

Learn to Walk before you can Run OR 13% Import Surcharge in the Context of Ukraine's WTO Obligations



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With the outbreak of the global financial crisis Ukraine, like other countries around the world, is forced to apply different protectionist measures to enable its industries to survive. However, after accession to the World Trade Organization on 16 May 2009, Ukraine is allowed to apply a very limited range of measures in the difficult situation at the present time. Moreover, such measures shall be imposed in line with respective WTO agreements and the commitments undertaken by Ukraine within the accession process.

Background

Due to the sharp decline in the export of Ukrainian products to various

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countries (especially of steel) and rapid increase in the volumes of imports, Ukraine has critically negative situation of balance of payments. That is, in the first eight months of 2008 credit balance deficit of Ukraine amounts to USD 13.7 billion (exports – USD 59.4 billion, imports – USD 73.1 billion)¹.

To restore the balance of payments equilibrium, it was reasonable to apply additional protective measures against imports. Hence, on 4 February 2009 the Supreme Council of Ukraine (Parliament) adopted the *On Amending Some Laws of Ukraine to Improve the Balance of Payments of Ukraine in Connection with the Global Financial Crisis Act of Ukraine, No. 923-IV (Balance of Payments Act)* entitling Parliament to introduce temporary import surcharges in case of the balance of payments reaching a critical state. The said surcharges shall be introduced for products and at the rates submitted by the Cabinet of Ministers of Ukraine (Cabinet of Ministers) for a period of up to 6 months following the month in which they take effect. At the same time, the Cabinet of Ministers is entitled to reduce the rate of the temporary import surcharges, abolish or prolong (not longer than for up to 6 months) them by issuing the respective resolution. The *Balance of Payments Act* came into force on 6 March 2009.

¹ According to the Explanatory Note to the *On Amending Some Laws of Ukraine to Improve Balance-of-Payment of Ukraine in Connection with the Global Financial Crisis Act of Ukraine No. 923-IV* // http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=33691



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Apart from the general procedure for applying import surcharges, the *Balance of Payments Act* introduced as of 6 March 2009 imposed an import surcharge of 13% for a period of up to 6 months (up to 7 September 2009) to apply to a wide range of products, to name a few: cattle/pig/poultry meat, apples and pears, sausages, sugar, wines and spirit, clothes, textile fabric, refrigerators and freezers, motor vehicles, etc.².

It is worth pointing out that after adoption of the *Balance of Payments Act*, there were heated disputes and discussion among Ukrainian politicians, different experts as well as the press, as to whether imposition of the 13% import

surcharge complies with Ukraine's WTO commitments.

Article XII:1 of the *General Agreement on Tariffs and Trade 1994* (GATT) directly entitles any contracting party to institute import restrictions (e.g. import surcharges) to safeguard its external financial position and its balance of payments. Based on Article XII:1 of the GATT and following the requirements of the *Understanding on the Balance of Payments Provisions of the General Agreement on Tariffs and Trade* (the BOP Understanding), on 4 March 2009 Ukraine notified the WTO Committee on Balance of Payments Restrictions (the BOP Committee) on in-

roduction of the 13% import surcharge to be applied up to 7 September 2009³.

Having analyzed the current situation in Ukraine, the BOP Committee confirmed that "...the current account of the balance of payments has worsened rapidly, moving from a surplus in 2005 to a deficit of 7% of GDP in the second quarter of 2008. Merchandise exports (f.o.b.) totaled USD 67 billion in 2008, while merchandise imports (c.i.f.) reached USD 85.49 billion. The deficit of Ukraine's current account of its balance of payments increased substantially in 2007 and by the end of 2008 reached a record level of USD 12.9 billion ...". Hence, the BOP Committee concluded that balance of payments provisions are among very few available for Ukraine today, WTO legitimate safeguard measures of a temporary nature to counteract shocks and mitigate dangerous negative trends and are well explained by the intention of Ukraine to be least trade disturbing and most economically justified⁴.

However, under pressure from politicians, experts and the press, on 18 March 2009 the Cabinet of Ministers abolished the said 13% import surcharge in respect of all products, except for refrigerators and motor vehicles classified under codes of UKT ZED 8418 and 8703, respectively, by issuing *Resolution No. 230*⁵ and notified the BOP Committee of this on 14 May 2009⁶.

The BOP Committee considered that as refrigerators and passenger cars were mostly consumer goods and did not impact the long-term potential for economic growth and in the short run would not cause a shortfall on the mar-



² The 13% temporary import surcharge is applied to the products classified under the following codes of the Ukrainian Classification of Goods of Foreign Economic Activity: 0202, 0203, 0206 – 0210, 0504 – 0506, 0509, 0511, 0808, 1601 – 1605, 1701, 1702, 2204 – 2208, 2701, 4203, 4303, 57, 60 – 65, 6806, 6901, 7201, 7301, 7321, 8401, 8414, 8418, 8501, 8516, 8702, 8703, 8704.

³ http://docsonline.wto.org/gen_home.asp?language=1&_=1

⁴ The Background Document by Secretariat, Consultations with Ukraine, WT/BOP/S/16 of 9 June 2009 and of 29 June 2009// http://docsonline.wto.org/gen_home.asp?language=1&_=1

⁵ It is to be pointed out that the said *Resolution No. 230* is not publicly available i.e. it is indicated with the label for official use only.

⁶ http://docsonline.wto.org/gen_home.asp?language=1&_=1

ket, nor would impair the wellbeing of consumers, Ukraine opted for temporary imposition of an import surcharge that would help to restore equilibrium in Ukraine's balance of payments⁷.

Recent developments

Irrespective of practical application of the 13% import surcharge, introduction of amendments thereto and notification of the BOP Committee thereof, the President of Ukraine challenged the authority of the Cabinet of Ministers to amend, abolish or prolong surcharges at the Constitutional Court of Ukraine (Constitutional Court).

Having considered the said motion, on 23 June 2009 the Constitutional Court adopted *Decision No. 15-pn/2009*, which sets out that import surcharges are a kind of tax to be regulated only by laws. Under the *Constitution of Ukraine* only the Parliament is entitled to adopt laws. Moreover, neither the *Constitution of Ukraine* nor other Ukrainian legislation provides for delegation of the said exclusive powers of Parliament to any other state bodies (incl. the Cabinet of Ministers). Therefore, the Constitutional Court ruled that delegation of powers to amend, abolish or prolong import surcharges to the Cabinet of Ministers does not conform with the *Constitution of Ukraine* and, thus, the Constitutional Court declared the respective provisions of the *Balance of Payments Act* to be unconstitutional.

It is worth emphasizing that there is a separate opinion of a judge of the Constitutional Court (Vyacheslav Dzhunya) to *Decision No. 15-pn/2009*: (a) the Constitutional Court by its *Decision No. 15-pn/2009* deprives Ukraine of the possibility to respond in a flexible and immediate manner to changes in the state of the balance of payments; (b) due to the special procedure for adoption of legislation by Parliament, introduction of any amendments to import surcharges will take a long time; (c) from the complex analysis of the *Constitution of Ukraine* and Ukrainian legislation, it can be concluded that

Parliament is entitled to introduce by laws general principles of the taxation system and types of taxes and fees, while the Cabinet of Ministers – to stipulate separate elements of such taxes and fees to be levied, including rates of import surcharges.

We fully agree with Judge Vyacheslav Dzhunya that introduction by Parliament of amendments of import surcharges (i.e. reduction or abolition of the latter) may in practice take a lot of time and so be regarded as breach of Article XII:2 of *GATT* obliging contracting parties to "...progressively relax them [restrictions applied for the purposes of restoring the balance of payments equilibrium] as such conditions improve ...".

Furthermore, *Decision No. 15-pn/2009* is silent as to the legal fate of *Resolution No. 230*. However, as the respective provisions of the *Balance of Payments Act*, on the basis of which the Constitutional Court adopted *Resolution No. 230*, were declared to be unconstitutional, the question exists as to whether the said resolution still remains in force. The latter is crucial for the customs authorities since it is now unclear whether the customs authorities shall levy the 13% import surcharge on all products listed initially in the *Balance of Payments Act* from 23 June 2009. According to *Letter No. 11/3-10.21/6096-EII* of 26 June 2009 of the State Customs Service of Ukraine, customs agencies will not apply the 13% import surcharge set out by the *Balance of Payments Act* until the Cabinet of Ministers provides clarifications/instructions in this respect.

Possible scenarios

There are two possible scenarios. First, on the basis of *Decision No. 15-pn/2009*, the Cabinet of Ministers may reverse *Resolution No. 230* and thus the 13% import surcharge will be applied to all products initially listed in the *Balance of Payments Act* starting from 23 June 2009; and second, *Resolution No. 230* may remain in force as it has been adopted within the powers of the

Cabinet of Ministers set out by the initial edition of the *Balance of Payments Act* (i.e. as of 18 March 2009 the Cabinet of Ministers was fully entitled to adopt the said resolution). Representatives of the business sector believe that the first scenario is most likely, especially taking into account the current financial situation.

According to the information placed on the official Internet-site of the State Customs Service of Ukraine⁹, in response to the *Letter No. 11/3-10.21/6096-EII* the Ministry of Economy of Ukraine and the Ministry of Justice of Ukraine confirmed that *Resolution No. 230* should be regarded as effective and applied. Besides, the Committee of the Parliament for Tax and Customs Policy stated that *Resolution No. 230* should be effective until Parliament adopts the respective law.

In the meantime the Draft Act of Ukraine *On Amending Some Laws of Ukraine (in respect of Temporary Surcharge to Current Rates of Import Duty) No. 4767 of 8 July 2009*⁸ (the Draft) has been registered in Parliament. The said Draft provides for, among other things, that (a) any temporary import surcharge established under the *Balance of Payments Act* and further amended by *Resolution No. 230* prior to *Decision No. 15-pn/2009* coming into force shall be regarded as effective (in future the list of products subject to the surcharge as well as rate thereof shall be amended only by law) and (b) the term of application of the 13% import surcharge shall be 12 months, instead of the 6 months initially set out. However, taking into consideration the current political situation, it is unclear whether the Draft will be adopted.

We believe that the inconsistency in the application of the 13% import surcharge may negatively affect Ukraine's image as a stable and predictable country and also may be regarded as a breach of WTO principles. That is, predictability giving businesses a clear view of their business opportunities, especially if the 13% import surcharge is again applied to the list of products initially provided for by the *Balance of Payments Act*. Also if the said surcharge is applied after 7 September 2009, there is a risk that other WTO members will introduce counter measures against Ukraine or will initiate the dispute settlement procedure. ■

⁷ The Background Document by Secretariat, Consultations with Ukraine, WT/BOP/S/16 of 29 June 2009// [http://docsonline.wto.org/gen_home.asp?language=1&_=">](http://docsonline.wto.org/gen_home.asp?language=1&_=)

⁸ http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=35742

⁹ http://www.customs.gov.ua/dmsu/control/uk/publish/article?art_id=1385322&cat_id=295923