

# 2012 MAJOR FOREIGN TRADE MILESTONES: UKRAINIAN ROLLERCOASTER



**NATALIYA MYKOLSKA**  
 COUNSEL, HEAD OF INTERNATIONAL TRADE, SAYENKO KHARENKO.  
 MS. MYKOLSKA GRADUATED FROM L'VOV NATIONAL UNIVERSITY (2001) AND RECEIVED HER MASTER OF EUROPEAN STUDIES FROM EUROPA-KOLLEG HAMBURG (2002). NATALIYA IS RECOMMENDED BY THE INTERNATIONAL WHO'S WHO OF BUSINESS LAWYERS 2013, THE INTERNATIONAL WHO'S WHO OF TRADE & CUSTOMS LAWYERS 2012 AND THE INTERNATIONAL WHO'S WHO LEGAL: CIS 2011 IN TRADE & CUSTOMS, THE INTERNATIONAL WHO'S WHO OF FRANCHISE LAWYERS 2012

In 2012 a number of foreign trade issues affecting Ukrainian and foreign businesses were making headlines in Ukraine. One of the most important and expected was the coming into force of the new *Customs Code*. Secondly, there were a number of landmark developments in trade remedies proceedings. Thirdly, Ukraine continued its efforts in regional trade liberalization, including ratification of the new CIS Free Trade Agreement. Notwithstanding these efforts, there were a number of issues with Ukrainian exports to Russia. Last but not the least, one of the most controversial was the Ukrainian Government's move for tariff renegotiation within the WTO, which raised strong concerns among Ukraine's trade partners. This brief overview will focus on these key developments.

## NEW CUSTOMS RULES: NEW BENEFITS FOR BUSINESS

On 1 June 2012 the long awaited new *Customs Code of Ukraine* came into force. The Code was highly appreciated by the business community for promoting a relaxation of customs procedures, to name but a few: customs clearance became possible at any customs office notwithstanding the importer's place of registration; improved customs procedures (especially with regard to re-export, re-import, processing, etc.) providing more opportunities for doing business, a time limit for customs clearance procedures (no more than four hours) and established list of documents for submission for customs clearance. Other positive novelties include introduction of the "authorized economic operator" concept providing for special benefits for business enjoying this status; the amendment of customs declarations within three years of customs clearance is allowed, etc.

The Code also complies with WTO standards in cases where there is a reason to doubt the truth or accuracy of the declared customs value as well as improves procedure for adjusting the latter. Moreover, the *Customs Code* aims to shift the focus on the supervision function from the customs border to post-customs documentary verifications (conducted after customs clearance).

However, one rotten apple spoils the bunch. The business faced a number of problems with practical implementation of these positive innovations. Further alignment of the *Tax Code of Ukraine*, foreign currency control legislation and other legislative acts with the *Customs Code* still has to be carried out. Moreover, some provisions of the *Customs Code* are still practically inoperative as they require adoption of the respective by-laws and fair application of them by the customs authorities.

## TRADE DEFENCE REMEDIES: PROTECTING INTERNAL MARKET

As in 2012 the domestic market remained a major market for most Ukrainian industries, they were trying to protect it from imports using the WTO-allowed trade defence

remedies. The Ukrainian authorities based on the industries requests initiated three anti-dumping investigations against imports of Chinese-origin citric acid, Russian-origin medical glass packing and US-origin suspension polyvinyl chloride and applied anti-dumping duties to import of Russian-origin methylic alcohol, of float glass originating in Russia, Bulgaria, Poland, Turkey and Belarus as well as of Belarusian-origin slate. There was also a final determination in a rather controversial safeguard investigation against automobiles imports in May 2012, but the relevant decision has not been made public yet.

## REGIONAL TRADE LIBERALIZATION: NEW OPPORTUNITIES ON FOREIGN MARKETS

It goes without saying that free trade agreements (FTAs) and customs unions are among the "corner stones" of international trade liberalization aimed at facilitating the free movement of goods and services. Ukraine is a party to 15 FTAs, mainly with former CIS countries, and following the worldwide trend moves firmly towards further deeper cooperation at regional level. There is already certain success in this area, as in 2012 three new FTAs came into force.

On 1 June 2012 the FTA with the European Free Trade Association (EFTA) member states came into force. The EFTA is a free trade organization between Liechtenstein, Iceland, Norway, and Switzerland. The FTA with the EFTA is a significant step in a commercial sense for Ukrainian industries because it increases market access for Ukrainian goods to EFTA countries. Moreover, as the EFTA Ukraine FTA covers both trade in goods and services, investment, protection of intellectual property rights, trade facilitation, competition, and government procurement, not only are Ukrainian manufacturers expected to benefit from the latter but other business too.

Moreover, in 2012 the new CIS FTA came into effect for Armenia, Belarus, Kazakhstan, Moldova, Russia and Ukraine. Contrary to the previous version of the CIS FTA of 1994, the new CIS FTA is adapted to WTO rules and stipulates the modern dispute settlement mechanism to be employed by the contracting parties in case of violation of CIS FTA provisions. However, the FTA still contains a significant number of exemptions e.g. oil, gas, sugar, spirits, sunflower seed, ferroalloys, cattle, etc.

In addition, in 2012 the Ukrainian Parliament ratified the FTA with Montenegro. The FTA will come into force in 2013 and provides for elimination of all customs duties on imports of products originating from Montenegro and Ukraine, except for Ukrainian-origin pork, poultry, sugar, etc.

There was also a breakthrough in negotiations on another long-hoped FTA with one of Ukraine's most important trading partners, accounting for about one third of Ukraine's external trade, i.e. the European Union. Ukraine and the EU have negotiated a deep and comprehensive Free Trade Agreement (DCFTA) since 2008 and the negotiations have now

## SAYENKO KHARENKO

**Address:**

10 Muzeyny Provulok,  
Kiev, 01001, Ukraine  
Tel.: **+380 44 499 6000**  
Fax: **+380 44 499 6250**  
E-mail: **info@sk.ua**  
Web-site: **www.sk.ua**

been concluded. The DCFTA will be part of a future Association Agreement, which will replace the present Partnership and Cooperation Agreement between the EU and Ukraine (which dates from 1998). The initialling of the EU-Ukraine Association Agreement took place in Brussels in March 2012, except for the DCFTA which was initialled in July 2012. Since the entire Agreement has now been initialled, the next step will be signing of the Agreement by the parties.

Notably, according to the official information of the Ukrainian Government, Ukraine is currently at different stages of negotiations on FTAs with Singapore, Turkey, Canada, Serbia, Syria, Israel, Morocco and Mexico.

### UKRAINE-RUSSIA “TRADE WARS”: IS THERE LIGHT AT THE END OF THE TUNNEL?

Russia joining the WTO in 2012 was welcomed by the Ukrainian Government and business expecting more transparent and predictable rules for exports to Russia. However, this year was notable for a string of bilateral trade disagreements between Russia and Ukraine. That is, Russia banned imports of cheese from major Ukrainian producers due to quality issues, introduced a recycling (scrapping) fee for car imports, banned Ukrainian railway wagon exploitation, etc.

Ukrainian business claimed that the above measures would affect Ukrainian imports and were clearly aimed to protect domestic industries suffering from import duties liberalization after Russia joined the WTO. Moreover, Ukrainian business believed that they were policies motivated in view of Ukrainian reluctance to cooperate with the Customs Union of Belorussia, Kazakhstan and Russia. The measures raised serious concerns as to their WTO compliance not only in Ukraine but also among other Russia's trade partners (e.g. the EU, Japan, etc.).

Notwithstanding the fact that Russia's membership in the WTO provided for a new unbiased trade dispute settlement forum for Ukraine, the Ukrainian Government decided not to go off the beaten track and to settle those issues through bilateral consultations, the efficiency of which was questioned by Ukrainian business. For the car dispute, however, Ukrainian Government decided to retaliate and introduced a recycling fee on Russian cars imports and has fur-

ther plans to introduce this fee for all imports. This move was highly criticized by the EU, Japan and some other WTO members and may result in a new dispute against Ukraine within the WTO.

This position demonstrated that the Ukrainian Government is still reluctant to use the WTO as a forum for trade quarrels with Russia. This will hopefully change as the WTO Dispute Settlement mechanism is an independent efficient rules-based system with timetables for completing a case and the priority is to settle disputes, through consultations if possible.

### RAISING TARIFFS: CONTROVERSIAL UKRAINIAN MOVE

In 2012 Ukraine initiated within the WTO raising the limit on tariffs it can legally impose based under Article XXVIII of the General Agreement on Tariffs and Trade on around 370 tariff lines, hitting imports to the total value of about USD 5 billion. Ukraine claimed that it requires this increase in order to have more flexibility in tariff regulation for countering the challenges of current global trade. Since creation of the WTO in 1995, Article XXVIII has been used about 30 times, mostly for small or technical adjustments to countries' tariffs, and in most cases for fewer than 10 tariff lines at a time.

This initiative raised very serious concerns among Ukraine's trading partners. Nearly 60 WTO members claimed that Ukraine misuses the procedure under Article XXVIII and it risks undermining the credibility of members' commitments to their WTO obligations and a further 23 states urged Ukraine to withdraw its request.

Notwithstanding those calls the Ukrainian Government decided to go further with the request as this initiative follows the established procedures in a transparent manner and should not be seen as protectionist. A total of 30 states have so far submitted their request for renegotiation of tariff commitments with Ukraine, which should be completed in February.

Taking into consideration the volume of Ukraine's request, negotiations can be very delicate and lengthy. Therefore, Ukraine may have to drive a hard bargain, though it may face serious complications and should at least expect a reduction in the number or position involvement of negotiations with the WTO secretariat.

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Sayenko Kharenko lawyers practice before all the relevant bodies in Ukraine and globally, and cover all major international trade law matters, including: agency & distribution; franchising; international transactions and contractual structuring; structured trade & commodity finance; customs; trade & export controls; trade remedies (anti-dumping, countervailing and safeguards); WTO; free trade agreements; legislation shaping.