

Fiche n°3

L'évolution de la structure et du contenu des accords de commerce et d'investissement, et les premiers contentieux fondés sur les accords méga-régionaux : l'affaire du *Bois ukrainien (Union européenne c. Ukraine) (2020)*

Document unique : Rapport final du panel d'arbitrage (Accord d'association UE-Ukraine), *Restrictions appliquées par l'Ukraine aux exportations de certains produits du bois vers l'Union européenne (Final Report of the Arbitration Panel – Restrictions applied by Ukraine on exports of certain wood products to the European Union)*, 11 décembre 2020, §§1-8, 25-28, 34-52, 93-99, 101-106, 126-138, 241-256, 468 (notes omises)

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

Final Report of the Arbitration Panel

established pursuant to Article 307

of the Association Agreement between Ukraine, of the one part,
and the European Union and its Member States, of the other part

Lugano (Switzerland), 11 December 2020

TABLE OF CONTENTS

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

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

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

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

CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, p. 1779
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
<i>Brazil – Taxation</i>	Panel Reports, <i>Brazil – Certain Measures Concerning Taxation and Charges</i> , WT/DS472/R, Add.1 and Corr.1 / WT/DS497/R, Add.1 and Corr.1, adopted 11 January 2019, as modified by Appellate Body Reports WT/DS472/AB/R / WT/DS497/AB/R
<i>Canada – Dairy</i>	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products</i> , WT/DS103/AB/R, WT/DS113/AB/R, and Corr.1, adopted 27 October 1999, DSR 1999:V, p. 2057
<i>China – Publications and Audiovisual Products</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, p. 3
<i>China – Rare Earths</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014, DSR 2014:III, p. 805
<i>China – Rare Earths</i>	Panel Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/R and Add.1 / WT/DS432/R and Add.1 / WT/DS433/R and Add.1, adopted 29 August 2014, upheld by Appellate Body Reports WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, DSR 2014:IV, p. 1127
<i>China – Raw Materials</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
<i>China – Raw Materials</i>	Panel Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/R, Add.1 and Corr.1 / WT/DS395/R, Add.1 and Corr.1 / WT/DS398/R, Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, DSR 2012:VII, p. 3501

Short Title	Full Case Title and Citation
<i>Colombia – Ports of Entry</i>	Panel Report, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry</i> , WT/DS366/R and Corr.1, adopted 20 May 2009, DSR 2009:VI, p. 2535
<i>Colombia – Textiles</i>	Appellate Body Report, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear</i> , WT/DS461/AB/R and Add.1, adopted 22 June 2016, DSR 2016:III, p. 1131
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, p. 7367
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
<i>EC – Seal Products</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I, p. 7
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
<i>Guatemala – Cement I</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
<i>India – Quantitative Restrictions</i>	Panel Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , WT/DS90/R, adopted 22 September 1999, upheld by Appellate Body Report WT/DS90/AB/R, DSR 1999:V, p. 1799
<i>India – Solar Cells</i>	Appellate Body Report, <i>India – Certain Measures Relating to Solar Cells and Solar Modules</i> , WT/DS456/AB/R and Add.1, adopted 14 October 2016, DSR 2016:IV, p. 1827

Short Title	Full Case Title and Citation
<i>India – Solar Cells</i>	Panel Report, <i>India – Certain Measures Relating to Solar Cells and Solar Modules</i> , WT/DS456/R and Add.1, adopted 14 October 2016, as modified by Appellate Body Report WT/DS456/AB/R, DSR 2016:IV, p. 1941
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
<i>Japan – Apples</i>	Panel Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/R, adopted 10 December 2003, upheld by Appellate Body Report WT/DS245/AB/R, DSR 2003:IX, p. 4481
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5
<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675
<i>Russia – Traffic in Transit</i>	Panel Report, <i>Russia – Measures Concerning Traffic in Transit</i> , WT/DS512/R and Add.1, adopted 26 April 2019
<i>US – 1916 Act (EC)</i>	Appellate Body Report, <i>United States – Anti-Dumping Act of 1916</i> , WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, p. 4793
<i>US - FSC</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3

Short Title	Full Case Title and Citation
<i>US – Gasoline</i>	Panel Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R, DSR 1996:I, p. 29
<i>US – Poultry (China)</i>	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> . WT/DS33/AB/R. adopted 23 May 1997, and Corr. 1, DSR 1997:1, p. 323

1. INTRODUCTION

1.1. Complaint by the European Union

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

1.2. Arbitration Panel establishment and composition

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

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

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

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

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

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

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

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

Chairperson: Mr Christian Häberli

Members: Mr Giorgio Sacerdoti
Mr Victor Muraviov

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

Assistants: Ms Ilaria Espa
Ms Nataliia Mushak

~~1.3 Arbitration Panel proceedings~~

~~1.3.1 General~~

~~9. On 29 January 2020, the organisational meeting of the Parties with the Arbitration Panel was held in Brussels. The Working Procedures¹¹ and the Timetable for the proceedings were adopted pursuant to paragraph 8 of Annex XXIV to the Association Agreement.~~

~~10. On 4 February 2020, the European Union published on the website of the European Commission a notice concerning the establishment of the Arbitration Panel, which indicated that the deadline for *amicus curiae* submission was 27 February 2020.¹² On 4 February 2020, Ukraine published a similar notice on the website of the Ministry for Development of Economy, Trade and Agriculture of Ukraine.¹³ One *amicus curiae* submission was~~

⁶ See Article 308(1) of the AA.

⁷ See Article 310(1) of the AA.

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

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

¹⁰ See below, Annex A.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

or;

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

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

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

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

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

~~2. FACTUAL ASPECTS~~

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

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

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

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

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

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

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

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

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

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

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

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

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

(56.2 %). In Volyn, Chernihiv, Cherkasy, Vinnytsya and Sumy Regions 20% of forests are contaminated. In the Red Forest, which is located within the 10km² area surrounding the Chernobyl Nuclear Power Plant, the pines planted after the accident have grown without a central leading stem, rendering them odd-looking dwarfs more like bushes than trees.³⁹ Therefore, these forests are not exploited.⁴⁰

39. In 2002, the State Programme “Forests of Ukraine” for 2002-2015 was adopted as one of the basic plans for the forest management in Ukraine.⁴¹ The programme recognised that the actual size of the woodland (15.6% of the total territory of Ukraine) was insufficient and the woodland should be expanded by 2 to 2.5 million hectares in order to meet the above-mentioned optimal coverage of 20%.⁴²

40. In 2010, the Ukrainian Parliament adopted the Law “On Main Principles of State Environmental Policy of Ukraine for the Period until 2020.”⁴³ According to this law, the total woodland should expand by more than 2 million hectares of new forests in order to meet the optimal coverage of 20%. This optimal woodland coverage would thus be reached in 20 years.⁴⁴

41. This law was replaced by the Law “On Main Principles of State Environmental Policy of Ukraine for the Period of up to 2030.”⁴⁵

42. The State Forest Resources Agency of Ukraine reported the same level of annual increment for 2018 and 2019 (35 million cubic metres).⁴⁶ The forest utilisation rate (i.e., the ratio of the average annual felling relative to the average annual increment) was 63% in 2018 and 60% in 2019. Ukraine writes that, according to the European Environment Agency “a felling-to-annual-increment ratio of approximately 70 % is recommended to ensure the sustainable management of forests.”⁴⁷

43. The State Forest Resources Agency of Ukraine also recalls that the average age of Ukrainian forests is over 60 years and that this age is still increasing. This should be seen as an

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“The forests in the Donetsk and Lugansk provinces of Donbas region play a crucial role in the natural and man-made landscapes, by preventing wind and water erosion and by ensuring the stability of water supply bodies.

Besides creating a favourable environment for the local fauna and flora, the region’s massive pine forests play a key social and economic role,

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

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

⁵⁵ *Ibidem*.

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

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

as they are often used for recreation, hunting, and mushrooms, berries, and herbs picking.

According to an assessment carried out by UN Environment's Science-Policy Platform on Environment and Security, the conflict has affected, damaged, or destroyed ecosystems within an area of at least 530,000 hectares, including 18 nature reserves covering an area of 80,000 hectares. Furthermore, 150,000 hectares of forests have been impacted, with 12,500 forest fires blazing through the military operations zone and adjacent areas.

In 2014 alone, the lack of forest protection and the fighting led to the near irreversible destruction of 479 hectares of forests. The fighting has had direct mechanical and chemical impacts on trees, including shrapnel damage of barks, branches, tops, ground vegetation, weakening or killing individual trees and entire plantations. The military operations zone has also been contaminated by unexploded ordnance whose elimination could take years or decades, based on the experience of other countries such as Bosnia and Herzegovina, Serbia, and Macedonia.⁵⁸

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

⁵⁸ *Ukraine's Written Submission*, para. 177 (referring to UN environment programme News and Stories, *Ukraine's Donbas bears the brunt of toxic armed conflict*, available at <https://www.unenvironment.org/news-and-stories/story/ukraines-donbas-bears-brunt-toxic-armed-conflict>).

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

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

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

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

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

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

~~2.3 The Products at issue~~

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

~~2.3.1 “Rare and valuable” species~~

~~54. The first category consists of timber and sawn wood of ten species listed in Article 1 of the Law of Ukraine “On Elements of the State Regulation of Business Operators’ Activities Related to the Sale and Export of Timber” of 08 September 2005, No. 2860-IV (hereinafter Law 2860-IV) and referred to in that law as “rare and valuable”.⁶⁵~~

⁶² Ukraine’s Written Submission, para. 183.

⁶³ Ukraine’s Written Submission, para. 184.

⁶⁴ Ukraine’s Opening Statement, para. 42.

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

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

~~4.1 Preliminary issues~~

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

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

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

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

4.1.1.1 The Parties' arguments

4.1.1.1.1 Ukraine

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

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

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

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

¹⁰⁹ *Ibidem*, para. 97.

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

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

4.1.1.1.2 The European Union

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

¹¹⁰ Article 301(2) of the AA.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹²² *Ibidem*, para. 23.

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

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

~~4.1.1.2 The Arbitration Panel's findings~~

~~4.1.1.2.1 On the timeliness of the jurisdictional objection~~

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

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

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

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

¹²³ EU's Closing Statement, para. 4.

¹²⁴ *Ibidem*, para.7.

¹²⁵ *Ibidem*, para.15.

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

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

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

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

4.1.1.2.2 On the merit of the jurisdictional objection

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

~~4.1.2.1 The Parties' arguments~~

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

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

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

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

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

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

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

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

¹⁴³ *Ibidem*, para. 33 ff.

~~238. Finally, as to Ukraine’s reference to multilateral environmental agreements, the EU accepts that “in assessing whether a measure is ‘designed’ to achieve the objectives of Article XX(b) or Article XX(g) of the GATT 1994, it may be relevant whether the measure’s objective can be sustained within the objectives pursued by a multilateral environmental agreement or by an environmental principle referred to in Article 292 of the Association Agreement.”²²⁷~~

~~239. According to the EU any conflict between the Association Agreement (including Articles 35 and 36 of the AA) and the multilateral environmental agreements would have to be resolved in accordance with the generally applicable rules of international law, as codified in the VCLT, in particular in Articles 30 and 59 VCLT.²²⁸ The EU, however, contends that none of the multilateral environmental agreements listed by Ukraine prescribes the imposition of export bans for forestry protection purposes.²²⁹~~

~~240. The EU concludes that “the provisions of Chapter 13 [invoked by Ukraine] do not provide an exception from Article 35, but they may provide relevant ‘context’ for assessing whether a measure may be justified under Article 36” of the AA.²³⁰~~

4.2.3.2 The Arbitration Panel’s analysis and finding

241. The Arbitration Panel has examined carefully the above arguments of the Parties and notes that both Parties recognise the importance in the Association Agreement of the Chapter on trade and sustainable development. They differ, however, on how to read the provisions of Chapter 13 in conjunction with the obligations stemming from Article 35 of the AA.”

242. In this respect, the Arbitration Panel has to examine the effects the provisions of Chapter 13 (“Trade and Sustainable Development”) may have with regard to the compatibility of Ukraine’s Article 35-incompatible export prohibitions. The presence in the Association Agreement of a specific chapter on trade and sustainable development strikes a balance between the regulation of purely trade matters and the taking into account of non-trade and environmental concerns in the AA that is different from GATT 1994.

243. The Arbitration Panel notes that Chapter 13 of the AA is part of the same Title IV (Trade and trade-related matters), where Article 35 AA is also found (Chapter 1). The Arbitration

²²⁷ *Ibidem*, para. 301.

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

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

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

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

The Parties reaffirm their commitment to *promoting the development of international trade, in such a way as* to contribute to the objective of sustainable development and to ensuring that this objective is integrated and reflected at every level of their trade relationship (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.3.1 Introduction

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

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

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

4.3.3.3 Overall finding on whether the 2015 temporary export ban is justified by Article XX(g) of the GATT 1994

468. In light of the foregoing, the Arbitration Panel **finds** that Ukraine’s 2015 temporary export ban on unprocessed timber is not justified in accordance with Article XX(g) of the GATT 1994, as applicable by virtue of Article 36 of the AA. The Arbitration Panel therefore **finds** that the 2015 temporary export ban is in breach of Article 35 of the AA.

~~469. This finding makes it unnecessary for the Arbitrators to investigate further whether the 2015 temporary export ban meets the requirement of the introductory part (or chapeau) of Article XX of the GATT 1994. In fact, besides focusing on the exception of Article XX(g) of the GATT 1994, the Parties have devoted some attention to the issue whether the 2015 temporary export ban is “not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade” as provided by the chapeau. However, since for the reason just stated the 2015 temporary export ban does not pass the test of compatibility with subparagraph (g) of Article XX, the Arbitration Panel is not required to address this issue and will refrain from doing so.~~

5. INTERIM REVIEW

~~470. On 13 November 2020, the Arbitration Panel issued its Interim Report to the Parties. Pursuant to Article 308(2) of the AA, Parties were invited to submit a written request for the arbitration panel to review precise aspects of this Interim Report within 14 days of its issuance. On 27 November 2020, both parties submitted their comments on the Interim Report. At the request of the Panel, entirely composed of non-English native speakers, the Parties also submitted editorial revisions as well as other linguistic changes in a separate document.~~

~~471. No party requested an additional meeting with the Panel. In the absence of such a review meeting, and in accordance with the Timetable for Panel Proceedings revised as of 14 September 2020 (Annex A), this Final Report is issued on 11 December 2020.~~

~~472. The numbering of paragraphs and footnotes in the Final Report has changed from the Interim Report. The text in this Section refers to the paragraphs and footnote numbers in the Interim Report regarding which the parties requested review.~~

~~473. The additional, separate editorial and linguistic submissions were not contested by the other Party and had no contradictory elements between them. They are not referred to specifically~~