
239. According to the EU any conflict between the Association Agreement (including Articles 35 and 36 of the AA) and the multilateral environmental agreements would have to be resolved in accordance with the generally applicable rules of international law, as codified in the VCLT, in particular in Articles 30 and 59 VCLT.²²⁸ The EU, however, contends that none of the multilateral environmental agreements listed by Ukraine prescribes the imposition of export bans for forestry protection purposes.²²⁹
240. The EU concludes that "the provisions of Chapter 13 [invoked by Ukraine] do not provide an exception from Article 35, but they may provide relevant 'context' for assessing whether a measure may be justified under Article 36" of the AA.²³⁰

4.2.3.2 The Arbitration Panel's analysis and finding

241. The Arbitration Panel has examined carefully the above arguments of the Parties and notes that both Parties recognise the importance in the Association Agreement of the Chapter on trade and sustainable development. They differ, however, on how to read the provisions of Chapter 13 in conjunction with the obligations stemming from Article 35 of the AA."
242. In this respect, the Arbitration Panel has to examine the effects the provisions of Chapter 13 ("Trade and Sustainable Development") may have with regard to the compatibility of Ukraine's Article 35-incompatible export prohibitions. The presence in the Association Agreement of a specific chapter on trade and sustainable development strikes a balance between the regulation of purely trade matters and the taking into account of non-trade and environmental concerns in the AA that is different from GATT 1994.
243. The Arbitration Panel notes that Chapter 13 of the AA is part of the same Title IV (Trade and trade-related matters), where Article 35 AA is also found (Chapter 1). The Arbitration

²²⁷ *Ibidem*, para. 301.

²²⁸ *EU's Responses to the Arbitration Panel's Questions*, para. 277.

²²⁹ *EU's Opening Statement*, para. 200.

²³⁰ *EU's Responses to the Arbitration Panel's Questions*, para. 300.

Panel also notes that Article 289(1) of the AA, which sets the “Context and Objectives” of Chapter 13 states, in the relevant part:

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 (emphasis added).

244. In the Arbitration Panel’s view, the language of Article 289(1) AA indicates that the provisions of Chapter 13 are not intended to replace the provisions of other chapters of Title IV, which contains specific disciplines on the promotion of international trade such as Article 35 of the AA. In other words, the provisions of Chapter 13 are not in and of themselves self-standing or unqualified exceptions to justify measures that are in breach of other provisions such as Article 35 of the AA.

245. The Arbitration Panel is rather persuaded that, in such cases, Chapter 13 provisions complement the provisions of other chapters of Title IV as relevant “context.” If a domestic measure, challenged as being incompatible with the Association Agreement, is claimed to be an environmental measure in view of its object, purpose and design, it may as such come within the purview of any of the provisions contained in Chapter 13.²³¹

246. The Arbitration Panel is also persuaded that in examining a Party’s measure that on its face appears incompatible with a provision of other chapters of Title IV, which contain specific disciplines on the development of international trade such as Article 35 of the AA, due regard must be paid to any relevant provision of Chapter 13 as invoked by the respondent. The Arbitration Panel notes that, in casu, Ukraine has invoked Article 290 of the AA on “Right to regulate”, Article 292 of the AA on “Multilateral environmental agreements”, Article 294 on “Trade in forestry products” and Article 296 on “Upholding levels of protection.”

247. Looking at the provisions of Chapter 13 which Ukraine has referred to in its submissions, the Arbitration Panel offers the following considerations.

248. Firstly, all of the provisions invoked may be of relevance when a domestic measure relates to trade in forest products (Article 294 of the AA) or more generally to the protection of the environment, either as a matter of autonomous national legislation (Article 290 and

²³¹ The reference to “context” for the interpretation of treaties is found in Article 31.1 of the Vienna Convention of the Law of Treaties, which states that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” According to Article Art31.2 “The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes (...)”.

Article 296 of the AA) or as a matter of compliance with international obligations arising out of MEAs (Article 290 of the AA).

249. Secondly, to the extent that legitimate environmental concerns may justify measures in derogation from other obligations, including the obligations imposed by Article 35 of the AA, Article 36 of the AA allows taking account of those legitimate environmental concerns. The Arbitration Panel considers this to imply that the provisions of Chapter 13 may serve as relevant “context” when assessing whether Article 35 of the AA-incompatible measures can be justified under Article 36 of the AA. This conclusion is applicable to the present dispute, provided that the domestic measures at issue apply to forestry products and have as an objective the protection of the environment. The Arbitration Panel further considers that this approach satisfies the requirement to interpret harmoniously different provisions of the same treaty.
250. Thirdly, many of the invoked provisions of Chapter 13 (e.g. Article 294 of the AA) appear to have a “promotional” or “programmatic” nature, so that they may not give rise to immediate and precise obligations.²³² This is in contrast to the provisions contained in Chapter 1, which often contain detailed, specific, compulsory rules as it is the case for Article 35 of the AA. This corroborates the Arbitration Panel’s view that mere references to provisions of Chapter 13 cannot in and of themselves cure any conflict of a domestic provision with Article 35 of the AA.
251. In light of the foregoing, the Arbitration Panel **finds** that the provisions of Chapter 13 are not self-standing or unqualified exceptions that could justify measures that are per se in breach of Article 35 of the AA. The Arbitration Panel is nonetheless persuaded that the provisions of Chapter 13 serve as relevant “context” for the interpretation of other provisions of Title IV, which allow the Parties to introduce or maintain measures in derogation to Article 35 of the AA, including for environmental reasons based on Article 36 of the AA in conjunction with Article XX of the GATT 1994, as discussed below in Section 4.3.
252. Accordingly, the Arbitration Panel will refer back to the relevance of the provisions of Chapter 13 of the AA invoked by Ukraine when it examines Ukraine’s defence of the measures at issue based on Article XX (b) or (g) of the GATT 1994 by virtue of Article 36 of the AA in Section 4.3 below.

²³² For a recent analysis see Gracia Marín Durán, ‘Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues’, *Common Market Law Review* 57 (2020), pp. 1031–1068.

4.2.3.3 Conclusions on the relationship between Article 35 of the AA and Chapter 13

253. The Arbitration Panel concludes that the provisions of Chapter 13 are not self-standing or unqualified exceptions, which can be relied upon for the purposes of providing a legal shelter for Article 35 of the AA-incompatible export bans. In the Arbitration Panel's view, Chapter 13 provisions can serve as relevant context for the purposes of assessing whether Article 35-incompatible export bans can be justified under other provisions of the Association Agreement, which allow the Parties to introduce or maintain measures in derogation of Article 35 of the AA, namely the policy exceptions mentioned in Article 36 of the AA.

4.2.4 Overall finding on the compatibility of the bans with Article 35 of the AA

254. The Arbitration Panel **finds** that: (i) the 2005 export ban and the 2015 temporary export ban are incompatible with Article 35 of the AA; (ii) reference to the provisions of Chapter 13 cannot cure the incompatibility of the measures at issue with Article 35 of the AA; and (iii) Chapter 13 provisions can serve as relevant context for the purposes of assessing whether the 2005 export ban and the 2015 temporary export ban are justified under Article 36 of the AA and, in particular, Article XX (b) and (g) of the GATT 1994 as incorporated therein.

4.3 Whether the bans are justified under Article 36 of the AA and Article XX of the GATT 1994

4.3.1 Introduction

255. Having found that the 2005 export ban and the 2015 temporary export ban are incompatible with Article 35 of the AA and cannot be justified by the provisions of Chapter 13 as self-standing defences, the Arbitration Panel now turns to examining whether the two export bans can be justified in accordance with Article 36 of the AA.

256. The Arbitration Panel notes that it is undisputed by the Parties that Article XX of the GATT 1994 is incorporated in its entirety in Article 36 of the AA, which reads:

Nothing in this Agreement shall be construed in such a way as to prevent the adoption or enforcement by any Party of measures in accordance with Articles XX and XXI of GATT 1994 and its interpretative notes, which are hereby incorporated into and made an integral part of this Agreement.

257. Accordingly, the Arbitration Panel will first examine the defences invoked by Ukraine in accordance with Article XX of the GATT 1994. The conclusions will then allow us to establish whether Ukraine’s measures can be justified under Article 36 of the AA.
258. Labelled “General Exceptions”, Article XX lists a number of legitimate public policy goals – paragraphs (a) to (j) – which may be invoked to justify a violation of, *in casu*, Article 35 of the AA, provided that such measure is not applied, as specified in the chapeau of Article XX, “in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”.
259. In this respect, a consolidated body of WTO jurisprudence has established that Article XX of the GATT 1994 requires a so-called “two-tiered” test. First, the measure at issue must fall within the scope of one of the particular exceptions listed under Article XX of the GATT 1994 and meet the requirements specified therein. Second, a measure “provisionally” justified under one of the listed exceptions must satisfy the conditions imposed by the chapeau of Article XX.²³³ The burden of proof in this test is on the defending party invoking an exception.²³⁴
260. Among the exceptions listed under paragraphs (a) to (j) of Article XX of the GATT 1994, Ukraine has invoked those provided by paragraphs (b) and (g).
261. In respect of the 2005 export ban, Ukraine invokes Article XX(b) of the GATT 1994, which permits a WTO Member to “adopt and enforce” a measure that is “necessary to protect human life or health.”
262. In respect of the 2015 temporary export ban, Ukraine invokes Article XX(g) of the GATT 1994, which allows measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”
263. The Arbitration Panel will first examine Ukraine’s defences specific to the 2005 export ban pursuant to Article XX(b) of the GATT 1994 (Section 4.3.2). It will then analyse Ukraine’s defences which are specific to the 2015 temporary export ban in relation to Article XX(g) of the GATT 1994 (Section 4.3.3).

4.3.2 Whether the 2005 export ban is justified by Article XX(b) of the GATT 1994

264. Article XX(b) of GATT 1994 and its chapeau read as follows:

²³³ See Appellate Body Report, *US–Gasoline*, pp. 20–1; Appellate Body Report, *US–Shrimp*, paras 119–20.

²³⁴ See Appellate Body Report, *US–Wool Shirts and Blouses*, p. 335; Appellate Body Report, *US–Gasoline*, p. 21.

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

265. Article XX(b) of the GATT 1994 thus allows a Member to “adopt and enforce” any measure, inter alia, necessary to protect plant life or health, even though that measure is inconsistent with another provision of GATT 1994.²³⁵

266. We will now examine the Parties’ arguments as to whether the 2005 export ban is “provisionally” justified by Article XX(b) of GATT 1994 (Section 4.3.2.1). In the affirmative, the Arbitration Panel will analyse whether the 2005 export ban satisfies the requirements of the chapeau (Section 4.3.2.2).

4.3.2.1 “Provisional” justification by Article XX(b) of the GATT 1994

4.3.2.1.1 The Parties’ arguments

4.3.2.1.1.1 Ukraine

267. Ukraine claims that the measure at issue concerns “plant life”: its sole subject-matter is the timber and sawn wood from ten wood species, the exportation of which is prohibited. It is also obvious that the measure is neither discriminatory – it applies to exports to all countries – nor a disguised trade restriction – since its object is clearly stated. Therefore, for Ukraine the only point that the Arbitration Panel would have to address is the European Union’s contention that this export ban is not necessary to protect these ten wood species and that other less-trade restrictive measures would be available.

268. To reply to this question, Ukraine repeatedly notes that the Ukrainian Law No. 2860-IV which introduced the 2005 export ban is not and should not be construed separately from the rest of the Ukrainian environmental policies regarding forestry resources. Indeed, the Ukrainian Law No. 2860-IV prohibits the exportation of ten species of wood but only because these species are considered “rare and valuable.” Yet, the combination of the two adjectives – “valuable” and “rare” – refers to a category of wood species repeatedly referenced in Ukrainian environmental policies as species subject to additional and specific

²³⁵ Appellate Body Report, *EC - Asbestos*, para. 115.

protections. Notably the Forest Code of Ukraine provides that “valuable and rare wood” is to be preserved during felling operations.²³⁶ According to Article 70 of the Forest Code of Ukraine:

[d]uring timber harvesting [it] is not allowed [to] fell [...] and damage [...]: valuable and rare trees and shrubs listed in the Red Book of Ukraine”.

269. By qualifying the six wood *genera* and the four wood species concerned by the 2005 export ban as “rare and valuable”, Ukraine has decided to highlight the importance of these species – five of which are listed in the Red Book of Ukraine – for the conservation and protection of its forestry resources and its biodiversity and therefore, to limit their industrial exploitation, save for the production of fruits and nuts or other products from flowering.²³⁷

270. Ukraine underlines that the 2005 export ban constitutes an external (trade) measure complementing the domestic restrictions aimed at protecting the protection of ten covered species with a view to effectively prevent the industrial exploitation, exportation and excessive logging of the specified rare and valuable species of wood and therefore to protect the lives of these plants. By barring the export of these species, the Ukrainian authorities are “limiting the possible outlets for timber and sawn woods that would be produced from those species, securing a better control over any illegal or irregular felling.”²³⁸ The interests protected by the 2005 export ban are fundamental, vital and important in the highest degree.

271. As a result, despite the European Union’s attempt to demonstrate “alternative obvious measures that could have been taken to achieve Ukraine’s objectives.”²³⁹ such as establishing a limitation of the quantity of trees/wood of the species covered by the 2005 export ban, Ukraine contends that there are no other practical alternatives within Ukraine’s means “given the grave issue at hand: the continuous survival of those species in a country still striving to put in place modern and effective governance of its forests”.²⁴⁰ Therefore, the maintenance of the 2005 export ban is required during the time needed to effectively implement the “obvious alternative measures” referred to by the EU.

²³⁶ Prior to the actual provisions of the Forest Code of Ukraine, its Article 59 (repealed in 2008), already specified that “*during the final felling operations valuable and rare wood and shrubs species, ..., shall be preserved.*”

²³⁷ *Ukraine’s Written Submission*, para. 59. For a complete overview, see Section 2.3.1 above.

²³⁸ *Ukraine’s Opening Statement*, para. 118.

²³⁹ See *Ukraine’s Written Submission*, paras 219, 239 and 311 (regarding that it is the complaining party which bears the burden of identifying possible alternative measures that could have been taken to achieve respondent’s objectives).

²⁴⁰ *Ukraine’s Opening Statement*, para. 119.

4.3.2.1.1.2 The EU

272. The EU asserts that in order to support the sustainable management of its forest resources, Ukraine could resort to other measures that are fully compatible with the international obligations assumed by Ukraine and which do “not restrict trade.” The EU underlines that it has provided vast support to Ukraine, in particular in the transfer of best practices in the establishment of a sustainable Forestry Policy Strategy and a Forest Policy Action Plan, in addition to supporting the Ukrainian Government in establishing the institutional reform of the State Forest Resources Agency of Ukraine.²⁴¹ Such alternative measures could be represented by a limitation at a sustainable level of the quantity of trees/wood of the species covered by the 2005 export ban that can be harvested each year, or by a selective moratorium.²⁴²
273. The EU also recalls to, with regards to Article XX (b) of the GATT 1994, WTO jurisprudence has clarified that the notion of protection implies the existence of some risk to human, animal or plant life or health. It follows that Ukraine should demonstrate the existence of a concrete risk either in quantitative or qualitative terms, and not simply presuppose or allege that a risk exists without any concrete data substantiating it.²⁴³
274. According to the EU, “Ukraine has confirmed that its assessment about the rarity of the ten wood species covered by the 2005 export ban is not based on scientific evidence or empirical observation, but it is just a vague approximation. Indeed, in response to question 5 of the Panel, Ukraine has noted that the ‘study of species composition is still in its infancy and accurate data on the area and stock of designated species requires separate research, but approximately their share in the forest stock of Ukraine does not exceed 2%.’”²⁴⁴
275. The EU recalls that, in order to assess the contribution of a measure to the achievement of its objective, consideration of the actual effects may prove useful. Indeed, a panel must always assess the actual contribution made by the measure to the objective pursued. This being said, the EU admits that “[h]owever, when particular circumstances makes it impossible or too difficult to observe the concrete effects of the measure (such as when the measure forms part of a broader policy scheme, and it is not yet having a discernible impact on its objective), the Appellate Body recognised that it is nevertheless possible to determine

²⁴¹ *EU’s Responses to the Arbitration Panel’s Questions*, para. 119 and Annex I.

²⁴² *Ibidem*, paras 106 and 111.

²⁴³ *EU’s Opening Statement*, paras 78-79 (referring to Appellate Body Report, *EC – Seal Products*, paras 5.197-5.198).

²⁴⁴ *EU’s Opening Statement*, para. 80.

the level of contribution to be made by the measure, by assessing whether the measure ‘is apt to produce a material contribution to the achievement of its objective.’”²⁴⁵

276. The EU concludes that “[t]he absence of any quantification or concrete estimation of the effects of the 2005 export ban on the preservation of these wood species clearly confirms that the measure’s contribution to the objective is inexistent or too small to be observed.”²⁴⁶

277. Finally, the EU recalls that the Appellate Body has already clarified with regards to Article XX (b) of the GATT 1994 in order to be considered as “necessary” a measure must be located significantly closer to the pole of “indispensable” than to the opposite pole of simply “making a contribution to”. Hence, a measure like the 2005 export ban, which makes no or a very limited contribution to the preservation of the “rare and valuable” wood species cannot be considered as necessary for the protection compatible with that provision.

4.3.2.1.2 Whether the 2005 export ban is designed to protect plant life or health

278. The Arbitration Panel recalls that, under a consistent body of WTO jurisprudence, a measure can be justified under Article XX(b) of the GATT 1994 if the respondent demonstrates that:

- (i) the challenged measure addresses the particular interest specified in subparagraph (b) of Article XX, that is, the measure is “designed to” protect human, animal or plant life or health, and
- (ii) there is a sufficient nexus between the measure at issue and the interest protected, that is, whether the challenged measure is “necessary” to protect human life or health.²⁴⁷

279. The Arbitration Panel will thus first examine whether the 2005 export ban falls within the range of policies designed to protect human, animal or plant life or health.

4.3.2.1.2.1 Applicable principles

280. The Arbitration Panel recalls that past WTO rulings have established that, for a measure to fall within the range of policies that protect human, animal and plant life or health within the meaning of Article XX(g) of the GATT 1994, the first step is to determine the existence

²⁴⁵ *Ibidem* paras 82-83 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151; Appellate Body Report, *China – Publications and Audiovisual Products*, paras 251-253; and Appellate Body Reports, *EC – Seal Products*, para. 5.213).

²⁴⁶ *Ibidem*, para. 85.

²⁴⁷ Cf., for instance, Appellate Body Report, *Colombia – Textiles*, para. 5.67.

of a risk to human, animal or plant life or health.²⁴⁸ To this end, WTO adjudicatory bodies “enjoy a margin of discretion in assessing the value of the evidence, and the weight to be ascribed to that evidence.”²⁴⁹

281. Once that risk is found to exist, the second step is to examine whether the measure is “designed to” reduce such a risk. WTO rulings have clearly stated that Members have the right to determine the level of protection that they deem appropriate.²⁵⁰ This requires adjudicators to examine whether the measure at issue is “not incapable” of protecting human, animal or plant life or health²⁵¹ based on its design, including “its content, structure, and expected operation.”²⁵²

4.3.2.1.2.2 The Arbitration Panel’s analysis

282. The Arbitration Panel now examines whether the 2005 export ban falls within the range of policies designed to protect human, animal or plant life or health.²⁵³ In a first step, the Arbitration Panel looks at whether the measure’s declared objective is to protect plant life or health within the meaning of Article XX(b) of the GATT 1994. In a second step, the Arbitration Panel looks at whether the 2005 export ban is “designed to” protect plant life or health.

Whether the claimed objective of the measures is a “plant life or health” objective within the meaning of Article XX(b) of the GATT 1994

283. Law No. 2860-IV prohibits the export of timber and sawn wood of “valuable and rare” wood species, that is, those wood species which are “threatened (ie assessed as Critically Endangered, Endangered or Vulnerable)” and therefore subject to a risk of extinction.²⁵⁴ In this context we note that some, albeit not all, of the wood species covered by the 2005 export ban are included in the list of the Red Book in Ukraine²⁵⁵ or on the IUCN Red

²⁴⁸ Panel Report, *EC – Asbestos*, para. 8.170. The panel in that case said that “the use of the word ‘protection’ implies the existence of a risk.” See Panel Report, *EC – Asbestos*, para. 8.184.

²⁴⁹ Appellate Body Report, *EC – Asbestos*, para. 161.

²⁵⁰ Appellate Body Report, *EC – Seal Products*, para. 5.200 (referring to Panel Report, *US – Gambling*, para. 6.461, referring to Appellate Body Reports, *Korea – Various Measures on Beef*, para. 176 and *EC – Asbestos*, para. 168).

²⁵¹ Appellate Body Report, *Colombia – Textiles*, para. 5.68.

²⁵² *Ibidem*, para. 5.69 (referring to Appellate Body Reports, *US – Shrimp*, paras 135-142; and *EC – Seal Products*, para. 5.144).

²⁵³ In this respect the Panel notes that what is at stake under the 2005 export ban is the protection of the “life”, rather than the “health”, of the ten “rare and valuable” species. However, since article XX(b) of the GATT 1994 refers to “life and health”, the Panel will use this terminology.

²⁵⁴ *Ukraine’s Written Submission*, para. 56 (referring to Article 1 of the Law No. 2860-IV).

²⁵⁵ *Ibidem*, para. 57.

List.²⁵⁶ We understand the EU to contend that this partial overlapping would imply that Ukraine has not substantiated the existence of a risk to plant life or health as required by Article XX(b) of the GATT 1994.²⁵⁷ Related to this observation, the EU points to the absence of any statistical or other quantitative data in relation to the ten wood species covered by the 2005 export ban that could prove the existence of some risk of extinction.²⁵⁸ The EU also notes that in the IUCN Red List those species fall within the category “Least concerned.”

284. The Arbitration Panel agrees with the EU that Ukraine’s protective regime for the ten species covered by the 2005 export ban presents some inconsistencies, considering that Ukraine claims that they are all equally rare, valuable and endangered.²⁵⁹ Thus, of the ten species covered by the 2005 ban, only two enjoy the maximum protection deriving from their insertion in Ukraine’s Red Book.²⁶⁰ Five other species are included in the International Union for Conservation of Nature Red List of Threatened Species list which, as Ukraine states, has been adopted as a benchmark for protection²⁶¹. Three other species (pear trees, chestnuts, black cherries) are not included in either list. Ukraine explains that these species are not intended for industrial use and are not commercially exploited.²⁶² Ukraine has not supplied statistics as to quantity, coverage or use for any of these species.

285. Ukraine has documented that the lack of more accurate data has to be attributed to “Ukraine’s realities.”²⁶³ Ukraine reports in particular substantial limitations in Ukraine’s forest governance, namely with respect to the persistent challenges of illegal logging.²⁶⁴ In the view of Ukraine, it is in light of such challenges that the highly protective regime for the ten covered species should be appreciated rather than based on an ascertained vulnerability of each and every covered species.²⁶⁵

286. In line with relevant DSB rulings, the Arbitration Panel is prepared to take these constraints into account, and to show deference to Ukraine’s policy choices and chosen level of protection.²⁶⁶ A measure could be considered as having as its object the protection

²⁵⁶ *Ibidem*, para. 58.

²⁵⁷ *EU’s Opening Statement*, para. 79; *EU’s Responses to the Arbitration Panel’s Questions*, paras 158-162.

²⁵⁸ *EU’s Responses to the Arbitration Panel’s Questions*, paras 163-165.

²⁵⁹ *EU’s Opening Statement*, para. 80.

²⁶⁰ See Section 2.3.1 above.

²⁶¹ *Ibidem*.

²⁶² *Ukraine’s Written Submission*, para. 59.

²⁶³ *Ukraine’s Answers to the Arbitration Panel’s Questions*, para. 29.

²⁶⁴ *Ukraine’s Opening Statement*, paras 118-119.

²⁶⁵ *Ukraine’s Answers to the Arbitration Panel’s Questions*, paras 105-112.

²⁶⁶ Based on WTO jurisprudence, dispute settlement bodies are not entitled to question a member’s chosen level of protection: Appellate Body Report, *EC–Asbestos*, para. 168 and Appellate Body Report, *Brazil–Retreaded*

of plant life or health also if it covers species beyond those exhibiting the highest risk of extinction.

287. In this connection, the Panel considers appropriate to look at the features, classification and use of the ten covered species as a whole, since the 2005 export ban covers all of them and the EU has challenged the export ban in its entirety. In light of the above, the Panel is satisfied that the species covered by the 2005 export ban deserve protection because of an existing or prospective risk to their conservation (“plant life or health”) within the meaning of Article XX (b) of the GATT 1994.²⁶⁷ The Panel is not in a position to assess which kind of protection is appropriate for each individual species. The Panel considers that a measure may be justified under this provision also if the risk may develop in the future should no protective measure preventively be adopted based on precaution.

288. The Arbitration Panel is therefore satisfied that a risk to plant life or health exists within the meaning of Article XX(b) of the GATT 1994.

Whether the 2005 export ban is designed to protect plant life or health

289. Having determined that there is a risk to plant life or health, we can now proceed to the second step under our analysis, namely whether the measure is “designed” to reduce a risk to human, animal or plant life or health. We recall that this standard has consistently been interpreted as requiring that the measure at issue is “not incapable” of protecting human, animal or plant life or health.²⁶⁸

290. We also recall Ukraine’s contention that the 2005 export ban is part of a comprehensive environmental policy, which consists of several national legal instruments aimed at achieving forest protection in line with Ukraine’s international obligations arising out of a number of multilateral environmental agreements (MEAs) to which Ukraine is party.²⁶⁹ The EU does not dispute that Ukraine maintains a comprehensive policy for forest protection purposes, but it contends that Ukraine did not explain how the export ban fits within the legal framework or makes the protection more effective. The EU also maintains

Tyres, para. 140. Furthermore, members enjoy the right to determine the level of protection that “they consider appropriate in a given situation”: Appellate Body Report, *EC–Asbestos*, para. 168; Appellate Body Report, *Brazil–Retreaded Tyres*, paras 140 and 210, and Appellate Body Report, *US – Gasoline*, p. 30.

²⁶⁷ The Panel recalls also that, as the EU also acknowledged, Ukraine estimates that “the share of the species covered by the 2005 export ban in the forest stock of Ukraine does not exceed 2%.” *EU’s Opening Statement*, para. 80. We read such data as suggesting that these species are relatively rare and hence in need of protection.

²⁶⁸ Appellate Body Report, *Colombia – Textiles*, para. 5.68.

²⁶⁹ *Ukraine’s Written Submission*, Section 3.3.2 and para. 230.

that Ukraine was not able to indicate any concrete reference to the export ban in that legal framework.²⁷⁰

291. The Arbitration Panel has examined the broad collection of documents composing Ukraine's comprehensive environmental policy. In doing so, we were mindful that a "mere assertion" that export restrictions form part of a comprehensive policy is not sufficient to demonstrate that they are designed to achieve such objectives.²⁷¹ Accordingly, we looked for persuasive evidence of a connection between the declared environmental goal and the 2005 export ban.

292. We can offer the following four considerations.

293. Firstly, we recognise that Ukraine's overall legal framework aims at mitigating the problem of extensive felling, on the one hand, and illegal logging, on the other hand, which are both due to the traditional prominence of economic considerations over environmental priorities in Ukraine's governance of forests.²⁷² In this respect, the Explanatory Note to Law No. 2860-IV apparently fits within the legal framework: "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."²⁷³ Accordingly, the Arbitration Panel takes note of the statement of Ukraine that the 2005 export ban covers only wood species listed that are not primarily intended for the industrial production of sawn wood, but rather for "the production of fruits and nuts or other products from flowering."²⁷⁴ In this connection, the Arbitration Panel notes that the 2005 export ban is not designed to promote domestic products that use the raw materials at issue in this dispute as inputs. The Arbitration Panel recognises that this was a crucial element in prior DSB rulings for the purposes of determining whether export restrictions could be considered to be designed to protect public health.²⁷⁵

294. The second consideration is about the connection between the 2005 ban and Ukraine's general legislation aimed at the conservation or protection of forests. To the extent that the legal instruments cited by Ukraine as the relevant context for the introduction of the 2005 export ban predate Law No. 2860-IV, it could not be expected that the 2005 export ban

²⁷⁰ *EU's Responses to the Arbitration Panel's Questions*, paras 168-170.

²⁷¹ Panel Reports, *China-Raw Materials*, paras 7.507-8 and Panel Reports, *China-Rare Earths*, paras 7.159-60.

²⁷² *Ukraine's Written Submission*, para. 229.

²⁷³ *Ukraine's Written Submission*, para. 61. This is in stark contrast with the Explanatory Note to the 2015 temporary export ban: see *infra* Section 4.3.3.2.2.2.

²⁷⁴ *Ukraine's Written Submission*, para. 59.

²⁷⁵ Panel Reports, *China - Rare Earths*, paras 7.169-70 and Panel Reports, *China - Raw Materials*, para. 7.166.

would be cited therein as a means to achieve forest protection goals.²⁷⁶ Neither could it be expected that these instruments would mention how the measure would operate to this end. Rather, the subsequent introduction of the 2005 export ban seems to corroborate Ukraine's contention that the measure at issue is "complementary ... to effectively prevent the industrial exploitation, exportation and excessive logging of these specific rare and valuable species of wood and therefore to protect these plant lives".²⁷⁷ Moreover, the Forest Code of Ukraine has always prescribed that "valuable and rare" species be preserved during felling operations.²⁷⁸ The Arbitration Panel also notes that the instruments cited by Ukraine, which were adopted after 2005, focus on tightening felling and logging regulations, including illegal logging prohibitions, in line with the declared objective of the 2005 export ban.²⁷⁹

295. Thirdly, as recalled in Section 4.2.3.1.1, Ukraine is party to a wide range of MEAs relevant for forest protection. While this is not dispositive in and of itself, the Arbitration Panel considers that participation in such international instruments by Ukraine is directly relevant inasmuch as it informs Ukraine's legal framework for forest protection.²⁸⁰ The Parties' right to regulate in line with relevant international standards and agreements is explicitly recognized in Chapter 13 of the Association Agreement (namely in Articles 290, 292 and 296 of the AA). The Arbitration Panel has already concluded that Chapter 13 constitutes relevant context to interpreting Article 36 of the AA (and hence Article XX of the GATT 1994) defences in Section 4.2.3.

296. Finally, the Arbitration Panel recalls that, based on prior WTO rulings, the examination of the design of the measure is "not a particularly demanding step" in contrast to the assessment of the necessity of a measure, which involves "a more in-depth, holistic analysis."²⁸¹ In particular, the Appellate Body has emphasized that "[a] panel must not ... structure its analysis of the ["design" step] in such a way as to lead it to truncate its analysis prematurely and thereby foreclose consideration of crucial aspects of the respondent's defence relating to the 'necessity' analysis."²⁸²

²⁷⁶ See *Ukraine's Written Submission*, para. 229.

²⁷⁷ *Ukraine's Opening Statement*, para. 118.

²⁷⁸ *Ibidem*, para. 116.

²⁷⁹ *Ukraine's Written Submission*, Section 3.5.

²⁸⁰ *Ibidem*, Section 3.3.2.

²⁸¹ Appellate Body Report, *Colombia – Textiles*, para. 5.70.

²⁸² *Ibidem*, para. 5.77 (referring to Appellate Body Report, *Argentina – Financial Services*, para. 6.203).

297. In light of the foregoing, the Arbitration Panel is satisfied that the 2005 export ban is capable of protecting plant life or health, such that there is a relationship between the measure and the protection of plant life or health.

4.3.2.1.3 Whether the 2005 export ban is necessary to protect plant life or health

4.3.2.1.3.1 Applicable principles

298. Once a measure is found to be designed to protect human, animal or plant life or health, the next step involves determining whether it is “necessary” to achieve that objective. In *EC – Seal Products*, the Appellate Body found that the necessity analysis under Article XX “involves a process of ‘weighing and balancing’ a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure.”²⁸³

299. As to the first factor, that is, the importance of the interests or values at stake, the Appellate Body clarified in *Korea – Various Measures on Beef* that the more vital or important those interests or values are, the easier it would be to accept as “necessary” a measure otherwise found to be inconsistent with GATT 1994.²⁸⁴

300. As to the second factor, that is the contribution of the measure to the objective pursued, the Appellate Body stated in *Brazil – Retreaded Tyres*, that “a contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue.”²⁸⁵ The Appellate Body has also clarified that there is not a generally applicable standard requiring the use of a pre-determined methodology or of a pre-determined threshold of contribution in the analysis of “necessity” under Article XX of the GATT 1994.²⁸⁶

301. As to the third factor to be “weighed and balanced”, that is, the level of trade-restrictiveness of the measure, consistent WTO jurisprudence states that “[t]he less restrictive the effects of the measure, the more likely it is to be characterized as

²⁸³ Appellate Body Report, *EC – Seal Products*, para. 5.214 (referring to Appellate Body Reports, *EC – Seal Products*, para. 5.169; *Brazil – Retreaded Tyres*, para. 182; and *US – Gambling*, para. 307 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 166)). See also Appellate Body Report, *Colombia – Textiles*, paras 5.70-5.75.

²⁸⁴ Appellate Body Report, *Korea – Various Measures on Beef*, para. 162.

²⁸⁵ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145.

²⁸⁶ Appellate Body Report, *EC – Seal Products*, para. 5.210 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145) and para. 5.213 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 146).

‘necessary.’”²⁸⁷ In *China – Audiovisuals* the Appellate Body further considered that when a Member adopts a highly trade-restrictive measure, “it will have to ensure that the measure is carefully designed so that the other elements to be taken into account in weighing and balancing the factors relevant to an assessment of the ‘necessity’ of the measure will ‘outweigh’ such restrictive effect.”²⁸⁸

302. Finally, the necessity analysis involves a comparison between the measure at issue and possible alternative measures which are “reasonably available” to the Member concerned.²⁸⁹ According to the Appellate Body, an alternative measure is not reasonably available “where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties.”²⁹⁰ Prior DSB rulings have also established that the complaining party has to demonstrate that such measures are not only less trade-restrictive than the measure at issue, but also contribute to the achievement of the pursued objective to an equal or greater extent than the challenged measure.²⁹¹

303. Once each of these four factors has been examined individually, they must be assessed holistically for an overall determination of whether or not a particular measure is “necessary”, and therefore justified pursuant to subparagraph (b) of Article XX.²⁹²

304. The Arbitration Panel will thus turn to the necessity analysis of the 2005 export ban required by Article XX(b) of the GATT 1994. In accordance with WTO jurisprudence, the Arbitration Panel will refrain from reaching any intermediate conclusion before completing the entire analysis.

4.3.2.1.3.2 The Arbitration Panel’s analysis

305. The Arbitration Panel recalls that, based on prior DSB rulings, “[i]n order to determine whether a measure is “necessary” within the meaning of Article XX(b) of GATT 1994, a panel must consider the relevant factors, particularly the importance of the interests or

²⁸⁷ Appellate Body Report, *China – Publications and Audiovisual Products*, para. 310. See also Appellate Body Reports, *Korea- Various Measures on Beef*, para. 163; and *Brazil – Retreaded Tyres*, para. 150.

²⁸⁸ Appellate Body Report, *China – Publications and Audiovisual Products*, para. 310.

²⁸⁹ Appellate Body Report, *Korea – Various Measures on Beef*, para. 166.

²⁹⁰ Appellate Body Report, *US – Gambling*, para. 308 and Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.

²⁹¹ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156 and para. 210.

²⁹² Appellate Body Report, *Colombia – Textiles*, para. 5.75 (referring to Appellate Body Reports, *EC – Seal Products*, para. 5.215; and *Brazil – Retreaded Tyres*, para. 182).

values at stake, the extent of the contribution to the achievement of the measure's objective and its trade restrictiveness.”²⁹³

306. If such analysis leads to the preliminary conclusion that the measure is necessary, the second step is to assess whether other least restrictive measures could be reasonably available to achieve the same level of protection sought by the defendant party.

The importance of the interests or values at stake

307. The Arbitration Panel starts its necessity analysis by assessing the degree of importance of the environmental objectives attached to the 2005 export ban.

308. The Arbitration Panel considers that it is undisputed by the Parties that the interests protected by the 2005 export ban, that is, the restoration of forests (reforestation and afforestation) more generally and the preservation of rare and valuable species more specifically,²⁹⁴ are “fundamental, vital and important in the highest degree” as claimed by Ukraine.²⁹⁵ The Arbitration Panel notes that the EU “agrees that the preservation from extinction of any wood species is a legitimate interest of high importance.”²⁹⁶

309. The Arbitration Panel agrees with the Parties and notes that what is disputed is whether the measure at issue contributes to the achievement of the stated objective within the meaning of the necessity test of Article XX(b) of the GATT 1994. The Arbitration Panel therefore turns to analysing whether the 2005 export ban “brings about” a material contribution or is “apt to make” a material contribution to the achievement of the declared environmental goal.

Existence of a material contribution

310. The Arbitration Panel recalls that prior DSB rulings have clarified that the necessity test imposes two sub-requirements: firstly, the measure must “bring about” or be “apt to make” a material contribution to the achievement of its objective.²⁹⁷ Secondly, there needs to be

²⁹³ Panel Reports, *China–Raw Materials*, para. 7.481 and Panel Reports, *China–Rare Earths*, para. 7.146, citing Appellate Body Report, *Brazil–Retreaded Tyres*, para. 178.

²⁹⁴ As noted earlier, the EU casts doubt on whether there is a genuine risk of extinction for the species covered by the 2005 export ban and hence whether the measure is actually about protecting plant life or health within the meaning of the first legal requirements under Article XX(b) of the GATT 1994: see *EU Responses to the Arbitration Panel's Questions*, para. 174. The Arbitration Panel has already looked into this issue in Section 4.3.2.1.2.

²⁹⁵ *Ukraine's Written Submission*, para. 238.

²⁹⁶ *EU's Responses to the Arbitration Panel's Questions*, para. 173.

²⁹⁷ Appellate Body Report, *Brazil–Retreaded Tyres*, para. 151. This approach was cited with approval in, among others, Panel Reports, *China–Raw Materials*, para. 7.484 and Panel Reports, *China–Rare Earths*, para. 7.146.

a “genuine relationship of ends and means between the objective pursued and the measures at issue”.²⁹⁸

311. As to the first sub-requirement, the Arbitration Panel notes that prior DSB rulings have recognised that a measure could contribute to one of the objectives recognised under Article XX(b) of the GATT 1994 as part of a broader policy scheme “comprising a multiplicity of interacting measures.”²⁹⁹ In such cases, WTO jurisprudence has accepted that a measure could be justified under Article XX (b) of the GATT 1994 even if the contribution of the measure is not immediately observable due to the difficulty in isolating the contribution “of one specific measure from those attributable to the other measures that are part of the same comprehensive policy.”³⁰⁰

312. In this connection, previous DSB rulings have recognised that the contribution of the measure can be demonstrated quantitatively or qualitatively:

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. This demonstration could consist of quantitative projections in the future, or *qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence* (emphasis added).³⁰¹

313. The Arbitration Panel notes that according to the EU the matter of contention is whether “Ukraine has also failed to show that the 2005 export ban is in any way apt to prevent those wood species from being harvested and industrially processed and consumed domestically and without any limitation.”³⁰² The Arbitration Panel also notes that the EU does not dispute that “when concrete data are missing or non-representative, for apprehending whether the measure is apt to contribute to its objective a Panel will have to rely again on the design of the measure.”³⁰³

²⁹⁸ Appellate Body Report, *Brazil–Retreaded Tyres*, para. 145.

²⁹⁹ Appellate Body, *Brazil – Retreaded Tyres*, para. 151. This approach was cited with approval in Panel Reports, *China–Raw Materials*, para. 7.485 and Panel Reports, *China–Rare Earths*, para. 7.146.

³⁰⁰ *Ibidem*.

³⁰¹ Appellate Body Report, *Brazil–Retreaded Tyres*, para. 151. The same approach was endorsed in Appellate Body Report, *China – Publications and Audiovisual Products*, paras 251-253 and Appellate Body Reports, *EC – Seal Products*, para. 5.213.

³⁰² *EU’s Responses to the Arbitration Panel’s Questions*, para. 174.

³⁰³ *EU’s Opening Statement*, para. 84.

314. The Arbitration Panel therefore recalls, first, its four considerations on the nature and the extent of the connection between the declared environmental goal and the 2005 export ban.(Section 4.3.2.1.2.2).
315. Secondly, the Arbitration Panel observes that the 2005 export ban fits within the broader legal framework set by Ukraine to achieve forest preservation goals. Accordingly, the Arbitration Panel considers that the question is whether the 2005 export ban, together with the other measures taken or envisaged within the comprehensive policy programme, is apt to contribute to its environmental objective.
316. The Arbitration Panel notes that it is undisputed by the Parties that in this case a quantitative assessment of the contribution of the 2005 export ban is neither possible nor indispensable.
317. Based on the consolidated WTO jurisprudence recalled above, the Arbitration Panel will therefore proceed with a qualitative analysis based on the following set of hypotheses: (i) the 2005 export ban forms part of Ukraine’s broader policy on forestry preservation, resulting in synergies with domestic measures targeting illegal felling; (ii) the 2005 export ban aims at drastically reducing any demand from abroad giving rise to illegal logging.
318. In this connection, the Arbitration Panel finds it appropriate that the “sufficient evidence” required to test and support such hypotheses is to be calibrated in light of the level of trade in the covered species occurring before the ban was enacted. In this respect, the Panel notes that in the EU’s view there is a lack of evidence pointing to the existence of any substantial volumes of export (from Ukraine)/import (into the EU) activities concerning the ten covered species.³⁰⁴ The Panel considers that such lack of evidence indicates that the Arbitration Panel cannot but expect that the magnitude of the contribution to the stated goal of the measure at issue is commensurate to the economic importance of such minimally traded ten species.
319. Having this in mind, the Arbitration Panel turns of the question of whether the 2005 export ban, together with the other measures envisaged within the broader policy scheme, is apt to contribute to its environmental objective. In this connection, the Arbitration Panel recalls that, in previous DSB rulings concerning export restrictions, WTO adjudicatory bodies have focused on whether the responding Party had adopted any corresponding domestic

³⁰⁴ *EU’s Responses to the Arbitration Panel’s Questions*, para. 5.

measure within its broader policy programme, which addressed domestic exploitation and not just foreign consumption.³⁰⁵

320. Accordingly, the Arbitration Panel notes that Ukraine has implemented a number of internal measures aimed at fighting unauthorised felling, as found in Section 4.3.2.1.2.2. Such measures do not prohibit harvesting of each and all of the covered species in and of itself, but they overall attempt at governing domestic felling for the purposes of excluding industrial and commercial exploitation of “rare and valuable species” covered by the ban.³⁰⁶ In the view of the Arbitration Panel, the 2005 export ban is complementary to and reinforces such domestic framework in the sense of further discouraging unauthorised felling that might originate from foreign demand of the covered species. In this connection, the Arbitration Panel further observes that Ukraine has also started to reinforce measures against illegal logging.³⁰⁷

321. At the same time, the Arbitration Panel notes Ukraine’s contention that “Ukraine’s environmental safety policy aimed at the preservation of forests did not result in decrease of felling and the increase of the woodland.”³⁰⁸ The Arbitration Panel appreciates the challenges of ensuring forest preservation in a country “still striving to put in place modern and effective governance of its forests.”³⁰⁹ The Arbitration Panel understands these challenges as requiring a variety of internal measures and corresponding external measures. In this connection, the Arbitration Panel is satisfied that “by barring the export market for those species, the Ukrainian authorities are limiting the possible outlets for timber and sawn woods that would be produced from these species, securing a better control over any illegal or irregular felling.”³¹⁰

322. The Arbitration Panel considers that this conclusion is not frustrated by the fact that Ukraine’s internal measures do not make it *per se* illegal to harvest the trees species covered by the 2005 export ban, as the EU contends. Concluding otherwise would be tantamount to say that an export ban cannot be justified under Article XX (b) of the GATT 1994 except when it is implemented in connection with a total harvesting prohibition for domestic purposes. The Panel however considers that such a complete correspondence between

³⁰⁵ Panel Reports, *China – Rare Earths*, para. 7.174. For a complete recollection, see also Espa, *Export Restrictions on Critical Minerals and Metals*, op. cit., pp. 211-213.

³⁰⁶ In the view of the Arbitration Panel, Article 70, paragraph 9, to which the EU refers, reinforces rather than undermines Ukraine’s contention that “rare and valuable species”, in any case those listed in the Red Book, are not intended for commercial exploitation to the extent that felling cannot occur but with a special authorization of the central executive body: *EU’s Opening Statement*, para. 100.

³⁰⁷ *Ukraine’s Answers to the Arbitration Panel’s Questions*, paras 103-104.

³⁰⁸ *Ukraine’s Written Submission*, para. 168.

³⁰⁹ *Ukraine’s Opening Statement*, para. 119.

³¹⁰ *Ibidem*, para. 118.

internal and external measure is not required under Article XX (b) of the GATT 1994, which does not contain explicit language on evenhandedness, as opposed to Article XX (g) of the GATT 1994. The Panel furthermore considers that this conclusions holds in particular in light of the circumstances of the case and their implications as set out above in paragraph 318.

323. In the view of the Arbitration Panel, the analysis above shows that the 2005 export ban, in combination with Ukraine's internal measures, purport to prevent industrial and commercial exploitation of the "rare and valuable species." For this reason, the Arbitration Panel is satisfied that the the 2005 export ban is apt to contribute to its environmental goals based on qualitative evidence that the Arbitration Panel considers sufficient in light of the specific circumstances of the case as explained in paragraph 318 above.

324. The Arbitration Panel now turns to the second sub-requirement, that is, to the analysis of whether there is a "genuine relationship of ends and means between the objective pursued and the measures at issue."³¹¹

325. The Arbitration Panel recalls that the EU contends that "Ukraine has failed to show the existence of a particular link between export and the risk of extinction of those wood species."³¹² The Arbitration Panel understands the EU's contention to be based on "the absence of any quantification or concrete estimation of the effects of the 2005 export ban on the preservation of these wood species."³¹³

326. The Arbitration Panel notes that the lack of data on the actual effects of the 2005 export ban on the restoration of land is not dispositive for excluding that the measure bears a rational connection to its stated environmental goal within the meaning of Article XX(b) of the GATT 1994, nor can it be equated to a confirmation that "the measures's contribution to the objective is inexistent or too small to be observed."³¹⁴ In this connection, the Arbitration Panel recalls its previous finding that the 2005 export ban is synergetic with the broader set of internal measures adopted by Ukraine to achieve the restoration of forest land. In the view of the Arbitration Panel, this is tantamount to considering that a rational connection between the measure at issue and the environmental goal cannot be appreciated in isolation from the broader policy framework designed in Ukraine to achieve forest protection.

³¹¹ Panel Reports, *China–Rare Earths*, para. 7.146, citing Appellate Body Report, *Brazil–Retreaded Tyres*, para. 145.

³¹² *Ukraine's Answers to the Arbitration Panel's Questions*, para. 174.

³¹³ *EU's Opening Statement*, para. 85.

³¹⁴ *Ibidem*, para. 85.

327. The Arbitration Panel is therefore satisfied that Ukraine’s policies altogether genuinely seek to improve sustainable forest management and to achieve forest protection and restoration via rules governing felling and logging, including specific rules on rare and valuable species.³¹⁵ In the view of the Arbitration Panel, the fact that Ukraine’s measures altogether “did not result in decrease of felling and the increase of the woodland”³¹⁶ does not compromise this conclusion; rather, if anything, it corroborates the urgency of continuing to fight excessive/illegal logging by all adequate means, that is, by internal and external (trade) measures.

328. As relevant factual context, it has finally to be taken into account that the ten species at issue do not constitute extensive forests, but at most just woods (as is the case of chestnuts). Cherries, pears, for instance, are mostly cultivated species for fruit collection and pleasure.³¹⁷

The trade restrictiveness of the measure

329. The Arbitration Panel turns now to assessing the trade restrictiveness of the measure. The Arbitration Panel notes that this element of its weighing and balancing analysis bears particular importance in connection with the alternative measures analysed in the following sub-section.

330. The Arbitration Panel notes that Ukraine does not dispute the EU’s contention that the 2005 export ban is “as trade restrictive as it can be, since it prohibits any export of timber and sawn wood of the listed wood species.”³¹⁸ The Arbitration Panel also notes, however, that Ukraine claims that the measure at issue is a mere exercise of its right to regulate its own level of environmental protection, a right which is duly recognised in Article 290 of the AA, belonging to Chapter 13. The Arbitration Panel understands that Ukraine further contends that the 2005 export ban falls within the ambit of Article 294 of the AA, because it targets illegal logging and thus aims at improving forest law governance and promoting trade in legal and sustainable forest products.³¹⁹

331. The Arbitration Panel recalls its conclusion in paragraph 253 above:

The provisions of Chapter 13 are not self-standing or unqualified exceptions that could justify measures that are *per se* in breach of

³¹⁵ *Ukraine’s Written Submission*, paras 161-189.

³¹⁶ *Ibidem*, para. 168.

³¹⁷ The Arbitration Panel refers in this respect to Anton Chekhov’s universally famous play “The Cherry Garden” which the author has situated in Ukraine.

³¹⁸ *EU’s Responses to the Arbitration Panel’s Questions*, para. 183. See, in particular, *Ukraine’s Written Submission*, para. 119.

³¹⁹ *Ukraine’s Answers to the Arbitration Panel’s Questions*, para. 236.

Article 35 of the AA. The Arbitration Panel is nonetheless persuaded that the provisions of Chapter 13 serve as relevant “context” for the interpretation of other provisions of Title IV which allow the Parties to introduce or maintain measures in derogation to Article 35 of the AA including for environmental reasons based on Article 36 of the AA in conjunction with Article XX of the GATT 1994, as discussed below in Section 4.3.

332. Accordingly, the Arbitration Panel considers that the requirement to interpret Article 36 of the AA harmoniously with the provisions of Chapter 13 comports with admitting that a highly trade restrictive measure such as an export ban may still be found necessary within the meaning of Article XX(b) of the GATT 1994, as incorporated into Article 36 of the AA. The Arbitration Panel considers that the provisions of Chapter 13 (*in casu*, Article 290 on the right to regulate and Article 294 on trade in forest products) serve as relevant context for the purposes of “weighing and balancing” with more flexibility any of the individual variables of the necessity test, considered individually and in relation to each other. *In casu*, as a consequence, the high trade restrictive effect inherent to an export ban cannot be considered to automatically outweigh the other elements to be taken into account in weighing and balancing the factors relevant to an assessment of the “necessity” of the measure.

333. In light of the foregoing, the Arbitration Panel concludes that the restrictiveness of the 2005 export ban does not exclude that the measure be found necessary within the meaning of Article XX(b) of the GATT 1994.

Existence of alternative measures

334. The Arbitration Panel proceeds now with the analysis of the last element to be weighed and balanced, that is, the determination of whether less trade restrictive alternative measures are available to Ukraine that could still ensure an equal contribution to the stated objective.

335. The Arbitration Panel first of all recalls that, according to a consolidated WTO jurisprudence on Article XX(b) of the GATT 1994, the burden of proof to demonstrate that there are reasonably available alternative measures which would make at least the same contribution to the protection of human, animal or plant life or health lies on the complaining party.³²⁰ If the complainant identifies alternative measures, the burden of

³²⁰ Appellate Body, *EC – Seal Products*, para. 5.169.

- proof then shifts to the respondent to show that the identified measures are not reasonably available or make the same contribution.³²¹
336. The Arbitration Panel notes that the EU has identified an alternative measure, namely the introduction of “a limitation of the quantity of trees or wood of the species covered by the ban that can be harvested or placed on the market each year at a sustainable level.”³²²
337. The Arbitration Panel further notes that Ukraine does not dispute that the identified alternative measure would be less trade restrictive.³²³ Ukraine rather contends that such an alternative measure is not reasonably available within the meaning of Article XX(b) of the GATT 1994 to the extent that it argues, at several instances, that “there are no other practical alternatives.”³²⁴
338. In this connection, the Arbitration Panel considers that the EU recognises that the alternative measure “would presuppose that Ukraine has at its disposal data on the population level of these wood species in its forests and possibly on their development trends”.³²⁵ The Arbitration Panel further observes that the EU admits that Ukraine does not have such data at its disposal.³²⁶ The Arbitration Panel notes that the implementation of such an alternative measure would thus imply, as clarified by the EU, a quantitative analysis in relation to the ten wood species based on a scientific assessment of the sustainable level of exploitation of those wood species.³²⁷
339. The Arbitration Panel recalls that in Section 4.3.2.1.2.2 it already acknowledged that the lack of such data is due to Ukraine’s struggle towards a more effective governance of its forests. The Arbitration Panel is satisfied that the challenges faced by Ukraine authorities, including the emergency in international relations, make it difficult for Ukraine to immediately implement the EU’s suggested alternative measure. This applies even more in respect of species that by their nature do not grow in substantial quantities in the wild and whose stock is therefore difficult to assess accurately.
340. Similar criticalities are entailed by another alternative measure suggested by the EU, namely the implementation of the National Forestry Inventory as part of Ukraine’s ongoing efforts to strengthen its legislation regarding forest management and protection.³²⁸ Based

³²¹ Panel Reports, *China – Rare Earths*, para. 7.180.

³²² *EU’s Responses to the Arbitration Panel’s Questions*, para. 106.

³²³ *Ukraine’s Opening Statement*, para. 119.

³²⁴ *Ukraine’s Written Submission*, para. 239; *Ukraine’s Opening Statement*, para. 119.

³²⁵ *EU’s Responses to the Arbitration Panel’s Questions*, para. 107.

³²⁶ *Ibidem*, para. 107.

³²⁷ *Ibidem*, para. 108.

³²⁸ *EU’s Opening Statement*, para. 150; *Ukraine’s Written Submission*, para. 47.

on the information provided by Ukraine, the Inventory “will enable a reliable assessment of plantations shared stocks and indicators of its current growth rates required for the assessment of the level of the forest management intensity.”³²⁹ The EU infers from this statement that this could be a viable alternative not only to the 2015 temporary export ban but also to the 2005 export ban.³³⁰

341. The Arbitration Panel first notes that such inventory was far from being available at the time of the establishment of the Arbitration Panel.³³¹ Second, the Arbitration Panel considers that, once ready, Ukraine’s Inventory might arguably allow collecting data on the population of the ten covered species. It may also likely provide a basis for running an assessment of the exploitation rate that such species can sustain. In this respect, the prospective adoption of the Inventory may in principle create more favourable conditions for the implementation of the first alternative measure suggested by EU and described in paragraph 332. At the same time, however, the Panel cannot but consider the struggles that Ukraine convincingly refers to, including the emergency in international relations. In the view of the Panel, such difficulties likely make the reaching of such a scenario, and the prospects for a successful implementation of such a system, not immediate and still very challenging – in addition to remaining prone to abuses. For these reasons, the Panel is not satisfied that the implementation of a National Forestry Inventory was, and today is, a reasonably available alternative that could make the same contribution to the stated objective with regards to the ten “rare and valuable” species.

342. Finally, the Arbitration Panel notes that the EU also suggests that another alternative measure could be to adopt “a moratorium on cutting trees of these wood species in the areas where illegal logging occurs the most.”³³² The Arbitration Panel however notes that it is undisputed by the Parties that there is a lack of reliable data on the extent and the localisation of illegal logging in relation to the ten covered species.³³³ The Arbitration Panel therefore concludes that such an alternative would be difficult to implement effectively and would thus in practice not make the same contribution to the stated objective.

³²⁹ *Ukraine’s Written Submission*, para. 47.

³³⁰ *EU’s Opening Statement*, para. 150.

³³¹ *Ukraine’s Written Submission*, para. 47. The Arbitration Panel however notes that it was approved later on in the form of the Law of Ukraine “On Amendments to Forest Code of Ukraine in regard of National Forestry Inventory”, adopted 02 June 2020.

³³² *Ibidem*, para. 111.

³³³ *EU’s Responses to the Arbitration Panel’s Questions*, para. 16 ff and *EU’s Responses to the Arbitration Panel’s Questions*, para. 102 ff.

343. In light of the foregoing, the Arbitration Panel is not convinced that any of the alternative measures identified by the complainant were reasonably available to Ukraine at the time of the establishment of the Arbitration Panel or make the same contribution to the protection of plant life or health of the ten covered species.

4.3.2.1.4 The Arbitration Panel's finding

344. For the reasons set out above, the Arbitration Panel concludes that the 2005 export ban is (i) designed to protect plant life or health; and (ii) necessary to protect plant life or health. The Arbitration Panel therefore **finds** that the 2005 export ban is “provisionally” justified in accordance with Article XX(b) of the GATT 1994.

4.3.2.2 The requirements of the chapeau of Article XX of the GATT 1994

345. Having found that the challenged measure is provisionally justified under subparagraph (b) of Article XX of GATT 1994, as being necessary for the protection of plant life and health, we must now proceed to the final step of our analysis in order to determine whether the measure satisfies the requirements of the chapeau of Article XX of the GATT 1994.

346. We shall thus assess whether the discriminatory aspects of the 2005 export ban have been “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”

4.3.2.2.1 Applicable principles

347. Prior DSB rulings have clarified that the chapeau aims at addressing the manner in which a measure is applied and preventing abuses of Article XX exceptions.³³⁴ In this respect, the requirements imposed by the chapeau “impart meaning to one another [so that] the kind 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.”³³⁵

348. As to the “arbitrary or unjustifiable discrimination” clause, WTO jurisprudence has clarified that it imposes three conditions: (i) the application of a measure must result in

³³⁴ Appellate Body Report, *US–Gasoline*, p. 22.

³³⁵ *Ibidem*; Panel Reports, *China–Rare Earths*, para. 7.34.9.

discrimination; (ii) the discrimination must be arbitrary or unjustifiable; and (iii) it must occur in countries where the same conditions prevail.³³⁶

349. The first requirement refers to both MFN and national treatment types of discrimination.³³⁷

The Appellate Body has however explained that the standard of discrimination under GATT obligations is not the same as under Article XX exceptions. In particular, the Appellate Body stated that “the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994.”³³⁸ In *EC – Seal Products*, the Appellate Body clarified that “[t]his does not mean, however, that the circumstances that bring about the discrimination that is to be examined under the chapeau cannot be the same as those that led to the finding of a violation of a substantive provision of the GATT 1994.”³³⁹

350. Likewise, for the purpose of our analysis in this case, we will also look at the standard of discrimination under the GATT 1994 obligations and look at the context in which the 2005 export ban has been adopted.

351. As to the second requirement, the Appellate Body in *Brazil–Retreaded Tyres* stated that the analysis of whether discrimination is justifiable or not under the chapeau of Article XX should be based on whether the “reasons given for this discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective”, and also take into account, as a relevant factor, the effects of the discrimination.³⁴⁰ According to *US–Gasoline*, moreover, discrimination may be arbitrary or unjustifiable “where alternative measures exist which would have avoided or at least diminished the discriminatory treatment.”³⁴¹

352. As to the third requirement, the Appellate Body considered that “only ‘conditions’ that are relevant for the purpose of establishing arbitrary or unjustifiable discrimination in the light of the specific character of the measure at issue and the circumstances of a particular case are relevant under the chapeau.”³⁴² The Appellate Body also stated that “the identification of the relevant ‘conditions’ under the chapeau should be understood by reference to the applicable subparagraph of Article XX under which the measure was provisionally justified

³³⁶ Appellate Body Report, *US–Gasoline*, para. 150; Panel Reports, *China–Rare Earths*, para. 7.350.

³³⁷ Panel Reports, *China–Rare Earths*, para. 7.350.

³³⁸ Appellate Body Report, *US – Shrimp*, para. 150 (referring to Appellate Body Report, *US – Gasoline*, p. 23).

³³⁹ Appellate Body Report, *EC – Seal Products*, para. 5.298.

³⁴⁰ Appellate Body Report, *Brazil–Retreaded Tyres*, paras 227–230.

³⁴¹ Appellate Body Report, *US–Gasoline*, pp. 26–7.

³⁴² Appellate Body Report, *EC – Seal Products*, para. 5.299.

and the substantive obligations under the GATT 1994 in respect of which a violation has been found.”³⁴³ A respondent arguing that conditions in the compared countries are not the same bears the burden of proving its claim.³⁴⁴

353. Finally, in respect of whether the measure constitutes a “disguised restriction on international trade”, the Appellate Body confirmed in *US – Gasoline* that

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." 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. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.³⁴⁵

4.2.2.2 The Arbitration Panel’s analysis

354. The Arbitration Panel turns now to the analysis of whether the 2005 export ban is applied in a manner that satisfies the requirements of the chapeau of Article XX of the GATT 1994.

355. First, with respect to the question of whether the 2005 export ban is applied in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail, Ukraine argues that the measure at issue satisfies this requirement in that it applies *erga omnes*, that is, “to all countries and not only to the European Union.”³⁴⁶ The Arbitration Panel understands Ukraine’s defence to mean that the 2005 export ban would meet the first chapeau requirement inasmuch as it does not discriminate “among like products originating in or destined for different countries” in accordance with the most-favoured nation principle.³⁴⁷

356. The Arbitration Panel recalls that according to relevant WTO jurisprudence, the chapeau covers both MFN and national treatment discrimination scenarios. In *China – Rare Earths*, WTO adjudicatory bodies have already ruled against export restrictive measures (*in casu*,

³⁴³ *Ibidem*, para. 5.301.

³⁴⁴ *Ibidem*.

³⁴⁵ Appellate Body Report, *US – Gasoline*, p. 23.

³⁴⁶ *Ukraine’s Written Submission*, para. 257, citing Article 2 of the Law No. 2860-IV.

³⁴⁷ *Ukraine’s Written Submission*, para. 257 and Article I:1 of the GATT 1994.

export duties imposed by China) to the extent that they resulted into a “national treatment-type discrimination arising from the difference in treatment accorded to the like product when destined for export, as compared with the treatment of the like product when destined for domestic consumption.”³⁴⁸

357. The Arbitration Panel therefore observes that in order to be compliant with this requirement, the 2005 export ban must not result in a national treatment-type of discrimination. The matter to be assessed is therefore whether such discrimination is rationally connected to the goal of the measures and arises between countries where different conditions prevail. The Arbitration Panel further recalls that, according to prior DSB rulings, the burden of proof in this connection lies on the respondent.³⁴⁹
358. The Arbitration Panel notes that Ukraine has focused its argument on the fact that its export ban applies to all exports of the covered species, without discrimination between countries of possible destination. This showing is however not sufficient to discharge Ukraine’s burden of proof. Ukraine should have also demonstrated that there is no discrimination in treatment between the EU (on whose market the placement of wood of these species originating in Ukraine is precluded by the ban) and its domestic market, provided that the same conditions prevail in the two markets.
359. Any existing discrimination should in turn be rationally connected to the stated goal of the measure and occur between countries (*in casu*, Ukraine and the EU) where hypothetically different conditions prevail.
360. The effect on the EU export market has to be compared to the effects of the various Ukrainian measures restraining the use of the wood of the ten species on its domestic market. The Arbitration Panel has examined this question in Section 2.3.1 above. Those effects have to be evaluated taking into account the fact that the wood of the ten species is not meant for industrial use.
361. The Arbitration Panel is persuaded that, as a consequence of those measures (strict limitations to felling of the species listed in the Red Book, unsuitability for industrial exploitation also of the other three non-included species in the IUCN either: pears, chestnuts, black cherries), the wood of these ten species is not marketable or marketed within Ukraine, at least not in measurable quantities.³⁵⁰

³⁴⁸ Panel Reports, *China – Rare Earths*, para. 7.190.

³⁴⁹ Appellate Body Report, *EC – Seal Products*, para. 5.301.

³⁵⁰ The Arbitration Panel believes that in accordance with the maxim *de minimis non curat praetor* (the judge does not care of minimal matters”) it does not have to look at marginal or niche uses of some of these wood species, such as it is documented for violin manufacturing (acacias) or cabinetry (cherry wood).

362. In this connection, the Arbitration Panel notes that in response to a specific question by the Arbitration Panel the EU has answered that “[t]he EU does not dispose of specific import statistics for the ten wood species covered by the 2005 export ban, which can only mean that imports of wood of these species were not particularly significant in terms of trade volume to justify a dedicate reporting.”³⁵¹
363. The Arbitration Panel interprets this to mean that there was no sizeable industrial demand for these species from Ukraine on the EU market. No information is available on exports to other countries. In other words, imports of wood of these ten species from Ukraine to the EU were, if not inexistant, at best so small as not to warrant statistical attention. The 2005 export ban appears in practice not to have changed the previous situation, with the exception of rendering illegal any export of wood from Ukraine of those species obtained by illegal felling.
364. This conclusion is confirmed by the fact that the issue of the pre-existing ban was not raised during the negotiation of the Agreement, or thereafter before the introduction of the 2015 temporary export ban, as confirmed by the EU’s answer to the specific question put to it by the Arbitration Panel.³⁵²
365. The Arbitration Panel concludes therefore that this ban, in context, does not create discrimination between the domestic Ukrainian market and EU imports of wood from Ukraine of the ten species covered by the 2005 export ban.
366. This conclusion is reinforced, in the Arbitration Panel’s view, by the fact that the 2005 export ban does not aim at the conservation of forests in general, but is focused specifically on the ten endangered species. Secondly, the Arbitration Panel notes that the 2005 export ban also prohibits export of sawn wood of these species. This is in line with Ukraine’s measures restricting the placement on the domestic market of wood of the ten species, which also restrains sawing. The general prevention of commercial exploitation of the wood from the ten species, without discrimination, is thereby enhanced.
367. Finally, the last requirement to be ascertained is whether the alleged arbitrary or unjustifiable discrimination is found to exist “between countries where the same conditions prevail.” The Arbitration Panel considers that it is irrelevant whether in Ukraine and the EU “the same conditions prevail,” since it has reached the conclusion that the ban, having regard to the context, does not discriminate between the Ukrainian market and the EU imports of wood from Ukraine of the ten species.

³⁵¹ *EU’s Responses to the Arbitration Panel’s Questions*, para. 5.

³⁵² *Ibidem*, paras 37-38.

368. For the sake of completeness, the Arbitration Panel will also examine this issue. The evidence before the Arbitration Panel suggests that the conditions are not different with regard to the ten species and their wood between Ukraine and the EU. Notably, the extensive, detailed and exhaustive FAO report submitted by the EU on the state of European Forests does not identify any distinction between forests of the same kind in Central Europe, meaning between those in the EU territory and those of neighbouring countries such as Ukraine and Belarus.³⁵³ There is also no evidence of different conditions between the two markets as to the commercial-industrial use (or rather non-use) of the wood of those species, as highlighted above.³⁵⁴
369. The Arbitration Panel concludes that the 2005 export ban, considered in context, does not discriminate between exports to the EU and the Ukrainian domestic market for the wood of the ten species at issue. It therefore complies with the requirement of the chapeau that no such discrimination be created between markets where the same conditions prevail. *A fortiori* the ban does not constitute an arbitrary or unjustifiable discrimination.
370. Ukraine also maintains that the 2005 export ban is not applied in a manner that constitutes a “disguised restriction on international trade.” In support, Ukraine submits that the measure is “publicly available and [was] published at the official website of the Parliament of Ukraine, therefore, it can be found in public access.”³⁵⁵
371. There is no doubt that the law providing for the 2005 export ban was enacted after having gone through public legislative proceedings and that its text is public. The Arbitration Panel recalls however, that based on prior DSB rulings, “concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of ‘disguised’ restriction.”³⁵⁶ The Arbitration Panel, on the other hand, recalls that WTO adjudicatory bodies have made clear that the same kind of considerations pertinent to assessing whether the 2005 export ban constitutes arbitrary or unjustifiable discrimination have a bearing in the determination of the ‘disguised restriction’ standard.³⁵⁷

³⁵³ FAO, State of Europe’s Forests 2015 (Exhibit EU-23).

³⁵⁴ In light of the above findings on the non-industrial use of at least most of the wood of the ten species covered by the 2005 export ban, the Panel cannot agree with the EU submission that this ban, just as the 2015 temporary export ban, “create[s] a discrimination between Ukraine and the EU (and between Ukrainian consumers and EU consumers) with regard to access to (or consumption of) those Ukrainian wood products.” *EU’s Opening Statement*, para. 176.

³⁵⁵ *Ukraine’s Written Submission*, para. 262.

³⁵⁶ Appellate Body Report, *US – Gasoline*, p. 25.

³⁵⁷ *Ibidem*.

372. The previous considerations and findings make clear, in the Arbitration Panel’s view, that the 2005 ban was introduced for *bona fide* conservational concerns and is neither meant to, nor does it restrict, trade under a false environmental pretence.

4.3.2.2.3 The Arbitration Panel’s finding

373. Based on the foregoing, the Arbitration Panel **finds** that the 2005 export ban’s application is compliant with the requirements of the chapeau of Article XX of the GATT 1994 since it does not “constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail” or “a disguised restriction on international trade.”

4.3.2.3 Overall finding on whether the 2005 export ban is justified by Article XX(b) of the GATT 1994

374. For the reasons set out above, the Arbitration Panel **finds** that the 2005 export ban is justified under Article XX of the GATT 1994, as made applicable to the Association Agreement by Article 36 of the AA.

375. Accordingly, the Arbitration Panel **finds** that the 2005 export ban is justified by the exception of Article 36 AA and is therefore not in breach of the Association Agreement.

376. Nonetheless, the Arbitrators consider that the “valuable and rare” tree species conservation objectives that Ukraine has invoked as a justification of its 2005 export ban could be more efficiently pursued if all the ten species covered in the ban would be listed in Ukraine’s Red Book.

4.3.3 Whether the 2015 temporary export ban is justified by Article XX(g) of the GATT 1994

377. The examination of the consistency of the 2015 temporary export ban with Article 35 of the AA and the Association Agreement in general will follow the order outlined hereafter. Firstly the Arbitration Panel recalls that at Section 4.2 the Arbitration Panel has found that both the 2005 and 2015 export bans are inconsistent with Article 35 of the AA and as such inconsistent with Ukraine’s obligations under the Agreement, except if justified by Article XX of the GATT 1994, which is made part of the Association Agreement by Article 36 of the AA, taking into account Chapter 13 of the AA.

378. In respect of the 2015 temporary export ban, the Arbitration Panel recalls that Ukraine has invoked as justification Article XX(g) of the GATT 1994 which exempts, in sub-paragraph

(g), at the conditions provided for in its chapeau, inconsistent domestic measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”

379. The Arbitration Panel does not need to restate here the function of the exceptions of Article XX of the GATT 1994 as made applicable by Article 36 of the AA, since it has highlighted the issue in Section 4.3.1 above. The same applies to the double-tiered approach required for examining whether the conditions for a justification under Article XX of the GATT 1994 are met. Thus our analysis here must focus on whether the challenged measure satisfies the requirements of the specific subparagraph of Article XX of the GATT 1994 invoked by the Respondent, and, if so, whether the requirements of the chapeau are also complied with.

380. The Arbitration Panel will therefore recall first the positions of the parties and then review the established principles of interpretation and standards of application for Article XX(g) of the GATT 1994 developed within the WTO dispute settlement system in respect of this provision (Section 4.3.3.1). The Arbitration Panel will thereafter examine whether the 2015 temporary export ban conforms to those requirements (Section 4.3.3.2). We will proceed to the analysis under the chapeau only if the 2015 temporary export ban is found compliant with the requirements of subparagraph (g).

4.3.3.1 The nature of the 2015 temporary export ban

381. In these proceedings, the EU has challenged as incompatible with the Association Agreement the temporary prohibition (for a duration of 10 years) introduced by Ukraine in 2015 on exports of unprocessed timber by Law 325-VIII of 9 April 2015.³⁵⁸ Article 1.2 of this Law added such export prohibition as new Article 2-1 in the previous Law 2860-IV. The new Article 2-1 (“Temporary Ban for the Export of Unprocessed Timber”) states that “Temporarily for a 10 year period, it is prohibited to export unprocessed timber beyond the

³⁵⁸ The Law of Ukraine No. 325-VIII of 09 April 2015 “On amendments of the Law of Ukraine “On Elements of the State Regulation of the Business Operators’ Activities Related to the Sale and Export of Timber” Concerning the Temporary Export Ban for Unprocessed Timber”, Information from the Verkhovna Rada of Ukraine 20152006, No. 313, p. 291 (Exhibit ExhEU-4). This provision has been incorporated in Law of Ukraine 2860-IV of 8 September 2005 (Exhibit Exh EU-3) which in its previous version of 2005 included in Article Art2 the prohibition of export of timber and sawn wood of valuable and rare wood species. The latest text of Law 2860-IV results from the further amendments introduced by Law 2531-VIII of 6 September 2018, On Amendments to Certain Legislative Acts of Ukraine on the Preservation of Ukrainian Forests and preventing the Illegal Export of Unprocessed Timber, Information from the Verkhovna Rada of Ukraine, 2018, No. 42, p. 327, which at Article 4 has introduced certain “Restriction[s] of domestic use of unprocessed timber” which are being discussed infra (Exhibit EU-5 and Exhibit UKR-2).

custom territory of Ukraine (code 4403 UCG FEA).” The prohibition applies from 1 November 2015 to wood species other than pines, and from 1 January 2017 to pine wood species. There is no dispute between the Parties as to the text and content of this provision.³⁵⁹

382. It is also undisputed that a domestic restriction in connection with the export ban on unprocessed timber was first introduced in 2018 by an amendment to Law 2860-IV.³⁶⁰ The new provisions, in the final text, enacted on 6 September 2018, established a restriction on domestic consumption of unprocessed timber of 25 million cubic metres per year for the duration of the temporary export ban in accordance with Article XX, sub-paragraph (g)” of the GATT.³⁶¹

383. The Parties disagree on the purpose of such prohibition. The EU considers that an export prohibition such as the one at issue is by its own terms a trade restrictive measure which is at odds with Article XI of the GATT 1994, and in this case also with the specific obligation of Article 35 of the AA. According to the EU, if a Party prohibits the export of a product but does not effectively limit or prohibit domestic consumption or production, it would appear difficult to conclude that the export prohibition is in any way designed to protect a natural exhaustible resource.³⁶²

384.. The EU has stated that the 2015 restriction had “a manifest protectionist purpose.”³⁶³ In the view of the EU, such a purpose is unambiguously manifested by the Explanatory Note of 10 December 2014 accompanying the bill submitted to the Parliament of Ukraine which led eventually to the adoption of Law 325-VIII introducing the restriction. The Explanatory Note stated that the Bill “is intended to restore the woodworking and furniture industries, create employment and refocus exports from wood raw materials towards products with a higher degree of processing, by imposing a 10-year moratorium on the export of unworked timber and lumber.”³⁶⁴

³⁵⁹ *Ukraine’s Written Submission*, para. 65. The Parties also agree that an additional export ban on fuel wood, initially proposed in the amendment, was vetoed by the President and never entered into force: see *Ukraine’s Written Submission*, para. 93.

³⁶⁰ See above Section 2.4.

³⁶¹ Exhibit EU-5. The amendment introduced also criminal penalties for illegal felling and the concealment of timber or sawn wood from customs control.

³⁶² *EU’s Responses to the Arbitration Panel’s Questions*, paras 46,52.

³⁶³ *EU’s Written Submission*, para. 3.

³⁶⁴ *EU’s Written Submission*, para. 32 with reference to ExhibitEU-1. In its Response to the Panel’s Questions, at para. 68, the EU submits that “Ukraine’s measures are aimed at protecting and promoting the economic interests of Ukraine’s domestic industry at the expense of foreign competitors, rather than, as alleged by Ukraine, in order to promote legitimate non-economic policy objectives, such as those within the environmental objectives within the scope of Article XX(b) and Article XX(g) of the GATT 1994 invoked by Ukraine.”

385. The EU refers to and quotes also the statement of Ukraine's Parliament's Committee on Industrial Policy and Entrepreneurship of 7 April 2015 according to which "[t]he purpose of the Bill is to revive the woodworking and furniture industries, create jobs and refocus exports from raw wood materials towards highly processed products by imposing a 10-year moratorium on the export of timber and lumber."³⁶⁵

386. The EU concludes in its closing statement:

The EU would welcome Ukraine to enact measures genuinely related to the conservation of Ukraine forests and is ready to help Ukraine in that respect. The EU cannot accept that measures whose essential objective is to protect a domestic industry be shielded from scrutiny under the guise of environmental measures.³⁶⁶

387. Ukraine submits to the contrary that the 2015 temporary ban was introduced in order to protect exhaustible natural resources, specifically to stop intensive deforestation, which could lead to unpredictable results (e.g. floods, habitat destruction, and a generally complicated ecological situation) and in order to protect exhaustible natural resources.³⁶⁷

388. Ukraine denies the Explanatory Note's relevance in order to determine the purpose of the 2015 temporary export ban. According to Ukraine "[T]he 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 (eg 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."³⁶⁸

389. Ukraine explains further that "[I]n accordance with Article 91 of the Law of Ukraine 'On the Rules of Procedure of the Verkhovna Rada of Ukraine', 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."³⁶⁹

³⁶⁵ *EU's Written Submission*, para. 33 referencing Exhibit EU 6.

³⁶⁶ *EU's Closing Statement*, para. 15.

³⁶⁷ *Ukraine's Written Submission*, para. 76.

³⁶⁸ *Ibidem*, para. 102

³⁶⁹ *Ibidem*, para. 103.

4.3.3.2 “Provisional” justification under Article XX(g) of the GATT 1994

4.3.3.2.1 Introduction

390. It is not necessary to repeat here the Parties’ arguments in respect of the the relationship between Article 35 of the AA and Article XI of the GATT 1994, since they have been reported and discussed above in Section 4.2. It is not necessary either to restate the findings of the Arbitration Panel in this Section that both the 2005 and the 2015 export bans are inconsistent, on their face, with the export ban prohibition of Article 35 of the AA. Accordingly, the Arbitration Panel confirms its finding that Ukraine’s 2015 export prohibition of unprocessed timber is incompatible with Article 35 of the AA.³⁷⁰

391. Ukraine invokes Article XX of the GATT 1994 also in respect to the 2015 temporary export ban (here sub-paragraph (g)).³⁷¹

392. The Arbitration Panel further recalls that it has found in Section 4.3.2 above that the 2005 export ban is justified under Article XX(b) of the GATT 1994 and its chapeau. This conclusion was reached on the basis of the Arbitration Panel’s finding that the 2005 export ban was enacted in order to protect the existence of endangered rare and valuable wood species, is apt to contribute effectively to this objective in connection with domestic measures restricting the felling of such trees and the commercial use, if any, of their wood, and is not discriminatory in its application.

393. That reasoning is not *eo ipso* applicable to the analysis to be made here whether the different requirements of Article XX(g) are met in respect of the different 2015 temporary export ban. This stems from the different wording, content and requirements of subparagraphs (b) and (g) of Article XX of the GATT 1994, and from the difference between the two measures (bans). The mere fact that both bans impose a total prohibition of exports of wood products does not make the reasoning and findings developed in respect of the 2005 export ban applicable also in respect of the 2015 measure. The fact that the species protected by the 2005 export ban appear not to be traded and not to have a commercial value underlines the difference with the 2015 temporary export ban which

³⁷⁰ In reaching this conclusion the Arbitration Panel notes that Ukraine has not raised any justifications to its 2015 export restrictions based on Article XI:2 of the GATT 1994: see *Ukraine’s Answers to the Arbitration Panel’s Questions*, para. 196. Since Article Art 35 of the AA incorporates by reference the whole of Article XI of the GATT 1994, any justification that would be available under ArticleArt XI:2 of the GATT 1994 would be available also in respect the prohibitions and other restrictions to export restrictions set forth in Article Art35 of the AA.

³⁷¹ *Ukraine’s Written Submission*, para. 64. As mentioned in the previous footnote, Ukraine has expressly answered to Panel’s question 53 that “Ukraine does not rely on ArticleXI:2(a) of the GATT 1994 in order to justify the alleged violation,” *Ukraine’s Answers to the Arbitration Panel’s Questions*, para. 196.

relates to the timber of pine trees and other commercially exploited and sought after trees.

In addition, the 2005 ban is permanent whereas the 2015 ban is temporary.

394. What is instead common is our analysis of Article XX of the GATT 1994 in general, which therefore does not need to be repeated here.³⁷²

395. The Arbitration Panel does however recall that, on the one hand, WTO Members have the legal right to invoke the policies listed in the subparagraphs of Article XX of the GATT 1994 to justify inconsistencies of any domestic measure with their obligations under GATT 1994. The Arbitration Panel considers it important to reinstate that this is due to the fact that those policies have been recognised as important and legitimate in character.³⁷³

396. At the same time, this legal right is subject to the challenged WTO-inconsistent measures' compliance with the various requirements of Article XX of the GATT 1994, found in the chapeau and in the various sub-paragraphs thereof. The exceptions should not be applied so as to frustrate or defeat the market access rights that the other party of a dispute enjoys under the relevant substantive provisions of the WTO Agreements.³⁷⁴

4.3.3.2.2 Whether the measure relates to “the conservation of exhaustible natural resources”

397. The Arbitration Panel recalls that Article XX(g) of the GATT 1994 and its chapeau read 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 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:

[...]

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; [...]

³⁷² See above paras 258-263.

³⁷³ Appellate Body Report, *US-Gasoline*, p. 17; Appellate Body Report *US-Shrimp*, para. 156.

³⁷⁴ Appellate Body Report, *US-Gasoline*, p. 22; Panel Report, *US-Gambling*, paras 6.452 and 6.575.

4.3.3.2.2.1 The Parties' positions

Ukraine

398. Ukraine claims that the 2015 temporary export ban falls within the range of policies designed to conserve exhaustible resources in accordance with Article XX(g) of the GATT 1994, considering that although living species are in principle “renewable”, they are in certain circumstances susceptible of depletion, exhaustion and extinction, frequently due to human activities.³⁷⁵
399. Ukraine first points out three characteristics of the 2015 restrictions: exhaustion of forests (“its forest ecosystem is used beyond its carrying capacity”); the temporary nature of the measure (“Ukraine needs the temporary measure to improve the effectiveness of the forest management and to stop uncontrolled deforestation”); and the restriction on domestic production or consumption (introduced in 2018 by Law No. 2531-VIII “in line with Article XX of GATT 1994 at the level of 25 million cube metres per year, relating to the conservation of exhaustible natural resources”).³⁷⁶
400. Ukraine submits that the 2015 restriction is an element of a more general policy in the field of forest protection, put in place through the Forest Code of 1994, as amended, and the successive “State strategies related to public policy in forest management” adopted by Resolutions of the Cabinet of Ministers in 2002 and 2009. Ukraine also refers to a number of international treaties to which it has acceded between 2002 and 2016 and “which implied on Ukraine a significant number of international obligations of global and regional nature, in particular in respect to water protection and conservation of forestry.”³⁷⁷
401. Ukraine submits that its 2015 measure complies with both requirements of subparagraph (g) as panels and the Appellate Body have interpreted them in their reports, since (a) it “relates to” the conservation of wood, which is an exhaustible natural resource, and (b) “is made effective” in conjunction with restrictions on domestic production or consumption.
402. As to the first requirement, Ukraine argues as follows at paragraphs 266-268 of its written submission:³⁷⁸

Article XX (g) of the GATT 1994 requires “a close and real” relationship between the measure and the policy objective.³⁷⁹ The

³⁷⁵ *Ukraine's Written Submission*, para. 264, relying on Appellate Body Report, *US – Shrimp*, para. 128.

³⁷⁶ *Ukraine's Written Submission*, paras 68-81.

³⁷⁷ *Ibid.* para.116 ff.

³⁷⁸ To support its statements Ukraine refers to Panel Reports, *China – Rare Earths*, paras 7.266, 7.267, 7.290 and 7.379, and the Appellate Body Reports, *US – Shrimp*, paras 141 and 142, and *China – Rare Earths*, paras 5.132 and 5.136.

³⁷⁹ Appellate Body Report, *US – Shrimp*, para. 141.

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 Article XX (g) of the GATT 1994 does not require an evaluation of the actual effects of the concerned measure.³⁸⁰

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”³⁸¹ being part of its “policy objective of protection and conservation”³⁸² of natural resources. The word “conservation” means “the preservation of the environment, especially of natural resources”.

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.”³⁸³

403. Addressing specifically the features of the 2015 temporary export ban, Ukraine asserts that it relates to the conservation of exhaustible natural resources because it was introduced as part of the State strategy related to public policy in forest management. No proof is required that forests are in principle renewable while being at the same time exhaustible.³⁸⁴

404. Ukraine describes in detail in its written submission the development of its current policy of preservation and restoration of Ukrainian forests which started at the beginning of this century. Ukraine refers notably to the first State strategy related to public policy in the forest management adopted in 2002 by Resolution of the Cabinet of Ministers of Ukraine.³⁸⁵

405. However, according to Ukraine, the objectives of these strategies that the forest area will grow by 0.5 million hectares, forest cover will increase from 15.6 to 16.1%, and the total

³⁸⁰ Panel Reports, *China – Rare Earths*, paras 7.290 and 7.379.

³⁸¹ Panel Reports, *China – Rare Earths*, para. 7.266.

³⁸² Appellate Body Report, *US – Shrimp*, paras 141 and 142.

³⁸³ Panel Reports, *China – Rare Earths*, para. 7.267.

³⁸⁴ *Ukraine’s Written Submission*, para. 282.

³⁸⁵ See “On approval of the State Program ‘Forests of Ukraine’ for 2002-2015” No. 581, of 29 April 2002, subsequently updated in 2009 by Resolution of the Cabinet of Ministers of Ukraine “On approval of the State Targeted Program ‘Forests of Ukraine’ for 2010-2015” No. 977, of 16 September 2009, cited in *Ukraine’s Written Submission*, para. 274 and Exhibits UKR-36 and EU-23.

stock of timber stands will rise by 16.7%. have not been achieved.³⁸⁶ Since Ukraine has suffered tree cover losses from 2001 to 2018, “Ukraine introduced the 2015 temporary export ban which is aimed at preserving Ukrainian forests and is the only possible way to achieve the objective of conservation of exhaustible natural resource.”³⁸⁷

406. On this basis, Ukraine submits that it has shown that the 2015 temporary export ban was part of the “policy objective” of protection and conservation of Ukrainian forests.” The 2015 ban thus meets the first requirements of Article XX(g) of the GATT 1994. Ukraine adds that “Statistical data from the State Statistical Service of Ukraine shows that huge areas of Ukrainian forests have been depleted over the last years. However, after the introduction of the 2015 temporary export ban, and starting from 2016, depleted areas are gradually decreasing.”³⁸⁸

407. In response to the first question by the Arbitration Panel and based on the data set out in its written submission and summarised above, Ukraine has added that “The inability to follow the strategy (cumulatively because of tree cover loss, harvesting, illegal logging, forest plantations’ death, emergency in international relations situation, etc.) prompted the Members of Parliament (not central executive authority) to implement the state forestry policy by introducing 2015 temporary export ban as the only way to conserve exhaustible natural resources and reforest the depleted areas which on average needs years.”³⁸⁹

The EU

408. The EU argues in the first place that with regard to the 2015 temporary export ban, Ukraine could easily reach its objective of ensuring that its forests are exploited in a sustainable way with GATT compatible measures. For instance, Ukraine could limit the amount of wood that can be harvested every year at the level it considers appropriate and avoid imposing any restriction on export.”³⁹⁰

³⁸⁶ *Ukraine’s Written Submission*, paras 275-276.

³⁸⁷ Ukraine refers in this respect to data from the Global Forest Watch website (Table 8 of *UKR’s Written Submission*). However, Ukraine has subsequently acknowledged (Answer to Panel’s question 17, paras 98-100) that the “Global Forest Watch map has a low level of accuracy of detection of forest restoration, namely its accuracy is 42%.” This explains in Ukraine’s view why the above data show a negative balance between forest loss and restoration”, contrary to data from other Parties’ exhibits. Question 17 was as follows: “How does Ukraine reconcile the data of its authorities (a) on an increase of acreage of forests in Ukraine in recent years, and (b) that total volumes in cubic meters of forests have increased, notwithstanding logging (Exhibit UKR-01, Report on Forestry 2019, pp. 6-8, 14; Exhibit EU-2, Report on Forests 2018, p. 19 ss) with Table 8 [the Global Forest Watch table referred to above] in its Written Submission that there has been a “Tree cover Loss” in Ukraine since 2001.”

³⁸⁸ *Ukraine’s Written Submission*, para. 283 and Table 9. The Arbitration Panel notes however that Table 9 shows, after considerable fluctuation in the previous years, a decrease for 2016, an increase in 2017 and a decrease again in 2018.

³⁸⁹ *Ukraine’s Answers to the Arbitration Panel’s Questions*, para. 194

³⁹⁰ *EU’s Responses to the Arbitration Panel’s Questions*, paras 112-113.

409. Specifically, as to the requirements of subparagraph (g) of Article XX of the GATT 1994, the EU also recalls the standards that emerge from WTO jurisprudence.³⁹¹

410. The EU recalls first the relevant principles stemming from the WTO rulings as follows:

(...) in *China – Rare Earths*, the Appellate Body held that the term ‘relating to’ requires a close and genuine relationship of ends and means between the measure and the conservation objective. A GATT-inconsistent measure that is merely incidentally or inadvertently aimed at a conservation objective would not satisfy the ‘relating to’ requirement of Article XX(g).³⁹² There must be a substantial relationship between the measure and the objective,³⁹³ that relationship must be reasonable or proportionate, close and observable³⁹⁴. In simple words, it could be said that the measure must be primarily aimed at the objective in question.

(...) while Article XX(g) does not prescribe a specific analytical framework, the Appellate Body has emphasized that assessing a measure based on its design and structure is an objective methodology that also helps to determine whether or not a measure does what it purports to do. Therefore, the analysis of a measure’s design and structure allows a panel or the Appellate Body to go beyond the text of the measure and either confirm that the measure is indeed related to conservation, or determine that, despite the text of the measure, its design and structure reveals that it is not genuinely related to conservation.³⁹⁵ (...) ³⁹⁶

[...] the absence of an effective domestic restriction may be relevant to an assessment of whether the challenged measure ‘relates to’ conservation.³⁹⁷ Indeed, the absence or the lack of effectiveness of a domestic restriction bear witness to the fact that beyond the words that might be used, the measure cannot be genuinely related to the conservation objective. Indeed, unrestricted domestic production or consumption may very well jeopardise that objective”.³⁹⁸

411. Having thus summarised what in its view are the relevant principles to be applied by this Arbitration Panel in relation to the assessment of the 2015 temporary export ban in accordance with Article XX(g) of the GATT 1994, the EU continues by evaluating the conformity of the measure with those principles.

412. Before so doing, the EU states that it “recognizes that an export ban of unprocessed timber may, when applied in conjunction with an effective restriction on domestic production and

³⁹¹ *EU’s Responses to the Arbitration Panel’s Questions*, para.193.

³⁹² Appellate Body Reports, *China – Rare Earths*, para. 5.90.

³⁹³ (Appellate Body Report, *US – Gasoline*, p. 19.

³⁹⁴ Appellate Body Report, *US – Shrimp*, paras 141-142.

³⁹⁵ Appellate Body Reports, *China – Rare Earths*, para. 5.96.

³⁹⁶ *Ibidem*, para. 5.97.

³⁹⁷ *Ibidem*, para. 5.98.

³⁹⁸ *EU’s Written Submission*, paras 195-198.

- consumption, contribute to the conservation of forests, preserving them against a real risk of depletion and ensuring their sustainable exploitation.”³⁹⁹
413. However, Ukraine has not shown that this is the situation prevailing in the present case. Although Ukraine stresses that the 2015 temporary export ban was introduced in order to stop intensive deforestation, no concrete evidence shows the existence of intensive deforestation in Ukraine or an overall reduction of the forest area.⁴⁰⁰
414. The EU recalls certain basic figures concerning forests in Ukraine. Forests cover 15,9% of the country and they have increased by half in the last 50 years. The vast majority of the forests in Ukraine are state owned and about 73% of the forested area is managed by Ukraine’s State Agency for Forest Resources.⁴⁰¹ According to the Agency’s Annual Report for 2018 “the stock of standing timber is 2,1 billion cubic metres. That stock is increasing by an average of 35 million cubic metres annually. Every year around 22 million cubic metres are harvested. This means that just 63% of the yearly increase in standing stock is harvested.”⁴⁰²
415. The State strategies of 2002 and 2009 defining Ukraine’s forest management policy do not mention in any way the necessity or the desirability of imposing an export ban as a measure apt to achieving Ukraine’s objectives in that policy area. Therefore, the existence of these strategies does not demonstrate that there is a genuine relation of ends and means between the 2015 temporary export ban and Ukraine’s declared objective of ensuring the sustainable exploitation of its forests.⁴⁰³
416. The EU refers instead to Ukraine’s own export statistics which show that Ukraine’s exports of unprocessed timber to the EU and the rest of the world, which had been increasing year after year until 2014-2015, decreased massively in 2016 and fell to nil in 2017.⁴⁰⁴ At the same time export of sawn wood increased by 11%, confirming Ukraine’s

³⁹⁹ *EU’s Responses to the Arbitration Panel’s Questions*, para. 209.

⁴⁰⁰ In this respect, the EU points out (*EU answers to the Arbitration Panel’s questions*, paras 211-212) that the data in Table 8 and 9 of Ukraine’s Written Submission, allegedly based on data from Global Forest Watch and its own State Statistical Service that would show loss of forest coverage, intensive deforestation and “forest plantation death” do not indicate the respective sources.

⁴⁰¹ *EU’s Written Submission*, paras 11, 13 based on official Ukrainian sources.

⁴⁰² *Ibidem*, para. 14.

⁴⁰³ *EU’s Responses to the Arbitration Panel’s Questions*, para. 218.

⁴⁰⁴ According to Table 3 of *Ukraine’s Answers to the Arbitration Panel’s Questions*, p. 35, exports to the EU in 2014 : Tons 1.167 thousand – value USD 100M; 2015: Tons 1.323 th. - value USD 89 M; 2016: Tons 754 th.- value USD 43M; 2017: Tons 240 – value USD 15.000. These data correspond to those supplied by the EU concerning imports from Ukraine, Exhibit EU-18. In 2014-2015 EU imports from Ukraine under HS 4403 were about 34.5% of the total. Ukraine was the biggest exporter of pinewood to the EU, at the same level as Norway, followed by Belarus and Russia (Exhibit EU-17).

objective to develop the domestic transformation industry at the expense of the export of unprocessed wood.⁴⁰⁵

417. In this respect the EU refers to the following statement in the Explanatory Bill of the 2018 Amendment: “The volume of sales of industrial products in US Dollars fell by 4% in the first nine months of 2016 in comparison with the same period in the previous year, but the wood-working industry showed an increase of 16% and the furniture industry of 15% over the same period, over which the paper sector also showed an increase of 5%.”⁴⁰⁶

418. The EU concludes that the first requirement of Article XX(g) of the GATT 1994, that a measure which is incompatible with a WTO obligation has to relate (genuinely) to the conservation of exhaustible natural resources, is not met in respect of the 2015 temporary export ban.

4.3.3.2.2 The Arbitration Panel’s analysis

Introduction

419. In assessing whether the 2015 temporary export ban is justified pursuant to Article XX(g) of the GATT 1994 the Arbitration Panel will use the two-tiered approach of the WTO Appellate Body and panels, which it also followed above when examining the 2005 export ban. Firstly, the Arbitration Panel will examine if the measure complies with the requirements of subparagraph (g) of Article XX of the GATT 1994. Only if this analysis leads to a positive evaluation of compatibility, the requirements of the chapeau (non-discrimination, no disguised restriction to trade) would be subsequently examined.⁴⁰⁷

Applicable principles

420. Article XX(g) of the GATT 1994 was for the first time invoked in WTO disputes to justify export restrictions and was the focus of panel and Appellate Body reports in the disputes *China – Raw Materials* and *China – Rare Earths*. Under the first prong examined here, Article XX(g) of the GATT 1994 requires that a measure “relates” to the “conservation” of an exhaustible natural resource.

⁴⁰⁵ *EU’s Written Statement*, para. 40 referencing Exhibit EU-9, p.3, and *EU’s Closing Statement*, para.15.

⁴⁰⁶ *EU’s Written Statement*, para. 40 referencing Exhibit EU-9, p. 3.

⁴⁰⁷ See e.g. Appellate Body Reports, *US – Gasoline*, p. 22; *Dominican Republic – Import and Sale of Cigarettes*, para. 64; *US – Shrimp*, paras 118-120; *Brazil – Retreaded Tyres*, para. 139; and *Colombia – Textiles*, para. 5.67; and Panel Reports, *Colombia – Textiles*, para. 7.288; *Brazil – Taxation*, para. 7.857; and *India – Solar Cells*, para. 7.383.

421. The Arbitration Panel does not need to dwell here on the definition of “natural resources” since both Parties agree that timber is an unprocessed (first transformation) product of forest trees, which are undoubtedly exhaustible natural resources within the meaning of Article XX(g) of the GATT 1994.
422. As to the term “conservation”, the panel in *China-Raw Materials* recognised that WTO Members are entitled to determine their own conservation policies on the basis of a full range of policy considerations and goals, including their own economic and sustainable development needs, and that this can also be achieved by means of a “comprehensive policy comprising a multiplicity of interacting measures.”⁴⁰⁸
423. At the same time, the right to adopt conservation policies cannot be relied upon to “excuse export restrictions adopted in aid of economic development if they operate to increase protection of [a] domestic industry” in contradiction of other Article XX exceptions, such as Article XX(i).⁴⁰⁹
424. As to the “relating” requirement, the Appellate Body confirmed in *China-Rare Earths* the validity of the rational connection test applied in *US-Shrimps* and endorsed in *China-Raw Materials*. According to this test, for a measure to “relate to” conservation within the meaning of Article XX(g) of the GATT 1994, there must be a “close and genuine relationship of ends and means.”⁴¹⁰ This requirement must be established on a case-by-case basis.⁴¹¹
425. Such an assessment must focus on the “design and structure” of the measure concerned,⁴¹² considering them however not in isolation but “in their policy and regulatory context.”⁴¹³ In this respect, the mere existence of a comprehensive conservation policy incorporating the challenged measure does not *per se* establish the fulfilment of the “relating” requirement.⁴¹⁴
426. Finally, evidence relating to “the actual operation or the impact of a measure at issue” may moreover be considered in the assessment under Article XX(g), even if this paragraph does not prescribe an empirical or actual effects test.⁴¹⁵

⁴⁰⁸ Panel Reports, *China-Raw Materials*, para. 7.375 (citing Appellate Body Report, *Brazil-Retreated Tyres*, para. 151); Panel Reports, *China-Rare Earths*, paras 7.265-7.

⁴⁰⁹ Panel Reports *China-Raw Materials*, para. 7.386 ; Panel Report *China-Rare Earths*, para. 7.270.

⁴¹⁰ Appellate Body Reports *China-Raw Materials*, para. 355, citing Appellate Body Reports, *US-Shrimps*, para. 136, and *China-Rare Earths*, para. 5.90. See also on this issue Espa, *Export restrictions on Critical Minerals and Metals*, op. cit., pp. 215-216.

⁴¹¹ Appellate Body Reports, *China-Rare Earths*, para. 5.113.

⁴¹² Appellate Body Reports, *China-Rare Earths*, paras 5.96 and 5.111-4.

⁴¹³ Appellate Body Reports, *China-Rare Earths*, para. 5.108.

⁴¹⁴ Panel Reports, *China-Rare Earths*, para. 7.288-9, citing Panels Reports, *China-Raw Materials*, paras 7.375-6.

⁴¹⁵ Panel Reports, *China-Rare Earths*, paras 5.113-4.

The conservation of exhaustible natural resources

427. In light of the above stated principles, developed by the relevant WTO rulings concerning the features that a measure at variance with a WTO obligation must present in order to be justified under Article XX(g) of the GATT 1994 as “relating to the conservation of exhaustible natural resources”, the Arbitration Panel can now draw the following conclusions.
428. From a general point of view, it cannot be denied that the 2015 temporary export ban “relates” to the conservation of exhaustible natural resources since it is a measure specifically applicable to unprocessed timber enacted with a view to protecting forests as a natural, exhaustible, resource.
429. However, the WTO rulings require in this respect more than the fact that the challenged measure has as its object a natural resource and regulates some aspect of its use. As mentioned above, in order for a measure to be found to “relate to” conservation within the meaning of Article XX(g) of the GATT 1994, there must be a “close and genuine relationship of ends and means” to be established on a case-by-case basis.⁴¹⁶
430. To establish such a relationship, the restrictive measure must “bring about” a material contribution to the objective of conservation.⁴¹⁷
431. It is a fact, which Ukraine has shown, and the EU has not denied, that Ukraine has been engaged since decades in improving the standard of its forests, increasing the total forest coverage of the country, improving the quality of trees, and in fighting deforestation, specifically deforestation due to illegal logging, an issue of great concern.
432. There is no clear evidence that the export prohibition has promoted the objectives of the forest conservation policy.⁴¹⁸ Nor does the evidence show that Ukraine’s forests are threatened by a decrease of their coverage in recent years, even taking into account the present unavailability of Crimea’s forest and of those affected by warfare in the Donbas.⁴¹⁹ On the other hand, the evidence does not show that the 2015 ban, which introduced the temporary export prohibition, was intended to be a part of that policy. The Explanatory

⁴¹⁶ See footnote 414 above.

⁴¹⁷ See above Section 4.3.3.1.

⁴¹⁸ There is also no evidence that it prevented illegal exports (which is a legitimate objective, outside however of the purview of Article XX(g) of the GATT 1994), as shown by the excerpts introduced by Ukraine at the hearing (*Ukraine’s Written Submission*, para. 338, footnote 215) of a report by the NGO Earthsight, *Complicit in Corruption, How billion-dollar firms and EU governments are failing Ukraine’s forests*, 2018), according to which “illegal sanitary felling currently represents 38-44% of total production and exports.”

⁴¹⁹ For relevant data see Section 2.1 above.

Note accompanying the Bill mentions the legislative intent of boosting the domestic transformation industry.⁴²⁰

433. The effects of the 2015 temporary export ban on the conservation of forests appear at best uncertain, even considering that such effects may require more than a few years to materialise and to become measurable. In this respect, one must also consider that such effects cannot be evaluated in isolation from related domestic measures, both restrictive policies connected with the export ban, and other policies actively promoting qualitative and quantitative improvement of forestry, including by means of international cooperation.
434. It has not been demonstrated, with the burden falling principally to Ukraine as the Party invoking the exception, that the 2015 outright export prohibition is structured and applied so as to contribute effectively to those policies and that it is thus genuinely “in relation with” the stated conservationist policy.⁴²¹
435. The initial absence of any connected restriction of domestic consumption, the 25 million cubic metre cap on domestic consumption having been introduced three years later in 2018, reinforces the hypothesis that by introducing the export prohibition in 2015 Ukraine did not principally pursue a conservation objective.⁴²² Similarly, the introduction by Ukraine of measures directly aimed at protecting the conservation and rational use of forests, such as monitoring of felling and growth and imposing criminal liability for illegal logging, only took place in 2018-2019.⁴²³
436. The timing of such measures seems to show that the 2015 temporary export ban did not have conservation purposes and objectives since new more effective domestic regulation on forest have been introduced thereafter.
437. The Arbitration Panel is therefore not convinced that the 2015 temporary export ban meets the test of Article XX(g) of the GATT 1994, first prong, requiring that the 2018 ban “relates to the conservation of natural resources”, as understood in the interpretation and application

⁴²⁰ Cf. Panel Reports, *China-Rare Earths*, para. 7.460: “measures adopted for purpose of economic development...are not ‘measures relating to conservation’”.

⁴²¹ See also the comment that a measure, even if *reasonably* related to the end pursued, i.e. the conservation of an exhaustible natural resource, “may not be *disproportionately* wide in its scope or reach in relation to the policy objective pursued”, P. Van den Bossche and W. Zdouc, *The Law and Policy of the WTO*, 4th ed., Cambridge 2017, p. 576 with reference to the Appellate Body Report, *China-Rare Earths*, para. 355.

⁴²² See also Appellate Body Reports, *China – Rare Earths*, para. 5.9: “the absence of an effective domestic restriction may be relevant to an assessment of whether the challenged measure “relates to” conservation.”

⁴²³ See the full text of the 2018 Amendment introducing a number of criminal provisions, Exh EU-5 and *Ukraine Written Submission*, paras 46-50, referring inter alia to independent management timber certification schemes. These covered, as of 1 August 2020, 45% of the total area of forests land in accordance with the revised text of Article 56 of the Forest Code (www.ukrforest.com) “as one of the mechanisms to prima facie cut down unsustainable and illegal logging.” Cf. *Ukraine Opening Statement*, paras 77-87 on Resolution 1142 of 4 December 2019 which “obliges all forest users to provide data about timber harvested and sold” (Exhibit EU-15).

of that provision “established in rulings of the DSB”, as referred to in Article 320 of the AA.

438. The Arbitration Panel emphasises that such a conclusion must not be construed as an obstacle to Ukraine’s policies aimed at promoting the sustainable management of its forestry sector for economic development purposes. Such an objective is perfectly legitimate without taking implementation measures in breach of the obligation imposed by Article 35 of the AA (or any other provision of the Association Agreement).

439. This being said, the Arbitration Panel postpones its final finding on the issue in order to examine first whether the measure is “made effective in conjunction with restrictions on domestic production or consumption”, which is the second requirement of subparagraph (g) of Article XX of the GATT 1994. This methodological approach is warranted because the Arbitration Panel is ultimately called to make a comprehensive evaluation and finding whether Ukraine can avail itself of the defence provided by this subparagraph to justify its measure, notwithstanding its incompatibility with Article 35 of the AA and Article XI of the GATT 1994.⁴²⁴

4.3.3.2.3 Whether the measure is “made effective in conjunction with restrictions on domestic production or consumption”

4.3.3.2.3.1 The Parties’ positions

Ukraine

440. In support of its contention that the 2015 temporary export ban is justified with regard to Article XX(g) of the GATT 1994 because it was “made effective in conjunction with restrictions on domestic production or consumption”, Ukraine refers to Article 4 of Law No. 2531-VIII enacted in 2018, which capped domestic consumption of unprocessed wood to 25 million cubic metres per year “for the period of validity of the temporary export ban”. Ukraine points out that this provision is introduced by the words “[i]n accordance with subparagraph (g) of Article XX of the GATT 1994 expressing a conservationist purpose in respect of natural exhaustible resources.”⁴²⁵

⁴²⁴ Cf. Appellate Body Report, *China – Rare Earths*, paras 5.94-5: “Article XX(g) always calls for holistic assessment of all its constituent elements” to be carried out “on a case-by-case basis, through a careful scrutiny of the factual and legal context in a given dispute.”

⁴²⁵ See Exhibits EU-5 and UKR-2.

441. Ukraine further draws the 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 restrictions on domestic consumption of unprocessed timber by imposing such restriction for the period of validity of the temporary export ban. Ukraine submits further that its domestic restriction applies in an even-handed manner which may not be identical with the 2015 temporary export ban, but provides a real and effective restriction on domestic consumption.”⁴²⁶
442. According to Ukraine, 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.”⁴²⁷
443. Ukraine submits that these data clearly show that the limit of domestic consumption of unprocessed timber of 25 million cubic metres per year is observed, since 15.6 million cubic metres of harvested timber is below the established limit, which was also true for previous years and not just for 2019. Ukraine concludes that 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” and “real”, but is also crucial for determining the purpose of the measure.⁴²⁸

The EU

444. The EU disagrees with Ukraine’s arguments. It rejects the conclusion that the domestic measures referred to by Ukraine meet the requirements for justifying the 2015 temporary export ban in accordance with Article XX(g) of the GATT 1994. In the EU’s view, Article 4 of Law No 2531-VIII does not fulfil the requirements of Article XX(g) of the GATT 1994 concerning domestic restrictions on several grounds.
445. Firstly, “Ukraine introduced ‘on paper’ a limitation of domestic production in July 2018 “ie several years after having introduced the 2015 temporary export ban, and after the European Union had raised the issue of the compatibility of the 2015 temporary export ban at regular occasions and various levels, including at regular EU-Ukraine Association

⁴²⁶ *Ukraine’s Written Submission*, paras 287-288, relying on Appellate Body Report, *US – Gasoline*, p. 19.

⁴²⁷ Ukraine refers in footnote 170 at para. 288 to the Public Annual Report (2019) of the State Forest Resources Agency of Ukraine, Exhibit UKR-1, p. 14.

⁴²⁸ See *Ukraine’s Written Submission*, paras 288-290.

Council meetings.”⁴²⁹ This runs counter to the term “made effective in conjunction with”, which reveals that the measure a party seeks to justify by Article XX(g) of the GATT 1994 should be promulgated or brought into effect about the same time as the restriction on domestic production or consumption.⁴³⁰

446. Secondly and even more decisively, Ukraine’s domestic cap fails to meet the test that it constitutes in fact a limitation, since “to comply with Article XX(g), the Member concerned must impose a real and effective restriction on domestic production or consumption that reinforces and complements the restriction on international trade.”⁴³¹

447. The EU points out that Ukraine’s cap of 25 million cubic metres does not satisfy this condition, because Ukraine itself gives first a figure of 15.6 million cubic metres as domestic consumption, and thereafter states that “in 2013 the total logging of harvestable timber in all types of felling had amounted to 18 million cubic metres” and that “there was a rise of logging in 2015-2018 from 21.9 to 22.5 million cubic metres.”⁴³²

448. Against the cap of 25 million, Ukraine’s own data show that the volume of timber harvested fluctuated in recent years between 20.7 million in 2014, 22.6 in 2016 and 20.9 in 2019.⁴³³ In contrast, domestic production of sawn wood has increased substantially between 2014 and 2018 and was in 2019 higher than in 2013-2014.⁴³⁴

449. The EU notes in addition that the 2015 temporary export ban and the 2018 cap, in any case, do not conform with the requirement of even-handedness that the WTO case law has developed: “foreign consumers are subject to significantly more onerous burden than domestic ones, as no unprocessed wood can be exported, while up to 25 million cubic metres can be consumed domestically.”⁴³⁵

⁴²⁹ *EU’s Responses to the Arbitration Panel’s Questions*, para. 229. In this connection, the EU observes (*ibidem* para. 238) that the Explanatory Note accompanying the Bill leading to the adoption of the Law 2480-VIII mentions that the consumption cap is necessary “to strengthen Ukraine’s position in discussions with international partners.” This suggests “that the sole reason for introducing the theoretical consumption cap was to create an appearance of legal justification for the 2015 export ban.”

⁴³⁰ *Ibidem*, paras 201-202 relying on the Appellate Body Report, *US-Gasoline*, p. 20.

⁴³¹ *Ibidem* para. 203 relying on the Appellate Body Reports, *China-Rare Earths*, paras 5.91, 5.93 and 5.94.

⁴³² *EU’s Responses to the Arbitration Panel’s Questions*, para. 216 with reference to *Ukraine’s Written Submission*, paras 84 and 86. See also *Ukraine’s Written Submission*, para. 289.

⁴³³ *EU’s Responses to the Arbitration Panel’s Questions* para. 215. See also *Ukraine’s Responses at Hearings*, Table “Volume of Timber Harvested in 2005/2014” (million cubic metres), p. 45 (excluding data from temporarily occupied areas).

⁴³⁴ With reference to Table 1 of *Ukraine’s Answers to the Arbitration Panel’s Questions*, para. 116 (“Volume of output of industrial products, codes 44071093 and 4407108).

⁴³⁵ *EU’s Responses to the Arbitration Panel’s Questions*, paras 204-205, with reference to Appellate Body Report, *US-Gasoline*, pp. 20-21. .

450. The EU therefore concludes that the 2015 temporary export ban is not made effective in conjunction with limitations on domestic consumption.⁴³⁶ On the contrary, the restrictive measure on exports encourages domestic consumption since the latter’s cap “is (according to Ukraine itself) constantly above Ukraine’s actual consumption.”⁴³⁷
451. The EU concludes that “(i) after the enactment of the 2015 export ban the amount of wood harvested did not decrease (ii) the volume of wood harvested in Ukraine is constantly well below on the domestic use of unprocessed timber of 25 million cubic metres per year introduced in 2018.”⁴³⁸
452. Finally, the EU observes that Articles 43 and 71 of the Forest Code to which Ukraine has referred do not set out quantitative limitations on production.⁴³⁹ The duty for the authorities in charge to determine wood cutting areas neither translates into a quantifiable limitation of production or consumption, nor has Ukraine indicated any limit that is accordingly applied.⁴⁴⁰ The EU observes in this connection that it was only with recent Decree of the President of Ukraine No. 511/2019 of 9 July 2019 “On certain measures for the conservation of forests and the rational use of forest resources” that a system for monitoring the domestic consumption was established, whose results are however not yet known.⁴⁴¹

4.3.3.2.3.2 The Arbitration Panel’s analysis

Applicable principles

453. The terms of the second prong of subparagraph (g) of Article XX of the GATT 1994 requires that the party whose measure is challenged be able to demonstrate that it imposes “restrictions” on domestic production or consumption. Under this provision, any measure “which restricts someone or something, a limitation on action, a limiting condition or regulation” can be considered to fall within the ambit of Article XX(g).⁴⁴²

⁴³⁶ *Ibidem*, para. 245.

⁴³⁷ *Ibidem*, paras 221-222.

⁴³⁸ *Ibidem*, para. 217.

⁴³⁹ *Ibidem*, para. 231, referring to *Ukraine’s Written Submission*, para. 83: “The Forest Code sets the limit for timber logging by way of final felling operations at the level of calculated wood cutting area”.

⁴⁴⁰ *Ibidem*, para. 231.

⁴⁴¹ *Ibidem*, paras 234-237.

⁴⁴² Appellate Body Reports, *China-Rare Earths*, para. 5.91. See also Panel Reports, *China-Rare Earths*, para. 7.307. For a complete recollection, see also *Espa, Export Restrictions on Critical Minerals and Metals*, op. cit., p. 219.

454. As to the requirement that the measures be “made effective” in conjunction with domestic restrictions, the Appellate Body has considered that restrictions imposed on international trade must operate jointly and concurrently with restrictions on domestic production or consumption towards a conservation objective.
455. This requirement embodies the notion of even-handedness: [t]his notion demands that the respondent impose “real” restrictions on domestic production or consumption that reinforce and complement the restrictions on international trade.⁴⁴³
456. In this regard, the design and the structure of domestic and export restriction should be given priority, while the market effects of such restrictions may also be taken into account.⁴⁴⁴
457. In light of these criteria the Arbitration Panel will now proceed to examine whether the cap of 25 million cubic metres per year for the domestic consumption of unprocessed wood introduced in 2018, together with other measures in existence and effective at the time of the establishment of the Arbitration Panel, complies with the requirements of the second prong of subparagraph (g) of Article XX of the GATT 1994.

Whether the measure is “made effective in conjunction with restrictions on domestic production or consumption”

458. The Arbitration Panel considers that the Parties’ positions regarding the interpretation of the second prong of sub-paragraph (g) of Article XX of the GATT 1994 show that there is no basic disagreement. Both Parties concur with relevant DSB rulings on the applicable legal criteria, namely that measures relating to the conservation of exhaustible natural resources must be made effective in conjunction with restrictions on domestic production or consumption. The disagreement is on whether the 2015 export restriction, in conjunction with the 2018 Amendment, meets the prescribed criteria.
459. In view of the rigorous prohibition of exporting unprocessed timber of all types to all destinations entailed by the 2015 temporary export ban, the domestic measure that must be taken in conjunction with such prohibition, in order to be effective, must impose an actual real limit to domestic consumption. Only if this condition is met will such a domestic measure contribute to the conservation of forests through a limitation of the demand for unprocessed timber both domestic and from abroad.

⁴⁴³ Appellate Body Reports, *China-Rare Earths*, para. 5.132.

⁴⁴⁴ *Ibidem*, para. 5.140.

460. The issue is therefore whether the cap on domestic consumption of 25 million cubic metres, introduced by Ukraine in 2018, meets those requirements, considering that it is not contested that this cap is well in excess of the actual domestic consumption of unprocessed wood.
461. The Arbitration Panel considers that the harvesting limit of 25 million cubic metres does not effectively limit domestic consumption. The Arbitration Panel recalls that, according to the Agency, 15.9 million cubic metres of timber were harvested in 2019 due to low demand in the domestic market.⁴⁴⁵ Notwithstanding some contradiction and inconsistency in respect of the figures supplied by the Parties, it is uncontested that domestic consumption has been in recent years well below the 25 million cubic metres per year cap.⁴⁴⁶ Ukrainian consumption may decrease in future years as a result of different measures put in place by Ukraine recently. Consumption could on the other hand well continue increasing without reaching the cap, thus showing that the latter is not an effective domestic limitation. Ukraine has not provided evidence of other measures in existence at the time of the establishment of the Arbitration Panel which could work as effective “restrictions on domestic production or consumption.”
462. This evidence makes it unnecessary for the Arbitration Panel to dwell on other circumstantial elements provided by the Parties and discussed by them as to their relevance. These elements tend in any case to reinforce the above conclusion. The Arbitration Panel refers, first, to the fact that the measure introducing the domestic cap was adopted in 2018, almost three years after the enactment of the export prohibition in 2015.
463. Secondly, the Arbitration Panel refers to the various statements from official Ukrainian sources which, though lacking legal force, indicate that the export prohibition was enacted not out of concern for the conservation of forests but in order to support the development of the domestic transformation industry.⁴⁴⁷ The absence of restrictions on the production and export of sawn wood by such industry confirms that the ban does not protect trees from felling in the absence of an effective domestic consumption cap.
464. The Arbitration Panel notes moreover that Ukraine has started to introduce and implement, from 2018 on, different measures to manage its forests and check their use (specifically to avoid illegal felling and smuggling) that do not imply a cap on domestic consumption and are not connected with limiting exports.⁴⁴⁸ These measures, although not existing at the

⁴⁴⁵ See above paragraph 442.

⁴⁴⁶ See the data presented at Section 4.3.3.1.

⁴⁴⁷ See the Explanatory Note referred to in para. 379 above.

⁴⁴⁸ See above para. 336.

time of the establishment of the Arbitration Panel, are independent from the ban and show that Ukraine does have less trade restrictive measures available in order to reach its desired level of forest conservation and rational use, and for tackling illegal felling or smuggling.

465. The Arbitration Panel therefore concludes that the 2015 temporary export ban, even in conjunction with the 2018 Amendment introducing a domestic consumption cap of 25 million cubic metres per year, does not meet the requirements of Article XX(g) of the GATT 1994 that the export restriction be “made effective in conjunction with restrictions on domestic production or consumption.”

4.3.3.2.4 On the relevance of Chapter 13 for justifying the 2015 temporary export ban

466. Before coming to a final conclusion on the availability of Article XX(g) of the GATT 1994 for the justification of the 2015 temporary export ban, the Arbitration Panel must address the issue of the relevance, if any, of Chapter 13 (Trade and Sustainable Development) for deciding on the compatibility of the 2015 temporary export ban with the Association Agreement. This issue has been discussed in general terms in Section 4.2.3 above. The Arbitration Panel has concluded in paragraph 251:

In light of the foregoing, the Arbitration Panel finds that the provisions of Chapter 13 are not self-standing or unqualified exceptions that may justify measures that are per se in breach of Article 35 of the AA. The Arbitration Panel is instead persuaded that the provisions of Chapter 13 can serve as relevant “context” for the interpretation of other provisions of Title IV which allow the Parties to introduce or maintain measures in derogation to Article 35 of the AA such as for environmental reasons based on the reference in Article 36 of the AA to Article XX of the GATT 1994.

467. In this respect, the Arbitration Panel recalls its above findings that the 2015 temporary export ban cannot be considered a measure relating to the conservation of the environment, especially since Ukraine has not implemented in this regard effective limits to the domestic consumption of unprocessed timber. As a consequence, the invocation by Ukraine of provisions of Chapter 13 (“Trade and Sustainable Development”) are basically irrelevant in respect of possible justifications of the ban under the Agreement.

4.3.3.3 Overall finding on whether the 2015 temporary export ban is justified by Article XX(g) of the GATT 1994

468. In light of the foregoing, the Arbitration Panel **finds** that Ukraine’s 2015 temporary export ban on unprocessed timber is not justified in accordance with Article XX(g) of the GATT 1994, as applicable by virtue of Article 36 of the AA. The Arbitration Panel therefore **finds** that the 2015 temporary export ban is in breach of Article 35 of the AA.

469. This finding makes it unnecessary for the Arbitrators to investigate further whether the 2015 temporary export ban meets the requirement of the introductory part (or chapeau) of Article XX of the GATT 1994. In fact, besides focusing on the exception of Article XX(g) of the GATT 1994, the Parties have devoted some attention to the issue whether the 2015 temporary export ban is “not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade” as provided by the chapeau. However, since for the reason just stated the 2015 temporary export ban does not pass the test of compatibility with subparagraph (g) of Article XX, the Arbitration Panel is not required to address this issue and will refrain from doing so.

5. INTERIM REVIEW

470. On 13 November 2020, the Arbitration Panel issued its Interim Report to the Parties. Pursuant to Article 308(2) of the AA, Parties were invited to submit a written request for the arbitration panel to review precise aspects of this Interim Report within 14 days of its issuance. On 27 November 2020, both parties submitted their comments on the Interim Report. At the request of the Panel, entirely composed of non-English native speakers, the Parties also submitted editorial revisions as well as other linguistic changes in a separate document.

471. No party requested an additional meeting with the Panel. In the absence of such a review meeting, and in accordance with the Timetable for Panel Proceedings revised as of 14 September 2020 (Annex A), this Final Report is issued on 11 December 2020.

472. The numbering of paragraphs and footnotes in the Final Report has changed from the Interim Report. The text in this Section refers to the paragraphs and footnote numbers in the Interim Report regarding which the parties requested review.

473. The additional, separate editorial and linguistic submissions were not contested by the other Party and had no contradictory elements between them. They are not referred to specifically

below and have been integrated into the Final Report. The Panel on its own also made editorial and other non-substantive consequential changes.

474. To facilitate understanding of the interim review comments and changes made, this Section is structured to follow the organisation of the Final Report.

Section 1.2 Arbitration Panel establishment and composition

475. Both the Parties consider that the Arbitration Panel Report is not the proper place for recording the contractual arrangements between the Parties and the arbitrators. Hence the European Union requests the Panel to omit paragraph 7 and footnote 6. Ukraine requests the Arbitration Panel to delete the footnote 6 to paragraph 7. The Panel has shortened these texts but decided to retain the reference to its remuneration according to the WTO scale for panels, and the maximum of 44.5 days of work allocated to each arbitrator.

476. The EU notes that the Parties were not in a position to agree on the date of establishment of the Panel. Paragraph 8 has been adjusted to say that the Parties confirmed each other the completion of the formalities related to the composition of the panel, and that this confirmation of the composition had the legal effect that the panel is considered as having been established on 28 January 2020.

477. At the request of the EU, paragraph 18 has been supplemented with a brief explanation of the reasons why the entirely virtual Hearing with the Parties on 22 and 23 September 2020, via Webex, could not be opened to the public, unlike the original intention to hold public hearings in Kyiv.

Section 1.3.1 Arbitration Panel proceedings –General

478. Ukraine notes that on 20 February 2020, a non-governmental public organisation “Ukrainian Association of the Club of Rome” filed an *amicus curiae* submission in Ukrainian. That submission – read and unofficially translated into English by the Arbitration Panel – is part of the record but was not referred to by the Parties in their submissions. The Arbitration Panel refers to the matter in Section 1.3.1.

479. A large manufacturer of layered wood floors, Barlinek S.A. (Poland), had expressed interest in making a submission to the Arbitration Panel shortly before the deadline. A short mail exchange with the Panel Chairperson clarified that their intent was not to constitute an *amicus curiae* but to make their submission in the part of the Hearing with the Parties

which was expected to be open to the public, then scheduled to take place on 30 March in Kyiv.

Section 2 Factual Aspects

480. The Panel has accepted the EU's suggestion that Sub-Section 2.1 containing Ukraine's general information about its forests be preceded by a new Sub-Section *General Information provided by the European Union on forest protection in Ukraine*. The text proposed, with earlier EU submissions and answers to Panel questions, has been added to the Final Report, and paragraphs 28 and 29 have been adjusted accordingly. The original Section 2.1 is now Section 2.2.

Section 2.2.1 Rare and valuable species (now Section 2.3.1)

481. At the EU's request, a number of modifications were made in paragraphs 47-49 and 50-53, pertaining to the industrial exploitation, the commercial use, and the nature of the rare and valuable species. The Panel also recorded the different listings of these species in paragraph 4 of Article 1 of Law No. 2860-IV as compared with that of the IUCN Red List.

482. The EU also claims an evolution of Ukraine's position as regards which species covered by the 2005 export ban are also listed in the Red Book of Ukraine.⁴⁴⁹ As the Panel is not convinced that such an alleged change was expressed formally by Ukraine, it has decided not to discuss this change.

Section 2.2.2 Unprocessed timber products (now Section 2.3.2)

483. At Ukraine's request, paragraph 57 has been modified to correctly define what wood products are covered by the "2015 temporary export ban."

Section 4 Findings

Section 4.1.1.2.1 On the timeliness of the jurisdictional objection

484. Ukraine contests that, according to the Panel, it "has not provided any reasons that might justify its non-compliance with Rule 18" [of the Working Procedures].⁴⁵⁰ The text in what

⁴⁴⁹ *EU's Comments on the Interim Report*, para. 14.

⁴⁵⁰ *Ukraine's Request to Review the Interim Report*, paras 16-18.

remains Section 4.1.1.2.1 has been modified based on the clarifications provided by Ukraine.

Section 4.1.1.2.2 On the merit of the jurisdictional objection

485. With reference to paragraphs 125, 127, 129 and 130 Ukraine asks the Panel to “clarify whether the Parties to the Association Agreement may refer any Chapter 13 of the Association Agreement case to arbitration.”⁴⁵¹

486. The Panel has reviewed its analysis of the relevance and admissibility of Chapter 13 (Section 4.1.1.2). It sees no need to modify or further expand on this question under the claims raised by the EU in this case.

Section 4.1.2 Applicability of Article 35 AA during the 10-year transitional period

487. The EU queries the Arbitration Panel’s statement in respect of the end of the 10-year transitional period (Paragraph 136, footnote 122, second sentence). According to the EU mail sent on 9 December 2020, the correct date is 31 December 2025. The Arbitration Panel has inserted this date in the Report.

Section 4.1.3 The emergency situation in international relations affecting Ukraine

488. On the relationship between Article XXI GATT and Article 35 AA, the EU considers that, if Ukraine had raised a national security defence under the former provision, the order of proceeding for the Arbitration Panel would be to first rule on the alleged breach and thereafter on that defence.⁴⁵² It requests the Panel to redraft paragraphs 155 and 159 accordingly.

489. The Panel disagrees. It has clarified its reasoning, to the extent that the question is at all relevant in the present case. In Section 4.1.3.2 it has modified paragraph 155 and added a new footnote.

⁴⁵¹ *Ukraine’s Request to Review the Interim Report*, paras 19-20.

⁴⁵² *EU’s Comments on the Interim Report*, paras 26-30.

Section 4.2.2.2.2 Whether Article 35 AA applies exclusively to goods “destined to the other Party”

490. Ukraine takes the view that Article 35 AA cannot be applied to Ukraine’s relationships with non-EU countries. It therefore requests the Arbitration Panel to remove what it considers an ambiguous conclusion, namely that “that Article 35 AA applies regardless of whether the prohibitions apply only to goods destined to the European Union (‘to the other Party’) or also to like goods destined to other countries or to any other country”.⁴⁵³ The Panel has adjusted paragraph 208.

Section 4.3.2.1 “Provisional” justification of the 2005 export ban under Article XX (b) of the GATT 1994

491. The EU considers that the presentation of its position in Sub-Section 4.3.2.1.1.2 omits completely the European Union’s arguments concerning the design of the 2005 export ban. It requests the Panel to present the European Union’s position in an objective and balanced manner.⁴⁵⁴

492. The Panel has modified paragraphs 266 and 277 and inserted some new paragraphs and footnotes to reflect the proposed complements of the EU’s viewpoints on the basis of its previous submissions and answers to Panel questions.

Section 4.3.2.1.2 Whether the 2005 export ban is designed to protect plant life or health

493. The EU raises a number of points in respect of the Panel’s analysis of the 2005 export ban and its justification under Article XX (b) GATT. It finds fault in that analysis, on how the Panel addressed, for instance, the dearth of reliable data, the description and classification of the rare wood species, and the felling prohibitions as presented by Ukraine. It particularly queries paragraphs 273, 275-278, 282, 286, 289, 299-309, 316-322, 340, 343, 345, 347, 372, 384, and 442 (and footnote 421).⁴⁵⁵

494. The Panel has carefully considered the EU’s arguments. It also verified the relevant WTO rulings referred to in its analysis concerning the demonstration of a material contribution in cases where the contested measures are part of a broader policy framework. It is however unable to agree with some of the EU’s arguments based on WTO rulings, for instance in

⁴⁵³ *Ukraine’s Request to Review the Interim Report*, paras 21-24.

⁴⁵⁴ *EU’s Comments on the Interim Report*, paras 31-32.

⁴⁵⁵ *EU’s Comments on the Interim Report*, paras 34-77.

respect of a quantitative assessment being required in the present case for the determination of a material contribution.

495. The Panel has nevertheless reviewed, and where necessary revised, its analysis and its findings in respect of the 2005 export ban, both under Article XX (b) GATT and its chapeau. Some parts of Section 4.3.2 have been redrafted, in particular paragraphs 272-273, 275-276, 281-282, 3000-301, 309, 321-322, 340, 345, 347, 372 and 442. A number of paragraphs and footnotes were added for the sake of better explaining our position.

Section 5 Clarifications requested by Ukraine

496. At the Hearing, Ukraine requested for an alternative relief “should the Arbitration Panel find that the European Union’s claim is not devoid of merit”, namely “to clarify what measures would be required to comply with the Association Agreement”.⁴⁵⁶

497. The EU objected to Ukraine’s request, considering that the Panel would act beyond its terms of reference. The EU is of the view that “the AA provides no basis for the Panel to give the clarification requested by Ukraine.” Hence, the Panel cannot “suggest” ways to implement the recommendation in the Panel’s ruling to bring the measure in dispute into conformity with the AA.⁴⁵⁷

498. Having carefully considered the differing views of the Parties in this matter, both on the procedural aspects and in substance, the Arbitration Panel decided to respond to Ukraine’s request, in line with its standard terms of reference laid down in Article 306.3 AA. The Panel read in this provision that its central task was to issue reasoned findings supporting a “ruling” as to the compatibility of the matter referred to by the EU in its request of establishment of the Panel. The Panel also recalled that WTO adjudicators are tasked by the DSB to find a “positive solution” (Article 3.7 DSU).

499. The Arbitrators had therefore offered their view that “a joint implementation plan, under the Trade Committee’s guidance and with sufficient sectorial expertise, foreseeing a structural adjustment programme furthering the economic integration of Ukraine’s entire forestry sector value chain with the European Union’s Internal Market, could facilitate a rapid removal of the 2015 export ban, without impairing, but on the contrary enhancing, the environmental, economic and social sustainability of the whole sector.” (paragraph 469)

⁴⁵⁶ *EU’s Opening Statement*, para. 131, and *EU’s Closing Statement*, paras 5 and 9.

⁴⁵⁷ *EU’s Responses to the Arbitration Panel’s Questions*, paras 27-30.

500. The EU maintains its view that these clarifications “are manifestly beyond the Panel’s terms of reference.”⁴⁵⁸ Moreover, the EU remains concerned that they “might provide an excuse for unjustifiably delaying or avoiding compliance with the Panel’s ruling, contrary to the obligation imposed by Article 311 of the AA.”⁴⁵⁹ The EU therefore requests the Panel to delete paragraphs 459-469 of the interim report in their entirety.⁴⁶⁰
501. The Arbitration Panel wishes to underline that its “clarifications” were in no way intended to make implementation conditional, or to allow for any kind of delay beyond a reasonable period of time (Art. 312 of the AA). On the contrary, the Panel explained its view that this could facilitate implementation of its findings (paragraphs 467-469).
502. This is not the place to discuss the fine line between rule making and rule interpretation which all adjudicators must constantly keep in mind in the fulfilment of their duties. To avoid all ambiguities in this matter, the Arbitrators decided to delete Section 5 of the Interim Report.
503. In this Final Report, Section 5 is now the Interim Review Section.

Section 6.2 Recommendations

504. In line with its demand to delete the “clarifications” in paragraphs 459-469, the EU proposes to delete the last seven words in paragraph 472 of the Interim Report (“in cooperation, as appropriate, with the EU”). The EU acknowledges the various cooperation obligations imposed upon the Parties by the AA. But it rejects any implication “that the European Union has failed to effectively implement Regulation No. 995/2010”, and “the implementation of the Panel’s ruling cannot be made conditional upon ‘cooperation, as appropriate, with the EU’.”⁴⁶¹
505. The Arbitration Panel has modified its recommendation in paragraph 472.

⁴⁵⁸ *EU’s Comments on the Interim Report*, paras 78-99.

⁴⁵⁹ *Ibidem*, para. 87.

⁴⁶⁰ *Ibidem*, para. 96.

⁴⁶¹ *EU’s Comments on the Interim Report*, paras 98 and 101.

6. CONCLUSIONS AND RECOMMENDATIONS

6.1 Conclusions

The Arbitration Panel

506. Having

- concluded the examination of all claims, defences and exceptions made or raised by the Parties in the arbitration proceedings in respect of Ukraine’s measures identified in the request of the EU for the establishment of the Arbitration Panel, namely Ukraine’s 2005 export prohibition of certain wood products (“the 2005 export ban”) and Ukraine’s 2015 temporary export prohibition of unprocessed timber (“the 2015 temporary export ban”), as identified and described in this Report;
- and having conducted and concluded the arbitration proceedings in full cooperation with the Parties;
- and having duly heard the Parties in accordance with:
 - (i) the relevant provisions of Chapter 14 of the (“Dispute settlement”) of Title IV of the Association Agreement;
 - (ii) the Rules of Procedure for dispute settlement of Annex XXIV of the (“Rules of Procedure for dispute settlement”) to the Association Agreement;
 - (iii) the Working Procedures established and subsequently revised by the Arbitration Panel in agreement with the Parties (Annex A), and
 - (iv) in accordance with the Timetable agreed by the Arbitration Panel with the Parties (as subsequently rescheduled several times to take into account the supervening constraints due to the outbreak of the Covid-19 pandemic that has made it impossible to comply with the time limits and other terms of Articles 308 and 310 of the AA);

507. Taking into account the relevant provisions of Article 308 of the AA (Interim Report) stating that “The arbitration panel shall issue to the Parties an interim report setting out the findings of fact, the applicability of the relevant provisions and the basic rationale behind any findings and recommendations that it makes...”, and the relevant provisions of Article 310 of the AA (Arbitration panel ruling) stating that “The arbitration panel shall notify its ruling to the Parties and the Trade committee...”,

Rules as follows

- 1. The Arbitration Panel has jurisdiction under Chapter 14 of the AA to examine the present dispute and rule on the complaint of the EU;**
- 2. Finds that Ukraine’s 2005 export ban is incompatible with Article 35 of the AA forbidding export prohibitions, but that it is justified under Article XX(b) of the GATT 1994, as made applicable to the Association Agreement by Article 36 of the AA (General Exceptions), as a measure “necessary to protect....plant life”, taking also into account relevant provisions of Chapter 13 of the AA on trade and sustainable development; the 2005 export ban is therefore not in breach of Article 35 of the AA;**
- 3. Finds that Ukraine’s 2015 temporary export ban is incompatible with Article 35 of the AA forbidding export prohibition, and that it is not justified under Article XX(g) of the GATT 1994, as made applicable to the Association Agreement by Article 36 of the AA (General Exceptions), because that export ban is not “relating to the conservation of exhaustible resources...made effective in conjunction with restrictions on domestic production or consumption.”**

6.2 Recommendations

508. Accordingly, the Arbitration Panel makes the following recommendation:

- 4. that Ukraine takes any measure necessary to comply in good faith with the above Arbitration Panel’s ruling, as prescribed by Article 311 of the AA (“Compliance with the arbitration panel ruling”) in respect of the 2015 temporary export ban found in paragraph (3) above to be in breach of its obligations pursuant to Article 35 of the AA, taking into due account all relevant provisions of the Association Agreement, including those of Chapter 13 on “Trade and sustainable development”, specifically Article 293 of the AA on “Trade in forest products”, which commits the Parties to “improve forest law enforcement and governance and promote trade in legal and sustainable forest products.”**

Viktor Muraviov

Member

Kyiv, Ukraine, 11 December 2020

Giorgio Sacerdoti

Member

Milan, Italy, 11 December 2020

Christian Häberli

Chairperson of the Arbitration Panel

Lugano, Switzerland, 11 December 2020

ANNEX A - Working Procedures of the Arbitration Panel (with Timetable)

Working Procedures

1. These Working Procedures have been established by the Arbitration Panel (hereinafter “Panel”) based on the Request for establishment of the arbitration panel by the European Union in accordance with Article 306 of the Association Agreement (note verbale of the European Union dated 20.06.2019 № ARES (2019)3929269), and exchange of notes verbales of the European Union dated 28.01.2020 № ARES (2020)520694 and of Ukraine dated 28.01.2020 № 3111/31-210-144 (in English).
2. After an organisational meeting held in Brussels on 29 January 2020, the Panel provided the Parties to the dispute (hereinafter “Parties”) with a Timetable for Panel Proceedings (hereinafter “Timetable”) (Annex 1) until the issuance of the final arbitration panel ruling (hereinafter “Final Ruling”).
3. Hearings and deliberations on the dispute at issue require the Panel to undertake detailed research and analysis of relevant provisions in the Association Agreement, as well as Ukrainian, EU and WTO law, case law and administrative practice in various areas (e.g. customs law, environmental law, etc.), as both Parties may refer to applicable domestic legislation and international trade rules.
4. For this purpose, and in conformity with arbitrator’s Contract with each Party, the Panel informed the Parties that it has designated two assistants. The assistants or other involved person (staff) shall comply with the provisions regarding confidentiality in accordance with Annex XXIV to Chapter 14 (Dispute settlement) (hereinafter “Annex XXIV”) and Annex XXV to Chapter 15 (Mediation mechanism) of Title IV of the Association Agreement.
5. The Panel shall conduct its internal deliberations in closed session. In line with Articles 318 and 319 of Chapter 14 (Dispute settlement) of Title IV of the Association Agreement, and Rule 27 of Annex XXIV the Panel shall open the hearing with the Parties to the public, subject to appropriate procedures to be adopted by the Panel after consulting the Parties.⁴⁶²

⁴⁶² Article 318: “Any hearing of the arbitration panel shall be open to the public in accordance with the Rules of Procedure set out in Annex XXIV to this Agreement.”

Article 319: “Interested natural or legal persons established in the Parties’ territories are authorised to submit amicus curiae briefs to the arbitration panel in accordance with the Rules of Procedure.”

6. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in these procedures shall preclude Parties from disclosing submissions or statements of their own positions to the public, provided that such Party does not thereby disclose any confidential information from the other Party. Parties shall treat as confidential all information submitted to the Panel by the other Party which the Party has designated as confidential.
7. Business Confidential Information (hereinafter “BCI”), if any, shall be designated as such with an appropriate mark on the top of the first page. BCI may be referred to by the Panel but not quoted or otherwise disclosed in the Interim Panel Report (hereinafter “Interim Report”) and the Final Ruling. If so required by the Parties, detailed provisions on BCI treatment shall be developed by the Panel, in consultation with the Parties.
8. Before the hearing of the Panel with the Parties, the Parties shall transmit to the Panel, in accordance with the Timetable, written submissions in which they present the facts of the case and their arguments, together with executive summaries not exceeding 6 pages to be used in the Final Ruling for summarising the Parties’ arguments.
9. Interested natural or legal persons established in the territories of the Parties (hereinafter “*Amicus curiae*”) may make unsolicited written submissions to the Panel, in accordance with the Timetable established by the Panel, and Rules 37 to 39 of Annex XXIV.
10. Hearings shall be conducted in accordance with Annex XXIV. The Ukrainian Party, as host of the hearing, will inform the Panel, with copy to the other Party, by beginning of March of the logistic arrangements it is planning for the hearing.
11. After the hearing and the Parties’ supplementary written submissions, and answers to Panel questions, the Panel will examine the specific arguments raised by the Parties, provide a comprehensive analysis of the measures at issue in the dispute, and their consistency with the provisions of the Association Agreement, in the form of an Interim Report. The Interim Report shall set out the findings of facts, the applicability of the relevant provisions and the basic rationale behind any findings and recommendations that it makes. It shall be issued on the date set out in the Timetable.
12. The Panel may at any time put questions to the Parties and ask them for explanations either during the course of the hearing or in writing. Written replies

to questions shall be submitted in accordance with the Timetable. Both Parties may also ask questions to each other during the hearing, and react to the other Party's comments and answers, and to *Amicus curiae* submissions, within a time limit specified by the Panel.

13. *Amicus curiae* submissions, if any, will be taken note of by the Panel, and recorded as such in the Interim Report and the Final Ruling.
14. A Party invited to present orally its views to the Panel shall make available, to the Panel and to the other Party, a final written version of its oral statements by the day indicated in the Timetable for Panel Proceedings for that purpose (close-of-business). The Parties shall provide a provisional written version of their oral statement at the time the oral statement is presented.
15. Should the Panel decide to seek expert opinions in line with Article 319 of Chapter 14 (Dispute settlement) of Title IV of the Association Agreement, the appropriate procedural arrangement shall be adopted by the Panel after consultations with the Parties.
16. The Parties shall make all submissions and statements in English. Where the original language of exhibits or of text quoted in the submissions or responses to questions is not English, the Party shall submit the original language version of that text together with an English translation. In the case of exhibits, the Parties may submit them in the original language, provided that an English translation is submitted at the same time. The Panel may grant an extension of the time for the submission of the translation of such exhibits into English upon a showing of good cause, provided this does not affect the orderly course of the proceedings.
17. Each Party's written submissions, written answers to questions and comments thereon, and written request for review of precise aspects of the Interim Report and comments shall be submitted simultaneously to the Panel and the other Party.
18. Any request for a preliminary ruling (including rulings on jurisdictional issues) shall be submitted at the earliest possible moment, and in any event no later than in a Party's first written submission. If a Party requests such a preliminary ruling, the other Party shall submit its comments within a time limit specified by the Panel. Exceptions to this procedure may be granted in exceptional circumstances.
19. The Parties shall submit all factual evidence to the Panel with their first written submissions, except with respect to factual evidence necessary for purposes of rebuttals, answers to questions or comments on answers. Exceptions to this

procedure may be granted upon a showing of good cause. In such cases, the other Party shall be accorded a period of time for comment, as appropriate.

20. To facilitate the maintaining of the record of the dispute, and for ease of reference to exhibits submitted by the Parties, the Parties are requested to number their exhibits sequentially throughout the stages of the dispute. Exhibits submitted by the EU shall be numbered EU-1, EU-2, etc, exhibits submitted by Ukraine shall be numbered UKR-1, UKR-2, etc. If, for example, the last exhibit in connection with the first submission was numbered EU-5, the first exhibit of the EU's subsequent submission thus shall be numbered EU-6.
21. According to the Rule 30 of the Annex XXIV, the Panel shall arrange for the transcript of the hearing in agreement with the Parties.
22. The Parties have the right to determine the composition of their own delegations. The Parties shall have responsibility for all members of their delegations and shall ensure that all members of their delegations' act in accordance with these Working Procedures. The Parties shall provide a list of the participants of their delegation before each hearing, preferably at least one (1) day before such hearing, by mail to the Chairperson of the Panel or to an assistant designated by him.
23. Following issuance of the Interim Report, each Party may request the Panel within the deadlines set out in the Timetable to review precise aspects of the Interim Report in accordance with the provisions of Article 308(5) of the Chapter 14 (Dispute settlement) of Title IV of the Association Agreement.
24. In addition, each Party may request an Interim Report review meeting. The right to request such a meeting must be exercised no later than at the time determined in the Timetable. The Panel reserves the right to organise such a review meeting by video-conference. The Parties are reminded that the Interim Report shall be kept strictly confidential and its content shall not be disclosed.
25. The Panel shall notify its Final Ruling to the Parties in accordance with the Timetable.
26. The Panel will provide the Parties with electronic versions of its Interim Report and its Final Ruling. Hard copies signed by each member of the Panel shall be provided to the Parties as soon as possible thereafter. In case of inconsistency between the electronic and hard copy version of these documents, the hard copy version shall prevail.
27. The following procedures regarding service of documents apply:

- (a) Each Party shall serve its written submissions (including any separate requests for preliminary ruling and responses thereto), executive summaries, written versions of oral statements, written answers to questions and comments invited by the Panel, directly to the other Party and the Panel by electronic mail at the email addresses to be provided by 3 February 2020. The email address for serving documents to Ukraine is dispute.settlement@me.gov.ua. The email address for serving documents to the EU is EU-UKR-WEBA@ec.europa.eu. The email address for serving documents to the Panel is espai@usi.ch.
- (b) The Party receiving any submission as above shall acknowledge the receipt thereof.
- (c) Each Party is responsible for its own record-keeping, under its internal regulations, of all proceedings as well as of all documents issued by it and by the Panel.
28. The Chairperson of the Panel will make the relevant administrative and procedural decisions necessary for the organisation and conduct of the arbitration proceedings, in line with the applicable Rules of Procedure. Where necessary, such decisions shall be made in consultation with the Parties and with the other members of the Panel.
29. Any delays in the procedure shall be notified to the Chairperson of the Panel as soon as they occur, or are foreseeable, with a copy to the other Party and the other arbitrators. After consulting with the Parties, the Panel shall decide on the appropriate measures to be taken under these circumstances.
30. Parties and arbitrators will make all reasonable efforts to apply appropriate measures to avoid theft, computer hacks and viruses, without however being liable for any incident beyond those precautions. Should any such incident occur, appropriate information shall be immediately provided to the Chairperson of the Panel who will then decide how to proceed and inform the Parties.
31. The Panel reserves the right to amend or supplement these Working Procedures at any time, following consultations with the Parties, in line with Rules 14 and 15 of Annex XXIV.

Final Amended Timetable for Arbitration Panel Proceedings

Step	Date
Establishment of the Panel	28 January 2020
Organisational meeting	29 January 2020
Receipt of first written submissions of the Parties:	
EU, complaining party	17 February 2020
Ukraine, respondent	11 March 2020
<i>Amici curiae</i>	27 February 2020
Questions from the Panel	27 April 2020
Answers to Panel questions	15 May 2020
Questions between the Parties	20 May 2020
Answers to Questions between the Parties	4 June 2020
Questions from the Panel	19 June 2020
Receipt of answers to Panel questions	8 July 2020
Party comments on answers to Panel questions	15 July 2020
Hearings with the Parties (<i>online</i>)	22-23 September 2020
Final written version of the oral statements and final answers to questions raised in the course of the hearings by the Panel and by the Parties	7 October 2020
Interim Report	13 November 2020
Comments on Interim Report (Request for Interim report Hearing if necessary)	27 November 2020
Review meeting, if any – possibly by video-conference	11 December 2020
Final Report	
Without Review meeting	11 December 2020
With Review meeting	18 December 2020

ANNEX B - List of Exhibits**European Union**

Exhibit No.	Title
Exhibit EU-1	Explanatory Note of 10 December 2014 to Draft law Reg.Nr.1362 (final law 325-VIII) introducing the export prohibition on all unprocessed timber
Exhibit EU-2	2018 Annual Report of the State Forest Agency of Ukraine
Exhibit EU-3	Law of Ukraine No. 2860-IV, of 8 September 2005, On Elements of the State Regulation of Business Operators' Activities Related to the Sale and Export of Timber, Law 2860-IV, Information from the Verkhovna Rada of Ukraine, 2006, N 2-3, p.34*
Exhibit EU-4	Law of Ukraine No. 325-VIII of 9 July 2015, on amendments of the Law of Ukraine on elements of the State Regulation of the Business Operators' Activities Related to the Sale and Export of Timber (Law 325-VIU), Information from the Verkhovna Rada of Ukraine, 2015, No 31, p. 291 *
Exhibit EU-5	The Law of Ukraine No. 2531-VIII of 6 September 2018 , on "Amendments to certain Legislative Acts of Ukraine concerning the preservation of Ukrainian Forests and preventing Illegal Export of Unprocessed Timber (Law 2531-VIII), Bulletin of Verkhovna Rada, 2018, No 42, p.327*
Exhibit EU-6	Conclusions of 7 April 2015 of the (lead) Committee on Industrial Policy and Entrepreneurship of the Verkhovna Rada, on Draft law Reg.Nr.1362 (final law 325-VIII) introducing the export prohibition on all unprocessed timber
Exhibit EU-7	Conclusion of 22 December 2014 of the Verkhovna Rada's Scientific and Expert Department, on Draft law Reg. Nr. 1362 (final law 325-VIII) introducing the export prohibition on all unprocessed timber
Exhibit EU-8	Proposals of 21 July 2018 of the President of Ukraine, in relation to draft law Reg.Nr.5495 (final Law 2531 -VIII) rejecting the introduction of an additional export prohibition on fire/fuel wood (HS 440110000).
Exhibit EU-9	Explanatory Note of 6 December 2016
Exhibit EU-10	Collection of the pages contained in the links of the footnotes of paragraph 58 of Ukraine's written submission (accessed on 6 May 2020)
Exhibit EU-11	Collection of web pages of IUCN Red List of the wood species covered by the 2005 export ban (accessed on 5 May 2020)
Exhibit EU-12	Strategy 2030 on Restructuring Forestry of Ukraine
Exhibit EU-13	Ukraine - Reviewed Forest road map time frame 2020-2025
Exhibit EU-14	Decree of the President of Ukraine No 511/2019
Exhibit EU-15	Decree No 1142 of 4 December 2019
Exhibit EU-16	Guidelines for Using the IUCN Red List Categories and Criteria 14 (August 2019)
Exhibit EU-17	Share EU imports from Ukraine HS4403
Exhibit EU-18	EU import statistics for line HS4403 (wood in the rough) and line HS 4407 (sawn wood)
Exhibit EU-19	EU roundwood production 2009 - 2018

Exhibit EU-20	EUROSTAT: Agriculture, forestry and fishery statistics - 2019 edition, page 95
Exhibit EU-21	EUROSTAT: Agriculture, forestry and fishery statistics - 2019 edition, page 96
Exhibit EU-22	EUROSTAT: Agriculture, forestry and fishery statistics - 2019 edition, page 86
Exhibit EU-23	FOREST EUROPE, 2015: State of Europe's Forests 2015
Exhibit EU-24	Selection of mail exchanges between the European Union and Ukraine concerning the 2015 export ban
Exhibit EU-25	Minutes of the 2 nd Meeting of the Association Committee in Trade Configuration (ACTC)
Exhibit EU-26	Agenda of the 2 nd Meeting of the Association Committee in Trade Configuration (ACTC)
Exhibit EU-27	Operational Conclusions of the 1 st Meeting of the ACTC of April 2016 and State of Play of Operational Conclusions of the 1 st Meeting of the ACTC of April 2016
Exhibit EU-28	Operational Conclusions of the 3 rd Meeting of the ACTC of November 2018
Exhibit EU-29	Import unit prices - Ukraine
Exhibit EU-30	Import unit prices – Top other four countries
Exhibit EU-31	Prices for wood products in certain EU Member States
Exhibit EU-32	Export unit prices from selected countries
Exhibit EU-33	Informal exploratory talks on a future free trade agreement between the EU and Ukraine - Common Understanding - (20 November 2007)
Exhibit EU-34	Imports into the EU by Member State

Ukraine

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” ⁴⁶³

Exhibit UKR-37	Abstracts from the Instruction on the Procedure for Maintaining the State Forest Cadastre and Primary Forest Accounting, approved by Order of the State Committee of Forestry of Ukraine No. 298, 1 October 2010
Exhibit UKR-38	Data from the State Forest Cadastre (2011), available at https://data.gov.ua/dataset/341e5bd6-3855-4507-9a53-f95a9a1e3035
Exhibit UKR-39	Abstracts from the Forest Code of Ukraine, No. 3852- XII, 21 January 1994 (Articles 10, 13, 14, 19, 39, 65, 66, 67, 70, 71, 77, 84)
Exhibit UKR-40	Abstracts from the Land Code of Ukraine, No. 2768-III, 25 October 2001 (Articles 19, 57, 83, 84, 140, 143)
Exhibit UKR-41	Abstracts from the Procedure for Issuing Special Permits for Usage of Forest Resources, approved by Resolution of the Cabinet of Ministers of Ukraine No. 761, 23 May 2007
Exhibit UKR-42	Abstracts from the Rules for Increasing Quality of Forest Structure, approved by Resolution of the Cabinet of Ministers of Ukraine No. 724, 12 May 2007
Exhibit UKR-43	Abstracts from the Sanitary Rules in the forests of Ukraine, approved by Resolution of the Cabinet of Ministers of Ukraine No. 555, 27 July 1995
Exhibit UKR-44	Abstracts from the Tax Code of Ukraine, No. 2755-VI, 2 December 2010 (Articles 134, 136, 185, 193, 194, 195, 256, 274, 277)
Exhibit UKR-45	Abstracts from the Procedure for Division of Forests into Categories and Allocation of Specially Protected Forest Areas, approved by Resolution of the Cabinet of Ministers of Ukraine No. 733, 16 May 2007
Exhibit UKR-46	State Programme for Development of Ukrainian Carpathian Region for 2020-2022, adopted by Resolution of the Cabinet of Ministers of Ukraine No. 880, 20 October 2019
Exhibit UKR-47	Abstracts from the Code of Ukraine on Administrative Offences, No. 8073-X, 7 December 1984 (Article 65)
Exhibit UKR-48	Abstracts from the Criminal Code of Ukraine, No. 2341-III, 5 April 2001 (Article 246)
Exhibit UKR-49	Form No. 3-ЛГ (annual) of the state statistical survey on forestry statistics, approved by Order of the State Statistics Service of Ukraine No. 118, 6 July 2018

Exhibit UKR-50	Abstracts from the Law of Ukraine on the Plant World, No. 591-XIV, 09 April 1994 (Article 10)
Exhibit UKR-51	Abstracts from the Constitution of Ukraine, No. 254к/96-BP, 28 June 1996 (Article 93)
Exhibit UKR-52	Abstracts from the Rules of Final Felling Operations, approved by Order of the State Committee of Forestry of Ukraine No. 364, dated 23 December 2009
Exhibit UKR-53	Order of the Ministry of Environmental Protection of Ukraine “On Approval of the Lists of Plant and Mushroom Species that are included to the Red Book of Ukraine (Plant Life) and Plant and Mushroom Species that are excluded from the Red Book of Ukraine (Plant Life)”, No. 312, 17 June 2009; and the List of Plant and Mushroom Species that are included to the Red Book of Ukraine (Plant Life) thereto (items Nos. 32, 33, 38, 563 and 569)
Exhibit UKR-54	Forest Code of Ukraine, No. 3852-XII, 21 January 1994 (Articles 12(1), 12(2), 18, 27(5), 86 and 108)

ANNEX C - Executive Summaries

Executive Summary of the European Union

1. While the EU supports the protection of forests and biodiversity, pursuing that objective does not require the adoption of measures that violate international obligations assumed by Ukraine under the Association Agreement (“AA”).
2. According to the 2018 Annual Report of the State Forest Agency of Ukraine, forests cover 15.9 % of Ukraine’s surface area. Over the last 50 years, Ukraine’s forests have increased by almost half. According to the Agency, the stock of standing timber is 2.1 billion cubic metres. That stock is increasing by an average of 35 million cubic metres annually. Every year around 22 million cubic metres are harvested. This means that just 63 % of the yearly increase in standing stock is harvested. These data are confirmed by the Agency’s report of 2019.
3. However, since 2005 Ukraine applies a permanent prohibition on exports of timber and sawn wood of ten “valuable and rare” wood species (the “2005 export ban”). In 2015 Ukraine introduced a temporary prohibition, for a period of 10 years, on exports of all other unprocessed timber (the “2015 export ban”).
4. According to the Ukrainian proponents of this measures the export prohibition essentially seeks to restore the woodworking and furniture industries, create employment and refocus exports from wood raw materials towards products with a higher degree of processing. The same objectives are reiterated in the conclusions of the Parliament’s Committee on Industrial Policy and Entrepreneurship, and by the Parliament Scientific and Expert Department.
5. Article 35 of the AA forbids each Party from *inter alia*, instituting “any prohibition” on exports of goods of that Party destined for the territory of the other Party. Article 35 of the AA incorporates by reference Article XI of the GATT 1994. Article XI:1 of the GATT 1994 forbids WTO Members from instituting or maintaining *inter alia* prohibitions on exports of any product destined for the territory of another Member.
6. The 2005 export ban and the 2015 export ban constitute “prohibitions” on exports from Ukraine to the EU within the meaning of both the first sentence of Article 35 of the AA and Article XI:1 of the GATT 1994. As such, they are incompatible with Article 35 of the AA.
7. In stark contrast with the very ambitious trade liberalization objectives pursued by the AA, Ukraine has put forward an extremely narrow interpretation of Article 35 AA, which would require reading that provision as imposing less obligations on the Parties than Article XI of the GATT 1994.
8. According to Ukraine, unlike Article XI of the GATT 1994, Article 35 AA would prohibit only those export prohibitions or restrictions that are shown to have the “actual effect” of restricting trade. Moreover, it appears that the Parties would be allowed to maintain any such restrictions until 2025, and that only those restrictions that apply specifically to trade to the other Party, as opposed to those applied *erga omnes*, would be caught by Article 35 AA. Last but not least, each Party would be free to restrict

exports (or imports) by invoking Article 290(1) AA and its “right to regulate”, whether or not such right is exercised in accordance with the relevant exceptions stipulated in the AA, such as those provided for in Article 36 AA.

9. Ukraine’s arguments have no basis on the text of Article 35 AA and the relevant context. They would lead to a result that is plainly at odds with the object and purpose of the AA. Whereas the Parties sought to set up a DCFTA providing for ‘WTO *plus*’ obligations, Ukraine would read Article 35 AA as providing for ‘WTO *minus*’ treatment. As mentioned expressly in Article 25 AA, the AA seeks to establish, as part of the DCFTA, a free trade area “in accordance with Article XXIV of the GATT 1994”. Yet, Ukraine’s interpretation of Article 35 AA would call into question the compatibility of the AA with Article XXIV of the GATT 1994 because paragraph 8(b) of that provision requires the parties to a FTA to eliminate between them any measures prohibited by Article XI of the GATT 1994 on substantially all trade, except as permitted by the exceptions cited therein. On Ukraine’s interpretation, however, Article 35 AA would fail to capture many export (and import) restrictions that would be prohibited by Article XI of the GATT 1994. Besides, if this interpretation is upheld the EU could still challenge the export bans before a WTO panel on the basis of Article XI of the GATT 1994.
10. Article 35 AA incorporates by reference Article XI of the GATT 1994 in its entirety consistently with the Parties’ objective to build upon their pre-existing WTO obligations in order to set up a WTO compatible DCFTA “leading towards Ukraine's gradual integration in the EU Internal Market”.
11. The EU observes that Ukraine does not question that, by their own terms, both the 2005 export ban and the 2015 export ban prohibit all exports of the products concerned by each of them from Ukraine to the EU.
12. According to Ukraine, what is not allowed under Article 35 AA are measures characterized as having an ‘effect’ ‘on the export’ of ‘good destined for the territory of the other Party’.
13. Ukraine appears to base its very peculiar reading of Article 35 of the AA on the phrase “... or any measure having an equivalent effect”. However, that phrase cannot be understood as requiring the complaining party to show that the challenged measure has the actual effect of restricting exports. Rather, that phrase serves to expand the prohibition contained in Article 35 also to measures that prohibit or restrict exports *de facto*. Irrespective of this, the evidence already provided by both Parties in the form of trade statistics, confirms beyond doubt that the measures at issue have had the actual effect of halting trade in the products concerned.
14. Moreover, Article 35 AA and Article XI:1 of the GATT 1994 forbid all prohibitions on exports from Ukraine to the EU (and viceversa), whether permanent or temporary, regardless of whether the prohibition applies also to exports to other countries or only to the EU or Ukraine.
15. Finally, Article 25 AA does not have the implication that temporary prohibitions or restrictions are permitted by the AA provided that they end before the transitional period

mentioned in that provisions. That transitional period reflects the fact the provisions included in Chapter 1 of Title IV relating to the elimination of customs duties on import and exports between the Parties are to be implemented gradually, according to a schedule with a maximum length for certain products of 10 years. Article 25 AA sets out an outer limit, within which each of the provisions of Chapter 1 of Title IV of the AA must specify the duration of the applicable transitional period, if any. Article 35 AA is not subject to any transitional period. To the contrary, the use of the term “maintain” underlines that it is meant to apply to any pre-existing prohibitions or restrictions from the first day of application of the AA. Subjecting the application of Article 35 AA to a transitional period would be absurd as that provision restates the pre-existing obligations of the Parties under Article XI of the GATT 1994.

16. With regard to the parties’ right to regulate, Article 290(1) AA is a confirmatory provision that “recognises” the pre-existing, and unquestionable, right of each Party to regulate its own levels of protection, “in line with relevant internationally recognised principles and agreements”. Such recognition, however, cannot be construed as conferring an unlimited right to derogate from any other provision of the AA, including Article 35 AA, as Ukraine seems to argue. That position would allow each Party to nullify at will (by pretending that its trade restrictive measure has an environmental nature) the benefits resulting from the trade provisions included in Title IV, such as Article 35 AA, thereby defeating one of the core objects and purposes of the AA. Rather, the right to regulate recognised in Article 290(1) AA must be exercised in accordance with the requirements of other provisions of the AA that give expression and operationalise the “right to regulate”, including the policy exceptions mentioned in Article 36 AA. By the same token, invoking one party’s right to regulate does not change the burden of proof under Article 36 AA.
17. In the present case Ukraine has invoked as justification Article XX(b) of the GATT 1994 with regard to the 2005 export ban and Article XX(g) of the GATT 1994 as a justification for the 2015 export ban. Those provisions read 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 countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement [the GATT] 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;...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. ...”
18. Ukraine has not showed that the 2005 export ban is designed and it is necessary to protect plant life or health, because it has neither provided any evidence showing a risk to the specific habitat or population of the ten wood species covered by the 2005 export ban, nor that the 2005 export ban had any positive effects on the conservation of those species, despite Ukraine had ample time to observe its effects (if any). Moreover, none

of the ten species covered by the 2005 export ban are classified by that IUCN Red List under a category that would suggest that their existence is threatened and the mere inclusion of some of those species in the “Red Book of Ukraine”⁴⁶⁴ is not in itself determinative in the absence of any reliable data on the existing population of those wood species and their evolution. In addition, Ukraine has not demonstrated that the export ban is necessary to implement any of its international obligation or it is a complementary element of its environmental policy.

19. Moreover, Ukraine has provided no concrete evidence whatsoever showing that the unsubstantiated risk of extinction that might be threatening those species is in any way linked to export of timber and sawn wood of those species. In addition, nothing really prevents or limits domestic consumption and production of timber and sawn wood of the ten species included in the 2005 export ban. Paragraph 9 of Article 70 of the Forest Code provides for a specific authorisation for harvesting the trees and shrubs listed in the Red Book of Ukraine, while the species covered by the export ban which are not registered in the Red Book of Ukraine can be harvested like any other wood species. In light of the above, the Arbitration Panel should conclude that 2005 export ban is incapable of protecting those woods species from the risk of extinction, if any. But even admitting (*quod non*) that the 2005 export ban is somehow theoretically apt to protect those woods species from that hypothetical risk of extinction, the above considerations also show that the 2005 export ban makes no concrete contribution or at best a very limited one to the achievement of Ukraine’s environmental objective of preserving from extinction the “rare and valuable” wood species. On the other hand, the measure is as trade restrictive as it can be. Therefore, on balance it cannot be considered as necessary under Article XX(b) of the GATT 1994, all the more so as there are less trade restrictive alternative measures that would allow Ukraine to achieve its objective to the same extent (such as a limitation of the quantity of trees/wood of the species covered by the 2005 ban that can be harvested or placed on the market each year, a moratorium on cutting trees of these wood species in the areas where illegal logging occurs the most, or a very low harvesting limit, the application of administrative controls on trading of wood from these areas and of course the forest management measures that Ukraine is in the process of finalising and that Ukraine has listed in its submissions).
20. While the above shows that the 2005 export ban is not provisionally justified under Article XX(b) of the GATT 1994, the EU maintains that it also does not comply with the Chapeau of Article XX of the GATT 1994 because it constitutes an arbitrary and unjustifiable discrimination between Ukraine and domestic consumers and the EU and EU’s consumers. Ukraine should have demonstrated that this discrimination bears a rational connection to the objective it has invoked. However, it failed to do so, because domestic consumption is capable of threatening the survival of those species, but it is not subject to any restriction remotely comparable to that imposed on export. Moreover, Ukraine fails to show that the 2005 export ban does not constitute a disguised restriction to international trade. Indeed, Ukraine’s argues that there is nothing disguised,

⁴⁶⁴ Ukraine’s Written Submission, para. 227

deceptive or concealed about the ban's application. However, it admits that this does not exhaust the meaning of disguised restriction.

21. With regard to the 2015 export ban, the EU recalls that Article XX(g) of the GATT 1994 permits the adoption or enforcement of trade measures that have a close and genuine relationship of ends and means to the conservation of exhaustible natural resources, when such trade measures are even-handed, i.e. they are brought into operation, and "work together with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource.
22. Ukraine stresses that the 2015 temporary export ban was introduced in order to stop intensive deforestation but no concrete evidence shows the existence of intensive deforestation in Ukraine or an overall reduction of the forest area. It argues that the 2015 export ban is necessary to combat illegal logging but it did not list export as one of the causes of that phenomenon. On the contrary, it explained that illegal logged wood is used mainly by local unregistered sawmills that can process and export the sawn wood without restriction (indeed, the 2015 export ban does not cover sawn wood). Moreover, by setting a domestic consumption limit of wood at 25 million cubic metres per year, Ukraine necessarily considers that harvesting that amount of wood does not threaten the sustainable exploitation of its forests. However, Ukraine does not explain why for the conservation of its forest it would be necessary to prohibit the export of all unprocessed wood, i.e. even of wood harvested in compliance with the 25 million cubic metre cap, and reserve that wood for the domestic processing industry. Hence, the 2015 export ban is undoubtedly overly broad and not proportional to the objective invoked by Ukraine. In addition, Ukraine has not demonstrated that the 2015 export ban is part of its policy for the preservation and sustainable exploitation of its forests, and that it contributes to the declared conservationist objective. On the contrary, several parliamentary documents explicitly confirm that the 2015 export ban is essentially designed to promote Ukraine's own wood processing industry, rather than any conservationist or environmental objective, by refocusing export from raw wood materials to processed wood products. However, the development of woodworking and wood-processing industry may very well lead to a sustained and increased consumption of domestic wood and jeopardise the conservation of forests. If Ukraine really wanted to conserve its forests, it should have forbidden not only export of unprocessed wood, but also of processed wood products. However, the 2015 export ban prohibits the export of unprocessed timber, but neither of fuel wood (which is unsuitable for further processing) nor of processed wood (e.g. sawn wood), in line with the objective of refocusing export from raw wood materials to processed wood products. Furthermore, the 2015 export ban was clearly conceived and enacted in the absence of any limitation to domestic consumption of wood. When the 2015 export ban was introduced, the Forest Code did not set out a real and effective quantitative limitation on the production or consumption of wood, but only a partial limitation concerning the wood cutting area available for final felling operations (which account for less than half Ukraine's wood production). Ukraine introduced "on paper" a limitation on domestic consumption of wood in July 2018 (the "consumption cap"), i.e. several years after having introduced the 2015 export ban, and after the EU had raised the issue of the compatibility of the

2015 export ban. However, in the course of this proceedings Ukraine has not clarified whether the procedure necessary to monitor compliance with the domestic consumption cap is operational. In any event, even if that procedure were operational, according to Ukraine's own data, the total volume of timber ever harvested in Ukraine is well below the level of the consumption cap. Hence, the cap is purely theoretical and does not impose any real and effective limitation on domestic consumption. Moreover, the 2005 export ban is not an even-handed measure because it imposes a complete ban on export, while allowing for a very high and unprecedented level of domestic consumption. Finally, Ukraine's arguments that according to which the 2015 export ban is somehow justified by the consequence of the conflict with Russia is an ex-post rationalisation unsupported by any concrete element. In light of the foregoing, it is undisputable that the design of the measure is clearly not to conserve Ukrainian forests and that at best there might be an incidental relation between the measure and the conservation of those forests, which is not sufficient for a measure to comply with Article XX(g) of the GATT 1994. The same holds with regard to Ukraine's argument according to which the 2015 export ban would contribute to the prevention of illegal logging. The EU fails to see what contribution could give to the achievement of that objective prohibiting the export of wood logged in compliance with Ukraine's legislation.

23. While the above shows that the 2015 export ban is not provisionally justified under Article XX(g), it also does not comply with the Chapeau of Article XX of the GATT 1994. The 2015 export ban is an arbitrary and unjustified discrimination to trade, as less trade restrictive measures are available to Ukraine to achieve its declared objective (such as a wood harvesting cap not combined with any export restriction or combined with an export restriction that applies only to wood harvested in excess of the level that Ukraine considers sustainable, a prohibition of export of illegally logged wood and wood products made with that wood and of course the forest management measures that Ukraine itself has listed in its submissions and it is in the way of finalising such as an obligatory electronic accounting system for all forestry users, sanctions for illegal logging, the National Forestry Inventory, etc. measures targeted to the problems affecting specific areas of Ukraine such a very low harvesting limit, or the application of administrative controls on trading of wood from those areas,). By the same token, the absence of any rational connection between the objective of conserving Ukraine's forests and the discrimination between Ukraine and the EU from the point of view of access to Ukraine's wood products in question confirms that this discrimination is arbitrary and unjustifiable. Moreover, relevant parliamentary documents show that Ukraine was well aware of the conflict between the export ban and its international law obligations but tried to hide that conflict by enacting a theoretical consumption cap. Therefore, the EU submits that the 2015 export ban constitutes a disguised restriction to international trade.
24. Finally, Ukraine has not demonstrated that conditions that relate to access to (or consumption of) Ukrainian rare and valuable wood species (2005 export ban) or

- unprocessed wood (2015 export ban) are not similar in Ukraine and the EU insofar as the objective of the conservation of Ukrainian forests is concerned.
25. Ukraine has also invoked some provisions of Chapter 13 AA. Ukraine requests that those provisions be “taken into account” when assessing the exceptions based on Article XX(b) and Article XX(g) of the GATT 1994. The EU considers that the right to regulate recognised in Article 290(1) and the provisions on multilateral environmental agreements included in Article 294 may be relevant in assessing whether the measures in dispute can be justified under Article XX(b) or Article XX(g). In particular, they may be relevant in assessing whether the measures in dispute are both “designed” and “necessary” to achieve the objectives protected by those exceptions.
 26. Ukraine has nowhere explained, let alone substantiated, why the measures at issue are necessary to implement the multilateral environmental agreements and environmental principles to which it refers. Indeed, none of the environmental agreements mentioned by Ukraine requires, or even envisages, the imposition of export bans. Nor are those export bans necessary to comply with the environmental principles invoked by Ukraine, given that there are less trade-restrictive alternatives to achieve the environmental objectives allegedly pursued by Ukraine and, hence, also to implement the international agreements and environmental principles invoked by Ukraine.
 27. In any event, Article 296(2) does not provide an exception from the obligations of the Parties under any other provision of the AA, including Article 35. Those provisions must be interpreted harmoniously and the only reasonable interpretation is that the obligation imposed by Article 296(2) presupposes that the “laws, regulations or standards” mentioned therein must be compatible with a Party’s obligations under any other provisions of the AA.
 28. Likewise, Article 294 of the AA stipulates an obligation to cooperate with regard to the sustainable management of forest resources and promoting trade in legal and sustainable forest products. There is nothing in the text of Article 294 that may be construed as providing an exception from a Party’s obligations under any other provision of the AA, including those under Article 35 of the AA. Nor does a breach of Article 294 by a Party entitle the other Party to suspend unilaterally its obligations under other provisions of the AA. In any event, the EU has complied with its obligation to cooperate with Ukraine on this matters providing considerable technical and financial support.
 29. The EU remains fully committed, in accordance with Article 294 of the Association Agreement, to cooperate with Ukraine in order to promote the sustainable management of forest resources. However, the measures at issue are neither necessary nor apt to achieve that purpose. The sustainable management of forest resources can be most effectively pursued through other measures that are fully compatible with the international obligations of the Parties. On the other hand, the EU cannot accept that measures whose essential objective is to protect a domestic industry be shielded from legal scrutiny under the cover of environmental measures.

Executive Summary of Ukraine

INTRODUCTION

1. Ukraine submits this Executive Summary of its Opening Statement made at the hearings held on 22-23 September 2020, written version of which were provided to the Arbitration Panel and the European Union on 23 September 2020 and subsequently published, albeit with minor corrections, at the website of the Ministry for Development of Economy, Trade and Agriculture of Ukraine (available at <https://me.gov.ua/>) on 24 September 2020.
2. In this *ad hoc* arbitration conducted under the Association Agreement, the European Union claims that the so-called “2005 export ban” and “2015 temporary export ban” constitute “prohibitions” on exports of (a) timber and sawn wood from ten wood species listed in Article 1 of 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 of Ukraine No. 2860-IV”) and (b) unprocessed timber from Ukraine under Article 35 of the Association Agreement and these two measures are incompatible with Article 35 of the Association Agreement.
3. Ukraine’s written submission respond accurately to the substantive arguments that the European Union raised in its written submission. However, some selected useful points were made in the Opening Statement. In particular, that:
 - a. Article 35 of the Association Agreement cannot be opposed by one Party against another in any arbitration proceeding until the end of the 10-year period agreed between the Parties to progressively establish a free-trade area, i.e. by the end of 2025;
 - b. the Arbitration Panel is not competent to address the dispute brought before it by the European Union because this dispute is a matter arising under Chapter 13 of the Association Agreement;
 - c. the challenged measures are not inconsistent with Article 35 of the Association Agreement *per se*;
 - d. even if Article 35 of the Association Agreement is engaged, the measures are exempted based on Article 36 of the Association Agreement, namely that the “2005 export ban” and “2015 temporary export ban” are justified under Article XX(b) and Article XX(g) of the GATT 1994 respectively.

Factual background regarding the measures at issue

4. In 2002, Ukraine set the goal to expand by 2015 its woodland from 15.6% to 16.1% of the total territory of Ukraine in order to meet ultimately in 20 years an optimal coverage of 19 to

20% according to European recommendations.⁴⁶⁵ By 2010, the Ukrainian woodland increased by just 0.1%. In 2019, it was reported that the Ukrainian woodland covers 15.9 % of the total area of Ukraine's territory.⁴⁶⁶ The expected expansion of the woodland has not been achieved for the reason that the Ukrainian resources have been mobilized for intensive reforestation after the expansion of woodcutting, rather than for the sake of afforestation.

5. In 2018-2019, the stock of standing timber was 2.1 billion cubic metres, while the total volume of timber harvested amounted to 22.5 and 20.9 million cubic metres, respectively.⁴⁶⁷ Given the same level of annual increment for 2018 and 2019 (35 million cubic metres), the forest utilisation rate was accordingly 63% in 2018 and 60% in 2019. While the annual increment reaches 35 million cubic metres in Ukraine, it was 768.3 million cubic metres in the European Union in 2010.⁴⁶⁸ Notwithstanding that the above-mentioned figures might provide an impression that the stock of standing timber in Ukrainian forests is considerably high, in addition to the fact that Ukraine does not reach its optimal woodland coverage of 20%, the average age of Ukrainian forests is over 60 years and they are gradually ageing. An increase in timber harvesting is therefore equivalent to an increase in carbon dioxide emissions to the atmosphere, which is the opposite of what should be done in terms of protection of the environment.
6. For 30 years the area of conservational forests has increased four times constituting now approximately 16.8% of the Ukrainian woodland. Further, the forest area of Ukraine certified by Forest Stewardship Council has increased to 4.65 million hectares, i.e. around 45% of the total area of forest lands in Ukraine.⁴⁶⁹
7. In sum, although it can be argued that the Ukrainian sustainable forest development policy makes a success in increasing the area of conservational forests and forest verified under an independent management certification scheme, there is still a failure in (i) reaching the optimal woodland coverage of 20% of the total area of Ukraine; and (ii) rejuvenation of forests which would increase the overall quality of the standing stock timber in the Ukrainian forests.

Threats faced by the Ukrainian forests and forestry resources.

8. The first challenge encountered by Ukraine with respect to its forest has been, and is still, to put in place and implement efficiently a sound management of its resource, in line with its commitments and policy to improve the protection of the environment.

⁴⁶⁵ See footnote 82 to paragraph 135 of *Ukraine's Written Submission*.

⁴⁶⁶ Public Annual Report (2019) of the State Forest Resources Agency of Ukraine, Chapter I (p. 3), Exhibit UKR-01; *Ukraine's Written Submission*, para. 27.

⁴⁶⁷ *Ukraine's Answers to the Arbitration Panel's Questions*, footnote 77 to para. 108. See Wood removals/ Logging by systems and types of fellings (2005-2019) available at http://www.ukrstat.gov.ua/operativ/operativ2017/sg/lis/zld/zld_e/zag_der_za_sys_ta_vyd_e.htm.

⁴⁶⁸ Eurostat, *Forestry in the EU and the world: A statistical portrait*, 2011 edition, page 15, available at: <https://ec.europa.eu/eurostat/documents/3217494/5733109/KS-31-11-137-EN.PDF>.

⁴⁶⁹ *Ukraine's Written Submission*, para. 50; *Ukraine's Answers to the Arbitration Panel's Questions*, para. 73.

9. The current challenges justifying the necessity to protect the Ukrainian forests are, among others, illegal logging and smuggling practices, emergency in international relations between Ukraine and Russian Federation since 2014.
10. With regard to the latter, Ukraine has taken a non-discriminatory approach in introducing a general – but temporary – measure, related to the export of wood rather than specific measure targeting a certain country because what the essential security interest of Ukraine required was to protect its resource as such. The situation of emergency in international relations that Ukraine has been facing since 2014 is the relevant factual background to be taken into account when assessing whether Ukraine could have adopted measures other than the *erga omnes* temporary ban to implement its legitimate environmental protection policy. Ukraine claims that the challenged measures are part and parcel of its overall policy and that they were the only workable measures that Ukraine could take in the situation it was confronted to.

The European Union's claim in context.

11. The European Union submits, inter alia, that Ukraine's temporary export ban would be burdensome for its consumers or producers. There is no evidence of this assertion.⁴⁷⁰ By contrast, it can be recalled again that there are 182 million hectares of forest in the European Union. This is 18 times more than in Ukraine, where the total area of forest lands is 10.4 million hectares. Forests cover 43% of the European Union's land area while forests cover only 15.9% of the Ukrainian land area.
12. Further, the European Union cannot be said short of forestry resources or of wood. Wood is abundant in the European Union. Far more abundant than in Ukraine. That is a point that is helpful to keep in mind in order to take the measure of this case: wood from Ukraine is, for example, not comparable to rare earth from China, as discussed in the case *China – Rare Earth* before the Appellate Body of the WTO, to which the European Union refers.⁴⁷¹

Legal Arguments

13. The rights and obligations of the Parties are not to be assessed solely under the prism of the GATT 1994, contrary to what the European Union suggests. It is the Association Agreement which regulates relations between the Parties in this dispute. Certainly, according to Article 35 of the Association Agreement, Article XI of the GATT 1994 is to be taken into account. But this is only to the extent that it provides exceptions to the basic rule established by Article 35 of the Association Agreement. After stating that certain trade restrictions are not allowed, Article 35 adds: “*except as otherwise provided in this Agreement or in accordance with Article XI of the GATT 1994 and its interpretative note*”. This is the only reference to Article XI, and it concerns only the exception it contains which are at Article XI:2 of the GATT 1994. Ukraine concludes that this excludes Article XI:1 of the GATT 1994 as an applicable “legal standard” for this case. Article XI of the GATT 1994 is relevant to the sole extent that it provides exceptions to the basic rule set out in Article 35 of the Association Agreement, as provided for in the Article XI:2 of the GATT 1994.

⁴⁷⁰ See *EU's Responses to the Arbitration Panel's Questions*, paras 204-206.

⁴⁷¹ Appellate Body Report, *China – Measures related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, para. 4.12.

14. The European Union filed its claim at a moment when the implementation of the Association Agreement was under a 10-year transitional period set forth in Article 25 of the Association Agreement. The Association Agreement is about the establishment of a free-trade area. This is not the case of the GATT 1994, which does not create a free-trade area. In fact, the GATT 1994 discusses free-trade areas as exceptions to its provisions. And, indeed the Association Agreement creates exceptions to the obligations of the Parties under the GATT 1994. This 10-year period is not over yet and Ukraine does take this opportunity to duly address the matters it has to fix in order to be able to effectively finalize this free-trade area when the transitional period is over. Of course, some obligations mentioned in the Association Agreement did enter into full effect immediately after its entry into force.
15. It is indisputable that Article 35 does not say that it applies “upon entry into force of the Association Agreement”. There is, therefore, no indication in the text itself of the moment of its entry into operation. But the context confirms that, when a provision is expected to be implemented “upon entry into force of the Agreement”, it is expressly stated. Thus, since the obligation of Article 35 does *not* take its full legal effect “upon entry into force” of the Agreement, it does so at the expiry of the 10-year period. And this interpretation is fully consistent with the object and purpose of the Association Agreement, which is the progressive establishment of a free-trade area, to be completed in 5 years from now.

The Arbitration Panel is not competent to address the dispute brought before it by the European Union.

16. The subject matter of the present dispute falls within the ambit of Chapter 13 of the Association Agreement, the procedures of which have not been activated by the European Union. Ukraine affirms that the challenged measures are a mere exercise of its right to regulate its own level of environmental protection, a right which is duly recognised in Chapter 13 of the Association Agreement, at Article 290.
17. The legal logic is that one cannot at the same time exercise a right recognized by an agreement and violate this same agreement. Article 290 is an exception to the trade rules of Article 35 of the Association Agreement. Indeed, the prohibitions of Article 35 apply: “except as otherwise provided in this Agreement”.⁴⁷² Precisely, Article 290 can only be seen as such an exception to the prohibitions of Article 35, and it is indeed an exception “provided in” the Association Agreement. This is Ukraine’s understanding of the relation between Articles 290 and 35 of the Association Agreement. Ukraine does *not* claim that each Party has an unlimited and unqualified right to regulate any field they see fit. It claims no more, but no less, than what the Association Agreement provides for, namely a right to regulate its own levels of domestic *environmental protection*.
18. It cannot be right that when Parties have devoted an express right to regulate in their Association Agreement, they were merely referring to pre-existing GATT 1994 rules. If it

⁴⁷² Article 35 of the Association Agreement titled “Import and export restrictions” reads:

“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” (emphasis added).

were right, then Article 290 would be devoid of any *effet utile*, which would not be an acceptable interpretation of the Association Agreement.

19. Within the meaning of Article 290 of the Association Agreement, Ukraine submits that the challenged measures are adopted by Ukraine “to establish and regulate [its] own levels of domestic environmental and sustainable development policies and priorities”. Ukraine is entitled to fix its “own levels” of protection, without been limited to what is arguably “necessary”.
20. The European Union’s key assertion is that this “right to regulate” its own levels of protection of the environment cannot be used, in so far as it has an effect on trade, in disrespect of the trade rule provided for at Article 35.⁴⁷³ Chapter 13 of the Association Agreement provides that insofar as the right to regulate for the protection of forests, recognized by Article 290, is concerned, its impact on trade is addressed in the same Chapter 13, by Article 294, titled “Trade in forest products”, *not* by Article 35.
21. Under this background, Ukraine argues that: (i) it has established its *own levels* of domestic environmental protection and sustainable development; (ii) this includes the challenged “2005 export ban” and “2015 temporary export ban”; (iii) the “2015 temporary export ban” has been adopted for a temporary period of 10 years (Ukraine needs these 10 years to guarantee, as required by Article 294 of the Association Agreement, a sustainable management of its forest resources, with the support of the European Union, and to “improve forest law enforcement and governance, and promote trade in legal and sustainable forest products”, as required by Article 293(2) of the Association Agreement); and (iv) as required by Article 293(2) of the Association Agreement, Ukraine effectively “strive(s) to facilitate and promote” trade in environmental goods – which includes wood, by adopting many rules for better management of its forestry resources.
22. It derives from the above that this case is *plainly* a Chapter 13 of the Association Agreement case.
23. Under Article 304 of the Association Agreement, which is about the “Scope” of Chapter 14 related to “Dispute Settlement”, any dispute related to any trade and trade-related matter can be resolved by means of arbitration and any Arbitration Panel would have jurisdiction to handle such dispute *unless otherwise expressly provided*. And, of course, Article 300(7) does *expressly provide otherwise* with respect to “any matter arising under” Chapter 13. The current dispute definitely relates to the trade in forest products (unprocessed timber; timber and sawn wood from 10 valuable and rare wood species listed in Article 1 of Law No. 2860-IV). It is therefore arising under Chapter 13, and it must be resolved only according to the procedures provided for in Articles 300 and 301 of the Association Agreement.
24. The European Union has therefore erred in seizing the current Arbitration Panel for addressing a matter arising under Chapter 13 of the Association Agreement. As a consequence, the Arbitration Panel cannot address this matter, because it has no jurisdiction, or because the request for the establishment of an arbitration panel is inadmissible.
25. Should this Arbitration Panel consider that it has jurisdiction and that its scrutiny must be based on Articles 35 and 36 of the Association Agreement, the very first point that would have to be clarified is the interpretation of Article 35.

⁴⁷³ EU’s Responses to Ukraine’s Questions, paras 49-50.

Ukraine submits that the challenged measures are not inconsistent with Article 35 of the Association Agreement per se.

26. With respect to the proper interpretation of Article 35 of the Association Agreement, Ukraine has submitted that the key term in Article 35 is the notion of “effect”. It has argued that a measure is incompatible with Article 35 to the extent that it has a certain “effect”, and that this effect must be demonstrated.
27. The European Union claims that the effect is irrelevant. But that is not what Article 35 of the Association Agreement says. It derives from the text of Article 35 that a threefold test must be met for a measure to be concerned: (i) to determine the nature of the measure, i.e. whether it is a “prohibition”; (ii) if it is the prohibition, to determine the nature of the activity subject to the prohibition, i.e. “export or sale for export”; and (iii) if it is the case, to determine the nature of the goods to be exported, i.e. whether the goods are *destined for the territory of the other Party*. The terms “destined for” suggest an actual destination, that is the intended destination of the exportation of a certain good.
28. So, if the European Union is correct when it contends that the effect of the measures is irrelevant in order to assess whether Article 35 is engaged, then, the only question, in order to know if Article 35 is engaged, is whether the Ukrainian measures prohibit the exportation of goods “destined for the territory of” the European Union. The answer is no. Both the “2005 export ban” and the “2015 temporary export ban” prohibit the exportation of certain sorts of wood “beyond the customs territory of Ukraine”.
29. If Ukraine is right in considering that Article 35 of the Association Agreement relates to measures having an actual effect, then it is the task of the European Union to prove that the challenged measures do concern “goods destined for “the European Union’s territory”. Ukraine submits that the European Union did not discharge its burden of proof in this regard.

Even if Article 35 is engaged, the Ukrainian measures are exempted based on Article 36 of the Association Agreement and, by reference, under Article XX of the GATT 1994.

30. Regarding the “2005 export ban”. Ukraine has maintained from the very beginning of this case that the “2005 export ban” was justified under Article XX(b) of the GATT 1994, which authorizes Parties to enact measure “necessary to protect [...] plant life [...]”.
31. It is undeniable that the measure at stake concerns “plant life”: its sole subject-matter is the timber and sawn wood from ten wood species, the exportation of which is prohibited. It is also obvious that the measure is neither discriminatory nor a disguised restriction. Therefore, the only point that the Arbitration Panel will have to address is the European Union contention that this “export ban” would not be necessary to protect these ten wood species and that other less-trade restrictive measures would be available.
32. To answer this question, it can first be recalled that Ukraine, throughout the present proceedings, has repeatedly noted that Law of Ukraine No. 2860-IV which introduced the so-called “2005 export ban” is not and should not be construed separately from the rest of the Ukrainian environmental policies regarding forestry resources. Indeed, Law of Ukraine No. 2860-IV prohibits the exportation of ten species of wood but only because these species are considered “rare and valuable”. The combination of the two adjectives – “valuable” and “rare” – refers to a category of wood species recurrently referenced in Ukrainian

environmental policies as species subject to additional and specific protections. Notably, Article 70 of the Forest Code of Ukraine has always provided that “*valuable and rare wood*” is to be preserved during felling operations.⁴⁷⁴

33. By qualifying the six wood genera and the four wood species concerned by the “2005 export ban” as “rare and valuable”, Ukraine has decided to highlight the importance of these species – five of which are indeed listed in the Red Book of Ukraine – for the conservation and protection of its forestry resources and its biodiversity,⁴⁷⁵ and therefore, to limit their industrial exploitation, save for the production of fruits and nuts or other products from flowering.⁴⁷⁶
34. Given this general protection granted to these ten wood genera/species, the “2005 export ban” is a complementary but necessary measure to effectively *prevent* the industrial exploitation, exportation and excessive logging of these specific rare and valuable species of wood and therefore to protect these plant lives.
35. Regarding the “2015 temporary export ban”. Should the Arbitration Panel consider that the “2015 temporary export ban” is inconsistent with the rule set up in Article 35 of the Association Agreement, Ukraine submits that it is covered by the exception of Article XX(g) of the GATT 1994.
36. A party invoking Article XX(g) must show that the measure: “relates to” the conservation of exhaustible natural resources “made effective in conjunction with” restrictions on domestic production or consumption and that it applies in a manner that “does not constitute arbitrary or unjustifiable discrimination [...] or disguised restriction on international trade”. The two issues that continue to oppose the Parties are (i) whether the measure was necessary for the conservation exhaustible natural resources and (ii) whether it was made effective with a “real” restriction on domestic production or consumption. On both issues, Ukraine maintains that affirmative answers should be upheld by the Arbitration Panel.
37. In 2005, the OSCE/UNECE study highlighted that Ukraine was in dire need of reforestation due to decades of illegal and irregular logging of its forest areas.⁴⁷⁷ Yet, the efforts of the Ukrainian authorities to secure growth of its forested areas have been hampered by numerous obstacles and notably illegal logging.⁴⁷⁸ The significant effect of deforestation should not be brushed aside. To recall, the forest area available for commercial exploitation is already reduced due to around 3.5 million hectares of forest being contaminated after the Chernobyl Nuclear Power Plant Disaster,⁴⁷⁹ the huge loss of forest area in the Donetsk and Luhansk regions due to forest fires and mechanical damage related to the ongoing conflict in that area,⁴⁸⁰ not to mention the numerous nature reserves put in place before 2015 aimed at environmental protection.

⁴⁷⁴ Prior to the actual provisions of the Forest Code of Ukraine, its former Article 59 (repealed in 2008), already specified that “*during the final felling operations valuable and rare wood and shrubs species, ..., shall be preserved*”.

⁴⁷⁵ This objective falls within the ambit of numerous international conventions to which Ukraine is a party to, including the Convention on Biological Diversity and the Convention on the Conservation of European Wildlife and Natural Habitat.

⁴⁷⁶ *Ukraine’s Written Submission*, para. 59.

⁴⁷⁷ *Ukraine’s Written Submission*, para. 322.

⁴⁷⁸ *Ukraine’s Answers to the Arbitration Panel’s Questions*, para. 208.

⁴⁷⁹ *Ukraine’s Written Submission*, para. 33.

⁴⁸⁰ *Ukraine’s Written Submission*, paras 177 and 181.

38. Thus, the “2015 temporary export ban” was adopted in order to conserve an exhaustible natural resource already in short supply.
39. As for the complementary restriction on domestic consumption or production, it comes under two forms: (i) the “2018 Amendment” which effectively limits domestic consumption of unprocessed timber to a maximum of 25 million cubic metres per year in order to conserve the exhaustible natural resource of forests, and (ii) the existence of different categories of domestic measures that restrict the production or consumption of timber in Ukraine, namely (a) access conditions to carry out timber harvesting, and (b) volume restrictions (production limits), that constitute a comprehensive set of regulations designed to limit the domestic production of rough wood products.
40. Ukraine submits that the domestic restrictions, described in detail at paragraphs 128 and 129 of its Opening Statement, together with the “2015 temporary export ban” guarantees a gradual increase in Ukraine’s forestry areas. Therefore, the challenged measure is a part of an environmental conservation policy that has gradually been put in place since the 1990s and that together with the other elements of restriction in domestic consumption contributes to the declared conservationist objective rendering it in conformity with Article XX(g) of the GATT 1994.

Conclusion

41. Ukraine respectfully requests the Arbitration Panel to rule as follows:
 - a. since the European Union did not bring its case before the relevant body, in accordance with the Association Agreement relevant provisions, its claim should be rejected as inadmissible, or rejected for lack of jurisdiction of the Arbitration Panel;
 - b. should the Arbitration Panel consider that the matter pertains to its jurisdiction under the Association Agreement, to reject the European Union’s conclusions on the merits;
or
 - c. should the Arbitration Panel find that the European Union’s claim is not devoid of merit, to clarify what measures would be required to comply with the Association Agreement.