

To the Arbitration Panel

established pursuant to Article 306 of the
**Association Agreement between
the European Union and the European Atomic Energy
and their Member States**
and
Ukraine

in the dispute

Ukraine – Export prohibitions on wood products

**Opening Oral Statement of
the European Union**

22 September 2020

Table of Contents

I.	FACTUAL BACKGROUND.....	1
A.	DATA ON UKRAINE’S FORESTS (PANEL’S SUGGESTED ISSUES 2 AND 3).....	1
B.	TRADE STATISTICS (PANEL’S SUGGESTED ISSUES 7, 12, 13).....	2
II.	LEGAL ARGUMENTS	3
A.	ARGUMENTS BASED ON ARTICLE 35 AA AND ARTICLE XI OF THE GATT 1994	3
(a)	The object and purpose of the Association Agreement.....	3
(b)	Article 35 AA incorporates by reference Article XI of the GATT in its entirety (Panel’s suggested issue 26) ...	7
(c)	The meaning and relevance for this dispute of the terms “any measure having an equivalent effect” (Panel’s suggested issues 25 and 26).....	8
(d)	The European Union has met its burden of proof under Article 35 AA	10
(e)	Relevance of the ECJ’s case law on Articles 34 and 35 TFEU relating to the notion of “measure having an equivalent effect” and “indistinctly applicable measures” (Panel’s suggested issue 31)	11
(f)	Article 35 AA forbids all prohibitions or restrictions on exports of goods to the European Union, including those that apply <i>erga omnes</i> to all exports (Panel’s suggested issues 27 and 31).....	12
(g)	Article 35 AA forbids all prohibitions or restrictions on exports, whether permanent or temporary (Panel’s suggested issue 28)	14
(h)	Article 35 AA, the Parties “right to regulate” and the burden of proof (Panel’s suggested issue 30).....	15
(i)	Panel Question 46 – Applicability of case-law on import restrictions to export restrictions (Panel’s suggested issue 29).....	16
B.	ARGUMENTS BASED ON INVOKED EXCEPTIONS.....	18
(a)	The importance of focussing the analysis on the design of the measure rather than on observable effects (Panel’s suggested issue 32)	18
(b)	The export ban make no contribution to and are not related with Ukraine’s stated objectives (still on Panel’s suggested issue 32, 17, 2)	23
(c)	An incidental relation with or a marginal contribution to the objective of Article XX(b) or (g) is not enough (Panel’s suggested issue 32)	31
(d)	About less trade-restrictive alternatives (Panel’s suggested issues 33, 34, 35, 36, 38).....	33
(e)	About which conditions are relevant under the Chapeau of Article XX of the GATT 1994 (Panel’s suggested issue 40).....	40
C.	ARGUMENTS REFERRING TO THE TRADE AND SUSTAINABLE DEVELOPMENT CHAPTER (CHAPTER 13 OF THE AA).....	44
(a)	Possible defences based on the provisions of the Trade and Sustainable Development Chapter (Panel’s suggested issue 40)	44
(b)	Article 296(2) AA is not a “stand still” provision allowing Ukraine to apply the 2005 Export Ban and the 2015 Export Ban (Panel’s suggested issue 41)	45
(c)	“Right to regulate” and cooperation by the EU (Panel’s suggested issue 42).....	47
(d)	International agreements and Article 296(2) AA (Panel’s suggested issue 43)	48
III.	CONCLUSION	48

TABLE OF CASES CITED

Short Title	Full Case Title and Citation
<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, p. 1779
<i>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>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
<i>Brazil – Taxation</i>	Panel Reports, <i>Brazil – Certain Measures Concerning Taxation and Charges</i> , WT/DS472/R, Add.1 and Corr.1 / WT/DS497/R, Add.1 and Corr.1, adopted 11 January 2019, as modified by Appellate Body Reports WT/DS472/AB/R / WT/DS497/AB/R
<i>China – Publications and Audiovisual Products</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, p. 3
<i>China – Rare Earths</i>	Panel Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/R and Add.1 / WT/DS432/R and Add.1 / WT/DS433/R and Add.1, adopted 29 August 2014, upheld by Appellate Body Reports WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, DSR 2014:IV, p. 1127
<i>China – Rare Earths</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014, DSR 2014:III, p. 805
<i>China – 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>Colombia – Ports of Entry</i>	Panel Report, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry</i> , WT/DS366/R and Corr.1, adopted 20 May 2009, DSR 2009:VI, p. 2535
<i>Colombia – Textiles</i>	Appellate Body Report, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear</i> , WT/DS461/AB/R and Add.1, adopted 22 June 2016, DSR 2016:III, p. 1131
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, p. 7367
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243
<i>EC – Seal Products</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I, p. 7

Short Title	Full Case Title and Citation
<i>Indonesia – Chicken</i>	Panel Report, <i>Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products</i> , WT/DS484/R and Add.1, adopted 22 November 2017, DSR 2017:VIII, p. 3769
<i>Indonesia – Import Licensing Regimes</i>	Appellate Body Report, <i>Indonesia – Importation of Horticultural Products, Animals and Animal Products</i> , WT/DS477/AB/R, WT/DS478/AB/R, and Add.1, adopted 22 November 2017, DSR 2017:VII, p. 3037
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5
<i>Russia – Pigs (EU)</i>	Panel Report, <i>Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union</i> , WT/DS475/R and Add.1, adopted 21 March 2017, as modified by Appellate Body Report WT/DS475/AB/R, DSR 2017:II, p. 361
<i>Thailand – Cigarettes</i>	GATT Panel Report, <i>Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes</i> , DS10/R, adopted 7 November 1990, BISD 37S/200
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755
<i>US – Tuna II (Mexico) (Article 21.5 – Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico</i> , WT/DS381/AB/RW and Add.1, adopted 3 December 2015, DSR 2015:X, p. 5133

TABLE OF ABBREVIATIONS

Abbreviation	Full Name
Agency	Ukraine's State Agency for Forest Resources
ASF	African Swine Fever
Association Agreement (AA)	Association Agreement between the European Union and the European Energy Community and its Member States, of one part, and Ukraine, of the other part.
CAA	Clean Air Act
DCFTA	Deep and Comprehensive Free Trade Area
DSB	Dispute Settlement Body
ECJ	European Court of Justice
EU	European Union
FAWS	Forests available for wood supply
FNAWS	Forest not available for wood supply
FTA	Free trade agreement
GATT 1994	The General Agreement on Tariffs and Trade 1994
HS	The Harmonized System
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
NAI	Net annual increment
SPS Agreement	WTO Agreement on the Application of Sanitary and Phytosanitary Measures
TFEU	Treaty on the Functioning of the European Union
UKR	Ukraine
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

1. On behalf of the European Union, we would like to thank the Panel for this opportunity to submit orally the views of the European Union, as well as for its continued availability and patience, despite the unusual and difficult circumstances that are rendering so challenging the conduct of these proceedings.
2. At the outset we would like to apologise for the length of our oral statement, but we wanted to address all “the suggestions for issues” made by the Panel in its communication to the Parties of 16 June 2020, to the extent that they concern the European Union. We will do so by following, as far as possible, the same order as in the Panel’s communication. However, with regard to the factual clarifications asked by the Panel we will skip reading Section I here below, which nevertheless should be considered as an integral part of the EU oral statement of today.
3. Needless to say, the European Union stands ready to answer any further questions that the Panel may have in the course of this hearing.

I. FACTUAL BACKGROUND

A. Data on Ukraine’s forests (Panel’s suggested issues 2 and 3)

4. With regard to the Panel’s suggested issues 2 and 3, the European Union would like to recall its responses to the Panel’s first set of written questions¹.
5. As regards FAWS and FNAWS, reference has been made to the data and methodology used by the Pan-European Ministerial Conference for the Protection of Forests in Europe. The relevant data for Ukraine are based on input supplied by Ukraine, including for 2015. Those data confirm that in Ukraine the area of FNAWS is relatively large, as compared with the average for the reporting countries – about 35% FNAWS, against 65% for FAWS.
6. The difference between that figure of 35% and the more general terms used by Ukraine in its own answers, *i.e.* “almost half of the forests have prohibition on

¹ See EU Responses to Panel Questions, paras. 1-2.

conducting final felling” does not seem significant for the purposes of this dispute. Indeed, it seems that those terms may well include forests which normally represent FAWS, but for which temporary felling restrictions have been issued.

7. As explained previously², the comparability of data may, in any event, depend on the methodologies used for collecting and interpreting relevant information. Moreover, both FAWS and FNAWS are managed and/or protected in an environmentally sustainable way – as demonstrated by Ukraine’s own available official data and reporting, including in particular the Annual Reports of the State Forest Agency. The latter confirm (*See Exhibits EU-2, UKR-1*) that the balance between the net annual increment (NAI) and annual fellings has been constantly and solidly positive in Ukraine, justifying the conclusion that Ukrainian forests are to be “regarded as solidly sustainable”³.

B. Trade statistics (Panel’s suggested issues 7, 12, 13)

8. The European Union appreciates the Panel’s efforts to further clarify certain potential discrepancies between the trade statistics supplied by the Parties and is ready to answer any additional questions. At the same time, the European Union believes that all the relevant statistical data have already been provided by both Parties.
9. As regards the Panel’s suggested issues 7 and 12, it is recalled that the 2005 Export Ban covers ten very specific wood species falling within the scope of HS 4407. The large majority of products within the scope of HS 4407 was not covered by the 2005 Export Ban. The entry into force of the 2005 Export Ban had little impact in the overall trade statistics for HS 4407. This suggests that the pre-existing trade flows for those ten species were rather modest.
10. The figures for Ukraine’s export volumes to the European Union (in tonnes) of sawn wood under HS 4407, provided by Ukraine in Table 2 of its response to the Panel’s questions, are very close, if not identical, to the corresponding EU import figures

² See EU Responses to Panel Questions, para 1.

³ See EU Responses to Panel Questions, para 2.

provided in EU Exhibit 18 (page 1). As explained previously by the EU⁴, the increase of relevant (permitted) exports of sawn wood picked up in parallel with the Ukrainian export ban on unprocessed timber (HS 4403) as of 2015. This is consistent with the achievement of one of the main purposes of the 2015 Export Ban, namely supporting domestic woodworking industry such as sawmills. An overall reduction of domestic felling or wood production or of overall exports of wood products was neither intended nor achieved.

11. The export data provided by Ukraine in Table 2 is overall compatible with the corresponding import data provided by the EU in Exhibit 18⁵. Also, Ukraine's Table 2 does indeed refer to export data from Ukraine to the European Union.
12. As regards pinewood (Panel's suggested issue 13), the 2015 Export Ban for HS 4403 became legally applicable for pinewood (HS 4403.21 and 4403.22) only as of 2017. As a result, there were still significant exports of pinewood to the EU during 2015 and 2016. The figures for exports shown in the trade statistics decrease from 2017 and become virtually nil as of 2019.

II. LEGAL ARGUMENTS

A. Arguments based on Article 35 AA and Article XI of the GATT 1994

(a) The object and purpose of the Association Agreement

13. Before addressing the specific issues relating to the interpretation of Article 35 of the Association Agreement (AA) and its relationship to Article XI of the GATT 1994 raised by the Panel, it is useful to recall the object and purpose pursued by the Parties through the AA.
14. The AA is not an ordinary free trade agreement. As indicated by its name, the AA establishes an "association" between the Parties. From the EU's perspective, the

⁴ See EU Responses to Panel Questions, para 6; Exhibit EU-18.

⁵ It would seem that the Panel's suggested issue 12 contains a typo when it refers to Exhibit 23.

agreement falls within the category of association agreements provided for in Article 217 TFEU, rather than within the category of ordinary trade agreements provided for in Article 207 TFEU.

15. That “association” entails very close political, cooperation and economic links between the Parties, going well beyond the mere liberalisation of trade between them⁶.

16. As regards trade, Article 1(2) AA states that one of the aims of the association is

to establish conditions for enhanced economic and trade relations leading towards Ukraine's gradual integration in the EU Internal Market, including by setting up a Deep and Comprehensive Free Trade Area as stipulated in Title IV (Trade and Trade-related Matters) of this Agreement, and to support Ukrainian efforts to complete the transition into a functioning market economy by means of, inter alia, the progressive approximation of its legislation to that of the Union

17. A basic component of that Deep and Comprehensive Free Trade Area (DCFTA) is the establishment of a free trade area for goods in accordance with Article XXIV of the GATT 1994. Thus, Article 25 AA describes the specific objective of Chapter 1 of Title IV (“Trade and Trade related matters”) as follows:

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, in accordance with the provisions of this Agreement and in conformity with Article XXIV of the General Agreement on Tariffs and Trade 1994 (hereinafter referred to as "GATT 1994").⁷

18. As made clear by the above quoted provisions, by concluding the AA the Parties sought to go beyond the level of trade liberalization already achieved between them under the WTO Agreement. Furthermore, whereas the AA establishes a free trade area in accordance with Article XXIV of GATT 1994, the Parties sought to go beyond the minimum requirements of that provision by setting up a DCFTA “leading towards Ukraine's gradual integration in the EU Internal Market”. Only a handful of

⁶ Cf. the objectives listed in Article 1.2 AA.

⁷ Similarly, the fifteenth recital states that the parties desire:
[to] achiev[...] economic integration, inter alia through a Deep and Comprehensive Free Trade Area (DCFTA) as an integral part of this Agreement, in compliance with rights and obligations arising out of the World Trade Organisation (WTO) membership of the Parties, and through extensive regulatory approximation;

trade agreements concluded by the European Union with certain European countries (EFTA States, Switzerland) aim at achieving a comparable degree of trade liberalization and economic integration.

19. In stark contrast with the very ambitious trade liberalization objectives pursued by the AA, Ukraine has put forward an extremely narrow interpretation of Article 35 AA, which would require reading that provision as imposing less obligations on the Parties than Article XI of the GATT 1994.
20. According to Ukraine, unlike Article XI of the GATT 1994, Article 35 AA would prohibit only those export prohibitions or restrictions (and by implication also those import prohibitions or restrictions) that are shown to have the “actual effect” of restricting trade. Moreover, it appears that the Parties would be allowed to maintain any such restrictions until 2025, and that only those restrictions that apply specifically to trade to the other Party, as opposed to those applied *erga omnes*, would be caught by Article 35 AA. Last but not least, each Party would be free to restrict exports (or imports) by invoking its “right to regulate”, whether or not such right is exercised in accordance with the relevant exceptions stipulated in the AA, such as those provided for in Article 36 AA.
21. As we will show later, Ukraine’s interpretations have no basis on the text of Article 35 AA and the relevant context. At this stage, however, the European Union would like to underline that Ukraine’s interpretation would furthermore lead to a result that is plainly at odds with the object and purpose of the AA.
22. Whereas the Parties sought to set up a DCFTA providing for ‘WTO *plus*’ obligations, Ukraine would read Article 35 AA as providing for ‘WTO *minus*’ treatment. Ukraine’s contrived reading of Article 35 AA, one of the most fundamental provisions of Title IV of the AA, calls into question Ukraine’s willingness to implement the AA in good faith and in a manner allowing Ukraine’s gradual integration in the EU internal market.

23. Moreover, as mentioned expressly in Article 25 AA, the AA seeks to establish, as part of the DCFTA, a free trade area “in accordance with Article XXIV of the GATT 1994”. Yet, Ukraine’s interpretation of Article 35 AA would call into question the compatibility of the AA with that provision of the GATT 1994. Indeed, Article XXIV:8(b) of the GATT 1994 provides that:

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

24. It is implicit in the above provision that, in order to comply with the requirements of Article XXIV of the GATT 1994, the parties to a FTA must eliminate between them any measures prohibited by Article XI of the GATT 1994 on substantially all trade, except as permitted by the exceptions cited therein, including those provided for in Article XI itself. On Ukraine’s interpretation, however, Article 35 AA would fail to capture many export (and import) restrictions that would be prohibited by Article XI of the GATT 1994.
25. Furthermore, Ukraine’s misguided interpretation of Article 35 AA, if upheld, would be without prejudice to the EU’s right to challenge the measures at issue before a WTO panel on the basis of Article XI of the GATT 1994, since, according to Ukraine, those two provisions would not provide for “identical obligations”.⁸ However, it is hardly conceivable that the Parties to the AA could have intended, by agreeing on Article 35 AA, to permit the application between them of export (or import) restrictions incompatible with Article XI of the GATT 1994, while at the same time allowing the parties to bring claims based on the latter provision under the WTO dispute settlement mechanism. It would be deeply ironical if the result of setting up between them a DCFTA, with a well-developed system of bilateral dispute settlement, was to encourage the Parties to resolve its trade disputes in the WTO, rather than bilaterally.

⁸ Cf. Article 324 AA.

(b) Article 35 AA incorporates by reference Article XI of the GATT in its entirety (Panel’s suggested issue 26)

26. The European Union considers that Article 35 AA incorporates by reference Article XI of the GATT 1994 in its entirety, and not just the exclusions listed in Article XI:2, as it appears to be Ukraine’s position.
27. First, the plain meaning of the second sentence of Article 35 leaves no scope for doubt. Article 35 AA 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.

28. The second sentence of Article 35 AA alludes to “Article XI of GATT 1994”. It does not distinguish between the first and the second paragraph of Article XI of the GATT 1994. Had the drafters intended to limit the incorporation by reference to the second paragraph of Article XI, they would have specified so by referring instead to “Article XI:2”, as they did in the first sentence of Article 35 AA.
29. Second, Ukraine’s interpretation is based exclusively on the words “to this end” that introduce the second sentence of Article 35 AA. According to Ukraine, those terms would refer only to the last part of the first sentence. However, the terms “to this end” may and must be read as referring to the first sentence as a whole. Indeed, Ukraine’s reading is contradicted by the fact that, as mentioned before, the last part of the first sentence refers to Article XI:2, whereas the second sentence alludes to Article XI, without further specification.
30. Third, for the reasons explained above, Ukraine’s reading of the second sentence is not consistent with the object and purpose of the AA.
31. The incorporation of basic provisions of the GATT 1994 (such as Article III⁹, Article XI or Article XX¹⁰), into FTAs is a usual technique in the trade agreements

⁹ Cf. Article 34 AA.

concluded by the European Union and many other countries. Through that technique the parties seek to ensure that the FTA is consistent with their obligations under Article XXIV of the GATT 1994 and achieves a level of liberalization which does not fall, with respect to matters covered by those provisions, below the level already achieved in the WTO agreements.

32. Reading Article 35 AA as incorporating by reference Article XI of the GATT 1994 in its entirety is consistent with the Parties' objective to build upon their pre-existing WTO obligations in order to set up a DCFTA "leading towards Ukraine's gradual integration in the EU Internal Market". It is also consistent with the specific objective expressed in Article 25 AA to establish a FTA in accordance with Article XXIV of the GATT 1994.

(c) The meaning and relevance for this dispute of the terms "any measure having an equivalent effect" (Panel's suggested issues 25 and 26)

33. Article 35 AA provides in relevant part that:

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

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

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

35. Thus, both Article 35 AA and Article XI of GATT 1994 forbid any "prohibitions" or "restrictions" on exports (and on imports). In addition, Article 35 also prohibits expressly "any measure having an equivalent effect" to those prohibitions or restrictions.

¹⁰ Cf. Article 36 AA.

36. Ukraine infers from this difference in wording that Article 35 AA only prohibits those measures, including “prohibitions” or “restrictions”, that are shown to have the actual “effect” of prohibiting or restricting exports.
37. This interpretation has no basis on the text of Article 35 AA. That provision distinguishes three categories of measures: “prohibitions”, “restrictions” and “measures having equivalent effect”. The term “effect” only qualifies the third category of measures. In the case at hand, however, the European Union does not argue that the measures at issue are “measures having equivalent effect”, but rather outright “prohibitions” on exports.
38. Moreover, it is well-established that in order to substantiate a violation of Article XI:1 of GATT 1994 it is not necessary to show that a measure has had the actual effect of restricting exports or imports¹¹. Therefore, Ukraine’s interpretation would create a significant divergence between Article XI:1 of the GATT 1994 and Article 35 AA.
39. The European Union considers that the mere presence in Article 35 AA of the phrase “any measure having an equivalent effect” does not have the sweeping implications alleged by Ukraine. As we will explain, despite that difference in wording, Article 35 AA and Article XI of the GATT 1994 impose “identical obligations” and should, therefore, be interpreted consistently, in accordance with Article 320 AA.
40. The terms “or any measure having an equivalent effect” are not meant to introduce an “actual effects” test. Rather, that phrase clarifies that the obligation not to adopt or maintain “prohibitions” or “restrictions” on exports applies not only to measures that prohibit or restrict exports *de iure*, but also to measures that do so *de facto*. WTO panels have confirmed that, despite the absence of any express language to that effect, Article XI of the GATT 1994 does prohibit both *de iure* and *de facto* prohibitions or restrictions¹². The phrase “or any measure having an equivalent effect” serves the sole purpose of making this explicit in Article 35 AA. It would be perverse to read that

¹¹ See EU Response to Panel’s Question 42.

¹² See e.g. Panel Report, *Argentina – Hides and Leather*, para. 11.17 (“There can be no doubt, in our view, that the disciplines of Article XI:1 extend to restrictions of a *de facto* nature.”)

phrase as limiting by implication the scope of the obligation imposed by Article 35 AA, as compared to Article XI:1 of the GATT 1994.

41. The fact that, as shown above, the second sentence incorporates by reference Article XI of the GATT 1994 as a whole, confirms that the drafters of Article 35 AA did not intend to subject the application of that provision to additional requirements, such as an ‘actual trade effects’ test, as compared to Article XI of the GATT 1994.
42. Moreover, for the reasons explained above, Ukraine’s attempt to create additional conditions for the application of Article 35 AA, as compared with Article XI of the GATT 1994, would be inconsistent with the objective pursued by the AA and, more specifically, by Chapter 1 of its Title IV.

(d) The European Union has met its burden of proof under Article 35 AA

43. In the present case, the European Union does not contend that the measures at issue prohibit or restrict exports *de facto*. Rather, the European Union claims that the measures at issue are, in and by themselves, *de iure* export prohibitions within the meaning of Article 35 AA. Therefore, the Panel is not required to apply the phrase “or any measure having equivalent effect”.
44. In any event, it is also well-established in the WTO case-law that, whereas in order to show that a measure restricts *de facto* exports (or imports) evidence of the actual effects of the measure may be relevant, such evidence is neither necessary nor dispositive¹³. Rather, the existence of a *de facto* restriction can be demonstrated on the basis of the design of the measure and its potential to adversely affect importation, as opposed to the actual resulting impact of the measure on trade flows.¹⁴
45. Ukraine does not question that, by their own terms, both the 2005 Export Ban and the 2015 Export Ban prohibit all exports of the products concerned by each of them from Ukraine to the European Union and are indeed designed to ban all exports of the

¹³ Panel Report, *Argentina – Hides and Leather*, paras. 11.20-11.21.

¹⁴ Panel Report, *Colombia – Ports of Entry*, paras. 7.252-7.253.

products concerned.¹⁵ Quite to the contrary, Ukraine is adamant that such a prohibition is necessary to achieve its alleged environmental objectives and that there is no less trade-restrictive alternative available.

46. Ukraine’s defence is manifestly self-contradictory. In essence, Ukraine seeks to rely on its own alleged inability to enforce an undisputed *de iure* export prohibition specifically designed to ban all exports of the goods concerned in order to argue that the export prohibition does not breach Article XI:1 of the GATT 1994 because it does not have “actual effects” on trade. At the same time, however, Ukraine contends that such an export prohibition is indispensable in order to achieve its alleged environmental objectives, because other, less-trade restrictive measures, would not be equally effective.
47. For the foregoing reasons, the European Union submits, once again, that there is no need for the Panel to consider evidence of the actual effect of the measures at issue, or for the European Union to provide evidence of such actual effects. Irrespective of this, the evidence already provided by both Parties in the form of trade statistics, confirms beyond doubt that the measures at issue have had the actual effect of halting trade in the products concerned.

(e) Relevance of the ECJ’s case law on Articles 34 and 35 TFEU relating to the notion of “measure having an equivalent effect” and “indistinctly applicable measures” (Panel’s suggested issue 31)

48. As previously noted by the European Union, the phrase “any measure having equivalent effect” appears to have been borrowed from Article 35 of the TFEU, which states that:

Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.

49. In the context of Article 35 TFEU, the concept of “measures having equivalent effect” has been broadly interpreted by the ECJ in order to capture any measures that, while being applicable to all traders active in a EU Member State, have *de facto* a

¹⁵ Ukraine’s written submission, paras. 55 and 65.

greater actual effect on exports than on the marketing of goods in the domestic market¹⁶.

50. Thus, in the context of Article 35 TFEU, the phrase “measure having equivalent effect” has been used by the ECJ to expand, rather than to narrow the scope of the prohibition on “quantitative restrictions on exports”. More specifically, that phrase has never been relied upon by the ECJ in order to limit the prohibition on *de iure* quantitative restrictions on exports to those restrictions which are shown to have had ‘actual effects’ on trade.
51. In response to a question raised by the Panel (suggested issue 31), the European Union would like to clarify, that the measure at issue could not be regarded as a measure having equivalent effect to a quantitative restriction on exports for the purposes of Article 35 TFEU, because it applies *de iure* only to exports of goods. Instead, the measure at issue, if applied by an EU Member State, would have to be characterised as a “quantitative restriction on exports”.
52. For the same reasons, the ECJ’s case law relating to “indistinctly applicable measures” under Articles 34 and 35 TFEU mentioned by the Panel would not be applicable to the measure at issue. The mere fact that the measures at issue applies *erga omnes* to all exports, regardless of the country of destination, does not mean that they are “indistinctly applicable” within the meaning of that case law. Rather, for the purposes of that case law, it would have to be shown that *de iure* a measure applies equally to all traders within the Ukrainian territory, i.e. including also those traders selling the products domestically, even if *de facto* the measure has a disproportionate impact on exports from that territory.

(f) Article 35 AA forbids all prohibitions or restrictions on exports of goods to the European Union, including those that apply *erga omnes* to all exports (Panel’s suggested issues 27 and 31)

¹⁶ See e.g. judgement of 21 June 2016, *New Valmar*, C-15/15, EU:C:2016:464, para. 36 and case-law cited therein (“The Court has held that a national measure applicable to all traders active in the national territory whose actual effect is greater on goods leaving the market of the exporting Member State than on the marketing of goods in the domestic market of that Member State is covered by the prohibition laid down by Article 35.”)

53. Ukraine has suggested that Article 35 AA only addresses prohibitions or restrictions specifically aimed at exports of goods to the territory of the other Party, to the exclusion of prohibitions or restrictions on goods that are applied *erga omnes* regardless of the country of destination¹⁷. Ukraine purports to base this interpretation on the terms “destined for the territory of the other party”¹⁸.
54. This interpretation is manifestly incorrect. Article 35 AA includes the terms “destined for the territory of the other Party” because it is concerned exclusively with trade between the Parties. Each Party remains free to regulate its trade with other countries that are not Parties to the AA, including by restricting its export to those other countries. But this does not have the implication that only those export restrictions that apply exclusively to exports to the territory of the other Party are prohibited by Article 35 AA. That provision forbids any prohibition or restriction that applies to exports to the other Party, even if the same restriction applies also to exports to other countries.
55. The terms “destined for the territory of the other party” paraphrase the wording of Article XI:1 of the GATT 1994, which forbids prohibitions or restrictions on exports of goods “destined for the territory of any other contracting party”. Yet Article XI:1 of the GATT 1994 has never been interpreted as allowing export (or import) restrictions merely because they were applied to non-WTO Members.
56. Indeed, Article XI:1 of the GATT 1994 is not concerned with discrimination. A non-discriminatory export (or import) restriction is still a restriction within the scope of Article XI:1 of the GATT 1994. If, in addition, the export (or import) restriction discriminates against a WTO Member, it may be incompatible with the Most-Favoured-Nation obligations in Article I:1 or Article XIII of the GATT 1994. But the mere fact of being non-discriminatory does not exempt *per se* a measure from Article XI:1 of the GATT 1994.
57. Once again, Ukraine’s narrow interpretation of the obligations imposed by Article 35 AA would be inconsistent with the object and purpose of the AA. In the first place, it

¹⁷ Ukraine’s response to Panel question 42, para. 168.

¹⁸ *Ibid.*

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

(g) Article 35 AA forbids all prohibitions or restrictions on exports, whether permanent or temporary (Panel's suggested issue 28)

58. As noted by the European Union in its response to Panel Question 43, Article XI:1 of the GATT 1994 forbids all prohibitions and restrictions on exports, whether permanent or temporary.
59. Contrary to what appears to be Ukraine's suggestion, Article 25 AA does not have the implication that temporary prohibitions or restrictions are permitted by the AA provided that they end before the transitional period mentioned in that provisions.
60. Article 25 AA is purposive provision (it is entitled "objective"), which states that:

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, in accordance with the provisions of this Agreement and in conformity with Article XXIV of the General Agreement on Tariffs and Trade 1994 (hereinafter referred to as "GATT 1994").

61. The transitional period mentioned in this provision relates to the establishment of a free trade as a whole, and not to each and every provision included in Chapter 1 of Title IV ("National Treatment and Market Access for Goods") considered on its own. That transitional period reflects the fact the provisions included in Chapter 1 of Title IV relating to the elimination of customs duties on import and exports between the Parties are to be implemented gradually, according to a schedule with a maximum length for certain products of 10 years (see Articles 29 AA and 31 AA and related Annexes).

62. Unless otherwise indicated, the provisions included in Chapter 1 of Title IV apply from the date of entry into force (or provisional application) of the AA. Unlike Article 29 AA or Article 31 AA, Article 25 AA is not subject to any transitional period. To the contrary, the use of the term “maintain” underlines that it is meant to apply to any pre-existing prohibitions or restrictions from the first day of application of the AA.
63. Subjecting the application for Article 35 AA to a transitional period would have been unnecessary and unjustified. That provision restates the pre-existing obligations of the Parties under Article XI of the GATT 1994. There is no reason to allow the Parties to maintain measures that they should have eliminated in order to comply with their pre-existing WTO obligations. In contrast, the obligation to eliminate the import and export customs duties between the Parties goes beyond their pre-existing WTO obligations. Hence the transitional period provided for in Article 29 AA and Article 31 AA and reflected in Article 25 AA.

(h) Article 35 AA, the Parties “right to regulate” and the burden of proof (Panel’s suggested issue 30)

64. The Panel refers to paragraph 162 of Ukraine’s response to the Panel’s questions. In that paragraph, Ukraine appears to allude to the “right to regulate” for environmental purposes recognized in Article 290(1) AA.
65. The European Union has set out its views on the relevance of Article 290(1) AA in its response to the Panel’s Question 62. As noted in that response, Article 290(1) AA is a confirmatory provision that “recognises” the pre-existing, and unquestionable, right of each Party to regulate its own levels of protection, “in line with relevant internationally recognised principles and agreements”. Such recognition, however, cannot be construed as conferring an unlimited right to derogate from any other provision of the Association Agreement, including Article 35 AA. Rather, the right to regulate recognised in Article 290(1) AA must be exercised in accordance with the requirements of other provisions of the AA that give expression and operationalise the “right to regulate”, including the policy exceptions mentioned in Article 36 AA.

66. The mere fact that, according to Ukraine, the measures at issue involve the exercise of the right to regulate recognised in Article 290(1) AA does not alter the allocation of the burden of proof under Article 35 AA. The European Union has set out its views on the allocation of the burden of proof under Article 35 AA in its response to the Panel’s Question 48. As recalled in that response, in accordance with well-established principles, the European Union has to present a *prima facie* case that the measures at issue violate Article 35 AA. The European Union sees no reason why the right to regulate recognised in Article 290 (1) AA should change this.
67. In turn, in accordance with the same well-established principles, it is for Ukraine to support its assertion that its measures are justified under other provisions of the AA.¹⁹ Again, the mere fact that a the measures at issue involve, allegedly, the exercise of the right to regulate recognised in Article 290(1) AA does not change the burden of proof under the exceptions mentioned in Article 36 AA which frame the exercise of that right. Indeed, all the measures covered by those exceptions involve the exercise by the Parties’ of their “right to regulate” for environmental or other legitimate purposes. If the mere invocation of the “right to regulate” were sufficient to reverse the burden of proof under those exceptions, it would always fall upon the complaining party to show that a measure is not justified under Article 36 AA, contrary to well-established principles on the allocation of the burden of proof.

(i) Panel Question 46 – Applicability of case-law on import restrictions to export restrictions (Panel’s suggested issue 29)

68. The Panel notes that “the EU responds to Panel Question 46 only under Article XI GATT and not (also) under Article 35 AA (EU Answers, paras 92-97).”
69. The European Union observes that Panel Question 46 referred exclusively to the GATT 1994 and rulings under that agreement, and not to Article 35 AA as such:

(EU) With reference to issues of interpretation of an export prohibition under WTO law, the three DSB legal interpretations of trade prohibitions referred to by the European Union concern imports of goods. (European Union First Written Submission, paras 48-52) Why would these rulings

¹⁹ See EU’s response to Panel Question 48.

also apply to export prohibitions and restrictions (“there is no reason why the term “prohibition” should be interpreted differently when applying to exports of goods”)? Does this assertion also stand in the light of (i) other GATT 1994 provisions, and (ii) in economic terms?

70. The Panel further notes that the “EU answers to UKR Q are more elaborate”. It is unclear to the European Union to which question from Ukraine the Panel is referring, since none of them addresses the issue raised by the Panel in its Question 46.
71. As the Panel is well aware, this is the first dispute under the AA. The European Union, therefore, cannot refer to interpretations of Article 35 AA made by previous panels, unlike in the case of Article XI:1 of the GATT 1994. Nevertheless, the European Union considers that the WTO rulings cited in its response to Panel Question 46 are also relevant for the interpretation of Article 35 AA, given that Article 35 AA incorporates by reference Article XI of the GATT 1994, as well as the consistency obligation imposed by Article 320 AA.
72. Article 35 AA uses identical terms (“prohibition”, “restriction”, “measure having equivalent effect”) to designate the types of measures prohibited by that provision, regardless of whether they are applied on imports and exports. Thus, an interpretation whereby Article 35 AA would impose different, and less demanding, obligations with regard to exports measures than in the case of import measures has no basis on the ordinary meaning of Article 35 AA.
73. Furthermore, there is no contextual element, either in Article 35 AA or in other provisions of the AA, which may suggest that the drafters intended that those terms be interpreted differently, depending on whether they are applied to imports or exports. Had the drafters intended to provide for a different, less demanding, legal test with regard to export measures, they would have done so by using different language and in a different provision (as they did with regard to customs duties on imports and exports. *See* Articles 29 AA and 31 AA, respectively).
74. Lastly, an interpretation of Article 35 AA whereby the terms “prohibition”, “restriction” and “measure having equivalent effect” would have to be interpreted as permitting certain restrictions on exports that would not be permitted if applied to imports, and that would be furthermore incompatible with the Parties obligations’

under Article XI:1 of the GATT 1994, would be inconsistent with the object and purpose of the AA described above in section II A a).

B. Arguments based on invoked exceptions

(a) The importance of focussing the analysis on the design of the measure rather than on observable effects (Panel's suggested issue 32)

75. As illustrated in responding to the Panel questions, under both Article XX, (b) and Article XX(g) focussing the analysis on the design and structure of the measure is key.
76. Let's start from Article XX(b). WTO case law is consistent in underlying that a Party invoking Article XX(b), should as a first step demonstrate that the measure is designed to protect the non-trade interest that it invokes.
77. Therefore, Ukraine must first establish whether the policy in respect of the measure for which Article XX(b) is invoked falls within the range of policies designed to protect plant life or health.
78. Moreover, with regard to Article XX(b), WTO jurisprudence has also clarified that the notion of 'protection' implies the existence of some risk to human, animal or plant life or health.²⁰
79. It follows that Ukraine should demonstrate the existence of a concrete risk either in quantitative or qualitative terms, and not simply presuppose or allege that a risk exists without any concrete data substantiating it.²¹
80. In this connection, it should be recalled that Ukraine has confirmed that its assessment about the rarity of the ten wood species covered by the 2005 export ban is not based on scientific evidence or empirical observation, but it is just a vague approximation. Indeed, in response to question 5 of the Panel, Ukraine has noted that

²⁰ Appellate Body Report, *EC – Seal Products*, para. 5.197.

²¹ Appellate Body Reports, *EC – Asbestos*, para. 167 and *EC – Seal Products*, para. 5.198.

the “study of species composition is still in its infancy and accurate data on the area and stock of designated species requires separate research, but approximately their share in the forest stock of Ukraine does not exceed 2%.”

81. Moreover, Ukraine itself seems not to believe that those tree species are rare or threatened by extinction. Indeed, it 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 plants²².
82. Even though the focus should be on the design of the measure in the context of the necessity analysis under Article XX(b) and notably in order to assess the contribution of a measure to the achievement of its objective, consideration of the actual effects may prove useful. Indeed, a panel must always assess the actual contribution made by the measure to the objective pursued. Thus, a party seeking to demonstrate that its measures are 'necessary' should seek to establish such necessity through 'evidence or data, pertaining to the past or the present', establishing that the measures at issue contribute to the achievement of the objectives pursued.¹
83. However, when particular circumstances makes it impossible or too difficult to observe the concrete effects of the measure (such as when the measure forms part of a broader policy scheme, and it is not yet having a discernible impact on its objective), the Appellate Body recognised that it is nevertheless possible to determine the level of contribution to be made by the measure, by assessing whether the measure "is apt to produce a material contribution to the achievement of its objective."²³
84. Hence, when concrete data are missing or non-representative, for apprehending whether the measure is apt to contribute to its objective a Panel will have to rely again on the design of the measure. Otherwise, the Panel could not formulate any reasonable hypotheses and test them on the basis of the available evidence.
85. The 2005 export ban has been in force for about 15 years and still Ukraine is unable to provide any quantification of its effects on the preservation of the wood species in

²² Exhibit-EU-23, page 156, Table 46.

question. In response to question 9 of the Panel, Ukraine confirmed that around 10 years is the period necessary for the restoration of forest land. Hence, it is clear that Ukraine had ample time to observe the effects (if any) of the 2005 export ban on the preservation of the ten ‘rare a valuable’ wood species. The absence of any quantification or concrete estimation of the effects of the 2005 export ban on the preservation of these wood species clearly confirms that the measure’s contribution to the objective is inexistent or too small to be observed.

86. Let’s focus now on Article XX(g) of the GATT 1994.
87. With regard to Article XX(g), the Appellate Body has emphasized the importance of assessing a measure based on its design and structure, since this is an objective methodology that also helps to determine whether or not a measure does what it purports to do. Therefore, the analysis of a measure's design and structure allows a panel to go beyond the text of the measure and either confirm that the measure is indeed related to conservation, or determine that, despite the text of the measure, its design and structure reveals that it is not genuinely related to conservation.²⁴
88. While consideration of the effects of the measures is not precluded, the Appellate Body has warned against relying solely on the observable effects of the measure in a given moment. The Appellate Body has clearly stated that there is no requirement to apply an "empirical effects test" under Article XX(g)²⁵, i.e. assessing compliance of the measure with Article XX(g) depends neither on the demonstration of the actual effects of the measures, nor on showing a causal link between those effects and the measure itself.²⁶
89. More precisely, the Appellate Body confirmed the centrality of the design and structure of the measure even when the effects of the measures are taken in consideration, clarifying that:

²³ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151, Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 251-253, Appellate Body Reports, *EC – Seal Products*, paras. 5.213.

²⁴ Appellate Body Reports, *China – Rare Earths*, para. 5.96.

²⁵ Appellate Body Report, *China – Rare Earths*, para. 5.98.

²⁶ Appellate Body Reports, *China – Rare Earths*, paras. 5.98, 5.99.

consideration of the predictable effects of a measure may be relevant for the analysis under Article XX(g). In referring to "predictable effects" in US – Gasoline, the Appellate Body was denoting effects that careful evaluation of the design and structure of the measure reveals are likely to or will occur in the future.²⁷

90. And finally, let's focus on the Chapeau of Article XX of the GATT 1994. Focussing on the design, architecture, and revealing structure of a measure rather than on its effects in a given moment is also essential under the Chapeau of Article XX.²⁸
91. Indeed, the Appellate Body has clarified that assessing whether discrimination is 'unjustifiable' usually involves an analysis that relates primarily to the cause or the rationale of the discrimination. Such an analysis should be made in the light of the objective of the measure, and that discrimination will be arbitrary or unjustifiable when the reasons given for the discrimination bear no rational connection to the objective or would go against that objective. In some cases, the effects of the discrimination may be a relevant factor. However, focusing exclusively on the effects of the discrimination is not sufficient, as those effects may not be reconciled or rationally connected with the policy objective with respect to which the measure has been provisionally justified.²⁹
92. Against this background, at paragraph 256 of its responses, in answering the Panel's general question (*How does "providing significant economic benefits" affect the compatibility of a measure under the Article XX of the GATT 1994*) the EU provided a general reply "the simple fact that a measure provides economic benefit to the domestic industry does not exclude *per se* that the same measure might comply with Article XX of the GATT 1994".
93. This general statement perfectly accords with the concept that assessing compliance of a measure with Article XX(b) and (g) or the Chapeau of Article XX cannot rely in the first place on consideration of the observable effects of that measure. Thus, the simple fact that a measure has at a given point in time beneficial effects for the domestic industry is not determinative under Article XX of the GATT 1994.

²⁷ Appellate Body Reports, *China – Rare Earths*, para. 5.100.

²⁸ Appellate Body Reports, *EC – Seal Products*, para. 5.302

²⁹ Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 229-230 and Appellate Body Report, *US – Tuna II (Mexico) Art. 21.5*, para. 7.316

94. One can think of a multitude of examples to illustrate the above concept, with regard to different letters of Article XX of the GATT 1994.
95. Let's imagine that in Fantasiland a small part of the population consumes pork meat, whereas the majority considers that to be immoral. Given the small consumption, most if not all pork meat is imported, whereas there is a highly competitive domestic production of other types of meat. The government of Fantasiland decides to proscribe imports and consumption of pork meat as being contrary to public moral and invokes Article XX(a) of the GATT 1994. It is likely that such measure would produce a beneficial effect for the domestic meat industry because it will eliminate from the market any bit of pork meat and redirect that demand towards other meats which are produced domestically. Nevertheless, that would not mean that the measure is for that sole reason incompatible with Article XX(a) of the GATT 1994.
96. Let's imagine moreover, that in Fantasiland traditional widgets are produced with a rare wood (X) which is partly imported and partly harvested domestically, whereas Fantasiland has a high production of other woods. The government of Fantasiland is worried that wood X will be extinct all over the world because of the high demand of traditional X wooden widget in its domestic market. It decides therefore to prohibit the harvesting and importation of wood X invoking Article XX(b). The national wood extraction and processing industry may benefit from this decision as traditional widgets will likely start being produced domestically using other domestic wood species. That however does not imply that the measure is necessarily at odds with Article XX(b).
97. A similar example can be imagined with regard to Article XX(b). In an imaginary country called Lowemission the electric-car industry is particularly developed but there is some production and imports of petrol and diesel cars because some drivers prefer those cars. Lowemission's government decides to proscribe the domestic production, selling and circulation of the latter type of cars as a measure necessary for the protection of the health of its citizens against polluting emissions. Market share of electric cars may well go up and the domestic industry may benefit from it. However, the measure is not for that reason alone at odds with Article XX(b).

(b) The export bans make no contribution to and are not related with Ukraine’s stated objectives (still on Panel’s suggested issue 32, 17, 2)

98. Coming back to the present case, with regard to the 2005 export ban, Ukraine has not demonstrated the existence of a concrete risk to life or health. It is remarkable that whilst apparently 50 species are registered in the Red Book of Ukraine,³⁰ the 2005 export ban concerns 10 wood species, 8 of which do not appear in that Red Book. And also for those 2 that are registered in the Red Book, Ukraine cannot provide any concrete and objective data demonstrating any risk of extinction, despite that risk could have been measured since 2005. Indeed, as Ukraine recalls, Article 46 of the Forest Code requires to make an “inventory of the forest fund with identification of species and age composition of stands, their condition, qualitative and quantitative characteristics of forest resources.”³¹
99. Ukraine has also failed to demonstrate any linkage between that hypothetical extinction risk and wood export (all the more so of those species which do not appear to be particularly traded). As a result, Ukraine has not demonstrated that the 2005 export ban of timber and sawn wood of those species contributes in any way to their preservation. Indeed, if there is neither any evidence of a risk nor that export is the cause of that risk prohibiting export is not a measure apt to protect those species from that theoretical risk.
100. Moreover, Ukraine has not demonstrated the existence of any restriction on the domestic exploitation of those wood species.³² Indeed, paragraph 9 of Article 70 of Ukraine Forest Code, allows for the harvesting also of valuable and rare trees and shrubs listed in the Red Book of Ukraine with the permission of the central executive body. It reads:

*Felling of trees and shrubs listed in the Red Book of Ukraine is carried out in the prescribed order only with the permission of the central executive body which implements state policy in the field of environmental protection.*³³

³⁰ Ukraine Response to questions from the Panel, para. 37.

³¹ Ukraine Response to questions from the Panel, para. 40.

³² We refer to Panel’s suggested issue 17.

³³ Exhibit UKR-39.

101. In any event, only two of the ten species covered by the 2005 export ban are listed in the Red Book. Hence, no permission is required for harvesting the other 8 species, while the two listed species can still be harvested but with that permission.
102. Hence, prohibiting export would not help in averting the hypothetical risk that those species become extinct because they can still be harvested and consumed domestically. This confirms again that Ukraine has not demonstrated that the 2005 is designed to protect those wood species from any hypothetical risk of extinction. In other words, the 2005 export ban is incapable of protecting those woods species from the risk of extinction, if any³⁴.
103. But let's admit (*quod non*) that the 2005 export ban is somehow theoretically apt to protect those woods species from that hypothetical risk of extinction. Obviously, the above considerations also show that the 2005 export ban makes no concrete contribution or at best a very limited one to the achievement of Ukraine's environmental objective of preserving from extinction the 'rare and valuable' wood species.
104. Therefore, it cannot be considered as necessary under Article XX(b) of the GATT 1994.
105. By the same token, since the measure treats Ukraine and domestic consumers differently from the European Union and EU's consumers, Ukraine should have demonstrated that this discrimination bears a rational connection to the objective it has invoked. However, it failed to do so. Indeed, it is clear that domestic production and consumption of timber and sawn wood of those wood species may very well lead to their extinction.
106. With regard to the 2015 export ban, the European Union has recalled that Article XX(g) of the GATT 1994 permits the adoption or enforcement of trade measures that have a close and genuine relationship of ends and means to the conservation of exhaustible natural resources, when such trade measures are brought into operation,

³⁴

See, mutatis mutandis, Appellate Body Reports, *Colombia – Textiles*, paras. 5.67-5.70

adopted, or applied and "work together with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource."³⁵

107. However, Ukraine has not demonstrated that the 2015 export ban is provisionally justified under Article XX(g).

108. First, Ukraine has not provided concrete evidence of intensive deforestation in Ukraine or an overall reduction of the forest area which the export ban is alleged designed to counteract:

- by responding to question 17 of the Panel, Ukraine itself has put into question the reliability of the data of Global Forest Watch on which it relied to demonstrate the existence of deforestation by clarifying that that “the Global Forest Watch map has a low accuracy of detection of forest restoration” and that “this explains the negative balance between forest loss and restoration”³⁶. In other terms, the apparent forest loss recorded by the Global Forest Watch is the consequence of the lack of accuracy of the underlying methodology, and does not show an actual reduction of the forested area. Hence, as Ukraine stresses, the information from the Global Forest Watch website should be taken with caution”³⁷.

- In response to question 2 of the Panel, Ukraine has confirmed that wood constitutes an abundant natural resource in Ukraine, which is exploited at a rather low utilisation rate. That results in an annual increase in standing wood stocks.

- Moreover, in the answer to question 12, Ukraine has clarified that more than 44% of its forested areas has been already assessed and certified based on the international requirements towards forest management and forest exploitation subject to the principles of sustainable development. Considering that Ukraine itself has underlined that “the lack of a certificat[ion] does not indicate any problems”, it is clear that Ukrainian forests can be regarded as solidly sustainable³⁸.

³⁵ Appellate Body Report, *China – Rare Earths*, para. 5.94.

³⁶ Ukraine Response to questions from the Panel, para. 99.

³⁷ Ukraine Response to questions from the Panel, para. 101.

³⁸ We refer to Panel’s suggested issue 2.

- In addition, in the answer to question 28 of the Panel, Ukraine has clarified that it used to the word “deforestation” to mean “timber harvesting” either legal (which is “carried out in accordance with scientifically sound parameters”) or illegal. But what genuine relationship of ends and means can there be between preventing the export of wood harvested in accordance with scientifically sound parameters and the preservation of forests?

- And finally, Ukraine has admitted not to have any reliable data to demonstrate the existence of deforestation as “Ukraine is going to start a national forest inventory, which will provide a definitive answer regarding the extent of deforestation or the increase of forest area in Ukraine”³⁹.

109. All this information tends to confirm that Ukrainian forests are exploited sustainably or, in any event, that Ukraine has not demonstrated any extensive deforestation overall.
110. This does not exclude that some specific areas might suffer from deforestation mainly due to illegal logging (as Ukraine seems to argue with regard to the Carpathian region). However, when asked by the Panel to indicate the cause of illegal logging (Panel’s question n. 18), Ukraine did not mention that export was or is a cause of that phenomenon, but rather the low level of social and economic development of rural regions and the possibility of obtaining quick profit by selling the wood to local sawmills,⁴⁰ which, according to the State Agency for Forest Resources, are “the main consumers of such timber”.⁴¹ As Ukraine rightly states “To overcome the horrible consequences of illegal logging, first the causes should be eliminated”⁴². Therefore prohibiting any export (also of legally logged wood) cannot contribute to combating illegal logging and the resulting deforestation even in those limited areas, because export is not a cause of illegal logging. Indeed, Ukraine has adopted other measures to tackle this problem (see response to Panel’s question n. 18).

³⁹ Ukraine Response to questions from the Panel, para. 135.

⁴⁰ We refer to Panel’s suggested issue 17.

⁴¹ 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**.

⁴² Ukraine Response to questions from the Panel, para. 103. The same concept appears in para. 111 “in order to overcome the consequences, we must first eliminate its causes”.

111. Second, by setting a domestic consumption limit of wood at 25 million cubic meters per year, Ukraine necessarily considers that harvesting that amount of wood does not threaten the sustainable exploitation of its forests. Ukraine explains that clearly in its response to question 59, where it argues that the 25 million cubic meters consumption cap does not “exceed 1 % per year of the total volume of standing timber in Ukraine’s forests” and “it operates so as to conserve Ukraine wood forestry, since it only represents 63 % of the estimated yearly increase of the stock of standing wood meaning that ... this restriction guarantees a gradual increase in Ukraine forestry areas.”⁴³ However, Ukraine does not explain why for the conservation of its forest it would be necessary to prohibit the export of all unprocessed wood, i.e. even of wood harvested in compliance with the 25 million cubic meter cap, and reserve that wood for the domestic market.
112. Third, Ukraine has not demonstrated that the 2015 export ban is part of its policy for the preservation and sustainable exploitation of its forests, and that it contributes to the declared conservationist objective. Despite Panel’s question n. 11, Ukraine has been unable to demonstrate that either of the export bans have been adopted in view of respecting or implementing a specific international obligation Ukraine has assumed.
113. Fourth, reliable documents from qualified sources⁴⁴ created in *tempore non-suspecto* explicitly confirm that the 2015 export ban is essentially designed to promote Ukraine’s own wood processing industry, rather than any conservationist or environmental objective, by refocusing export from raw wood materials to processed wood products. However, such refocussing does not help forest conservation and does not ensure a decrease in felling of Ukraine’s forests. On the contrary, the development of woodworking and wood-processing industry may very well lead to a sustained and increased consumption of domestic wood. And indeed Ukraine, in responding to question 37 of the Panel, has underlined that “the volumes of internal consumption, including processing of wood as well as tax revenues are sustainably

⁴³ Ukraine Response to questions from the Panel, para. 218.

⁴⁴ See the Explanatory Note of 10 December 2014 accompanying the bill which lead eventually to the adoption of law 325-VIII (Exhibit EU-1) the Parliament’s Committee on Industrial Policy and Entrepreneurship (Exhibit EU-6) and the Verkhovna Rada’ Scientific and Expert Department (Exhibit EU-7).

increasing since 2016”⁴⁵. By the same token, had the 2015 export ban been concerned with the conservation of Ukraine forests, then its scope should have also included fuel wood, since exporting fuel wood requires first felling trees. However, the 2005 export ban prohibit the export of unprocessed timber, but neither of fuel wood (which is unsuitable for further processing) nor of processed wood, in line with the objective of refocusing export from raw wood materials to processed wood products.

114. Fifth, the 2015 export ban was clearly conceived and enacted in the absence of any limitation to domestic consumption of wood. Ukraine has confirmed what the EU argued in paragraph 231 of its responses to the Panel’s questions, i.e. that the Forest Code does not set out a real quantitative limitation on the production or consumption of wood. Indeed, in response to question n. 8 of the Panel Ukraine states:

As described in paragraphs 83 to 85 of Ukraine’s Written Submission, pursuant to Article 71 of the Forest Code of Ukraine, a timber harvesting limit for final felling is set, which is amount of allowable cut approved in accordance with the established procedure. (underlined added)

115. Then, in paragraph 17 of its responses Ukraine explains that:

According to Articles 14 and 19 of the Forest Code of Ukraine, forest owners ... and permanent forest users ... are allowed to carry out timber harvesting subject to obtaining a special permit for this type of the special usage of forest resources called a “felling ticket” (which is being issued for final felling operations only). (underlined added)

116. But then Ukraine adds at paragraph 18:

Additionally, forest owners and permanent forest users are allowed to cut down trees by way of various types of forest formation and forest rehabilitation felling (including sanitary felling)... The main feature of this common type of felling is that no felling ticket is needed to carry out timber harvesting by these types of non-industrial felling.” (underlined added)

117. It follows that the limit set pursuant to Articles 43 and 71 of the Forest code on the wood cutting area only applies to final felling operations for which a felling ticket is required, and not to the other felling operations mentioned in paragraph 18 of Ukraine’s responses.

⁴⁵ Ukraine Response to questions from the Panel, para. 153.

118. To be noted that according to footnote 27 of Ukraine's responses, in 2019 about 61% of harvested wood was obtained with those felling operations for which no felling ticket is required.
119. Hence, the possible limitation to domestic consumption resulting from the Forest Code applies to just some of the wood harvested in Ukraine (less than half in 2019).
120. However, since there is no apparent limitation to the amount of wood that can be harvested through felling operations for which no felling ticket is required and those felling operations result in massive wood production, it appears that in substance no real limit to the amount of wood that can be harvested results from the Forest Code.
121. Sixth, even now the 2015 export ban clearly does not apply 'in conjunction with' a real and effective restriction on domestic consumption and therefore in an even-handed manner. Indeed, it is still not clear if there is any procedure to effectively monitor the level of domestic consumption, and even if there was, the consumption cap is set at a level that currently does not impose any real and effective limitation on domestic consumption.
122. While the European Union shares the interest, demonstrated by the Panel in its suggested issue 23, in receiving any information on the implementation of the relevant Decree of the President of Ukraine finally introducing such monitoring mechanism, it would like to stress that this should not have any impact on the present dispute. It will be relevant for any future cooperation on sustainable forest management. In relation to the export ban, it only demonstrates that its initial design and implementation had no relation whatsoever with the objective of Article XX(g) of the GATT 1994.
123. Seventh, regardless of the effectiveness of the domestic consumption cap, a very high level of consumption of these wood products is allowed domestically, a level that it is way higher than current Ukraine's wood harvesting and consumption. Hence, this cap has no actual limiting effect on domestic consumption. On the other hand, there is a complete ban on exporting the product at issue. Hence, the restriction is only imposed on international trade and it is as severe as possible and, therefore, also from this viewpoint, it is not even-handed.

124. Moreover, the data contained in paragraph 84 and 86 of Ukraine's Written Submission tend to confirm the EU's arguments as they show that:
- (i) after the enactment of the 2015 export ban the amount of wood harvested in Ukraine did not decrease so that the 2015 export ban did not contribute to preserve Ukraine forests or fight deforestation;
 - (ii) the volume of wood harvested in Ukraine is constantly well below the limitation on the domestic use of unprocessed timber of 25 million cubic meters per year introduced in 2018.⁴⁶
125. In light of the foregoing, it is undisputable that the design of the measure is clearly not to conserve Ukrainian forests. Likewise, the concrete data submitted by Ukraine do not show that the 2015 export ban produced any quantifiable positive effect on the conservation of forest by for instance leading to a decrease in the amount of wood harvested.
126. In summary, at best there might be an incidental relation between the measure and the conservation of those forests.
127. These arguments also show that Ukraine has not demonstrated why it would be rational for the conservation of its forest to prohibit all export without putting any effective restriction on domestic consumption of wood. In the alternative and assuming for the sake of argument that the domestic consumption cap is effective, Ukraine has not demonstrated why it would be rational to allow for such a high level of domestic consumption while prohibiting any export.
128. The absence of any rational connection between the objective of conserving Ukraine's forests and the discrimination between Ukraine and the EU from the point of view of access to Ukraine's wood products in question shows that this discrimination is arbitrary and unjustifiable. Indeed, the reasons given for this discrimination bear no rational connection to the stated conservationist objective.

⁴⁶ Ukraine's written submission, table 5, page 33.

129. In its responses to the Panel questions 60 and 61, Ukraine explains that in the present case additional factors may be relevant to assess compliance of the 2015 export bans with Article XX(g). Indeed, an emergency in international relation between Ukraine and the Russian Federation begun in 2014 and had a heavy impact on Ukraine's forests located in the regions where this emergency occurred and increased wood consumption in the rest of Ukraine. Ukraine argues that these circumstances are objectively connected with 2015 export ban and should be considered by the Panel in its assessment of Ukraine's defence. However, this argument is simply an ex-post rationalisation. First, there is no mention of the conflict with Russia neither in any of the parliamentary documents which describe the objectives and causes of the 2015 export ban, nor in the legislative instrument that laid out the ban. Second, the EU does not recall that during the institutional dialogue with Ukraine concerning the 2015 export ban, Ukraine ever argued that the ban was related to the consequence of the conflict with Russia.⁴⁷ If that had been the case, we trust that Ukraine would have explained that clearly. Third, if it were true that as a consequence of the conflict wood consumption in the rest of Ukraine increased and this threatens the conservation of forests, why Ukraine did not introduce a real and effective limitation on domestic consumption together with the export ban in 2015? Why a limitation was introduced only in 2018, and implemented even later? Why the consumption cap was set at a level significantly and constantly higher than Ukraine wood production in the ten years predating that conflict?⁴⁸ Because of the conflict the forest area controlled by Ukraine authority decreased after 2014. If the 2015 ban had been related to the conservation of forests, it would have been accompanied by a consumption cap lower than the amount of wood cut before 2014 when the available forested area was larger. But Ukraine did the opposite, because the ban's objective is one of economic policy, i.e. refocussing export from raw wood to processed products (which indeed can be freely exported).

(c) An incidental relation with or a marginal contribution to the objective of Article XX(b) or (g) is not enough (Panel's suggested issue 32)

⁴⁷ See notably Exhibits EU-24-28.

⁴⁸ Ukraine first written submission, Table 5.

130. Finally, let's come to the issue of the marginal or incidental contribution to the objective.
131. Were the Panel to consider that, despite the above arguments, the 2005 and the 2015 export bans are nevertheless incidentally related with or make a marginal contribution to the objective of Article XX(b) or (g), that incidental relation or marginal contribution would be of no avail to justify those measures.
132. As regards, Article XX(b), the Appellate Body has already clarified that to be considered as 'necessary' a measure must be located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'.⁴⁹ Hence, a measure, like the 2005 export ban, that make no or very limited contribution to the preservation of the 'rare and valuable' wood species cannot be considered as compatible with that provision.
133. As regards Article XX(g) the Appellate Body held that the term 'relating to' requires a close and genuine relationship of ends and means between the measure and the conservation objective. A GATT-inconsistent measure that is merely incidentally or inadvertently aimed at a conservation objective would not satisfy the 'relating to' requirement of Article XX(g).⁵⁰ There must be a substantial relationship between the measure and the objective,⁵¹ that relationship must be reasonable or proportionate, close and observable.⁵² In simple words, one could say that the measure must be primarily aimed at the objective in question, and not only incidentally.
134. To conclude, a trade-restrictive measure that gives a marginal or incidental contribution to the protection of plant life or has an incidental or marginal relation with the conservation of exhaustible natural resources cannot be provisionally justified under Article XX(b) and (g) (unless the degree of trade restrictiveness is also equally marginal or incidental – which is clearly not the case for an export ban).

⁴⁹ Appellate Body Report, *Korea- Various Measures on Beef*, para. 161.

⁵⁰ Appellate Body Reports, *China – Rare Earths*, para. 5.90

⁵¹ Appellate Body Report, *US – Gasoline*, p. 19.

⁵² Appellate Body Report, *US – Shrimp*, paras. 141-142.

(d) About less trade-restrictive alternatives (Panel’s suggested issues 33, 34, 35, 36, 38)

135. With regard to the burden of proof of less trade-restrictive alternative measures, the EU would like to highlight first of all that the issue of the existence of less trade restrictive alternative measures arises both under Article XX(b) and Article XX(g).
136. In the context of Article XX(b) this issue is the last step of the necessity analysis. As the Appellate body clarified, the issue arises in most cases, but not always. It does not arise when the weighting and balancing of the other factors that need to be considered for assessing the necessity of the measure is already heavily tilted in the direction of showing that the measure is unnecessary (for instance because the measure is very trade restrictive and brings none or only an incidental contribution to the measure’s objective, like in the present case).
137. In any event, the point to be stressed is that it is for the party invoking Article XX(b) (i.e. the respondent) to demonstrate that the measure is necessary. Obviously, the respondent cannot be asked to demonstrate that there are less trade restrictive alternative measures that it could have adopted. That would mean that the party invoking Article XX(b) would also have to demonstrate that the same provision is not complied with.
138. By the same token, the party invoking Article XX(b) cannot be asked to demonstrate that there are no-less trade restrictive alternatives conceivable⁵³. Indeed, that would be a *probatio diabolica* (i.e. impossible to discharge) because the responding party would have to identify the universe of less trade-restrictive alternative and show that none of them is feasible⁵⁴ but the complaining party may always conceive an alternative measure that the respondent did not think of.
139. Accordingly, the Appellate Body clarified that:

⁵³ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156, which reads: “As the Appellate Body indicated in *US – Gambling*, while the responding Member must show that a measure is necessary, it does not have to ‘show, in the first instance, that there are no reasonably available alternatives to achieve its objectives’”.

⁵⁴ Appellate Body Report, *US – Gasoline*, para. 25.

In order to determine whether a measure is 'necessary' within the meaning of Article XX(b) of the GATT 1994, a panel must assess all the relevant factors, particularly the extent of the contribution to the achievement of a measure's objective and its trade restrictiveness, in the light of the importance of the interests or values at stake. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued. It rests upon the complaining Member to identify possible alternatives to the measure at issue that the responding Member could have taken. (underlined added)⁵⁵

140. It is important here to stress the language of the Appellate Body. The Appellate Body requires the complaining party to identify possible alternatives that the responding Member could have taken.
141. Of course, vague assertions without any explanation cannot tantamount to the identification of possible alternatives. However, it is plain that the complaining party is not required to describe the possible alternative in detail, or to come up with a complete set of ready-to-use rules that the responding party could adopt, nor with a detailed description of a precise policy mix that would allow the responding party to achieve its objective. The complaining party must only identify a possible alternative that the responding member could have taken.
142. Once the complaining party has pointed to alternatives, it is then for the responding party to demonstrate that those alternatives are not genuine either because they are not reasonably available to it or do not allow to reach the same level of protection⁵⁶.
143. The alternative must be less trade restrictive. That means that an alternative measure can be a WTO-consistent measure or a less WTO-inconsistent one.⁵⁷ Hence, some

⁵⁵ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156. See in the same sense Panel Report, *Brazil – Taxation*, paras. 7.620-7.621, and with regard to Article XX(a) Appellate Body Report, *China – Publications and Audiovisual Products*, para. 319 “When, however, the complaining party identifies an alternative measure that, in its view, the responding party should have taken, the responding party will be required to demonstrate why its challenged measure nevertheless remains 'necessary' in the light of that alternative or, in other words, why the proposed alternative is not a genuine alternative or is not 'reasonably available’”.

⁵⁶ Appellate Body Report, *EC – Asbestos*, paras. 170-172.

⁵⁷ Appellate Body Reports, *EC Asbestos*, para 171; *Dominican Republic – Import and Sale of Cigarettes*, para. 70. GATT Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, para. 70.

trade restrictiveness can still be accepted in some circumstances, but the responding party should prefer the measure that has the lower impact on trade.

144. With regard to being reasonably available, the Appellate body also clarified that:

*An alternative measure may be found not to be "reasonably available", however, where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties. Moreover, a "reasonably available" alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued ...*⁵⁸

*an alternative measure should not be found not to be reasonably available merely because it involves some change or administrative cost. Changing an existing measure may involve cost and a Member cannot demonstrate that no reasonably available alternative exists merely by showing that no cheaper alternative exists. Rather, in order to establish that an alternative measure is not 'reasonably available', the respondent must establish that the alternative measure would impose an undue burden on it, and it must support such an assertion with sufficient evidence*⁵⁹

145. It is also important to recall that when searching for reasonably available less trade restrictive alternatives it is highly relevant to look at recent or planned legislative developments of the responding party. In this sense, the Panel in *Indonesia - Chicken* noted “there is a concrete less trade-restrictive alternative which is plainly before us insofar as Indonesia, in the meantime, has enacted it in its legislation.”⁶⁰ Indeed, when the responding party intends to replace or has replaced the challenged measure with other measures, it is difficult to see how it can argue at the same time that no alternative is reasonably available to it.

146. In this connection, the EU would like to underline that on several occasions Ukraine explained that the 2015 export ban is temporary and it is in place while Ukraine will develop effective legislation to ensure sustainable exploitation of its forest.

147. For instance, with regard to the 2015 export ban Ukraine explained that:

It's a temporary ban; 10 years, an average amount for strong and durable forest regeneration all while allowing for the implementation of effective

⁵⁸ Appellate Body Report, *US - Gambling*, para. 308.

⁵⁹ Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 326-327

⁶⁰ Panel Report, *Indonesia – Chicken*, paras. 7.236-7.239.

*legislation regarding forest management, protection and sustainable use of exhaustible natural resources.*⁶¹

148. In paragraph 47-50 of its Written Submission and 104 of its responses to the Panel's questions, Ukraine has even detailed a number of measures that it has adopted or it is in the process of finalising for that purpose. Hence, Ukraine recognises that alternatives are available and within its reach and they will make the 2015 unnecessary (also from Ukraine's own perspective).⁶²
149. None of those measures are as trade restrictive as the existing export ban and therefore they should be preferred. This is precisely what the European Union pointed out in paragraphs 117-120, 129 and 130 of its responses to the Panel's questions.
150. The European Union adds that these measures appear to be reasonably available less trade restrictive alternatives not only to the 2015 export ban, but also to the 2005 export ban. Indeed, as Ukraine explains "The implementation of the National Forestry Inventory will enable a reliable assessment of plantation shared stocks and indicators of its current growth rates required for the assessment of the level of the forest management intensity."⁶³ The EU understands this as meaning that the National Forest Inventory will allow collecting concrete and precise data on the population of the alleged rare wood species covered by the 2005 export ban and assess what is the level of exploitation that they can sustain.
151. Turning now the focus to Article XX(g) it should be recalled that "In the context of Article XX(g), alternatives may be considered during the chapeau analysis".⁶⁴ The Appellate Body noted in *US – Gasoline*

*There was more than one alternative course of action available to the United States in promulgating regulations implementing the CAA. These included the imposition of statutory baselines without differentiation as between domestic and imported gasoline. This approach, if properly implemented, could have avoided any discrimination at all*⁶⁵

⁶¹ Ukraine Response to questions from the Panel, para. 242. See also paras. 208 and 210 which repeats the same idea almost verbatim.

⁶² We refer to Panel's suggested issue 36.

⁶³ Ukraine FWS, para. 47.

⁶⁴ Panel Reports, *China – Rare Earths*, footnote 549.

⁶⁵ Appellate Body Report, *US – Gasoline*, p. 25.

152. Likewise, in *US – Shrimps* it observed:

The Inter-American Convention thus provides convincing demonstration that an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure, a course of action other than the unilateral and non-consensual procedures of the import prohibition under Section 609. It is relevant to observe that an import prohibition is, ordinarily, the heaviest "weapon" in a Member's armoury of trade measures.⁶⁶

153. In both cases, the Appellate Body considered the measure to constitute an arbitrary and unjustifiable discrimination because alternative measures existed that would have avoided or at least diminished the discriminatory treatment.

154. Accordingly, the Panel in *China – Rare Earths* concluded that:

The Panel recalls additionally that discrimination may also be arbitrary or unjustifiable in cases where it is avoidable and foreseeable. This will be the case where alternative measures exist which would have avoided or at least diminished the discriminatory treatment.⁶⁷

155. There is no reasons for considering that the burden of proof as regards available alternatives should be administered differently in the context of the necessity analysis and in the context of the Chapeau. Indeed, it is for the respondent to show that its measures comply with the Chapeau, but for the reasons already illustrated above the respondent cannot be expected to demonstrate that no conceivable alternative exists. It is then for the complaining party to point to possible alternatives, and once this has been done the burden of showing that those alternatives are not available shifts back on the respondent.

156. In the present case, on top of the measures mentioned by Ukraine itself which Ukraine has adopted or is finalising, the EU has also identified other alternative measures (in the response to question 49 of the Panel) that Ukraine could adopt, that would be less trade restrictive and would allow to better achieve the objective of the 2005 and 2015 export ban.

⁶⁶ Appellate Body Report, *US – Shrimps*, para. 171.

157. The obvious alternative to the 2005 export ban Ukraine would be to establish a limitation of the quantity of trees/wood of the species covered by that ban that can be harvested or placed on the market each year at a sustainable level, and avoid imposing any restriction on export. Likewise, an obvious alternative to the 2015 export ban would be to limit the amount of wood that can be harvested every year and avoid imposing any restriction on export.
158. Those measures could easily be introduced by Ukraine, they do not appear to involve a heavy legislative or administrative burden, rather they appear to be among the most elementary and immediate measures that an authority can adopt to tackle a perceived risk of extinction of given wood species or to avoid excessive exploitation of its forests.
159. They would be less trade restrictive because they would not imply any violation of Article 35 of the AA and XI of the GATT 1994, and moreover they would not discriminate between the EU and Ukraine as regards access to Ukrainian wood.
160. They would be more effective in achieving Ukraine's objectives as they would directly address the phenomenon that most directly threatens the survival of the allegedly rare wood species or the conservation of forests, i.e. the felling of trees.
161. In addition, the European Union reiterates that to the extent that certain tree species or forest appear to face particular challenges in some Ukrainian regions or areas due to the conflict with Russia or due to illegal logging, specific measures relating to the wood from those regions or areas would constitute a less trade restrictive alternative that Ukraine could adopt, which would better tackle those particular challenges (e.g. a very low harvesting limit, the application of administrative controls on trading of wood coming from those areas, or even a logging moratorium for some of those areas and/or threatened wood species).⁶⁸ They would be less trade restrictive because they would not apply to Ukrainian wood coming from other areas.

⁶⁷ Panel Reports, *China – Rare Earths*, para. 7.354. See also para 7.664 which reads “*It is well settled that discrimination can also be arbitrary or unjustifiable where alternative measures exist that would have avoided or at least diminished the discriminatory treatment*”

⁶⁸ EU's Responses to Panel's questions, paras. 11, 121-125.

162. The European Union does not see why a logging moratorium aiming at the preservation of threatened wood species in areas with heavy illegal logging would be technical unfeasible.⁶⁹ Ukraine already adopted in the past similar measures for Fir-Beech forests in the Carpathian Region.⁷⁰ In addition, a moratorium on cutting any kind of tree in regions affected by illegal logging would be even easier to implement because it would not require to distinguish between species that can be cut and species that cannot.
163. On the other hand, neither the 2005 export ban nor the 2015 export ban help in achieving Ukrainian environmental and conservationist objectives. The EU has already explained at length why this is the case.
164. However, Ukraine seems to argue in its responses to the Panel's questions that the export bans are measures targeted to combat illegal logging.
165. It must be stressed however that Ukraine still fails to show any clear causal relation between illegal logging and export of wood. Ukraine has even clarified in response to question 20 of the Panel that the figure of 118 thousand cubic meters refers to the total volume of illegal logging in 2019 and not to the illegally logged timber blocked at the Ukraine-EU border. It has indicated that it has adopted a number of specific measures to tackle illegal logging among which the export bans do not figure⁷¹ and it has not identified trade as a route-cause of illegal logging.⁷² It has even confirmed that the "2005 export ban ... did not do much to curb the general illegal logging and deforestation".⁷³
166. In this connection, it should be kept in mind that export bans do not regulate or limit in anyway the felling of trees in Ukrainian forests. Therefore, to the extent that the 2015 export ban prohibits export of unprocessed timber it simply creates an incentive to process the wood domestically, regardless of whether it was logged legally or illegally, so that it can be consumed domestically or exported as processed wood products (and at that stage it becomes more difficult to detect if the wood was logged

⁶⁹ We refer to Panel's suggested issue 38.

⁷⁰ Ukraine's written submission, para. 159.

⁷¹ Ukraine response to Panel's question, para. 104.

⁷² Ukraine response to Panel's question 18.

⁷³ Ukraine response to Panel's question, para. 207 and Panel's suggested issue 20.

illegally or not). Likewise, to the extent that the 2005 export ban prohibits export of timber and sawn wood of the ten allegedly “valuable and rare” wood species it also creates an incentive to further process this wood domestically.

167. In summary, if Ukraine was concerned with the export of illegally logged wood, then it could restrict the scope of application of the 2005 and 2015 export bans to wood that has been illegally logged in Ukraine (and wood products made with that wood). In other words, if the export bans’ objective is to combat illegal logging both measures overshoot their intended objective as they prohibit also the export of legally logged wood, and in that respect they make no contribution towards the intended objective.⁷⁴ The EU fails to see indeed what contribution could give to the achievement of Ukraine’s objectives prohibiting the export of wood logged in compliance with Ukraine’s legislation.

168. Hence, restricting the scope of the 2005 and 2015 export bans to wood that has been illegally logged in Ukraine is another less trade restrictive alternative measure that is reasonably available to Ukraine, and would provide the same contribution to achieving Ukraine’s purported objectives as the current export bans (assuming for the sake of argument that they provide any contribution).

169. Moreover, if indeed the main concern of UKR was the reduction of production and circulation of illegally logged wood, whether on the domestic market or abroad, a general export ban as such must necessarily miss the target. It would notably not address the key problem of domestic illegal loggings and processing by local unrecorded sawmills, combined with legalised permits and domestic papers, which are very difficult to detect by customs and border authorities. The core issues of illegal forest activities can and should only be addressed as a priority at local level.

(e) About which conditions are relevant under the Chapeau of Article XX of the GATT 1994 (Panel’s suggested issue 40)

⁷⁴ Panel Report, *Indonesia - Chicken*, para. 7.228.

170. Panel's suggested issue 40 requires *inter alia* the Parties to discuss the issue of which conditions are relevant for assessing whether a measure constitutes an arbitrary or unjustifiable discrimination "between countries where the same conditions prevail".
171. In *EC – Seal Products* the Appellate Body examined the term "condition" and concluded that this term must be understood in the specific context in which it appears in the chapeau of Article XX. The Appellate Body explained that the identification of the relevant conditions must be understood by reference to the applicable subparagraph of Article XX under which the measure was provisionally justified and the substantive obligations under the GATT 1994 with which a violation has been found. Furthermore, if a respondent considers that the conditions prevailing in different countries are not "the same" in relevant respects, it bears the burden of proving that assertion. The Appellate Body clarified:

only 'conditions' that are relevant for the purpose of establishing arbitrary or unjustifiable discrimination in the light of the specific character of the measure at issue and the circumstances of a particular case should be considered under the chapeau. The question is thus whether the conditions prevailing in different countries are relevantly 'the same'...

We consider that, in determining which 'conditions' prevailing in different countries are relevant in the context of the chapeau, the subparagraphs of Article XX, and in particular the subparagraph under which a measure has been provisionally justified, provide pertinent context. In other words, 'conditions' relating to the particular policy objective under the applicable subparagraph are relevant for the analysis under the chapeau. Subject to the particular nature of the measure and the specific circumstances of the case, the provisions of the GATT 1994 with which a measure has been found to be inconsistent may also provide useful guidance on the question of which 'conditions' prevailing in different countries are relevant in the context of the chapeau. In particular, the type or cause of the violation that has been found to exist may inform the determination of which countries should be compared with respect to the conditions that prevail in them.⁷⁵

172. The Appellate Body repeated the same concepts in *Indonesia – Import Licensing Regimes*.⁷⁶

⁷⁵ Appellate Body Reports, *EC – Seal Products*, paras. 5.299-5.300. See also 5.301 (underlined added).

⁷⁶ Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.99.

173. It should also be recalled that “the analysis of whether discrimination is arbitrary or unjustifiable “must focus on the cause of the discrimination, or the rationale put forward to explain its existence”⁷⁷ so the discrimination will be arbitrary or unjustifiable when the reasons given for the discrimination bear no rational connection to the objective of the measure or would go against that objective.
174. In *US — Tuna II (Mexico)* the relevant prevailing conditions between countries were found to be the risks of adverse effects (harms) on dolphins arising from certain tuna fishing methods.⁷⁸ In *EC - Seal Products* it was found that the same animal welfare conditions prevail in all countries where seals are hunted, which were the relevant conditions for the purpose of the Article XX chapeau.⁷⁹ In *Russia — Pigs (EU)*, under a similar provision in the SPS Agreement, the panel found that in order to determine whether similar conditions prevail in the European Union and in Russia in respect of trade in the pig products at issue, it was relevant to consider the presence of African Swine Fever (ASF) in each territory, and the associated risks.⁸⁰
175. These previous cases were concerned with measures limiting import. The concept of the relevant conditions was not analysed with respect to export measures in cases such as *China – Raw Materials* and *China- Rare Earths*. In those cases, the Panel and Appellate Body considered sufficient for the purpose of the Chapeau to observe that a discrimination existed and it was not rationally connected to the objective of the measure.
176. In the present case, the export bans constitute a violation of Article 35 of the AA and Article XI of the GATT 1994 as they prohibit any export of the Ukrainian wood products covered by the bans. When analysed under the Chapeau of Article XX, these bans create a discrimination between Ukraine and the EU (and between Ukrainian consumers and EU consumers) with regard to access to (or consumption of) those Ukrainian wood products.

⁷⁷ Appellate Body Report, *US – Tuna II (Mexico)* Art. 21.5, para. 7.316.

⁷⁸ Appellate Body Report, *US — Tuna II (Mexico)* (Article 21.5), para. 7.308.

⁷⁹ Appellate Body Report, *EC - Seal Products*, para. 5.317.

⁸⁰ Panel Report, *Russia — Pigs (EU)*, para. 7.1327.

177. The reason given for justifying these bans and the resulting discrimination is preservation from extinction of certain allegedly ‘rare and valuable’ Ukrainian wood species as far as the 2005 export ban is concerned in connection with Article XX(b) of the GATT 1994. The need to ensure the conservation of Ukraine’s forests is the reason offered to justify the 2015 export ban in connection with Article XX(g) of the GATT 1994.
178. However, if the Ukrainian policy is indeed intended to reduce exploitation of rare and valuable tree species or ensure a sustainable level of exploitation of its forests overall, then basic economics suggest that the most efficient and effective solution would be to allocate that reduced available output to the most lucrative uses, regardless of whether that is the domestic or the export market.
179. Hence, to demonstrate that the discrimination is not between countries where the same conditions prevail, Ukraine should demonstrate that conditions that relate to access to (or consumption of) the ‘rare and valuable’ Ukrainian wood species are not similar in Ukraine and the EU, insofar as the objective of preserving those wood species from extinction is concerned.
180. By the same token, with regard to the 2015 export ban, Ukraine should demonstrate that conditions that relate to access to (or consumption of) Ukrainian unprocessed wood are not similar in Ukraine and the EU, insofar as the objective of the conservation of Ukrainian forests is concerned.
181. However, Ukraine has not provided a demonstration that the export bans relate to countries where similar relevant conditions do not prevail. Indeed, whether the consumption of the Ukrainian ‘rare and valuable’ wood species or of Ukrainian unprocessed wood in general occurs within Ukraine’s borders or beyond is in principle irrelevant for preserving those ‘valuable and rare’ species from extinction or for the conservation of Ukrainian forest.
182. Ukraine has simply stated that the situation of its forests is different from that of the EU’s forests. However, the conditions relating to the conservation of the EU’s forests (or of any other WTO Member) or the situation of ‘rare and valuable’ wood species in the EU (or of any other WTO Member) cannot be relevant for assessing whether

the discrimination created by the export bans is arbitrary or unjustified. Indeed, the matter at issue concerns the conservation of forests and rare tree species in Ukraine, and not forest or wood species of other countries, as well as the conditions of access to and consumption of Ukrainian wood and not wood grown elsewhere. Likewise, Ukrainian export bans can only apply to the export of Ukrainian wood, not to the conditions of access to and consumption of wood of different origins in Ukraine's territory. Hence, the conditions of EU's forests/EU's rare trees and of EU's wood production cannot be relevant to assess whether the export bans imposed by Ukraine constitute arbitrary or unjustified discrimination between countries where the same conditions prevail.

*C. Arguments referring to the Trade and Sustainable Development Chapter
(Chapter 13 of the AA)*

(a) Possible defences based on the provisions of the Trade and Sustainable Development Chapter (Panel's suggested issue 40)

183. The European Union has already set out in detail its views with regard to the relevance for this dispute of the provisions of Chapter 13 (Trade and Sustainable Development) of the AA, and in particular of Articles 290(1), 292, 294 and 296(2) in its responses to Panel Questions 62, 63 and 66, to which the Panel is referred.
184. The European Union looks forward to responding to any further specific questions that the Panel may have with regard to those provisions.
185. The European Union considers that, to the extent that Ukraine seeks to rely on any of the provisions of Chapter 13 as a defence, either on its own, or in conjunction with the exceptions cited in Article 36 AA, Ukraine bears the burden of proving that the measures at issue are justified under those defences.
186. The European Union further considers that, contrary to what may be suggested by the question ("regardless of the burden of proof"), issues relating to the burden of proof are of crucial importance. Failure to comply with the applicable principles on the

allocation of the burden of proof may compromise the legitimacy of the Panel's ruling.

187. In this regard, it is not for the European Union to make Ukraine's case under the provisions of Chapter 13, even if it is in order to refute that case. If the Panel considers that Ukraine has not articulated sufficiently its defence under Chapter 13 AA, it should address appropriate questions to Ukraine, rather than to both Parties. In doing so, however, the Panel should be extremely cautious not to make the case for Ukraine, including by refraining, when framing its questions, from advancing any suggestion as to how Ukraine could defend its measures.

(b) Article 296(2) AA is not a “stand still” provision allowing Ukraine to apply the 2005 Export Ban and the 2015 Export Ban (Panel's suggested issue 41)

188. Contrary to Ukraine's assertions⁸¹, Article 296(2) AA is not a “stand still” provision allowing Ukraine to maintain the 2005 Export Ban and the 2015 Export Ban.
189. Article 296 AA is entitled “upholding levels of protection” and states that:

1. A Party shall not fail to effectively enforce its environmental and labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties.

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

190. In the context of trade agreements, so-called “stand-still” provisions prohibit the parties from introducing new trade restrictions, or increasing the existing ones, typically during a transitional period at the end of which the restrictions concerned must be eliminated completely. An example of those “stand still” provisions is Article 30 AA, concerning customs duties on imports.

⁸¹ Ukraine's response to Panel Question 57, paras. 211-213.

191. Article 296 AA is not a “stand-still” provision. It does not seek to prevent the Parties from introducing new trade restrictions, or increasing the existing ones, during a certain period of time. Instead, as indicated by its title, Article 296 AA is aimed at upholding the levels of protection afforded by each Party’s own environmental and labour laws, regulations or standards, either present or future.
192. As recognised in Article 290 AA, each Party has the right to establish and regulate its own level of environmental protection. Without prejudice to this, Article 296(1) AA enjoins them to enforce effectively the level of protection which they have chosen to establish and regulate at any point in time. In turn, Article 296(2) AA prohibits the Parties from weakening or reducing that level of protection in order to encourage trade and investment, by waiving or otherwise derogating from its laws, regulations and standards.
193. Unlike a “stand-still” clause, Article 296(1) AA does not prevent a Party from introducing new measures that provide for a higher level of environmental protection. However, as already explained by the European Union⁸², this does not mean that Article 296 AA provides an exception from other obligations of the Parties under the AA, including Article 35 AA. To repeat, Article 296 AA does not seek to derogate from the Parties’ obligations under other provisions of the AA, but instead to ensure that each Party uphold its own environmental laws, regulations and standards. Nonetheless, those laws, regulations or standards must be compatible with that Party’s obligations under any other provisions of the Association Agreement, including Article 35 AA.
194. Moreover, it should be noted that Article 296(2) AA is concerned exclusively with the granting of “waivers” and “derogations” from generally applicable rules with a view to encouraging trade or foreign investment. Thus, Article 296(2) AA does not prevent a Party from lowering its level of protection by enacting a new generally applicable measure, which amends or replaces the previously applicable generally applicable measure. Indeed, that would be in contradiction with Article 290(1) AA, which recognises each Party’s right to “establish and regulate [its] own levels of domestic environmental [...] protection”. The European Union, however, does not

claim that Ukraine should “waive” or “derogate from” a generally applicable measure (the 2005 and 2015 Export Bans) in order to confer a benefit to certain exporters to the European Union, but rather that Ukraine should repeal altogether the 2005 and 2015 export bans.

195. Lastly, the European Union notes that, contrary to Ukraine’s suggestions⁸³, Article 296(2) AA has been applied provisionally since 1 November 2014 and, therefore, pre-dates the 2015 export ban.

(c) “Right to regulate” and cooperation by the EU (Panel’s suggested issue 42)

196. As explained by the European Union⁸⁴, Article 290(1) AA does not provide an exception with regard to other provisions of the AA, including Article 35 AA. Rather, the “right to regulate” recognised in Article 290(1) AA must be exercised accordance with the requirements of other provisions of the AA that give expression and operationalise the “right to regulate”, including the policy exceptions mentioned in Article 36 AA.
197. Similarly, the European Union has explained⁸⁵ that Article 292 AA (concerning “multilateral environmental agreements”) does not provide an exception from Article 35 AA, but may provide relevant “context” for assessing whether a measure may be justified under Article 36 AA.
198. As further explained by the European Union, Article 294 AA (concerning cooperation with regard to forest law enforcement and governance) may not be construed as providing an exception from a Party’s obligations under any other provision of the AA, including those under Article 35 AA. Nor would a breach of Article 294 AA by a Party entitle the other Party to suspend unilaterally its

⁸² See EU’s response to Panel’s Question 62, para. 288 ff.

⁸³ Ukraine’s response to Panel Question 57, para. 213.

⁸⁴ EU’s Response to Panel Question 62, para. 283 ff.

⁸⁵ EU’s Response to Panel Question 62, para. 297 ff.

obligations under other provisions of the AA. Without prejudice to this, the European Union has fully cooperated with Ukraine⁸⁶.

(d) International agreements and Article 296(2) AA (Panel’s suggested issue 43)

199. As just recalled, the European Union has explained⁸⁷ that Article 292 AA (concerning “multilateral environmental agreements”) does not provide an exception from Article 35 AA, but may provide relevant “context” for assessing whether a measure may be justified under Article 36 AA.
200. Ukraine has not shown that there is a conflict between Articles 35 and 36 AA, on the one hand, and any of the multilateral environmental agreements cited by Ukraine, on the other hand. Indeed, none of the environmental agreements mentioned by Ukraine requires or authorises the imposition of export bans.
201. Should there be a conflict between the AA (including Articles 35 and 36 AA) and the multilateral environmental agreements, such conflict would have to be resolved in accordance with generally applicable rules of international law, as codified in the VCLT, and in particular in Articles 30 and 59 VCLT.
202. Article 296(2) AA is not aimed at resolving possible conflicts between the AA and the Parties’ obligations under other international agreements. Rather, Article 296(2) AA is aimed at upholding the level of environmental protection implemented by each Party through its own domestic “laws, regulations and standards”. As just explained, Article 296(2) AA does not provide a derogation from other provisions of the AA⁸⁸. The “laws, regulations and standards” mentioned in that provision must be consistent with a Party’s obligation under the AA, including under Article 35 AA.

III. CONCLUSION

⁸⁶ EU’s response to Panel Question 66 and Annex I

⁸⁷ EU’s Response to Panel Question 62, para. 297 ff.

⁸⁸ See EU’s response to Panel’s Question 62, para. 288 ff.

203. For the reasons set out above, 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.

Agents for the European Union

Davide GRESPAN

Ramon VIDAL-PUIG