

To the Arbitration Panel

established pursuant to Article 206 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

**Written Submission
by the European Union**

Brussels, 17 February 2020

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TABLE OF CASES CITED

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| <i>Brazil – Retreaded Tyres</i> | Panel Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R, DSR 2007:V, p. 1649 |
| <i>Canada – Periodicals</i> | Panel Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/R and Corr.1, adopted 30 July 1997, as modified by Appellate Body Report WT/DS31/AB/R, DSR 1997:I, p. 481 |
| <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 |
| <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:I, p. 323 |

TABLE OF EXHIBITS

| Exhibit No. | Title |
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| 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 № 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 № 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-VIII), Information from the Verkhovna Rada of Ukraine, 2015, No 31, p. 291 * |
| Exhibit EU – 5 | The Law of Ukraine № 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 4401 10000). |
| Exhibit EU – 9 | Explanatory Note of 6 December 2016 |

Note: All the documents cited in the above table are provided both in the original Ukrainian version and in English translation. The English translation of the documents marked with an asterisk was supplied by Ukraine during the consultations. All the other English translations have been prepared by the translation services of the European Commission.

TABLE OF ABBREVIATIONS

| Abbreviation | Full Name |
|-----------------------|--|
| Agency | Ukraine's State Agency for Forest Resources |
| EU | European Union |
| UKTZED/UCG FEA | Ukrainian Classification of Goods and Foreign Economic Activity |
| GATT 1994 | The General Agreement on Tariffs and Trade 1994 |
| HS | The Harmonized System |
| US dollar | The United States dollar |
| Association Agreement | Association Agreement between the European Union and the European Energy Community and its Member States, of one part, and Ukraine, of the other part. |
| Law 2860-IV | Law of Ukraine № 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 |
| Law 2531-VIII | Law of Ukraine № 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-VIII), Information from the Verkhovna Rada of Ukraine, 2015, No 31, p. 291 |
| Law 325-VIII | Law of Ukraine № 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-VIII), Information from the Verkhovna Rada of Ukraine, 2015, No 31, p. 291 |

EXECUTIVE SUMMARY

1. While the European Union 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.
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.
3. However, since 2005 Ukraine applies a permanent prohibition on exports of timber and sawn wood of ten 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"). Both export prohibitions have a manifest protectionist purpose and are incompatible with Article 35 of the Association Agreement.
4. According to the Ukrainian proponents of those measures, they seek 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. In 2018 a limit on the domestic consumption of unprocessed timber of domestic origin was introduced (the "consumption cap"). However, according to the Agency's own data, the total volume of timber harvested annually in Ukraine (around 22 million cubic metres) is well below the level of the consumption cap introduced by law in 2018 (25 million cubic meters). This renders that cap purely theoretical and shows that the sole reason for introducing a theoretical consumption cap was to create *ex post* an appearance of legal justification for the

2015 export ban. The Ukrainian Parliament Scientific and Expert Department in substance confirmed this assessment at the time of the introduction of the consumption cap.

6. Article 35 of the Association Agreement 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 Association Agreement 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.
7. The 2005 export ban and the 2015 export ban constitute “prohibitions” on exports from Ukraine to the European Union within the meaning of both the first sentence of Article 35 of the Association Agreement and Article XI:1 of the GATT 1994. As such, they are incompatible with Article 35 of the Association Agreement.
8. The export prohibitions at issue and cannot be possibly justified under any other provision of the Association Agreement. Even though the European Union cannot anticipate the arguments that Ukraine will submit to the Panel to justify the export prohibition at stake, it understands that in these proceedings Ukraine may contend that the 2015 export ban is justified under letter (g) of Article XX of the GATT 1994, which refers to measures

Relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production to consumption.

9. The European Union further understands that in these proceedings Ukraine may contend that the 2015 export ban and/or the 2015 export prohibition are justified under Article XI:2 (a) of the GATT 1994, which states that;

The provisions of paragraph 1 of this Article shall not extend to the following:

(a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;

10. However, these defences are not available to Ukraine because the objective of the export bans is protectionist and the bans are not applied in conjunction with an effective restriction on domestic consumption. In any event, both Article XX(g) and Article XI:2(a) of the GATT 1994 are in the nature of affirmative defences. Accordingly, Ukraine bears the burden of proving that the measures at issue are justified under those provisions.
11. The European Union 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 indeed 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.

I. INTRODUCTION

1. Ukraine applies since 2005 a permanent prohibition on exports of timber and sawn wood of ten wood species. In 2015 Ukraine introduced a temporary prohibition, for a period of 10 years, on exports of all other unprocessed timber.
2. Both export prohibitions have a manifest protectionist purpose. According to the Ukrainian proponents of those measures, they seek to “restore the woodworking and furniture industries, create employment and refocus exports from wood raw materials towards products with a higher degree of processing”¹.
3. The export prohibitions at issue are incompatible with Article 35 of the Association Agreement and cannot be possibly justified under any other provision of the Association Agreement.
4. The European Union supports the protection of forests and biodiversity. However, that objective does not require the adoption of measures that violate international obligations assumed by Ukraine under the Association Agreement. The European Union therefore 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 indeed apt to achieve that purpose. The sustainable management of forest resources can be most effectively pursued through other measures that do not restrict trade between the Parties.

II. PROCEDURAL HISTORY

5. On 15 January 2019, the European Union requested consultations with Ukraine pursuant to Article 304 of the Association Agreement with regard to the measures described in Section III.B) below.
6. By diplomatic note of 9 August 2019, the European Union proposed to Ukraine the nomination of the three members of the arbitration panel, the terms of

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 – 1**).

remuneration and reimbursements to proceed with the formal requirements necessary to conclude the nomination process.

7. On 20 August 2019, Ukraine confirmed by diplomatic note its acceptance of the proposal of the European Union.
8. By this exchange of diplomatic notes both Parties agreed, in accordance with paragraph 41 of Annex XXIV (Rules of Procedure for Dispute Settlement) to the Association Agreement, to use English as working language for the dispute settlement proceedings and to instruct the members of the Arbitration Panel to deliver the interim report and the final ruling in the same language.
9. On 27 January 2020, the Parties exchanged diplomatic notes mutually confirming the completion of the nomination process of the Arbitration Panel and the agreement to consider the Arbitration Panel as established as of 28 January 2020 with the following composition:
 - Mr. Christian Häberli, Chairman of the arbitration panel
 - Mr. Giorgio Sacerdoti, Member of the arbitration panel
 - Mr. Victor Muraviov, Member of the arbitration panel
10. The Arbitration Panel is to rule on the matter in accordance with the standard terms of reference set out in Article 306(3) of the Association Agreement.

III. FACTUAL BACKGROUND

A. Some basic facts about Ukraine's forest sector

11. Forests cover 15.9 % of Ukraine's surface area². Over the last 50 years, Ukraine's forests have increased by almost half³. Ukraine is the ninth country in Europe in terms of forested area and the sixth in terms of forest stocks⁴.

² 2018 Annual Report of the State Forest Agency of Ukraine (**Exhibit EU – 2**), at p. 1.

³ *Ibid.*, p.1.

⁴ *Ibid.*, p.1.

12. Ukraine's forests comprise more than thirty timber species, including pine, oak, beech, spruce, birch, alder, ash, hornbeam and fir⁵. Conifer plantations make up 43 % of the total forested area, including in particular pine (35 %)⁶. Hardwood stocks account for a further 43 % of the total forested area, including, in particular, oak and beech (37 %)⁷.
13. The vast majority of forests are state owned, with private forests accounting for less than 1 % of the total forested area⁸. About 73 % of the forested area is managed by the State Agency for Forest Resources (the "Agency")⁹.
14. According to the Agency, the stock of standing timber is 2.1 billion cubic metres¹⁰. That stock is increasing by an average of 35 million cubic metres annually. Every year around 22 million cubic metres are harvested¹¹. This means that just 63 % of the yearly increase in standing stock is harvested¹².
15. In 2018, enterprises under the authority of the Agency logged 16.5 million cubic metres¹³. Out of those, the Agency 13.7 million cubic metres of round timber were sold as such on the domestic market (1.1 million cubic metres more than in 2017)¹⁴; 2.2 million cubic metres were sent to processing enterprises under the authority of the Agency¹⁵; and some 527 thousand cubic metres of fuel wood were exported (a fall of 40 %)¹⁶.
16. Ukraine has traditionally been a largely self-sufficient producer. It imports very little timber products. Until the introduction of the 2005 and 2015 exports prohibitions, Ukraine was a significant exporter of unprocessed timber, including to the European Union.

⁵ *Ibid.*, p.3.

⁶ *Ibid.*, p.3.

⁷ *Ibid.*, p.3.

⁸ *Ibid.*, p. 4.

⁹ *Ibid.*, p. 4.

¹⁰ *Ibid.*, p. 19.

¹¹ *Ibid.*, p. 19.

¹² *Ibid.*, p. 19.

¹³ *Ibid.*, p. 19.

¹⁴ *Ibid.*, p. 19.

¹⁵ *Ibid.*, p. 19.

¹⁶ *Ibid.*, p. 19.

B. The measures

17. This dispute concerns the prohibitions applied by Ukraine on exports of certain wood products to other countries, including the European Union.
18. Ukraine applies since 2005 a permanent and complete prohibition on all exports of timber and sawn wood of ten wood species (the “2005 export ban”).
19. In 2015 Ukraine introduced a temporary prohibition, for a period of 10 years, on all exports of unprocessed timber (the “2015 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.
20. In 2018, an attempt was made to introduce a temporary prohibition on exports of fuel wood (the “2018 amendment”).
21. Currently, the export prohibitions which are the subject of this dispute are stipulated in the Law of Ukraine № 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”)¹⁷, as successively amended.
22. In particular, the following amendments of Law 2860-IV are relevant for this dispute:
 - The Law of Ukraine № 325-VIII of 9 July 2015, on amendments of the Law of Ukraine № 2860-IV, concerning the Temporary Export Prohibition for Unprocessed Timber (Law 325-VIII);¹⁸ and
 - The Law of Ukraine № 2531-VIII of 6 September 2018 , on “Amendments to certain Legislative Acts of Ukraine concerning the preservation of Ukrainian

¹⁷ Law of Ukraine № 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, No 2-3, Article 34 (**Exhibit EU 3**).

¹⁸ Law of Ukraine № 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-VIII), Information from the Verkhovna Rada of Ukraine, 2015, No 31, p. 291 (**Exhibit EU 4**).

Forests and Preventing Illegal Export of Unprocessed Timber (Law 2531-VIII)¹⁹.

(a) The 2005 export ban

23. Article 2 of Law 2860-IV imposes a prohibition on exports of timber and sawn wood of certain species, which that Law describes as “valuable and rare”. It states that:

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

24. The terms “valuable and rare wood species” are defined in Article 1 of Law 2860-IV as including:

Acacias, checker trees, cherry trees, pear trees, walnut trees, chestnuts, common yews, black cherries, acers and junipers.

25. In turn, the term “timber” is defined as follows:

Wood materials that are extracted by dividing into parts felled trees and logs (along and across) for further processing²⁰.

26. Last, the terms “sawn wood” are defined as:

Sawn goods of a certain size and quality that have at least two planar parallel layers (section IX, group 44, code 4407 of the Ukrainian Classification of Goods for Foreign Economic Activity (584a-18))²¹.

27. The prohibition instituted by the 2005 export ban is permanent. It has applied since Law 2860-IV entered into force and is not subject to any temporary limitation.

(b) The 2015 export ban

28. In 2015 Law 325-VIII introduced a temporary prohibition on exports of unprocessed timber.

¹⁹ The Law of Ukraine № 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– 5**).

²⁰ Article 1 of Law 2860-IV.

29. The 2015 export prohibition is stipulated in Article 2-1 of Law 2860-IV (as amended by Article I.2 of Law 325-VIII), which states that:

Temporarily, for a 10 year period, it is prohibited to export unprocessed timber beyond the customs territory of Ukraine (code 4403 UCG FEA)²².

30. In the case of wood species other than pine, the temporary prohibition applies from 1 November 2015. In the case of pine wood species, the temporary prohibition applies from 1 January 2017.

31. The term “unprocessed timber” is defined as:

Timber in accordance with the code 4403 group 44 section IX of the Ukrainian classification of goods for foreign economic activity (584a-18).²³

32. The objectives of the 2015 export ban can be readily inferred from the Explanatory Note of 10 December 2014 accompanying the bill submitted to the Parliament, which led eventually to the adoption of Law 325-VIII²⁴. That Explanatory Note states in unambiguous terms that the overriding objective of the 2015 export ban is to promote Ukraine’s own processing industry:

The Bill amending the Act on the Special Features of the State Regulation of Business Activities Relating to the Implementation and Export of Timber (Moratorium on the Export of Unworked Timber and Lumber) 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.

The main objective of the project is to refocus exports from raw wood materials towards more highly processed products, create greater value added for forestry products, which are a national resource, thereby promoting the development of woodworking and wood-processing businesses.

²¹ Article 1 of Law 2860-IV.

²² The English translations of Ukrainian legal texts supplied by Ukraine use the acronyms UKTZED and UCG FEA in relation to the classification of the products at issue. The European Union understands that both acronyms refer to the same term. The first one is based on the original Ukrainian terms (in original cyrillic: YKT 3ED) and the second one on the English translation (Ukrainian Classification of Goods and Foreign Economic Activity).

²³ Article 1 of Law 2860-IV, as amended by Article I.1 of Law 325-VIII. *See* previous footnote.

²⁴ 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-1**).

The objectives of the Act are:

- to overcome the negative effects of Ukraine's destructive economic policy of being the 'raw materials appendage' of the West and to take legislative measures to ensure the rational use of forest resources;
- to regulate legal relations in order to create new jobs in the woodworking, furniture and other industries;
- to supply raw materials to domestic woodworking and furniture businesses²⁵.

33. The same objectives are reiterated in the conclusions of the Parliament's Committee on Industrial Policy and Entrepreneurship:

The purpose of the Bill is to revive the woodworking and furniture industries, create jobs and refocus exports from raw wood materials towards more highly processed products by imposing a 10-year moratorium on the export of timber and lumber.

[...]

The Ukrainian Members of Parliament (Committee members who reviewed the Bill), agree with the authors on the need to revive the woodworking and furniture industries, create jobs and refocus exports from raw wood materials towards more highly processed products by establishing a 10-year moratorium on the export of unworked timber and lumber.²⁶

34. The above mentioned Explanatory Note of 10 December 2014 alleged in passing that the 2015 export ban "falls under Article XI(2)(a) of the GATT 1994"²⁷. Nevertheless, this purported justification was called into question in an opinion issued by the Parliament's own Scientific and Expert Department, which cautioned that:

²⁵ *Ibid.*, at section 2 ("Goals and objectives of the Bill")

²⁶ 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 – 6**). See also in the same sense: "The purpose of the Bill, as evidenced by the Explanatory Note thereto, is to revive Ukraine's woodworking and furniture industry, create jobs and refocus export away from raw wood towards more highly processed products" 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 – 7**).

²⁷ Explanatory Note of 10 December 2014 to Draft law Reg.Nr.1362 (final law 325-VIII) introducing the export prohibition on all unprocessed timber, section 4 ("Current Regulatory Framework") (**Exhibit EU – 1**).

[...] the Explanatory Memorandum lacks clear statistical information and economic calculations indicating a critical deficit of unworked timber and lumber in Ukraine. In particular, no data are given on Ukraine's needs for unworked timber and lumber, nor on ways and means of meeting those needs via import substitution.

Moreover, in the documents which accompany the Bill, no clear justification is given regarding the feasibility of banning, as opposed to limiting, the export (including re-export) of unworked timber and lumber from the customs territory of Ukraine.²⁸

(c) The 2018 Amendment

35. In 2018 the Parliament passed Law № 2480-VIII, which introduced a temporary prohibition, for a period of eight years, on exports of fuel wood²⁹. At the same time, Law 2480-VIII placed a limit on the domestic use of unprocessed timber of domestic origin.
36. Law 2480-VIII was signed into law by the Speaker of the Parliament on 9 July 2018. Nevertheless, the President of Ukraine refused to sign it, thereby preventing its entry into force. The President of Ukraine concluded that the export prohibition on fuel wood was “unacceptable” because it would breach Ukraine’s obligations under Article XI:1 of the GATT 1994 and Article 35 of the Association Agreement³⁰. For that reason, the President of Ukraine proposed to exclude that export prohibition on fuel wood from the law³¹.
37. On 6 September 2018, the Parliament adopted Law 2531-VIII³², which replaced Law 2480-VIII. In line with the President’s proposals, Law 2531-VIII no longer provided for a temporary prohibition on export of fuel wood. On the other hand,

²⁸ 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 – 7**).

²⁹ More specifically, the prohibition applied to exports of “trade item 4401100000 under point 2 of Section II of UKTZED (Ukrainian Classification of Goods and Foreign Economic Activity)”.

³⁰ 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 – 8**).

³¹ *Ibid.*

³² The Law of Ukraine № 2531-VIII of 6 September 2018 , on Amendments to certain Legislative Acts of Ukraine concerning the preservation of Ukrainian Forests and preventing the Illegal Export

Law 2531-VIII maintained the cap on the domestic use of domestic unprocessed timber by supplementing Article 4 of Law 2860-IV with the following content:

In accordance with the Article XX, paragraph (g) “General Exceptions” of the General Agreement on Tariffs and Trade (GATT 1947) for the period of validity of the ban on the export of unprocessed timber from the customs territory of Ukraine (commodity position 4403 according to the UCG FEA), as defined in Article 2-1 of this Law, the restriction on domestic consumption of unprocessed timber in the amount of 25 million cubic meters per year is established.

The volume of domestic consumption of domestic unprocessed timber should not exceed 25 million cubic meters per years, regardless of the volume of domestic consumption of domestic unprocessed timber in the previous year³³.

38. Neither Law 2531-VIII nor its predecessor Law 2480-VII, nor their respective preparatory documents available to the European Union, provide any justification for placing the limit on the domestic use of domestic unprocessed timber at the level of 25 million cubic metres per year.
39. As explained above, according to the Agency’s own data, the total volume of timber harvested annually in Ukraine (around 22 million cubic metres) is well below the level of the consumption cap introduced by Law 2531-VIII (25 million cubic meters), which renders that cap purely theoretical.
40. The Explanatory Note accompanying the bill leading to the adoption of Law 2480-VIII mentions, by way of justification for this measure, that the consumption cap is necessary “to strengthen Ukraine’s position in discussions with international partners”.³⁴ This suggests that the sole reason for introducing a theoretical consumption cap was to create *ex post* an appearance of legal justification for the 2015 export ban. Indeed, the same Explanatory Note goes on to stress that the 2015 export prohibition is already providing significant economic benefits to Ukraine’s wood processing industry:

of Unprocessed Timber (Law 2531-VIII, Bulletin of Verkhovna Rada, 2018, No 42, p.327 (**Exhibit EU-5**).

³³ The Law of Ukraine № 2531-VIII of 6 September 2018, on Amendments to certain Legislative Acts of Ukraine concerning the preservation of Ukrainian Forests and preventing the Illegal Export of Unprocessed Timber (Law 2531-VIII, Bulletin of Verkhovna Rada, 2018, No 42, p.327 (**Exhibit EU-5**).

It should also be noted that the moratorium on the export of round timber from Ukraine is already significantly benefitting the Ukrainian woodworking, furniture and paper industries and the economy as a whole, even though it has been in existence for only a very short time, of little more than a year. In particular, according to official data from the State Tax Office:

1) The volume of sales of industrial products in US Dollars fell by 4% in the 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%.

2) Total goods exports in US dollars in the nine months of 2016 fell by 9% in comparison with the same period in the previous year. Exports of worked timber increased by 11%, however, which added 30 million US Dollars to the country's balance of trade, during the period of existence of the moratorium alone.

3) Total taxes in US Dollars paid into the budget by businesses in the wood-working, paper and furniture sectors in the nine months of 2016, during which the moratorium was in force, increased by 17% in comparison with the same period in the previous year (when there was no moratorium).

4) Total imports of wood-working machinery (one of the key investments in the sector) in US Dollars in the nine months of 2016, during which the moratorium was in force, were three times greater than in the same period in the previous year (when there was no moratorium).

This increase in investment, especially at a time of a threefold depreciation of the Ukrainian currency (Hryvnia) is a clear leading indicator of the future growth in production and exports in this sector, the creation of new jobs and increased income for budgets in all markets.³⁵

IV. LEGAL ARGUMENT

41. Both the 2005 export ban and the 2015 export ban institute complete prohibitions on the exportation of certain categories of goods from Ukraine to the European Union. For that reason, as explained below, they constitute a flagrant violation of Article 35 of the Association Agreement.

³⁴ Explanatory Note of 6 December 2016, at p. 2. (Exhibit EU – 9).

³⁵ *Ibid.*, p. 2

42. The European Union understands that Ukraine takes the view that the export prohibitions may be justified under Article XI:2 (a) of the GATT 1994 or Article XX (g) of the GATT 1994. Those two provisions are in the nature of affirmative defences. Therefore, as further explained below, should Ukraine invoke in this dispute that the measures in dispute are justified under any of those provisions, Ukraine would bear the burden of proving such justification. Were Ukraine to invoke these defences or any other argument to justify the export prohibition at issue, the European Union reserves the right to respond to those arguments in the course of these proceedings.

C. Legal standard

43. Article 35 of the Association Agreement (which is entitled “Import and Export Restrictions”) states 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.

44. Thus, Article 35 of the Association Agreement forbids each Party from *inter alia*, instituting “any prohibition” on exports of goods of that Party destined for the territory of the other Party.

45. Article 35 of the Association Agreement incorporates by reference Article XI of the GATT 1994, which provides in its first paragraph that:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

46. Therefore, Article XI:1 of the GATT 1994 forbids Members from instituting or maintaining *inter alia* prohibitions on exports of any product destined for the territory of another Member.

47. In accordance with Article 320 of the Association Agreement, the obligations under the Association Agreement which are identical to an obligation under the WTO Agreement must be interpreted consistently with any relevant interpretation established in rulings of the WTO Dispute Settlement Body.

48. In *China – Raw Materials*, the Appellate Body observed that the term "prohibition" in Article XI:1 of the GATT 1994 alludes to a "legal ban on the trade or importation of a specified commodity."³⁶

49. In *Canada – Periodicals*, the panel found that a complete ban on imports of certain magazines was inconsistent with Article XI:1 of the GATT 1994:

Since the importation of certain foreign products into Canada is completely denied under Tariff Code 9958, it appears that this provision by its terms is inconsistent with Article XI:1 of GATT 1994³⁷.

50. Similarly, the panel in *Brazil – Retreaded Tyres* noted:

There is no ambiguity as to what 'prohibitions' on importation means: Members shall not forbid the importation of any product of any other Member into their markets³⁸.

51. That panel then found that Brazilian measures prohibiting the importation of used consumer goods and the importation of retreaded tyres constituted import prohibitions inconsistent with Article XI:1 of the GATT 1994.

52. While the above quoted case law concerned import prohibitions, there is no reason why the term "prohibition" should be interpreted differently when applying to exports of goods.

D. The export bans breach Article 35 of the Association Agreement.

53. By their own terms, the 2005 export ban and the 2015 export ban prohibit completely the exportation of certain types of wood products from Ukraine. That prohibition applies *inter alia* to exports of those products to the territory of the European Union.

³⁶ Appellate Body Report, *China – Raw Materials*, para. 319.

³⁷ Panel Report, *Canada – Periodicals*, para. 5.5.

54. Therefore, the 2005 export ban and the 2015 export ban constitute “prohibitions” on exports from Ukraine to the European Union within the meaning of both the first sentence of Article 35 of the Association Agreement and Article XI:1 of the GATT 1994. As such, they are incompatible with Article 35 of the Association Agreement.

E. Ukraine bears the burden of justifying the measures

55. Article 35 of the Association Agreement forbids any prohibition on exports “except as otherwise provided in this Agreement or in accordance with Article XI of GATT 1994”.
56. Article 36 of the Association Agreement (which is entitled “General Exceptions”) states that:

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.

57. The European Union has shown that the measures at issue are specifically aimed at providing economic benefits to Ukraine’s wood processing industry. Nevertheless, even though the European Union cannot anticipate the arguments that Ukraine will submit to the Panel to justify the export prohibition at stake, it understands that in these proceedings Ukraine may contend that the 2015 export ban is justified under letter (g) of Article XX of the GATT 1994, which refers to measures

Relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production to consumption.

58. The European Union further understands that in these proceedings Ukraine may contend that the 2015 export ban and/or the 2015 export prohibition are justified under Article XI:2 (a) of the GATT 1994, which states that;

The provisions of paragraph 1 of this Article shall not extend to the following:

³⁸ Panel Report, *Brazil – Retreaded Tyres*, para. 7.29

(a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;

59. Both Article XX(g) and Article XI:2(a) of the GATT 1994 are in the nature of affirmative defences³⁹. Accordingly, Ukraine bears the burden of proving that the measures at issue are justified under those provisions. Should Ukraine invoke those defences, the European Union reserves the right to submit additional argument and evidence in order to rebut Ukraine's allegations.

V. CONCLUSION

60. For the reasons set out in this submission, the European Union respectfully requests the Arbitration Panel to issue a ruling in accordance with Article 310 of the Association Agreement 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; and 2), therefore, Ukraine is required to take any measure necessary to comply with those obligations.



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³⁹

Appellate Body Report, *United States – Woven Wool Shirts and Blouses*, para. 47. As regards Article XI:2(a), see also Panel Report, *China – Raw Materials*, para. 7.213 ("the burden is on the respondent [...] to demonstrate that the conditions of Article XI:2(a) are met in order to demonstrate that no inconsistency arises under Article XI:1.").