

To the Arbitration Panel

established under Article 306 of the
Association Agreement between

the European Union and its Member States
and
Ukraine

in the dispute

Ukraine – Export prohibitions on wood products

**Responses by the European Union to the
questions of the Panel at the hearing**

Brussels, 7 October 2020

TABLE OF CONTENTS

<i>QUESTION 1</i>	1
<i>QUESTION 2</i>	5
<i>QUESTION 3</i>	7
<i>QUESTION 4</i>	11
<i>QUESTION 5</i>	19
<i>QUESTION 6</i>	20
<i>QUESTION 7</i>	21
<i>QUESTION 8</i>	22
<i>QUESTION 9</i>	22
<i>QUESTION 10</i>	23
<i>QUESTION 11</i>	23
<i>QUESTION 12</i>	24
<i>QUESTION 13</i>	25
<i>QUESTION 14</i>	26
<i>QUESTION 15</i>	26
<i>QUESTION 16</i>	30
<i>QUESTION 17</i>	33
<i>QUESTION 18</i>	34
<i>QUESTION 19</i>	35
<i>QUESTION 20</i>	37

Question 1

What is the EU's position concerning the timing and the substance of Ukraine's objection to the effect that the Panel lacks jurisdiction to decide this dispute?

1. In its Oral Statement, Ukraine alleged, for the first time in these proceedings, that the European Union should have brought its claims “according to the procedures provided for in Article 300 and 301 of the Association Agreement”¹. On that basis, Ukraine requested the Panel the panel to rule that:

*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, for lack of jurisdiction of the Arbitration Panel*².

2. For the reasons set out below, the European Union submits that Ukraine's request is manifestly untimely and, in any event, manifestly without merit.

Ukraine's objection is manifestly untimely

3. The WTO Appellate Body has emphasised that the principles of good faith and the requirements of due process demand that:

*[...]responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes [...] The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes.*³

4. The WTO Appellate Body has further noted that:

*[...] when a Member wishes to raise an objection in dispute settlement proceedings, it is always incumbent on that Member to do so promptly. 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.*⁴

5. Ukraine has failed to raise this jurisdictional objection “seasonably and promptly”. Ukraine could and should have raised this objection during the

¹ Ukraine's Oral Statement, para. 96.

² Ukraine's Oral Statement, para. 132.

³ 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.

⁴ Appellate Body Report, *Mexico – HFCS*, Article 21.5, paras. 49-50.

consultations or at the latest in its written submission to the Panel. Yet Ukraine deliberately chose to wait until the very last possible moment to do so.

6. At the hearing, Ukraine's representative sought to excuse Ukraine's untimeliness by suggesting that Ukraine was reacting to the EU's response to the Panel Question 66. However, that response concerned a different and separate issue. In that response the European Union addressed Ukraine's allegation that the European Union had breached Article 294 AA. The European Union observed that Ukraine was not allowed to bring counter-claims and that, in any event, Ukraine's claims based on Article 294 AA would fall outside the Panel's jurisdiction and should be brought by Ukraine in accordance with the special procedures in Articles 300 and 301 AA. The EU objected to Ukraine's counter-claims as soon as possible. Ukraine cannot rely on the EU's timely objection to Ukraine's counter-claims in order to justify its own, manifestly untimely objection to the EU's claims.

Ukraine's objection is without merit

7. In the event that Panel considered that, in view of the nature of the objection raised by Ukraine, it is required to examine it on its own authority, despite its manifest untimeliness, the European Union further submits that Ukraine's objection is manifestly without merit.

8. The European Union has brought this dispute under the dispute settlement procedures set out in Chapter 14 AA.

9. Article 304 AA states that:

The provisions of [Chapter 14] apply in respect to any dispute concerning the interpretation and application of the provisions of Title IV of this Agreement except as otherwise expressly provided.

10. The claims brought by the European Union are based on Article 35 AA, which is included in Title IV of the AA. Therefore, in accordance with Article 304 AA, Chapter 14 AA applies in respect to any dispute concerning the interpretation and application of Article 35 AA "*except as otherwise expressly provided*".

11. The terms “*except as otherwise expressly provided*” in Article 304 AA allude to provisions such as Article 52 AA, which states that:

Chapter 14 (Dispute Settlement) of Title IV of this Agreement shall not apply to Sections 1, 4, 5, 6 and 7 of this Chapter.

12. Similarly, Article 261 AA states that:

No Party may have recourse to dispute settlement under Chapter 14 (Dispute Settlement) of Title IV of this Agreement with respect to any issue arising under this Section, with the exception of Article 256 of this Agreement.

13. There is no equivalent provision in the AA which “expressly provides” that disputes concerning the interpretation and application of Article 35 AA are excluded from the scope of Chapter 14.

14. More specifically, Article 300(7) AA does not exclude “expressly” disputes relating to the interpretation and application of Article 35 AA from the scope of Chapter 14. Article 300(7) AA states that:

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.

15. Ukraine argues that the current dispute “definitely relates to trade in forest products” and that, for that reason alone, the current dispute “must be resolved” according to the procedures provided for in Articles 300 and 301 AA pursuant to Article 300(7) AA⁵.

16. However, that is not “expressly provided” in Article 300(7) AA, as required by Article 304 AA. Article 300(7) AA does not say that any disputes “relating to trade in forest products” shall be subject exclusively to the dispute settlement procedures included in Chapter 13 and excluded from Chapter 14. Nor does Article 300(7) AA expressly carve out from Chapter 14 any disputes “relating to” the environmental or social measures mentioned in Chapter 13.

17. Rather, Article 300(7) AA alludes to “matters arising under Chapter 13”. The term “matter” is used also in Article 306(3) AA, which sets out the standard

⁵ Ukraine’s Oral Statement, para. 96.

terms of reference of the panels established pursuant to Chapter 14. It provides that:

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 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."

18. Article 306(3) AA is modelled after Article 7(1) of the DSU, which provides that:

Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

*"To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the **matter** referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."*

19. The Appellate Body has clarified that the "matter" referred to in a panel's terms of reference under Article 7(1) DSU consists of two elements: the specific measures and the claims.⁶
20. For a "matter" to "arise" under Chapter 13 within the meaning of Article 300(7) AA, it is not enough to show that a measure "relates" to "trade in forest products" or to the "protection of the environment". Rather, a "matter 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.
21. The European Union has not brought any claims on the basis of any provision included in Chapter 13. Therefore, the "matter" before the panel does not "arise under Chapter 13" within the meaning of Article 300(7) AA.

⁶ Appellate Body Report, *Guatemala – Cement I*, para. 72.

22. Furthermore, Ukraine’s jurisdictional objection has the implication 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. That proposition, however, is manifestly unreasonable and unacceptable.
23. 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.
24. For that reason, environmental measures may be subject simultaneously to the provisions of Chapter 13 and to the provisions of other Chapters of Title IV. For example, an environmental tax must comply with the national treatment obligation in Article 34 AA and, at the same time, must be enforced in accordance with the obligations imposed by Article 296 AA. If the complaining party claims that an environmental tax is discriminatory and breaches Article 34 AA, that claim must be pursued under Chapter 14; if the complaining party claims that the other party violates Article 296 AA by failing to effectively enforce the environmental tax, or by granting derogations or waivers therefrom with a view to encourage trade or investment, that claim must be pursued in accordance with the procedures provided for in Articles 300 and 301 AA.

Question 2

If the Panel finds that the export bans are incompatible with the AA, on what legal basis and with what effect could the Panel indicate to Ukraine what measures would be required to comply with the AA?

25. Ukraine has requested the Panel, in the alternative, to “clarify what measures would be required to comply with the Association Agreement”.⁷
26. For the reasons explained below, the European Union considers that the requested “clarification” is beyond the Panel’s terms of reference.

27. The Panel has been established with the standard terms of reference set out in Article 306(3) AA, which provides that:

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 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."

28. The content of the “ruling” referred to in the standard terms of reference may be inferred from Article 308(1) and (5) AA, which provide in relevant part that:

1. The arbitration panel shall issue to the Parties an interim report setting out the findings of facts, the applicability of the relevant provisions and the basic rationale behind any findings and recommendations that it makes, within 90 days of the date of establishment of the arbitration panel. [...]

5. After considering any written comments by the Parties on the interim report, the arbitration panel may modify its report and make any further examination it considers appropriate. The final arbitration panel ruling shall include a discussion of the arguments made at the interim review stage.

29. The term “recommendation” used in Article 308.1 AA does not allude to the possibility for the Panel to advise or suggest specific ways to implement the ruling. Rather, that term is used in Article 308(1) AA with the same meaning as in Article 19.1 DSU, which provides that:

Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.⁸

30. Unlike the last sentence of Article 19.1 DSU, no provision of the AA provides for the possibility that a panel may “suggest” ways to implement the recommendation in the Panel’s ruling to bring the measure in dispute into

⁷ Ukraine’s Oral Statement, para 132.

⁸ Footnotes omitted.

conformity with the AA. Therefore, the AA provides no basis for the Panel to give the clarification requested by Ukraine.

Question 3

How does the EU interpret the reference to the 10 years transition period in Article 25 AA in relation to Ukraine's claim that Article 35 AA only applies after those 10 years?

31. Ukraine contends that Article 35 AA will not become applicable until the end of the transitional period mentioned in Article 25 AA⁹. The European Union has already addressed and rebutted Ukraine's contention in its Oral Statement, to which the Panel is referred. Here below, the European Union will elaborate on its rebuttal and address the specific supporting arguments made by Ukraine in its Oral Statement.
32. Article 25 AA is entitled "Objective" and describes the overall objective pursued by the provisions of Chapter 1 of Title IV ("National treatment and market access for goods")¹⁰.
33. The objective described in Article 25 AA is the establishment of a "free trade area" for goods "in conformity with Article XXIV of GATT 1994". This objective should be achieved "over a transitional period of a maximum of 10 years"¹¹.
34. The terms "transitional period of a maximum of 10 years" relate to the "establishment of a free trade", and not to each of the components of a free trade area. This means that different provisions relating to the establishment of

⁹ Ukraine's Oral Statement, paras. 52-65.

¹⁰ Other chapters in Title IV of the Association Agreement have similar specific provisions setting out the objectives to be achieved by the application of the obligations stipulated in that Chapter. Examples are Article 59 with regard to Chapter 4 (Sanitary and phytosanitary measures), Article 75 with regard to Chapter 5 (Customs and trade facilitation), Article 148 with regard to Chapter 8 (Public Procurement), Article 157 with regard to Chapter 9 (Intellectual property) and Article 303 (Dispute settlement). Many other chapters contain objective clauses in combined provisions that cover also other general aspects like the scope of definitions. Examples of such combined provisions are Article 85 with regard to Chapter 6 (Establishment, trade in services and electronic commerce) and Article 282 with regard to Chapter 12 (Transparency).

¹¹ This is necessary because the term "reasonable length of time" for the formation of a free trade area in Article XXIV(5)(c) of GATT 1994 has been defined by paragraph 3 of the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 as a period that should exceed 10 years only in exceptional circumstances.

a free trade area may be subject to different transitional periods, or to no transitional period at all.

35. Moreover, contrary to Ukraine’s assertions, Article 25 AA does not refer to a “transitional period of 10 years”¹², but instead to a “transitional period of a **maximum** of 10 years”. The terms “transitional period of a maximum of 10 years” are too open-ended to be capable of direct application. Rather, those terms operate as an outer limit, within which each of the provisions of Chapter 1 of Title IV of the AA dealing with the various components of a free trade area must specify the duration of the applicable transitional period, if any.
36. In accordance with Article XXIV(8)(b) of the GATT 1994, the establishment of a free trade area for goods requires the elimination of both “duties” and “restrictive regulations of commerce” with respect to substantially all trade.
37. Consistent with the requirements of Article XXIV(8)(b), Chapter I of Title IV of the AA includes provisions on the elimination of customs duties on imports (Article 29 AA) and on “non-tariff measures”, including provisions on quantitative restrictions on imports and exports (Article 35 AA) and on national treatment (Article 34 AA). In addition, Chapter 1 of Title IV of the AA includes provisions on the elimination of customs duties on exports (Article 31 AA), on other fees and charges (Article 33 AA) and on the elimination of export subsidies on agricultural products (Article 32 AA).
38. The provisions on the elimination of import customs duties on both imports and exports are subject to a transitional period, the length of which varies according to the product concerned, within the outer limit enounced in Article 25AA. All the other provisions of Chapter 1 of Title IV of the AA are not subject to any transitional period.

¹² Ukraine’s Oral Statement para. 52. Ukraine did not accurately cite Article 25 AA, in particular by omitting the central term of “maximum”. The correct wording of Article 25 AA is as follows [differences in bold]:
“The Parties shall progressively establish a free trade area over a transitional period of a maximum of 10 years starting from the entry into force of this Agreement (1), in accordance with the provisions of this Agreement and in conformity with Article XXIV of the General Agreement on Tariffs and Trade 1994 [...]”

39. The rationale for not subjecting the provisions on fees and charges, national treatment and import and export restrictions to a transitional period is straightforward. Indeed, those provisions restate pre-existing obligations of both Parties under the GATT 1994¹³. Accordingly, there was no reason to delay the application of those provisions beyond the date of entry into force of the AA. Moreover, the immediate application of those provisions from the date of entry into force of the AA was necessary in order to prevent that the benefits from the progressive elimination of customs duties on imports or exports from that date could be nullified through the imposition of other fees or charges or of non-tariff measures.
40. In contrast, the provisions on the elimination of customs duties on both imports and exports go beyond the pre-existing obligations of each Party under the GATT 1994. For that reason, the Parties agreed to phase in progressively their application, according to the sensitivity of each product, within the limit of the maximum transitional period referred to in Article 25 AA.
41. The elimination of export subsidies on agricultural subsidies also goes beyond the pre-existing obligations of the parties under the WTO Agreement on Agriculture, which allows Members to grant export subsidies within certain limits. Nonetheless, unlike in the case of the export and import customs duties, the Parties agreed to eliminate those subsidies already from the date of entry into force of the AA. For the avoidance of doubt, this was expressly reflected in the wording of Article 32 AA.
42. Ukraine's interpretation rests on the argument that where the Parties meant to apply a provision from the date of entry into force of the AA they specified so expressly. Ukraine cites four "examples": Article 32, Article 67¹⁴, Articles 88 and Article 145.¹⁵ But Articles 67, 88 and 145 are not included in Chapter 1 of Title IV and, therefore, are not covered by Article 25 AA. They are part of other chapters of Title IV, which are not subject to any transitional period.

¹³ Cf. Articles III, VIII and XI of the GATT 1994.

¹⁴ Ukraine refers Article 62 AA, but it appears to be a typographical mistake.

¹⁵ Ukraine's Oral Statement, para. 58.

Therefore, those provisions do not support, but rather contradict Ukraine's *a contrario* argument. As regards Article 32 AA, the express reference to its application upon the entry into force of the AA, through arguably unnecessary, may be explained by the reason mentioned above.

43. Ukraine's interpretation has the implication that the only provisions of Chapter 1 of Title IV currently applicable between the Parties are those relating to the elimination of customs duties on imports and exports and of export subsidies. According to Ukraine, all other provisions of that chapter will not become applicable until ten years after the date of entry into force of the AA. As a result, on Ukraine's interpretation, it is open to each Party to nullify the benefits resulting from the elimination of customs duties on imports and exports by applying, at their entire discretion, import or export restrictions, fees and charges or discriminatory internal legislation.
44. Ukraine's has not advanced any plausible reason that may explain why the Parties would have agreed to delay ten years the application of provisions that restate their pre-existing obligations under the GATT, with the ensuing risks described above. As explained above, Ukraine's position is based on little else than the *a contrario* reading of Article 32 AA. This is an extremely formalistic and unconvincing basis for an interpretation with the sweeping implications of Ukraine's reading of Article 25 AA.
45. The reading of Article 25 AA made by Ukraine in this case comes as a complete surprise to the European Union. Ukraine had never made that interpretation prior to this dispute. Indeed, even in the context of this dispute, that interpretation was not clearly advanced by Ukraine before its oral Statement at the hearing. For the reasons explained above, Ukraine's novel reading of Article 25 AA would have manifestly unreasonable and unacceptable consequences for both Parties. The European Union, therefore, wonders whether the interpretation of Article 25 AA expressed by Ukraine's representatives at the hearing reflects the considered views of the Ukrainian authorities.

Question 4

Can the European Union provide its comments on the passages of the Earthsight report quoted by Ukraine?

46. During the hearing on 23 of September the parties agreed with the Chairman’s proposal that, despite the fact that the Earthsight Report of 2018 entitled “Complicit in corruption, how billion-dollar firms and EU governments are failing Ukraine’s forests” (the “Earthsight Report”) had not been exhibited by Ukraine so far, it can be considered to be part of the record “to the extent that all (and only) the direct quotes from that report, contained in [Ukraine’s] opening statement”¹⁶, provided that the EU is afforded an opportunity to respond.
47. Ukraine seems to have referred to the Earthsight Report on three occasions: twice in the first written submission and once in the oral Statement. For the sake of completeness, the EU will also respond to the references contained in the first written submission. The references to the report are the following:
 1. In paragraph 338 and footnote 215 of Ukraine’s first written submission, Ukraine affirms that the EU is one of the world’s largest importers of wood. Footnote 215 of Ukraine’s first written submission refers in turn to footnote 332 of the Earthsight Report to support this statement.
 2. In paragraph 342 and footnote 219 of Ukraine’s first written submission, Ukraine alleges that the European Union Timber Regulation “*has been unsuccessfully implemented by member states of the European Union. In 2015, almost two years after EUTR had become effective, several key countries that has borders with Ukraine, like Poland, had yet to implement it.*” Footnote 219 refers to page 53 of the Earthsight Report.

¹⁶ Chairperson email dated 24 September 2020 15:41:25.

3. In paragraphs 35 and 37 of the oral statement delivered on the 22 of September, Ukraine quotes several passages of the Earthsight Report. Footnote 33 indicates that the quote contained in paragraph 35 is taken from page 4 and 5 of the Earthsight Report. In turn, footnotes 34 and 35 indicate that the quotes contained in paragraph 37 of the oral statement are taken respectively from pages 3 and 8 of the Earthsight Report.
48. At the outset, the European Union would like to underline that the organisation Earthsight is a non-profit organisation with a mandate to expose “pressing issues of human rights and environmental justice”. It is neither a public authority of Ukraine or of the EU whose acts are subject to judicial and political control, nor is it an academic or scientific organization whose findings are subject to scientific testing and confirmation. Without diminishing the importance of the role of NGOs in a democratic society, the findings of NGOs should be considered with caution and any facts or conclusions be verified, before one can safely rely on them.¹⁷
49. With regard to point (1) above, footnote 332 of the Earthsight Report does not contain any information that would reveal whether or not the EU is among the biggest importers of wood in the world. It is contained in a section telling the story of one of the members of Earthsight presenting himself as a potential (fake) seller of illegal logs to the company Erdert Tuszer, Hungary’s largest timber company. It refers to the fact that before the 2015 export ban the company was used to buy logs in Ukraine, whereas it started after the 2015 ban to buy sawn wood, also from areas non certified as FSC. Screenshots of the relevant passages are reproduced below.

¹⁷ In the same sense, see Ukraine’s Response to questions from the Panel (para. 99-101) where Ukraine recommends to take the data from ‘Global Forest Watch’ with caution.

doing business with it. One of these was Erdert Tuszer, Hungary's largest timber company, which produces and distributes sawn and planed lumber and other wood products.³²⁸ Erdert, privately owned by the wealthy Toth family, also has a large facility close to the Ukrainian border, complete with its own rail link. Prior to the

log export ban, the company was importing 4000 cubic metres (3500 tonnes) per month of sawlogs from Ukraine.³²⁹ In 2017, the company was continuing to import over 1000 tonnes per month of sawn lumber³³⁰, less than half of it FSC certified.³³¹ Its largest supplier was the controversial Klesiv SFE in Rivne³³² (see Case Study 3 on page 38).

³³² Based on Ukrainian Customs export data for 2017, analysed by Earthsight

50. This passage of the Earthsight Report merely confirms the point the EU has made already several times. The 2015 export ban prohibits the export of unprocessed wood and thereby creates an incentive to export processed wood which then can be exported from Ukraine. When one considers that the export ban does neither limit nor otherwise regulate the felling of trees and that the domestic annual “consumption cap” is well above the level of wood ever harvested in Ukraine, it becomes clear that the 2015 export ban does not contribute to the conservation of Ukraine's forests. Wood in those forests can still be harvested up to a level (“cap”) which Ukraine has never previously reached (including exports). Any such harvested wood can be freely exported once it has been processed in Ukraine, for instance as sawn wood. Hence, there is no genuine relation of end and means between prohibiting export of unprocessed wood and conserving Ukraine forests or combating illegal logging.

51. As for point (2) above, page 53 of the Earthsight Report is as follows:

border with Ukraine and are among the largest importers of its timber were among the slowest to implement EUTR into national legislation. By the spring of 2015, two years after EUTR had become effective, none of these countries had implemented it. The European Commission was forced to begin formal investigations. While this finally prompted Poland to act, the Commission had to launch formal infringement procedures against Hungary and Romania for continued failure to implement the law.

Hungary was not fully applying the law until September 2016³⁸⁸, and the infringement case against Romania was not closed until December 2016.³⁸⁹ As of March 2017, Slovakia was still under investigation by the Commission for not having in place required penalties for breaches of EUTR.³⁹⁰ Even where the Commission judges a country to be compliant, this only means that it has passed relevant legislation and nominated an agency to implement it. Other evidence also suggests either a lack of enthusiasm or insufficient resources.

None of the countries has responded to surveys by NGOs regarding numbers of checks carried out and penalties applied.³⁹¹ Though third-country agents are commonly involved in their imports from Ukraine and most of the wood is re-exported within the EU, Poland and Romania are also two of only a handful of EU countries which have not reported any collaboration with EUTR authorities in other member states.³⁹²

Ukraine has been the subject of regular attention at meetings of European EUTR

competent authorities during the last two years, and the focus of compliance checks by a number of countries.³⁹³ Increasing efforts are being made, including in some of the key neighbouring countries. The EU even sent a mission to Ukraine in early 2018 to investigate the issue, which included representatives from Member State EUTR Competent Authorities. It found that "substantial corruption risk can be found in every supply chain and is widespread throughout the whole country". However, its conclusion with regard to the implications for EU imports was doubly odd, stating that there was "not enough evidence publicly available to convince EU operators of the risks linked to Ukrainian timber." Aside from being arguably untrue, this suggests that EU timber importers have to be persuaded to comply with EU law, rather than being forced to by their home governments. Hopefully this report will help fill the gap they believe exists.

Our evidence shows that Member States are still not implementing EU law effectively with regard to Ukraine. As a result, many EU companies are continuing to import Ukrainian wood at high risk of illegality, without carrying out meaningful due diligence.

In Brussels meanwhile, though bureaucrats working directly on supporting the implementation of EU legal commitments on timber legality with regard to Ukraine have made substantial efforts to encourage greater compliance, the EU institutions' greatest efforts on the issue of EU wood imports from Ukraine have been directed elsewhere.

Authorities in EU importing countries are taking a lax attitude to what constitutes meaningful due diligence with regard to Ukraine

52. In this respect, the EU refers to its response to panel question 65 and would like to recall that there are no ongoing infringement cases against Poland and Slovakia. A pending case against Romania is not concerned with imports of timber and wood products, but relates instead to the national forest management.

53. With regard to point (3) above, the quote contained in paragraph 35 of Ukraine's oral statement comes from page 5 of the report and in particular from the following passage (starting at page 4)

Our evidence shows that Ukraine's hundreds of SFEs engage in the systematic, deliberate breaching of a wide range of regulations during harvesting. None is more destructive than illegal 'sanitary felling'. The environmental friendliness of logging in Ukraine is supposed to be assured through careful planning of which trees can be cut

each year, but nearly 60 per cent of the harvesting occurs outside such limits, mostly in the form of ‘sanitary felling’ justified to prevent the spread of disease. In the face of allegations that corrupt forest enterprises were abusing this loophole on a massive scale to cut healthy trees whose harvesting would not otherwise have been allowed, including in national parks and other protected areas (even the irradiated Chernobyl exclusion zone), the national authorities tightened the rules in 2016. But the problem persists. A study commissioned by Earthsight of 18 logging sites across four of the largest timber producing provinces in 2017 found that between 67 and 78 per cent of this harvesting is unjustified and therefore illegal. Extrapolated to a national level, this suggests illegal sanitary felling currently represents 38-44 per cent of total production and exports. Our field research showed other breaches of logging regulations by state agencies are equally common.

54. The indication that around 60% of the felling occurs outside a legal framework ensuring a proper planning of the activity tallies with the information provided by Ukraine in paragraph 18 and footnote 27 of Ukraine’s responses to the Panel questions. According to that paragraph and that footnote, a felling ticket issued by a public authority is required only for final felling operations but not for other type of felling operations that actually result in around 60% of Ukraine yearly wood production. On the other hand, the figure of 38-44% of illegal sanitary felling is the result of an extrapolation by Earthsight based on the observation of a very limited number of logging sites (i.e. 18). Moreover, the assertion that the same figure would apply to the wood export appears to be substantiated neither on empirical data nor on any extrapolation. However, since the 2015 export ban prohibits the export of unprocessed wood, it would be logical to conclude that this figure regarding the export of timber harvested by illegal sanitary felling refers mostly to wood processed in Ukraine. It

follows, that once again the Report confirms that prohibiting export of unprocessed wood simply creates an incentive to process the wood domestically, but in itself does not contribute to protecting Ukraine's forests.

55. At the same time, page 5 of the Earthsight Report contains a passage that seems relevant for the present dispute, which however Ukraine has strategically avoided to quote. It reads:

SFEs are supposed to offer all of their timber for sale by auction. Even where this requirement is followed, such auctions are commonly corruptly rigged, and much of this wood ends up in the hands of the 'shadow sawmillers'. An estimated 12,000 unlicensed sawmills process this wood, mostly for export. As a result, exports of sawn timber exceed the country's entire legal production by 75 per cent: 1.2 million cubic metres of illegally-sourced lumber exports every year.

56. This passage confirms the finding of Ukraine's Forest Agency according to which local unrecorded sawmills are "the main consumers"¹⁸ of illegally logged timber. If the main consumers of illegally logged timber are local sawmills and the 2015 export ban does not prevent in any way the export of processed wood, including sawn wood, it is also clear that the ban is not designed and indeed does not make any contribution to the conservation of Ukraine's forests and to combating illegal logging.

57. Let's consider now the first quote in paragraph 37 of Ukraine's oral statement. That quote refers to the fact that the EU's buyers of wood products from

¹⁸ Agency 2019 Report, page 10 **Exhibit UKR-01** (underlined added), and in the same sense Agency 2018 Report, page 14, which refers to "the large number of unrecorded private power saw mills, which are buying up illegally harvested timber" **Exhibit EU-02**. The same information is also confirmed by another passage of the Earthsight Report at page 15 which reads "Apparent confirmation of the illegality of these sawn timber exports was revealed in an important paper on the Ukrainian timber industry released in 2017. The analysis, conducted by the Better Regulation Delivery Office (BRDO), found that there were 12,000 illegal sawmills operating in Ukraine, far outnumbering the 9200 legal ones. This compares with just 500 illegal sawmills in 2001."

Ukraine include many of the world's largest multinational wood processing companies, and it insists on the fact that their products may potentially contain Ukrainian wood of illegal origin. This passage is contained in page 3 of the Earthsight Report which contains the "key findings" and underlines on many occasions the pervasive corruption in the Ukrainian wood industry as well in the local and national authorities dealing with that industry.

58. Page 3 is reproduced herewith.

<p>For the last two years, Earthsight has been investigating illegal logging and timber corruption in Ukraine, and tracking connections to overseas markets. Our findings reveal an industry steeped in illegality, with the biggest problems involving corruption among the state enterprises that do most of the logging, and their superiors within the country's forest administration. This corruption is threatening Ukraine's forests – home to lynx, bear and wolves - and also undermining wider governance in a fragile state suffering from armed conflict.</p> <p>Earthsight's field studies revealed multiple breaches of regulations governing harvesting in every logging enterprise visited. The most destructive is the systematic abuse of loopholes allowing trees to be harvested to prevent the spread of disease.</p> <p>We reveal how a previous national forestry chief is the subject of an ongoing criminal investigation for having creamed off over €30 million into Swiss bank accounts in bribes from overseas timber importers, in exchange for access to wood at discounted prices. Our evidence indicates that similar high-level corruption has continued since his downfall.</p> <p>There are major ongoing province-wide criminal corruption investigations relating to two of the three largest timber producing regions. The head of forestry in another province, in the Ukrainian Carpathians, was caught red-handed in a sting operation in October 2017 trying to bribe police to turn a blind eye to widespread illegalities. Corruption at the district level in sales of timber for domestic processing, meanwhile, is feeding a growing 'shadow lumber' industry of over 12,000 illegal sawmills.</p> <p>The EU is by far the largest destination for Ukrainian wood exports, representing 70 per cent of the total. EU purchases have been rising rapidly, breaking €1 billion in 2017. Our findings suggest that at least 40 per cent of this wood was</p>	<p>harvested or traded illegally, with the aid of corruption. They also indicate that Ukraine is the largest single supplier of such high-risk wood to the EU, exceeding all of the tropical countries of Latin America, Africa and SE Asia combined.</p> <p>> The EU buyers of Ukrainian wood include many of the world's largest multinational wood processing companies. We found many of these companies are mentioned in ongoing criminal investigations relating to illegal logging, illegal wood exports and related corruption. One has even been specifically implicated in the corrupt scheme masterminded by the former forest chief. All of them continue to import large volumes of wood from state logging enterprises which are the subject of such investigations.</p> <p>> Products produced by these companies, potentially tainted with Ukrainian wood of illegal origin, are to be found on sale throughout the EU, including in branches of the largest DIY, furniture and supermarket chains on the continent.</p> <p>> The EU has long recognised that its huge demand for cheap wood has in the past helped drive illegality in the forests of supplier countries. As a result, since 2013, it has had a law in place which is meant to prevent wood imports of likely illegal origin. But our findings reveal that for Ukraine this law is not working. Authorities in key Member States are failing to meaningfully enforce it. Its impact is also being undermined by false confidence being placed by buyers and authorities in the independent 'certification' of forests by the Forest Stewardship Council (FSC).</p> <p>> Brave activists in Ukraine are battling timber corruption at significant personal risk, as are progressive elements within the government. Some European officials are making real efforts to help. But under pressure from the giant firms dependent on steady supplies of cheap Ukrainian wood, the EU has used its greatest leverage to push the Ukrainian government to overturn its ban on exports of raw logs.</p>
--	---

59. While assessing the existence of corruption in Ukraine is not a matter before this Panel, it is certainly not surprising that, in the light of that background, Earthsight comes to the conclusion that wood products made with Ukrainian wood may contain illegally sourced wood. However, this does not say anything about whether the 2015 export ban is designed to help the conservation of Ukraine forest and combat illegal logging. Likewise, it does not say anything as to the degree of contribution of the ban to that objective. As mentioned countless times, the export ban does not prevent the export of processed wood, and it appears that illegally logged wood is mainly processed in Ukraine.

60. The last quote in paragraph 37 of Ukraine's oral statement is extracted from page 8 of the Earthsight Report and criticizes the EU for insisting with Ukraine on the removal of the export ban. It alleges that the EU's action is the result of the pressures exercised by EU timber industry (see below).

The ultimate solution to forest crime in Ukraine must come from within the country. More and better enforcement by relevant agencies would help, but tackling the roots of timber corruption will also require changes to how forestry is regulated, to reduce the opportunities and incentives for sleaze. Expert studies have already identified the key measures required, such as separating the responsibilities for carrying out logging and monitoring its legality, and improving transparency. Some potentially useful new regulations are already in draft, but the reform process is moving painfully slowly.

Meanwhile, the battle against the scourge of timber corruption continues, with those in the frontlines facing grave personal risks. Corrupt forest guards chase independent civil society monitors out of the forest at gunpoint. Corrupt elements within Ukraine's secret police monitor the movements of anti-corruption activists. Junior forest officials who inform on their superiors have their cars burned and their families threatened.

These activists and progressive elements within government are fighting an uphill battle, however, so long as the biggest market for Ukraine's timber remains open to illegally sourced wood. The EU is providing some useful funding and support to forest governance reforms in Ukraine. Yet its greatest influence has instead been applied to forcing the Ukrainian government to overturn its log export ban, efforts this report shows have been lobbied for by many of the same EU timber processing giants we found to be consuming suspect wood.

61. In this connection, the EU would like to repeat that the question before this Panel is whether the measures challenged by the EU comply with Ukraine's obligation under the AA. The EU is firmly convinced that they do not, i.e. they are illegal and moreover they do not genuinely contribute to the preservation of Ukraine's forests or valuable and rare wood species, as they do not help in any way to prevent export of timber illegally logged and processed in Ukraine, or to combat corruption. Quite clearly, they serve only to reserve Ukraine's unprocessed wood for the domestic processing industry. The quote in paragraph 37 of Ukraine's oral statement does nothing to show that those measures are legally justified.

Question 5

Is the conclusion of free trade agreements containing “WTO-minus” provisions compatible with Article XXIV(8)(b) of the GATT 1994, having regard to the Appellate Body Report in the case DS 457, Peru – Agricultural Products?

62. In *Peru – Agricultural Products*, the Appellate Body addressed the question of whether a provision included in the FTA between Peru and Colombia which, allegedly, authorised Peru to maintain between the parties a measure inconsistent with Article 4.2 of the WTO Agreement on Agriculture could, nevertheless, be considered compatible with the WTO Agreements pursuant to Article 41 VCLT on the amendment of treaties between certain parties.

63. The Appellate Body held that:

[...] the WTO agreements contain specific provisions addressing amendments, waivers, or exceptions for regional trade agreements, which prevail over the general provisions of the Vienna Convention, such as Article 41[VCLT]¹⁹.

64. Therefore, according to the Appellate Body,

the proper routes to assess whether a provision in an FTA that may depart from certain WTO rules is nevertheless consistent with the covered agreements are the WTO provisions that permit the formation of regional trade agreements – namely: Article XXIV of the GATT 1994, or the Enabling Clause³⁰¹ as far as agreements between developing countries are concerned, in respect of trade in goods; and Article V of the General Agreement on Trade in Services (GATS) in respect of trade in services²⁰.

65. The Appellate Body further noted that:

The references in paragraph 4 [of Article XXIV] to facilitating trade and closer integration are not consistent with an interpretation of Article XXIV as a broad defence for measures in FTAs that roll back on Members' rights and obligations under the covered agreements.²¹

¹⁹ Appellate Body Report, *Peru – Agricultural Products*, para. 5.112.

²⁰ Ibid, para. 5.113.

²¹ Ibid., para. 5.116.

66. Nevertheless, the Appellate Body did not consider it necessary to rule on whether the provision at issue was consistent with Article XXIV of the GATT 1994.²²
67. The legal interpretations made by the Appellate Body in *Peru - Agricultural Products* support the EU's position that, even if the export bans at issue in this case were allowed by Article 35 AA, as narrowly interpreted by Ukraine, they would be prohibited by Article XI:1 of the GATT 1994 and could not be justified under Article XXIV of the GATT 1994. Furthermore, as a result, the AA as a whole would fail to be in conformity with Article XXIV of the GATT, contrary to one of the core objects and purposes pursued by the AA.²³

Question 6

Could the EU elaborate on the compatibility with Article 35 AA of potential environmental protection measures that include export restrictions and which are equivalent, but not identical, to internal restrictions consistent with Article III of the GATT 1994

68. Article III of the GATT 1994 prohibits discrimination between domestic and imported products. It does not address discrimination between domestic products sold internally and domestic products sold for export. Therefore, Article III of the GATT 1994 appears to be irrelevant for the assessment of the compatibility of the export restrictions at issue in this case with Article 35 AA.
69. Note AD III further provides that internal regulations which apply to both imported and like domestic products but are enforced in the case of imported products at the time of importation are subject to Article III of the GATT 1994, rather than to Article XI:1 of the GATT 1994. As just mentioned, however, Article III is not relevant in relation to export restrictions.
70. Restrictions on exports are always subject to Article XI:1 of the GATT, even if an “equivalent” restriction is applied to the domestic sale of the like products. This is not saying, however, that all measures having the effect, in practice, of

²² Ibid., para. 5.117.

restricting exports are to be regarded as restrictions “on the exportation or sale for export” within the scope of Article XI:1. Some generally applicable measures (e.g. a ban on the production of toxic product) may have the effect of preventing exports, but do not amount to a prohibition “on the exportation or sale for exportation”. In the case at hand, however, it is beyond question that the bans are applied specifically and exclusively “on the exportation or sale for export”, rather than being an unavoidable side-effect of an internal measure.

71. The existence of an “equivalent” internal measure is nevertheless relevant for the purposes of the analysis of an export restriction under Article XX of the GATT 1994, including in particular Article XX g), which requires that the measure must be applied in conjunction with restrictions on domestic production or consumption. The existence of an “equivalent” internal measure is likewise relevant in order to assess the existence of “unjustifiable discrimination” under the *chapeau*.

Question 7

Could a Party to the AA suspend trade concessions or apply other sanctions in response to a breach of the obligations under Chapter 13 of the AA?

72. Article 300(7) AA provides that:
- “For any matter arising under [Chapter 13], the Parties shall only have recourse to the procedures provided for in Articles 300 and 301 of this Agreement.”*
73. Unlike the dispute settlement procedures in Chapter 14, Chapter 13 does not allow a party to suspend trade concessions or impose other sanctions in response to a breach of the obligations with regard to the protection of the environment stipulated in that Chapter.
74. The above is without prejudice to the possibility for the Parties to adopt appropriate counter-measures in accordance with international law in response to a breach of the international instruments referred to in Chapter 13.

²³ EU’s Oral Statement, paras. 23-24.

Question 8

What are the customs duties applicable in the EU on imports of the goods within the scope of the measures at issue?

75. The customs duty rates applicable on imports into the European Union of wood products covered under the tariff headings 44.01 to 44.04 are 0% as MFN duty and 0% as preferential duty under the Association Agreement.

Question 9

Is there a possibility for the exchange of information between the customs authorities of the EU Member States and Ukraine?

76. The Association Agreement between the European Union and the European Atomic Energy Community and its Member States, of the one part, and Ukraine, of the other part, covers matters related to customs cooperation including the kind of exchange of information described by the Panel.
77. The provisions on customs cooperation are set out in Protocol II on mutual administrative assistance in customs matters.²⁴
78. The scope of Protocol II set out in Article 2 thereof covers in particular the exchange of information. In addition to the assistance in customs matters on request, Article 4 of Protocol II provides a legal base for spontaneous assistance between the customs administrations on both sides of the border. The provision stipulates:

“The Parties shall assist each other, at their own initiative and in accordance with their legal provisions, if they consider that to be necessary for the correct application of customs legislation, particularly by providing information obtained pertaining to:

- activities which are or appear to be operations in breach of customs legislation and which may be of interest of the other party;*
- new means or methods employed in committing breaches of customs legislation;*

²⁴ OJ L No L 161 of 29.3.2014, p.2121 -2126.

- goods known to be subject to breaches of customs legislation;
- natural or legal persons in respect of whom there are reasonable grounds for believing that they are or have been involved in operations in breach of customs legislation;
[...]"

Article 1, point (a) of Protocol II defines the term “customs legislation” as:

“any legal or regulatory provision applicable in the territories of the Parties governing the import, export and transit of goods and their placing under any other customs regime or procedure, including measures of prohibition, restriction and control”.

Question 10

Have the Parties knowledge of international activities, for example in the World Customs Organisation, for aligning the statistical data of imports and exports?

79. The European Union is unaware of any initiative on the alignment of statistical data of imports and exports in the framework of the World Customs Organisation.
80. With regard to the determination of the value of imports or exports for the purpose of applying customs duties, the applicable international framework is set by the WTO Agreement on the Customs Valuation which provides for a certain harmonisation but allows members to calculate export values on the basis of the ex-works price of the exported good while value of imports may also include the price for transport and insurance. In application of such a price determination method, the value of the exported good is by definition lower compared to the value of the imported good. The fact that the calculation of the values is made in different currencies and that further trade with the exported good may take place prior to importation or that the good is imported at a later stage (customs warehouse) would make such harmonisation a difficult exercise.

Question 11

Has the Ministry of Energy and Environmental Protection adopted all the acts required by the Decree of the Council of Ministers of Ukraine No 1142 of 4 December 2019 for implementing the new monitoring procedure for controlling the respect of the domestic consumption cap? Has the Ministry of Energy and Environmental Protection informed the Council of Ministers of the results of the monitoring procedure by 1st April as required by

the Decree of the Council of Ministers of Ukraine No 1142 of 4 December 2019? (see EU's responses to Panel's questions, paras. 234-236)

81. Ukraine has not demonstrated that the acts necessary for the implementation of the new monitoring procedure for controlling the respect of the domestic consumption cap have been adopted.
82. Ukraine has not explained if the Ministry of Energy and Environmental Protection informed the Council of Ministers of the results of the monitoring procedure by 1st April 2020.

Question 12

As regards the 2005 export ban, in paragraphs 59, 226 and 232 of its first written submission Ukraine indicates that the species covered by the 2005 export ban are not intended for industrial production. What does that mean? What is the relevance of prohibiting the domestic exploitation of the valuable and rare wood species listed in the Red Book of Ukraine pursuant to Article 70 of the Forest Code?

83. The EU refers to its Responses to the Panel's questions, paragraphs 156-164, and its oral statement, paragraph 101 and ff. Regardless of the question of whether 2 or 5 species are listed in the Red Book of Ukraine, the fact remains that only a part of the wood species covered by the 2005 export ban are listed in that book. Therefore, the special authorisation procedure provided by paragraph 9 of Article 70 of Ukraine's forest Code applies only to some of the species covered by the 2005 export ban (which can still be harvested although a special authorisation is required). The remaining 8 or 5 species can be harvested as any other wood species. Moreover, Ukraine has been unable to explain how much wood of the species listed in its Red Book and covered by the 2005 export ban it has allowed to harvest pursuant to paragraph 9 of Article 70 of Ukraine Forest Code. Therefore, Ukraine has not demonstrated that a real limitation exists on the harvesting of the wood species covered by the 2005 export ban. It should also be recalled that Ukraine did not report to Forest Europe any threatened tree species for the "State of Europe's Forest 2015", whilst it reported various figures for birds, mammals, vertebrate, invertebrates,

fungi and vascular plants.²⁵ This confirms that even for Ukraine itself the listing of a wood species in the Red Book of Ukraine is not determinative in order to demonstrate that that species is endangered.

84. Ukraine cannot provide any concrete and objective data demonstrating any risk of extinction of those ten wood species, despite the fact that such risk could have been measured since 2005, nor can it show with quantitative data or a qualitative analysis that the 2005 export ban had any positive effect on the preservation of those wood species. In the absence of any concrete data or a detailed qualitative analysis, the Panel should conclude that the 2005 export ban's contribution to the preservation of the tree species covered by the ban is inexistent or too small to be observed.

Question 13

How can an export ban protect plant life and what are the measures of Ukraine specifically designed to protect the endangered species?

85. Given that this question was addressed to Ukraine the EU will only make a few comments. Already by design, an export ban which only concerns some wood products as such does not appear to be a measure that is apt to protect plant life. The case of Ukraine clearly demonstrates this proposition. The export bans as such do not reduce the felling of tree but incentivise domestic processing of wood. The export of unprocessed wood is replaced (in total or partially) by export of processed wood that falls within a different tariff line.
86. The protection of endangered wood species begins with the collection and analysis of data on the population of the various tree species and their habitat. Once this step is performed, the collection and reproduction of seeds and active nursery for young trees, would appear to constitute the second logical step to be performed. Another important element is the available space for forests. It should be stressed that in Ukraine the State is in general owner of the forest

²⁵ Exhibit-EU-23, page 156, Table 46.

and the agricultural land. Ukraine therefore would seem to have the possibility to increase the usage of land for growing forests.

Question 14

Is it possible to extend the temporary export ban beyond the 10 years?

87. Despite the measure appears to be limited in time, the EU understands that the Parliament of Ukraine has the power to amend it at any time and extend its temporary application if it so wishes.

Question 15

To what extent do the measures adopted by Ukraine in 2018 or before reduce the consumption of the goods at issue in the internal market of Ukraine?

88. Ukraine argues that the 2015 export ban was made effective in conjunction with restrictions on domestic production or consumption as required by Article XX(g) of the GATT. According to Ukraine, before the enactment of the 2015 export ban several national rules restricted domestic production of wood and the 2018 amendment introduced a domestic consumption cap of 25 million cubic meters per year (Ukraine's Oral Statement, paras. 128-130).
89. As already explained by the European Union,²⁶ the WTO jurisprudence has clarified that the expression 'made effective in conjunction with' requires that there should be a close temporal relationship between the measure and the restriction so that the trade restrictive measure does not predate the domestic restriction by several years. Moreover, a 'restriction' is by definition something that restricts someone or something, a limitation on action, a limiting condition or regulation.

²⁶ EU's responses to panel questions, paras. 201-203.

90. Ukraine does not contest this jurisprudence. It confirms that a restriction “refers generally to something that has a limiting effect”²⁷ and explains that the restriction must be real i.e. capable of limiting the quantity of domestic production or consumption below the level of expected demand.²⁸
91. Indeed, the Panel in *China Rare Earth* clarified that:
- the term "restrictions on domestic production or consumption" to require a measure that is capable of limiting the quantity of domestic production or consumption below the level of expected demand. Such measure, in order to be considered a real restriction, must actually be enforced.*²⁹
92. With regard to the situation prior to the 2018 amendment, Ukraine refers to a variety of measures that would constitute such a restriction.
93. In paragraph 128(b) it refers to the national rules that limit the persons allowed to harvest timber, rules that restrict the transfer of forest land under public property and rules concerning the issuance of felling tickets for final felling operations or for forest formation and rehabilitation. In this connection, Ukraine adds in footnote 98 that also for the latter type of felling operations a felling ticket is required, which is however issued by the permanent forest users or forest owners themselves (whereas for final felling operations the felling tickets are issued by local authorities).
94. In this respect, the EU would note that the rules limiting the persons allowed to harvest timber, or restricting the transfer of forest land under public property clearly do not have any discernible limiting effect on the amount of wood production and consumption in Ukraine, and indeed Ukraine is not capable of quantifying any such effect.
95. With regard to the rules on issuing felling tickets, Ukraine wants to renege what it explained in its responses to the Panel. However, it clarifies that the felling tickets for forest formation and rehabilitation felling operations are issued by the same subjects that are to execute those felling operations and sell

²⁷ Ukraine’s first written submission, para. 200.

²⁸ Ukraine’s oral statement, para. 129(a).

the wood. Therefore, it appears doubtful that this sort of auto-limitation could effectively limit the production of wood below the level of expected demand, as the amount of wood harvested is left to the discretion of the same commercial entities that exploit the forests, and have an economic interest in felling as much wood as the market demands.

96. It is therefore not surprising that Ukraine did not raise this argument before and even at this stage is unable to quantify what kind of limitation it produces. On the contrary, it remains that according to footnote 27 of Ukraine's responses to the Panel's questions, in 2019 about 61% of harvested wood was obtained with forest formation and rehabilitation felling, rather than through final felling operations, which should constitute the main means to harvest wood.
97. In short, the restriction resulting from the mechanism of the felling tickets is not imposing a real limitation as its effectiveness is left to the good will of the operators that exploit the forests. It is not a real restriction on production or consumption of Ukraine wood, within the meaning of Article XX(g) of the GATT 1994.
98. Ukraine explains also that Table 6 of its first written submission shows the total amount of yearly logging obtained from final feeling operations.³⁰
99. However, Table 6 refers to the years following the entry into force of the 2015 export ban, and therefore it is irrelevant to prove that there was a restriction on wood production or consumption already in place when the ban was enacted as Ukraine contends. Moreover, it is plain that table does not take into account the amount of wood logged through other felling operation such as sanitary felling, and forest formation and rehabilitation felling. Rather in paragraph 85 of its first written submission Ukraine explains that there was a "slight rise of the yearly limit of logging of final felling operations in 2015-2019 from 9.5 to 9.9

²⁹ Panel Report China Rare Earth, para. 7.313.

³⁰ Ukraine's oral statement, para. 129(ii).

million cubic meters” while as regards “actual timber harvesting, there was a rise of logging in 2015-2018 from 21.9 to 22.5 million cubic meters”.³¹

100. This confirms again that even after the enactment of the 2015 export ban more than half of the total harvested wood in Ukraine is obtained with felling operations which are not subject to the issuance of a felling ticket by any Ukrainian public authority, and therefore the limitation on production or consumption resulting from the “felling tickets” is purely theoretical. Moreover, it appears clearly that neither the 2015 export ban nor the other rules/mechanisms mentioned by Ukraine resulted in a limitation of wood production or consumption below the level of expected demand, since on the contrary wood production or consumption increased for several year.
101. Ukraine further argues that there are other rules imposing from time to time more severe restrictions on timber logging.³² To support this statement, Ukraine refers either to rules that apply only in limited parts of Ukraine’s territory, such as the Carpathian region, and tend to restrict or regulate the felling activity in those areas, or to rules that regulate certain specific type of felling operations (such as sanitary felling). However, legislation that regulates how a certain activity must be carried out (for instance in order to reduce its impact on the environment) does not constitute per se a restriction on production and consumption within the meaning of Article XX(g) of the GATT 1994.
102. First, such legislation is not designed to limit the quantity of domestic production or consumption below the level of expected demand. And indeed it is not based on any assessment of that demand.
103. Second, it does not set any clear pre-established limit to production or consumption.
104. Third, its limiting effect is only hypothetical, as Ukraine itself admits in paragraph 129(b)x of its oral statement.

³¹ Ukraine’s first written submission, para. 86.

105. Fourth, since virtually any economic activity which has an impact on the environment is subject to some form of regulation, accepting Ukraine's position would reduce to nullity the condition of Article XX(g) of the GATT (according to which a trade restriction must be made effective in conjunction with a restrictions on domestic production or consumption). Indeed, that condition would be met in virtually every case.
106. Finally, with regard to the "2018 amendment" introducing the consumption cap, the EU makes reference to its observations contained in paragraphs 233, 241-245 of its Responses to the Panel's questions which demonstrate that this measure does not have any real limiting effect on wood production or consumption in Ukraine, because the cap is set at a level that is higher than the total wood ever produced in Ukraine (even pre-2014 where Ukraine had more forest land available to it).
107. Second, it is not even-handed, because no actual restriction is imposed on domestic consumption (or at best a very high and theoretical one) whereas all export of unprocessed wood is prohibited.
108. Third, as already mentioned Ukraine has not demonstrated that the consumption cap is effectively implemented and monitored.

Question 16

What is the 'effet utile' of the recognition of the "right to regulate" in Article 290(1) AA?

109. Article 290(1) AA consists of two parts. The first part is an introductory sentence "recognising" the "right to regulate" i.a. with regard to the protection of the environment:

Recognising the right of the Parties to establish and regulate their own levels of domestic environmental and labour protection and sustainable development policies and priorities, in line with relevant internationally recognised principles and agreements, and to adopt or modify their legislation accordingly [...]

³² Ukraine's oral statement, para. 129(b).

110. Unlike the first part of Article 290(1) AA, the second part is drafted in mandatory language and imposes an obligation on the Parties limiting the exercise of the right to regulate recognised in the first part:

[...] the parties shall ensure that their legislation provides for high levels of environmental and labour protection and shall strive to continue to improve that legislation.

111. The first part of Article 290(1) AA neither confers rights on the Parties nor imposes upon them any legally binding obligation. The “right to regulate” is an inherent attribute of all sovereign States. This includes the right to regulate in the specific areas mentioned in the first part of Article 290(1) AA. Article 290(1) AA limits itself to “recognise”, i.e. to declare or affirm that pre-existing sovereign right.
112. Ukraine’s position according to which the first part of Article 290(1) AA would amount to a self-standing exception allowing a Party to derogate from any other provision of the AA, including Article 35 AA, is manifestly without merit.
113. First, as explained above, the first part of Article 290(1) AA is a declaratory provision, which limits itself to “recognise” a pre-existing right of all States.
114. Second, there is nothing in the wording of the first part of Article 290(1) AA which may even remotely suggest that it was conceived by the drafters as an exception to any other provision of the AA. If Article 290(1) AA were a self-standing exception the drafters would have used appropriate language to that effect. For example, they would have stipulated that “nothing in the [AA] shall prevent the exercise of the right to regulate...”; or that “notwithstanding Article X, the Parties shall have a right to regulate ...”.
115. Third, Ukraine’s position according to which Article 290(1) AA is a self-standing exception conferring an unlimited and unqualified right to regulate with regard to i.a. environmental matters would have manifestly unreasonable and unacceptable consequences. Indeed, that interpretation would allow each Party to nullify at will 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. Ukraine does not really address this objection. Instead, it argues that the right to regulate recognised in Article 290(1) AA is not unlimited or unqualified because it is circumscribed to the areas mentioned in that provision³³. Yet those areas are very broadly defined. Moreover, Ukraine's argument begs the question: why should the Parties enjoy an unlimited and unqualified right to regulate with regard to the protection of the environment, while their right to regulate in other, no less vital areas, such as for example the protection of human life, would have to be exercised consistently with i.a. Articles 35 AA and 36 AA?

116. For the above reasons, the European Union submits, once again, that Article 290(1) AA does not confer an unlimited and unqualified right which may be invoked as a self-standing exception to derogate from any other provisions of the AA.
117. In the first place, the exercise of the right to regulate with regard to environmental matters recognised in Article 290(1) is subject to the obligations imposed by other provisions of Chapter 13, including Articles 290(2), 292(2), 292(3), 292(4), 293(2), 294 and 296 AA.
118. In addition, the exercise of the right to regulate with regard to environmental matters recognised in Article 290(1) AA must be consistent with the other obligations imposed upon the Parties by other chapters of the AA, including the prohibition on export restrictions in Article 35 AA. If a Party restricts exports for environmental reasons inconsistently with Article 35 AA, that restriction must be justified under a relevant and genuine exception, such as Article 36 AA.
119. The above interpretation the first part of Article 290(1) AA does not unduly deprive it of its "effet utile". As explained above, the intended legal effects of that provision are limited to begin with. Moreover, that provision is part of the relevant context, within the meaning of Article 31 VCLT, for the interpretation

³³ Ukraine's Oral Statement, para. 71.

and application of other provisions of the AA including, Article 35 AA and Article 36 AA.

120. More specifically, the explicit recognition of the right to regulate with regard to the matters mentioned in Article 290(1) AA involves the explicit acknowledgement by both Parties that environmental protection constitutes constitute a legitimate regulatory purpose. In turn, this may relevant (but not dispositive in itself) for the purposes of i.a. assessing whether a measure is consistent with other provisions of the AA, such as, for example, Articles 54 AA *juncto* Article 2.2 of the WTO TBT Agreement, Article 58(1) AA, Article 75 AA, Article 85 AA and Article 104(2) and (4) AA.
121. Furthermore, as already explained by the European Union, whether or not the right to regulate for environmental matters recognised in Article 290(1) AA has been exercised in conformity with the obligations imposed by other provisions of Chapter 13 may be relevant (but not dispositive in itself) in order to assess the justification of a measure under Article 36 AA³⁴.

Question 17

What does it mean that, pursuant to Article 290(2) of the AA, “as a way to achieve the objectives referred to in this Article, Ukraine shall approximate its laws, regulations and administrative practice to the EU acquis”?

122. As explained in the response to the previous question, the exercise of the right to regulate with regard to environmental matters recognised in Article 290(1) AA in order to achieve the objective stated in the same provision is subject to the obligations imposed by other provisions of Chapter 13, including Article 290(2) AA.
123. Article 290(2) AA requires Ukraine to exercise the right to regulate recognised in Article 290(1) AA by approximating its laws, regulations and administrative practices to those of the European Union.

³⁴ EU’s response to Panel Question 63, paras. 300-303.

124. The export bans at issue in this dispute have no equivalent in the laws, regulations and administrative practice of the European Union. Therefore, even assuming that Article 290(1) AA amounted to a self-standing exception with regard to the provisions of other chapters of the AA, including Article 35 AA, (*quod non*) Ukraine could not rely on that exception in this dispute because it has failed to exercise its right to regulate in conformity with Article 290(2) AA.

Question 18

Could the EU consider alternative supplies of unprocessed wood from Sweden, Germany or other countries that could replace the supplies of unprocessed wood from Ukraine?

125. The European Union does not allocate supplies of unprocessed wood between different Member States. It is the responsibility of each business to establish its supply chains and to procure the necessary inputs for its production on the market.
126. The European Union has established a customs union between its Member States and ensures the free circulation of goods in its Internal Market. By establishing those market access possibilities, producers of wood products in the European Union have the right to procure their supplies of unprocessed wood from any Member State in the European Union or from outside the EU.
127. Ukraine has concluded an agreement with the European Union, which establishes a free trade area and shall lay down the foundations for the further integration of both markets. As a first step in this process, the Parties have to remove customs duties and quantitative restrictions, such as export prohibitions, in order to facilitate market integration (see also recitals 15 and 16 of the Association Agreement).
128. Moreover, under Article XX of the GATT, the complainant may need to indicate an alternative less trade restrictive measure that the respondent could adopt in order to reach the objective protected by that provision. The respondent in this case is Ukraine. The EU therefore cannot indicate as alternative for the export bans a measure that the EU itself could adopt.

Question 19

Why did Ukraine enact the domestic “consumption cap” 3 years later compared to the wood ban of 2015?

129. The Explanatory Note accompanying the bill leading to the adoption of Law 2480-VIII introducing the consumption cap, by way of justification for this measure, mentions that the consumption cap is necessary “to strengthen Ukraine’s position in discussions with international partners”.³⁵ This suggests that the sole reason for introducing the 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. This also explains why the consumption cap was set at a level way higher than the historic annual consumption of domestic wood, and therefore above the level of expected demand. Had Ukraine’s intended to enact a measure improving the conservation of its forests, necessarily it should have set a consumption cap lower than the historic wood production.

130. The EU would also like to recall that several official parliamentary documents during the drafting and adoption procedure of the 2015 export ban have repeated and affirmed the same introductory paragraph from the original Explanatory Note of 10 December 2014 to the first Draft Law Reg.Nr.1362 (final Law 325-VIII) introducing the export ban on all unprocessed timber:

“The purpose of the Bill is to revive the woodworking and furniture industries, create jobs and refocus exports away from raw wood materials towards more highly-processed products.”³⁶

³⁵ Explanatory Note of 6 December 2016, at p. 2. (**Exhibit EU-9**).

³⁶ See Explanatory Note of 10 December 2014 to Draft law Reg.No. 1362 (Exhibit EU-1), Conclusions of 7 April 2015 of the (lead) Committee on Industrial Policy and Entrepreneurship of the Verkhovna Rada, on Draft law Reg.No.1362 (Exhibit EU-6), Conclusion of 22 December 2014 of the Verkhovna Rada’s Scientific and Expert Department, on Draft law Reg.No. 1362 (Exhibit EU-7),

131. Ukraine, in its oral reply to the Panel question argued that the delay of the introduction of the domestic consumption cap was due to the fact that the initial Draft Law 2480-VIII (Registration No. 5495) introducing a domestic consumption cap has been vetoed by the President in Summer 2018 and was thus adopted as Law 2531-VIII (Reg. No. 5495) only on 6 September 2018 (entering into force on 1 January 2019)³⁷. The EU would like to note that the date of introducing Draft Law 2480-VIII (Registration Nr.5495) in Parliament was as such only 6 December 2016, which is already 2 years after the first Draft Law of the 2015 export ban (12 December 2014)³⁸ and 1,5 years after its adoption (Law 325-VIII of 9 April 2015).³⁹
132. In any event, the EU would like to stress that for the assessment of whether an export ban was applied “*in conjunction with restrictions on domestic production or consumption*” (Article XX (g) GATT 1994), it is the dates of adoption of both measures that count. Indeed, a party cannot invoke provisions of its internal law as a justification for its failure to perform a treaty.⁴⁰ Accordingly, Ukraine cannot avail itself of the national rules that determine the various steps and the overall duration of its legislative procedure to justify the delay in the introduction of the consumption cap.
133. Moreover, whilst the domestic consumption cap entered into force on 1 January 2019 on paper, the Ukrainian government only started to work out the related implementation and monitoring procedures in early 2019, i.e. after the EU had requested consultations with Ukraine under the present dispute settlement procedure. Accordingly, Ukraine adopted on 4 December 2019 the Decree of the Council of Ministers Decree No 1142 on a “Procedure for Monitoring the Domestic Consumption of Unprocessed Domestic Timber and Controlling Excess Domestic Consumption of Unprocessed Timber”⁴¹.

³⁷ See Exhibits UKR-02, EU-05

³⁸ Exhibit EU-1

³⁹ Exhibit UKR-03; Exhibit EU-4

⁴⁰ Vienna on the Law of Treaties, Article 27.

⁴¹ Exhibit EU-15

134. According to that decree, the Ministry of Energy and Environmental Protection should have submitted by 1 April 2020, for the first time the “results of monitoring domestic consumption” and should have adopted “the legal acts necessary for implementation of this Decree”. All other central executive bodies are required to “make their normative legal acts compliant with this Decree within three months”⁴².
135. As already mentioned, to date Ukraine has not provided information showing that the provisions of Decree No. 1142 have been complied with and therefore it has failed to demonstrate that the consumption cap is effective.

Question 20

Did Ukraine notify the export bans to the WTO?

136. The notification of the export ban by Ukraine to the WTO is of no relevance for the assessment of the compatibility of that export ban with the Association Agreement.

⁴² Exhibit EU-15.