

**Law of Ukraine  
“On Safeguards of the National Industry  
Against Dumped Imports”**

**Aanalysis**

**Contents**

## **1. Introduction**

The draft Law of Ukraine “On Safegua

The fourth chapter provides a procedure for the initiation and termination of anti-dumping measures.

The fifth chapter provides time-limits for anti-dumping measures, their review, the resumption of an anti-dumping investigation, and reimbursement of paid anti-dumping duties.

The sixth chapter contains general and special provisions for the levying of anti-dumping duties.

Finally, the seventh chapter provides a procedure for the submission of information to interested parties, the notification of the competent authorities of the interested parties, factors of national interest, and the procedure for the implementation of the Law.

### **3. Sphere of Implementation of the Law**

This Law applies to the imported product which is the object of dumping, and where such product causes injury to a national producer of a like product.

Should Ukraine join the WTO, sub-paragraph 2 of paragraph 2 of the article 2 of this Law, which “shall not exclude application” of the measures stipulated in the framework of the General Agreement on Tariffs and Trade (GATT) and WTO, shall come into force.

Further, pursuant to paragraph 2 of article 2, special measures shall apply in the sphere of agriculture along with the special regulations established pursuant to the international agreements of Ukraine ratified by the Supreme Rada\* of Ukraine.

For example, the legislation of Ukraine provides for the application of tariff and non-tariff regulations to agricultural imports<sup>7</sup>. The tariff regulation shall establish regular and seasonal rates of import duty for agricultural products. The non-tariff regulation shall be carried out by means of establishing annual quotas and certification for agricultural imports.

To this end, Ukraine shall reserve the right to apply additional measures by means of tariff and non-tariff regulation in the sphere of agriculture. In other words, Ukraine shall influence the import of agricultural products in two ways: by means of measures set out in the Law, and by means of measures envisaged in the Law or to be envisaged in the future in matters relating to the state regulation of agricultural imports.

However, it turns out that in this Law, application of the additional measures is subject to certain circumstances. Surely, such uncertainty does not make the provisions of the Law clear and accurate.

### **4. Bodies Performing Anti-Dumping Investigations**

The performance of an anti-dumping investigation is vested in the Interdepartmental Committee for Foreign Trade (hereinafter referred to as the Committee), the Ministry for Foreign Economic Relations and Trade (hereinafter referred to as the Ministry), and the State Customs of Ukraine (hereinafter referred to as the Customs).

#### **4.1. Composition and Functions of the Committee**

The Committee shall consist of representatives of more than ten ministries and agencies of Ukraine, including the Ministry of Internal Affairs and the Security Service of

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\* The Parliament of Ukraine

<sup>7</sup> The Law of Ukraine “On State Regulation of Agricultural Imports” No.468/97, of July 17, 1997

Ukraine. The Chairman of the Committee shall be the Minister of Foreign Economic Relations and Trade.

The most important functions of the Committee shall be:

- initiation of an anti-dumping investigation;
- making decisions on the existence of dumping and injury caused thereby;
- making decisions on the application of anti-dumping measures.

#### **4.2. Functions of the Ministry**

The Ministry shall directly carry out the anti-dumping procedures and anti-dumping investigations.

The following matters shall be within the competence of the Ministry:

- notification of the interested parties of initiation of an anti-dumping investigation;
- collection of information for an anti-dumping investigation;
- submission of a report to the Committee on the results of an anti-dumping investigation.

#### **4.3. Functions of the Customs**

The Customs shall collect anti-dumping duties and carry out the control over the payment thereof.

### **5. Anti-Dumping Procedure**

The Ministry shall initiate an anti-dumping procedure with the purpose of establishing the existence of dumping and injury caused thereby. In the event Ukraine joins the WTO, paragraph 2 of Article 38 of the Law provides that the Ministry shall notify the competent authorities of the exporting country about the initiation of an anti-dumping procedure.

#### **5.1. Determination of the National Producer**

Pursuant to the Law a national producer shall normally initiate an anti-dumping investigation. A national producer means an aggregate number of producers of similar products or those producers whose aggregate production of such products constitutes the major proportion of the whole amount of like products being manufactured in Ukraine.

#### **5.2. Procedure of Submission of an Application**

A procedure for an anti-dumping investigation shall be initiated upon submission of an application. Where a national producer can provide evidence of the existence of dumping, he may direct a written application to the Ministry.

An application may be directed also by a trade union of employees of an enterprise of the national industry.

An application shall contain not only evidence of the existence of dumping, but evidence of injury and causal link between them.

An application shall also contain the following information:

- information about the applicant;
- the name of the country of origin or the exporting country;
- information about the allegedly dumped product ;
- the volume of production of the like product in Ukraine;
- the prices at which the imported product is sold for consumption in the domestic market of the country of origin or the exporting country;
- how the imported product affects the market of Ukraine, the resulting impact thereof, etc.

An application may be withdrawn by an applicant in the course of an anti-dumping procedure prior to the initiation of an anti-dumping investigation. In such cases, the application shall be considered non-existent.

### **5.3. Conditions of Initiation of an Anti-Dumping Procedure**

An anti-dumping procedure may be initiated if an application on behalf of a national producer is supported by other producers, who produce more than 25 per cent of the aggregate production of the like product in Ukraine. For the purpose of initiation of an anti-dumping investigation, an application must be supported by Ukrainian producers, whose aggregate production constitutes not less than 50 per cent of the total volume of production of the like product in Ukraine. The aforementioned conditions conform with paragraph 4 of Article 5 of the WTO Agreement. The Ministry shall review submitted evidences and determine whether they are sufficient to initiate an anti-dumping investigation.

### **5.4. The Volume of Dumped Import Which May Be Disregarded**

Where the volume of a dumped import is insignificant and may be disregarded, the countries – members of the WTO shall not apply anti-dumping measures thereto.

Pursuant to paragraph 9 of Article 12 of the Law, if Ukraine joins the WTO, an anti-dumping investigation shall not be carried out with regard to the importing country – WTO member if the volume of the dumped imports of such country is less than 1 per cent of the total volume of consumption of the like product in Ukraine; however, provided that the total volume of import from such countries – members of the WTO shall not be more than 3 per cent of the total consumption of the like product in Ukraine.

In the WTO Agreement, the aforementioned volumes are 3 and 7 per cent respectively. Accordingly the present situation is that any volume of dumped import may be subject to an anti-dumping investigation. If Ukraine joins the WTO, the anti-dumping procedures shall not be applied to insignificant volumes of dumped imports from WTO member countries. However, in such cases Ukrainian legislation will be stricter towards the volumes of a dumped import that will not trigger an investigation.

## **6. Anti-Dumping Investigation**

An anti-dumping investigation shall be carried out for the purpose of establishing the existence of dumping and injury, and for the application of anti-dumping measures. An anti-dumping investigation shall not hinder the procedure of customs clearance.

### **6.1. Notification of Interested Parties on Initiation of the Investigation**

Upon the termination of an anti-dumping pr

shall be determined on the basis of prices established in the ordinary course of trade carried out by the independent buyers in the exporting country.

### **6.3.1. Determination of an ordinary trade transaction**

For determination of the normal value of an imported product, the sales volume of the like product in the domestic market of the exporting country shall be used if the volume of such sales is not less than 5 per cent of the volume of sales of the product in Ukraine. The lesser per cent of the sales volume may be used, if the sales volume is sufficient to determine the normal value. Where it is proved that prices for trade transactions in the exporting country have been formed on a non-market basis, such transactions may be disregarded in the determination of the normal value. The WTO Agreement does not provide for such exclusion.

### **6.3.2. Other methods of the determination of the normal value**

Where there is no opportunity to use the sales information for a product in the exporting country, the normal value of a product may be determined by the following two methods:

- on the basis of the production costs in the country of origin plus a reasonable amount for selling, administrative and other costs, and profit;
- on the basis of export prices practiced in the ordinary course of trade in an appropriate third country.

### **6.4. Determination of the Price Value**

Along with determination of the normal value, the actual export price shall be also determined. The export price of a product shall mean the price actually paid or payable for a product for delivery in Ukraine from the exporting country. In cases, where there is no export price or where the Ministry considers the export price to be unreliable the export price may be constructed on another substantiated basis.

### **6.5. Margin of Dumping**

If the normal value of a product exceeds EXre i5()0 Tc0 Tw( )Tj/Tno export 6e m)8.7Aiateti-lc  
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lease, other civil law agreements, or in the event of change of one taken obligations to another or change in the terms of obligations to be performed”.

If such definition is true, than a sale shall also mean not only a lease contract, but any transaction, where the product is transferred within the scope of a commission, storage, guarantee, or other civil law contract which does not provide for transfer of property rights to the product in question.

The above definition of the Law is not in conformity with either the Civil Code of Ukraine<sup>8</sup> or basic taxation laws<sup>9</sup>, where sales of product are defined as a transfer of a product from one person to another for payment with an appropriate transfer of property rights thereto.

Disregard of payment in the definition of sales transaction may lead to humanitarian or technical assistance or a gift be treated as a sales transaction.

Moreover such definition of the sales transaction allows to take into account the value of products, which are transferred pursuant to .7203 TmU332 653.aich a; TD.001cdi1



aforementioned factors characterizing a negative impact of a dumped product on the national industry shall be of an unconditional decisive significance to establish injury to the national industry.

## **7. Provisional and Definitive Anti-Dumping Measures**

Upon the termination of an investigation, the Ministry shall submit to the Committee evidence of dumping and injury to the national industry together with calculations of the normal value and export price and the rate of margin of dumping. This chapter of the Law also conforms to the procedures for the application of anti-dumping measures.

### **7.1. Provisional Anti-Dumping Measures**

For the purpose of the protection of national interests and the prevention of injuries to the national industry, the Committee may decide to apply in the course of an anti-dumping investigation provisional measures to an exporter of a dumped product.

The provisional anti-dumping measures may be applied after:

- an anti-dumping procedure and the investigation have been initiated;
- the interested parties have been informed of the initiation of an investigation;
- the Ministry has made preliminary determination of the existence of dumping and injury linked thereto.

A provisional anti-dumping duty, the rate of which shall be established by the Committee, may be levied thereon as a provisional measure.

The payment of a provisional duty may be made in cash or non-cash form, or by a deposit or bond.

A rate of a provisional duty shall not exceed an anti-dumping margin.

A provisional duty shall be levied by the customs authorities irrespective of the payment of taxes, fees, and other prescribed payments. A provisional duty shall be established for a period of up to 4 months. The Committee may extend this term up to 6 months on request of the exporters who are engaged in a significant volume of trade with the like product.

The WTO Agreement states that the authority, which carries out an investigation, may extend the aforementioned time-limits to 6 and 9 months respectively if the rate of a provisional duty is sufficient to prevent injury to be caused and is less than the rate of the anti-dumping margin.

### **7.2. Undertakings of Exporters**

The Committee, having obtained evidence of the existence of dumping and injury linked thereto, may suspend an anti-dumping investigation without the application of anti-dumping measures. This can be done if the exporter, towards whom the aforementioned investigation is directed, provides the Committee with voluntary undertakings to review the prices or terminate the export at dumped prices.

Such an undertaking shall provide for the prices, which must not be higher than are needed to compensate a margin of dumping, if the Committee considers them sufficient to eliminate injury linked to the dumping in question. The Committee may, if it decides that such undertakings are insufficient to eliminate the consequential impact of

dumping, levy on such exporter the provisional or definitive duties. A definitive duty may be levied by the Committee if nullification of the offered undertakings or the violation of their provisions have been established. The Committee may suspend an anti-dumping investigation if an exporter undertakes to suspend the dumped import. Where, in the course of investigation, the Ministry makes a negative determination of the existence of dumping and injury linked thereto, the undertakings of the exporter shall cease to be effective.

### **7.3. Definitive Anti-Dumping Measures**

Definitive anti-dumping measures shall be applied, if:

- the Ministry has made negative determination of the existence of dumping and injury linked thereto;
- national interests require the anti-dumping measures to be applied;
- the Ministry provides the Committee with appropriate recommendations not later than one month prior to termination of the term of application of the provisional anti-dumping measures (if any).

Definitive anti-dumping measures may be applied in the form of a payable duty, and shall be paid irrespective of the payment of other taxes and charges, including duties and customs fees. Prior to making a decision on the application of definitive measures, the Committee shall review the comments of an exporter with relation to products against which the aforementioned measures are to be applied. The definitive anti-dumping duty shall be levied pursuant to the decision made by the Committee and be effective within the time-limits and in the amounts which are needed to eliminate dumping and injury linked therewith. The anti-dumping measures shall not be applied for a period of more than 5 years.

The conditions of application of the anti-dumping measures may be reviewed by the Committee on the basis of an application submitted by an interested party, the central executive body of the government of Ukraine, or a Ukrainian producer. A substantiated application shall be reviewed not sooner than one year after the making of a decision on application of such measures. Pursuant to the decision of the Committee, the anti-dumping measures may be terminated if there is adequate evidence to prove that such termination would not likely lead to a continuation or recurrence of dumping.

### **7.4. Restrictions to Application of Anti-Dumping Measures**

The anti-dumping and countervailing duties shall not be simultaneously levied on one and the same supplier of an imported product. A countervailing duty, pursuant to the law of Ukraine, shall be levied in cases where imported products are introduced into the territory of Ukraine at lower prices due to the result of a state subsidy<sup>10</sup>.

### **7.5. Minimum Product Price**

The rate of the provisional or definitive anti-dumping duty shall not be higher than it is needed to compensate a margin of dumping. Article 14 of the Law provides for a definition and calculation of the minimum price of a product at which sales thereof would

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<sup>10</sup> The Law of Ukraine "On Safeguards of the National Industry Against Subsidized Imports," No.331-XIV, of December 22, 1998

not likely cause injury to the national industry. In other words, there is an attempt to determine the rate of the anti-dumping duty in a quantity which would correspond to the size of injury caused by dumping and which generally could be less than an anti-dumping margin; However, shortcomings exist.

First, in order to calculate the minimum price, three additional determinations have been introduced:

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## 10. Court Hearing

There is a provision not present in the law and important in the WTO Agreement which provides WTO member state having anti-dumping legislation, to have courts, arbitration or administrative tribunals, or procedures for effective consideration of the matters connected with the duration and review of anti-dumping measures and undertakings of exporters. Such tribunals or procedures shall be independent of state authorities which carry out anti-dumping procedures.

Ukrainian legislation provides for appeals in court proceedings against governmental bodies and legislation which allow interested parties to appeal the decisions of the authorities carrying out anti-dumping investigations<sup>11</sup>.

## 11. Conclusions

The Law establishes a mechanism for the protection of national producers against dumped imports from other countries, customs or economic unions. It regulates the procedure for the initiation and performance of anti-dumping investigations as well as for the application of anti-dumping measures. Thus, having adopted the Law, Ukraine established one more mechanism for the protection of national producers.

Obviously, a positive aspect of the Law is that the provisions of the Law correspond to the WTO Agreement On Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. Such conformity extends not only to general principles of the WTO Agreement, but also to time and quantitative requirements.

However, we think that there are significant drawbacks in the Law.

The Law is twice as long as the Agreement), and it is imperfect in structure – (the terms of application of anti-dumping measures are considered in thirteen Articles (!): Articles 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28) which make it difficult to understand.

Pursuant to Article 38 of the Law, if Ukraine joins the WTO, the following provisions of the Law shall come into effect:

- measures stipulated in the framework of GATT/WTO shall not be excluded;
- an anti-dumping investigation shall not be carried out where the importing country is a WTO member if the volume of its dumped import is less than 1 per cent of the total volume of consumption of a like product in Ukraine provided that the aggregate volume of imports from these countries is less than 3 per cent of the total volume of consumption of a like product in Ukraine (in the Agreement it is 3 and 7 per cent respectively);
- upon the receipt of an application and prior to the initiation of an anti-dumping investigation, the Ministry shall notify the competent authorities of the exporting country about the initiation of an anti-dumping procedure;
- an anti-dumping investigation shall be suspended without application of the anti-dumping measures, if the appropriate margin of dumping is less than two per cent.

The first of the four above sub-paragraphs appears to be of a merely declarative nature. Should Ukraine join WTO (which means signing and ratifying of the multilateral agreements of the Uruguay Round), the rules of international law which regulate the

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<sup>11</sup> Code of Arbitration Procedure of Ukraine, No. 1798-XII, of November 6, 1991

activities of WTO shall automatically become a part of the Ukrainian legislation.<sup>12</sup> In this case, if the rules of national law conflict with the rules of international law, the rules of international law shall be applied in Ukraine.<sup>13</sup>

The provision of the Law laid down in the second sub-paragraph provides for stricter conditions for the volumes of imports than the WTO Agreement. Thus, after Ukraine joins WTO, these rules will lead to a conflict between the rules of national law and those of international law, and the conflict shall be settled in favor of the rules of international law.

What may perplex the situation is that the last two sub-paragraphs will become effective only after Ukraine's accession to WTO. We suggest that it would be more important, for example, to include in the list, provisions of Article 13 of the WTO Agreement allowing for the arbitration of questions covering the duration and review of anti-dumping measures and undertakings by the exporter.

Thus the Law contains provisions which, on the one hand make unclear the sphere of implementation of the Law and, on the other hand, create collisions in the effective legislation of Ukraine.

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<sup>12</sup> Article 9 of the Constitution of Ukraine, No. 254, of June 28, 1996

<sup>13</sup> Article 17 of the Law of Ukraine "On International Agreements of Ukraine" No.3767-XII, of December 22, 1993