

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

**Integrated Executive Summary of the
European Union**

Brussels, 7 October 2020

1. While the EU supports the protection of forests and biodiversity, pursuing that objective does not require the adoption of measures that violate international obligations assumed by Ukraine under the Association Agreement (“AA”).
2. According to the 2018 Annual Report of the State Forest Agency of Ukraine, forests cover 15.9 % of Ukraine’s surface area. Over the last 50 years, Ukraine’s forests have increased by almost half. According to the Agency, the stock of standing timber is 2.1 billion cubic metres. That stock is increasing by an average of 35 million cubic metres annually. Every year around 22 million cubic metres are harvested. This means that just 63 % of the yearly increase in standing stock is harvested. These data are confirmed by the Agency’s report of 2019.
3. However, since 2005 Ukraine applies a permanent prohibition on exports of timber and sawn wood of ten “valuable and rare” wood species (the “2005 export ban”). In 2015 Ukraine introduced a temporary prohibition, for a period of 10 years, on exports of all other unprocessed timber (the “2015 export ban”).
4. According to the Ukrainian proponents of this measures the export prohibition essentially seeks to restore the woodworking and furniture industries, create employment and refocus exports from wood raw materials towards products with a higher degree of processing. The same objectives are reiterated in the conclusions of the Parliament’s Committee on Industrial Policy and Entrepreneurship, and by the Parliament Scientific and Expert Department.
5. Article 35 of the AA forbids each Party from *inter alia*, instituting “any prohibition” on exports of goods of that Party destined for the territory of the other Party. Article 35 of the AA incorporates by reference Article XI of the GATT 1994. Article XI:1 of the GATT 1994 forbids WTO Members from instituting or maintaining *inter alia* prohibitions on exports of any product destined for the territory of another Member.
6. The 2005 export ban and the 2015 export ban constitute “prohibitions” on exports from Ukraine to the EU within the meaning of both the first sentence of Article 35 of the AA and Article XI:1 of the GATT 1994. As such, they are incompatible with Article 35 of the AA.
7. In stark contrast with the very ambitious trade liberalization objectives pursued by the AA, Ukraine has put forward an extremely narrow interpretation of Article 35 AA,

which would require reading that provision as imposing less obligations on the Parties than Article XI of the GATT 1994.

8. According to Ukraine, unlike Article XI of the GATT 1994, Article 35 AA would prohibit only those export prohibitions or restrictions that are shown to have the “actual effect” of restricting trade. Moreover, it appears that the Parties would be allowed to maintain any such restrictions until 2025, and that only those restrictions that apply specifically to trade to the other Party, as opposed to those applied *erga omnes*, would be caught by Article 35 AA. Last but not least, each Party would be free to restrict exports (or imports) by invoking Article 290(1) AA and its “right to regulate”, whether or not such right is exercised in accordance with the relevant exceptions stipulated in the AA, such as those provided for in Article 36 AA.
9. Ukraine’s arguments have no basis on the text of Article 35 AA and the relevant context. They would lead to a result that is plainly at odds with the object and purpose of the AA. Whereas the Parties sought to set up a DCFTA providing for ‘WTO *plus*’ obligations, Ukraine would read Article 35 AA as providing for ‘WTO *minus*’ treatment. As mentioned expressly in Article 25 AA, the AA seeks to establish, as part of the DCFTA, a free trade area “in accordance with Article XXIV of the GATT 1994”. Yet, Ukraine’s interpretation of Article 35 AA would call into question the compatibility of the AA with Article XXIV of the GATT 1994 because paragraph 8(b) of that provision requires the parties to a FTA to eliminate between them any measures prohibited by Article XI of the GATT 1994 on substantially all trade, except as permitted by the exceptions cited therein. On Ukraine’s interpretation, however, Article 35 AA would fail to capture many export (and import) restrictions that would be prohibited by Article XI of the GATT 1994. Besides, if this interpretation is upheld the EU could still challenge the export bans before a WTO panel on the basis of Article XI of the GATT 1994.
10. Article 35 AA incorporates by reference Article XI of the GATT 1994 in its entirety consistently with the Parties’ objective to build upon their pre-existing WTO obligations in order to set up a WTO compatible DCFTA “leading towards Ukraine’s gradual integration in the EU Internal Market”.

11. The EU observes that Ukraine does not question that, by their own terms, both the 2005 export ban and the 2015 export ban prohibit all exports of the products concerned by each of them from Ukraine to the EU.
12. According to Ukraine, what is not allowed under Article 35 AA are measures characterized as having an ‘effect’ ‘on the export’ of ‘good destined for the territory of the other Party’.
13. Ukraine appears to base its very peculiar reading of Article 35 of the AA on the phrase “... or any measure having an equivalent effect”. However, that phrase cannot be understood as requiring the complaining party to show that the challenged measure has the actual effect of restricting exports. Rather, that phrase serves to expand the prohibition contained in Article 35 also to measures that prohibit or restrict exports *de facto*. Irrespective of this, the evidence already provided by both Parties in the form of trade statistics, confirms beyond doubt that the measures at issue have had the actual effect of halting trade in the products concerned.
14. Moreover, Article 35 AA and Article XI:1 of the GATT 1994 forbid all prohibitions on exports from Ukraine to the EU (and viceversa), whether permanent or temporary, regardless of whether the prohibition applies also to exports to other countries or only to the EU or Ukraine.
15. Finally, Article 25 AA does not have the implication that temporary prohibitions or restrictions are permitted by the AA provided that they end before the transitional period mentioned in that provisions. That transitional period reflects the fact the provisions included in Chapter 1 of Title IV relating to the elimination of customs duties on import and exports between the Parties are to be implemented gradually, according to a schedule with a maximum length for certain products of 10 years. Article 25 AA sets out an outer limit, within which each of the provisions of Chapter 1 of Title IV of the AA must specify the duration of the applicable transitional period, if any. Article 35 AA is not subject to any transitional period. To the contrary, the use of the term “maintain” underlines that it is meant to apply to any pre-existing prohibitions or restrictions from the first day of application of the AA. Subjecting the application of Article 35 AA to a transitional period would be absurd as that provision restates the pre-existing obligations of the Parties under Article XI of the GATT 1994.

16. With regard to the parties' right to regulate, Article 290(1) AA is a confirmatory provision that "recognises" the pre-existing, and unquestionable, right of each Party to regulate its own levels of protection, "in line with relevant internationally recognised principles and agreements". Such recognition, however, cannot be construed as conferring an unlimited right to derogate from any other provision of the AA, including Article 35 AA, as Ukraine seems to argue. That position would allow each Party to nullify at will (by pretending that its trade restrictive measure has an environmental nature) the benefits resulting from the trade provisions included in Title IV, such as Article 35 AA, thereby defeating one of the core objects and purposes of the AA. Rather, the right to regulate recognised in Article 290(1) AA must be exercised in accordance with the requirements of other provisions of the AA that give expression and operationalise the "right to regulate", including the policy exceptions mentioned in Article 36 AA. By the same token, invoking one party's right to regulate does not change the burden of proof under Article 36 AA.

17. In the present case Ukraine has invoked as justification Article XX(b) of the GATT 1994 with regard to the 2005 export ban and Article XX(g) of the GATT 1994 as a justification for the 2015 export ban. Those provisions read as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement [the GATT] shall be construed to prevent the adoption or enforcement by any contracting party of measures: ...

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

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

18. Ukraine has not showed that the 2005 export ban is designed and it is necessary to protect plant life or health, because it has neither provided any evidence showing a risk to the specific habitat or population of the ten wood species covered by the 2005 export ban, nor that the 2005 export ban had any positive effects on the conservation of those species, despite Ukraine had ample time to observe its effects (if any). Moreover, none of the ten species covered by the 2005 export ban are classified by that IUCN Red List under a category that would suggest that their existence is threatened and the mere inclusion of some of those species in the "Red Book of

Ukraine”¹ is not in itself determinative in the absence of any reliable data on the existing population of those wood species and their evolution. In addition, Ukraine has not demonstrated that the export ban is necessary to implement any of its international obligation or it is a complementary element of its environmental policy.

19. Moreover, Ukraine has provided no concrete evidence whatsoever showing that the unsubstantiated risk of extinction that might be threatening those species is in any way linked to export of timber and sawn wood of those species. In addition, nothing really prevents or limits domestic consumption and production of timber and sawn wood of the ten species included in the 2005 export ban. Paragraph 9 of Article 70 of the Forest Code provides for a specific authorisation for harvesting the trees and shrubs listed in the Red Book of Ukraine, while the species covered by the export ban which are not registered in the Red Book of Ukraine can be harvested like any other wood species. In light of the above, the Panel should conclude that 2005 export ban is incapable of protecting those woods species from the risk of extinction, if any. But even admitting (*quod non*) that the 2005 export ban is somehow theoretically apt to protect those woods species from that hypothetical risk of extinction, the above considerations also show that the 2005 export ban makes no concrete contribution or at best a very limited one to the achievement of Ukraine’s environmental objective of preserving from extinction the “rare and valuable” wood species. On the other hand, the measure is as trade restrictive as it can be. Therefore, on balance it cannot be considered as necessary under Article XX(b) of the GATT 1994, all the more so as there are less trade restrictive alternative measures that would allow Ukraine to achieve its objective to the same extent (such as a limitation of the quantity of trees/wood of the species covered by the 2005 ban that can be harvested or placed on the market each year, a moratorium on cutting trees of these wood species in the areas where illegal logging occurs the most, or a very low harvesting limit, the application of administrative controls on trading of wood from these areas and of course the forest management measures that Ukraine is in the process of finalising and that Ukraine has listed in its submissions).
20. While the above shows that the 2005 export ban is not provisionally justified under Article XX(b) of the GATT 1994, the EU maintains that it also does not comply with the Chapeau of Article XX of the GATT 1994 because it constitutes an arbitrary and

1 Ukraine’s written submission, para. 227.

unjustifiable discrimination between Ukraine and domestic consumers and the EU and EU's consumers. Ukraine should have demonstrated that this discrimination bears a rational connection to the objective it has invoked. However, it failed to do so, because domestic consumption is capable of threatening the survival of those species, but it is not subject to any restriction remotely comparable to that imposed on export. Moreover, Ukraine fails to show that the 2005 export ban does not constitute a disguised restriction to international trade. Indeed, Ukraine's argues that there is nothing disguised, deceptive or concealed about the ban's application. However, it admits that this does not exhaust the meaning of disguised restriction.

21. With regard to the 2015 export ban, the EU recalls that Article XX(g) off the GATT 1994 permits the adoption or enforcement of trade measures that have a close and genuine relationship of ends and means to the conservation of exhaustible natural resources, when such trade measures are even-handed, i.e. they are brought into operation, and "work together with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource.
22. Ukraine stresses that the 2015 temporary export ban was introduced in order to stop intensive deforestation but no concrete evidence shows the existence of intensive deforestation in Ukraine or an overall reduction of the forest area. It argues that the 2015 export ban is necessary to combat illegal logging but it did not list export as one of the causes of that phenomenon. On the contrary, it explained that illegal logged wood is used mainly by local unregistered sawmills that can process and export the sawn wood without restriction (indeed, the 2015 export ban does not cover sawn wood). Moreover, by setting a domestic consumption limit of wood at 25 million cubic meters per year, Ukraine necessarily considers that harvesting that amount of wood does not threaten the sustainable exploitation of its forests. However, Ukraine does not explain why for the conservation of its forest it would be necessary to prohibit the export of all unprocessed wood, i.e. even of wood harvested in compliance with the 25 million cubic meter cap, and reserve that wood for the domestic processing industry. Hence, the 2015 export ban is undoubtedly overly broad and not proportional to the objective invoked by Ukraine. In addition, Ukraine has not demonstrated that the 2015 export ban is part of its policy for the preservation and sustainable exploitation of its forests, and that it contributes to the declared conservationist objective. On the contrary, several parliamentary documents explicitly

confirm that the 2015 export ban is essentially designed to promote Ukraine's own wood processing industry, rather than any conservationist or environmental objective, by refocusing export from raw wood materials to processed wood products. However, the development of woodworking and wood-processing industry may very well lead to a sustained and increased consumption of domestic wood and jeopardise the conservation of forests. If Ukraine really wanted to conserve its forests, it should have forbidden not only export of unprocessed wood, but also of processed wood products. However, the 2015 export ban prohibits the export of unprocessed timber, but neither of fuel wood (which is unsuitable for further processing) nor of processed wood (e.g. sawn wood), in line with the objective of refocusing export from raw wood materials to processed wood products. Furthermore, the 2015 export ban was clearly conceived and enacted in the absence of any limitation to domestic consumption of wood. When the 2015 export ban was introduced, the Forest Code did not set out a real and effective quantitative limitation on the production or consumption of wood, but only a partial limitation concerning the wood cutting area available for final felling operations (which account for less than half Ukraine's wood production). Ukraine introduced "on paper" a limitation on domestic consumption of wood in July 2018 (the "consumption cap"), i.e. several years after having introduced the 2015 export ban, and after the EU had raised the issue of the compatibility of the 2015 export ban. However, in the course of this proceedings Ukraine has not clarified whether the procedure necessary to monitor compliance with the domestic consumption cap is operational. In any event, even if that procedure were operational, according to Ukraine's own data, the total volume of timber ever harvested in Ukraine is well below the level of the consumption cap. Hence, the cap is purely theoretical and does not impose any real and effective limitation on domestic consumption. Moreover, the 2015 export ban is not an even-handed measure because it imposes a complete ban on export, while allowing for a very high and unprecedented level of domestic consumption. Finally, Ukraine's arguments that according to which the 2015 export ban is somehow justified by the consequence of the conflict with Russia is an ex-post rationalisation unsupported by any concrete element. In light of the foregoing, it is undisputable that the design of the measure is clearly not to conserve Ukrainian forests and that at best there might be an incidental relation between the measure and the conservation of those forests, which is not sufficient for a measure to comply with Article XX(g) of the GATT 1994. The same holds with regard to Ukraine's argument

according to which the 2015 export ban would contribute to the prevention of illegal logging. The EU fails to see what contribution could give to the achievement of that objective prohibiting the export of wood logged in compliance with Ukraine's legislation.

23. While the above shows that the 2015 export ban is not provisionally justified under Article XX(g), it also does not comply with the Chapeau of Article XX of the GATT 1994. The 2015 export ban is an arbitrary and unjustified discrimination to trade, as less trade restrictive measures are available to Ukraine to achieve its declared objective (such as a wood harvesting cap not combined with any export restriction or combined with an export restriction that applies only to wood harvested in excess of the level that Ukraine considers sustainable, a prohibition of export of illegally logged wood and wood products made with that wood and of course the forest management measures that Ukraine itself has listed in its submissions and it is in the way of finalising such as an obligatory electronic accounting system for all forestry users, sanctions for illegal logging, the National Forestry Inventory, etc. measures targeted to the problems affecting specific areas of Ukraine such a very low harvesting limit, or the application of administrative controls on trading of wood from those areas,). By the same token, the absence of any rational connection between the objective of conserving Ukraine's forests and the discrimination between Ukraine and the EU from the point of view of access to Ukraine's wood products in question confirms that this discrimination is arbitrary and unjustifiable. Moreover, relevant parliamentary documents show that Ukraine was well aware of the conflict between the export ban and its international law obligations but tried to hide that conflict by enacting a theoretical consumption cap. Therefore, the EU submits that the 2015 export ban constitutes a disguised restriction to international trade.
24. Finally, Ukraine has not demonstrated that conditions that relate to access to (or consumption of) Ukrainian rare and valuable wood species (2005 export ban) or unprocessed wood (2015 export ban) are not similar in Ukraine and the EU insofar as the objective of the conservation of Ukrainian forests is concerned.
25. Ukraine has also invoked some provisions of Chapter 13 AA. Ukraine requests that those provisions be "taken into account" when assessing the exceptions based on

Article XX(b) and Article XX(g) of the GATT 1994. The EU considers that the right to regulate recognised in Article 290(1) and the provisions on multilateral environmental agreements included in Article 294 may be relevant in assessing whether the measures in dispute can be justified under Article XX(b) or Article XX(g). In particular, they may be relevant in assessing whether the measures in dispute are both “designed” and “necessary” to achieve the objectives protected by those exceptions.

26. Ukraine has nowhere explained, let alone substantiated, why the measures at issue are necessary to implement the multilateral environmental agreements and environmental principles to which it refers. Indeed, none of the environmental agreements mentioned by Ukraine requires, or even envisages, the imposition of export bans. Nor are those export bans necessary to comply with the environmental principles invoked by Ukraine, given that there are less trade-restrictive alternatives to achieve the environmental objectives allegedly pursued by Ukraine and, hence, also to implement the international agreements and environmental principles invoked by Ukraine.
27. In any event, Article 296(2) does not provide an exception from the obligations of the Parties under any other provision of the AA, including Article 35. Those provisions must be interpreted harmoniously and the only reasonable interpretation is that the obligation imposed by Article 296(2) presupposes that the “laws, regulations or standards” mentioned therein must be compatible with a Party’s obligations under any other provisions of the AA.
28. Likewise, Article 294 of the AA stipulates an obligation to cooperate with regard to the sustainable management of forest resources and promoting trade in legal and sustainable forest products. There is nothing in the text of Article 294 that may be construed as providing an exception from a Party’s obligations under any other provision of the AA, including those under Article 35 of the AA. Nor does a breach of Article 294 by a Party entitle the other Party to suspend unilaterally its obligations under other provisions of the AA. In any event, the EU has complied with its obligation to cooperate with Ukraine on this matters providing considerable technical and financial support.

29. The EU remains fully committed, in accordance with Article 294 of the Association Agreement, to cooperate with Ukraine in order to promote the sustainable management of forest resources. However, the measures at issue are neither necessary nor apt to achieve that purpose. The sustainable management of forest resources can be most effectively pursued through other measures that are fully compatible with the international obligations of the Parties. On the other hand, the EU cannot accept that measures whose essential objective is to protect a domestic industry be shielded from legal scrutiny under the cover of environmental measures.