

The Handbook of Trade Enforcement

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Overview

Tatyana V Slipachuk and Nataliya Y Mykolska

Vasil Kisil & Partners

Ukraine's accession to the World Trade Organization in 2008 after almost 15 years of negotiations was a benchmark for fundamental changes in the Ukrainian trade system and regulations.

WTO accession

In addition to acceding to the WTO Agreement and Multilateral Trade Agreements, Ukraine undertook to become an observer to the Government Procurement Agreement and to start negotiations to become a party thereto as well as a signatory to the Civil Aircraft Agreement.

The Constitution of Ukraine grants a direct effect in Ukraine to provisions of the WTO agreements as treaties duly ratified. Moreover, the said effect also applies to procedures in national courts.

According to the commitments taken on acceding to the WTO, Ukraine undertakes to reduce the average import tariff bindings for agricultural goods from 18 per cent to 10.66 per cent, and from 6.11 per cent to 4.95 per cent for industrial goods (certain positions involve reductions phased in over a period up to 2013). Ukraine also undertook to apply export duties to a very limited range of goods (eg, oilseed, live cattle, cattle skins, scrap) and to substantially reduce their rates. Moreover, Ukraine is allowed to apply tariff quotas only for imported raw cane sugar.

Significantly, the government of the newly elected president of Ukraine has recently announced its intention to initiate the renegotiation of certain market access commitments assumed by Ukraine. Currently there is no information available as to what kind of obligations are going to be renegotiated and under which terms and conditions.

Trade defence remedies

Trade defence remedies are governed in Ukraine by special laws on trade defence instruments adopted during Ukraine's WTO accession process and which entered into force in 1999. Even though said laws were drafted based on provisions of the respective Uruguay Round Agreements, some provisions of said laws are vague, unclear and

make investigation procedures not as transparent and predictable as in other jurisdictions. It is important to note that since Ukraine's accession to the WTO provisions, the Uruguay Round Agreements shall have a direct effect in Ukraine.

Since 1999, 25 anti-dumping and 32 safeguard investigations were initiated in Ukraine. As of March 2010 the following trade investigations are being conducted: two anti-dumping investigations related to imports into Ukraine of poultry from the US and Brazil and of auto-tyres from Belorussia; and three safeguard investigations related to imports into Ukraine of ferroalloys, float-glass and mineral fertilisers notwithstanding the country of origin and export. Moreover, as of March 2010, 15 anti-dumping and six safeguard measures have been applied. No countervailing investigation has ever been conducted in Ukraine.

Competent authorities

In Ukraine the following state authorities are involved in trade investigations: the Interdepartmental Committee on International Trade, responsible for the adoption of key decisions within the framework of investigations; the Ministry of Economy of Ukraine, being in charge of carrying out investigations; the State Customs Service of Ukraine, providing relevant customs data required for the investigation and implementing application of trade remedies imposed.

Investigation procedure

Even though each investigation has its essential peculiarities, generally the anti-dumping, countervailing and safeguard investigations have similar stages:

- complaint submission by a national producer;
- conducting of an anti-dumping or countervailing procedure by the Ministry of Economy (there is no the respective stage in safeguard investigations);
- investigation initiation by the Committee and publication of a relevant notice;
- collection of appearance applications from interested parties and their registration;

- conducting the investigation by the Ministry of Economy, ie, collecting all relevant data and evidence, ensuring access of the interested parties to the information, collecting answers to questionnaires, holding consultations (in anti-dumping and countervailing investigations only), holding hearings, etc.
- adoption by the Committee of a decision on provisional measures (if any);
- adoption by the Committee of a decision on termination of the investigation either without measures application or with application of the final measures;
- renewal of the investigation (applicable to the anti-dumping investigations only);
- review of the decision on final safeguard measures by the Committee (applicable to the safeguard investigations only);
- judicial review of the final decision (if any); and
- final measures reviews.

Appearance registration and other issues of major concern

Any interested party (ie, a foreign producer, exporter or importer, or relevant union (association), competent authorities of an exporting country; national producer, manufacturer or wholesaler of similar products in Ukraine) in order to participate in the investigation is required to submit an appearance application to the Ministry of Economy within 30 days of the date of official publication of the investigation initiation notice. A request for the hearings shall generally be submitted with the application.

The initiation notice provides for special terms for submission comments on the initiation of the investigation and the national producer's complaint (usually 40 or 60 days from the date of publication).

There is no established practice in Ukraine in relation to providing the interested parties with questionnaires. In some investigations the interested parties are required to submit a separate request for questionnaires, while in others the interested parties are provided with questionnaires without any additional requests.

In addition, it is important to note that Ukrainian legislation requires all investigations to be performed in Ukrainian and all evidence, written proof and other information submitted to be in Ukrainian or accompanied by a Ukrainian

translation. Non-compliance with this requirement may result in the relevant authorities disregarding the information and documents submitted.

Terms

Consistent with the WTO Anti-dumping Agreement, the final findings in anti-dumping investigations shall be made within 12 months from the day of initiation. In certain cases and under special circumstances this term may be extended, but in no case may the total investigation term be more than 18 months. For countervailing investigations the 12 month period also applies. However, the maximum extended investigation period allowed is 14 months. In safeguard investigations the final findings shall be made within 270 days of the initiation date. This term may be extended, but in no case will total terms exceed 330 days.

Judicial review

Ukrainian legislation allows challenging either preliminary or final decisions before the court. Applying to the judicial review is a recent trend in Ukraine. Unfortunately, taking into account the complexity of the trade defence instruments and absence of established case law, such reviews are not prompt and some court decisions appear quite controversial. To date, no judicial reviews were related to the investigations initiated under Ukraine's accession to the WTO.

Legislative developments

The draft law significantly amending effective anti-dumping regulations in part of procedural aspects has been submitted for consideration by the Parliament of Ukraine in order to improve the transparency and predictability of the procedure.

Free trade agreements and trade defence remedies

Ukraine is party to a number of bilateral free trade agreements. Most FTAs generally provide for the availability of trade defence remedies. However, some of Ukraine's FTAs (eg, with Macedonia and Latvia) additionally set forth particular procedural aspects (eg, mandatory consultations prior to application of the remedies and disclosure of information about findings) based on which the remedies are applied.

Ukraine is currently conducting negotiations with the European Union on a 'deep and comprehensive' free trade agreement that is expected to cover a wide range of trade-related issues, including among others trade defence remedies and applicable procedures.

Anti-discrimination investigations

In addition to the above trade defence remedies, Ukrainian law stipulates measures against discriminatory and unfriendly acts of other states in the form of full or partial trade embargo, divesting of the most-favoured nation treatment, special duties, licensing, quotas and indicative prices

applied as result of relevant investigation. The said measures do not apply to the WTO members, as it is provided that the said measures shall be imposed only if Ukraine and the discriminating state are not members of the same international organisation with its own dispute settlement mechanism.

To date only a few anti-discrimination investigations have been conducted in Ukraine (against Belarus, Uzbekistan, Hungary and Russia). Usually such anti-discrimination investigations are terminated without the application of remedies as respective discriminatory and unfriendly actions are eliminated at relevant consultations between the parties.

Vasil Kisił & Partners

Leonardo Business Centre
17/52-A B. Khmel'nitskogo St
Kiev 01030
Ukraine
Tel: +380 44 581 7777
Fax: +380 44 581 7770

Tatyana Slipachuk
slipachuk@vvp.kiev.ua

www.kisilandpartners.com

Through relentless focus on client success, the Vasil Kisił & Partners team delivers integrated legal solutions to complex business issues. In Ukraine, the Vasil Kisił & Partners brand is synonymous with great depth and breadth of legal expertise and experience, which has created superior value for our clients since 1992.

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Tatyana V Slipachuk

Vasil Kisil & Partners

Dr Tatyana Slipachuk FCIArb is a partner at Vasil Kisil & Partners and chairs the international trade and international arbitration practice group. Dr Slipachuk's international trade practice focuses on contracts, WTO issues, trade remedies and dispute settlement.

Dr Slipachuk has been repeatedly nominated by her peers as one of the leading practitioners in the field of international trade and international arbitration in the *Ukrainian Law Firms (Handbook for Foreign Clients)* and *Who's Who Legal CIS 2010*. She was also ranked as the top international trade practitioner in Ukraine by *Best Lawyers International* in 2009.

Dr Slipachuk also advises the government of Ukraine on multilateral and bilateral trade issues within the framework of the Expert Council at the Ministry of Economy of Ukraine on WTO and EU-Ukraine FTA issues.

Dr Slipachuk is the author of numerous Ukrainian and international publications on international trade and arbitration issues.

Dr Slipachuk is a leading researcher at the Private Law and Enterprise Institute of the Academy of Law Sciences of Ukraine (ALSU). In 1993, Dr Slipachuk received PhD in Business Law and Arbitration. She received her law degree from the National Taras Shevchenko University of Kiev.



Nataliya Y Mykolska

Vasil Kisil & Partners

Nataliya Y Mykolska is a senior associate at Vasil Kisil & Partners, focusing primarily on international trade matters.

Ms Mykolska has extensive experience of working for state authorities and private companies in Ukraine, Germany and Canada.

Nataliya Mykolska advises the government of Ukraine on multilateral and bilateral trade issues within the framework of the Expert Council at the Ministry of Economy of Ukraine on WTO and EU-Ukraine FTA issues.

She is also deputy chairman of the UBA International Law Committee and a Ukrainian franchising expert of the International Distribution Institute. The *Ukrainian Law Firms (Handbook for Foreign Clients)* has repeatedly named her among recommended lawyers practising foreign trade in Ukraine.

Nataliya Mykolska is the author of numerous publications on various international trade aspects, including international contracts and transactions, trade investigations, the WTO and EU Law.

Ms Mykolska received her law degree from the Ivan Franko Lviv National University (2001) and a Master of European Studies from Europa-Kollege-Hamburg, Germany (2002).