

## Ukraine's Accession to the WTO: Strategy and Impediments\*

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**ABSTRACT.** This paper focuses on issues surrounding Ukraine's internal efforts for WTO accession given the importance of completing the negotiation process prior to the December 2005 Hong Kong Ministerial Conference. The paper is divided into two sets of issues: first, Ukraine's prospects of acquiring WTO membership, including procedural questions, in the near future, and second, the substantive conditions for completing the accession process and the associated problems that require immediate attention. Among other matters, the paper describes the current procedure for WTO accession and proposes an optimum scenario for Ukraine's membership, identifying the necessary measures, timeframes and risks that threaten the prescribed tasks. It also highlights major institutional problems that are hindering the harmonization of Ukrainian laws with GATT/WTO rules and offers a WTO-consistent legislative and regulatory action plan with specific proposals on amending relevant laws. The paper also illustrates the major problematic aspects of multilateralism that are impeding the completion of the negotiations. Furthermore, the author offers several proposals concerning approaches to and techniques for addressing these challenging issues.

**KEYWORDS.** The World Trade Organization (WTO), Ukraine's accession to the WTO, the Working Party (WP) on Ukraine's WTO accession, WTO member-states, WTO accession procedure, WTO General Council (GC), domestic laws harmonization, foreign trade policy (regime), problematic issues of Ukraine's WTO accession.

Ukraine's WTO accession is one of its government's foreign policy priorities. It is viewed to be a systems-level factor in the development of the national economy, the liberalization of foreign trade

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\* The paper focuses on the practical aspects of Ukraine's WTO accession process and is based on the author's personal work experience with WTO-related matters in various state agencies of Ukraine. It was submitted for publication spring 2005 and reflects the status of Ukraine's accession at that time. It was translated into English from the original in Ukrainian.

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and the creation of a predictable and transparent business environment that is conducive to the attraction of foreign investment and that reflects Ukraine's national interests.

The past two years have seen significant progress in Ukraine's advancement towards WTO membership. Such progress is marked by the signing of 21 out of a total of 32 bilateral agreements on goods and services markets access, agreement on up to 70 per cent of the Working Party's (WP) draft report, and the final stage of negotiations on access to Ukraine's goods and services markets. Acting in conjunction with other central executive authorities, Ukraine's Ministry of Economy has been consistently working towards completing bilateral talks with the WTO member-states and harmonizing Ukraine's legal framework with WTO agreements. Parallel to these efforts comprehensive work has been carried out in preparation of the regular session of the WP on Ukraine's WTO accession to expedite, to the extent possible, the negotiations and to prevent any unnecessary delays in Ukraine's admission to this organization.

In this regard, Ukraine's accession to the WTO would be best timed for the organization's Ministerial Conference that is held only once every two years and is next scheduled for mid-December 2005, especially so should Ukraine continue to expect to launch negotiations for European Union membership as soon as three years after obtaining an agreement on a Ukraine-EU joint action plan. The timing for WTO accession appears to be especially relevant and favorable since at this current moment in the process, Ukraine's aspiration for WTO membership is being supported by all major members of the organization.

### **Procedural Outlook of Ukraine's WTO Accession in 2005**

Today, one of the first foreign economic policy priorities assigned to the Government of Ukraine by the president is Ukraine's accession to the WTO by 2005. What are the realistic procedural prospects of accomplishing this goal?

The answer to this question must begin with an overview of what would be the final stage of Ukraine's WTO accession. The secretariat, on behalf of the WP on Ukraine's accession, prepares a package of documents pertaining to the applicant's accession and consisting of the Working Party Report and Accession Protocol, including the Decision on Accession, Schedule of Commitments and Concessions with respect to goods and services, and a Schedule of Specific Commitments in the Services Sector. The process nears completion with

the final session of the Working Party which preliminarily approves the accession documents and recommends to the WTO General Council (or the Ministerial Conference) that the applicant be admitted to the WTO. The WTO General Council (or the Ministerial Conference) holds a session and approves the accession documents package with two thirds of the votes to pre-empt a veto situation and at least one objection from the membership which can block consensus, the basis for WTO approval and decision-making. In practice, however, decisions of this nature are made on a consensus basis. It should be noted that the documents package may be approved (i.e. a final decision on a country's admission to the WTO may be made) by the WTO General Council or the Ministerial Conference, meaning that there is no strict dependence on the Ministerial Conference. The Protocol on Accession enters into effect the 30<sup>th</sup> day following its endorsement by the applicant. This endorsement may be made in the form of a signature, or — in case parliament's approval is necessary — through the appropriate legal mechanism for ratification.

In light of the fact that the majority of experts tend to connect Ukraine's accession to the WTO to the December 2005 Ministerial Conference in Hong Kong, it is worth describing the WTO's decision making system at work and the nature of interaction between the WTO General Council and the Ministerial Conference. The Ministerial Conference is the supreme body of the WTO and convenes once every two years to make decisions on strategically important matters and avenues of its membership activities.

Composed of representatives of all WTO member-states and reporting directly to the Ministerial Conference, the General Council is a second tier body in charge of addressing all day-to-day matters in between the Ministerials, monitors compliance with WTO agreements and ministerial decisions and acts on behalf of the Ministerial Conferences.<sup>1</sup> In practice, the General Council sits regularly three to four times a year (though at least twice) even though there are no strictly prescribed timetables for conducting the General Council meetings and to the extent that issues emerge requiring the attention of the Council members. The last two General Council meetings took place in August and December 2004. It may be confidently predicted that in 2005, given the upcoming Ministerial Conference and a multitude of matters associated therewith, the General Council will sit at least twice.

Based on the outcomes of negotiations with WTO members and preparations for a regular session of the Working Party on Ukraine's

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<sup>1</sup> See the WTO official website: [http://www.wto.org/english/thewto\\_e/gcounc\\_e/gcounc\\_e.htm](http://www.wto.org/english/thewto_e/gcounc_e/gcounc_e.htm)

accession to the WTO, there are substantial uncertainties associated with each aspect of Ukraine's accession scenario (see Table 1). In this respect, the following proposed scenario about Ukraine's accession to the WTO in 2005 is likely to unfold. To manage these uncertainties at least two formal and one informal WP sessions, complete with plurilateral negotiations on domestic support for agriculture, are required. The next informal session of the WP (taking into account the time needed to the Secretariat to process and circulate relevant materials provided by Ukraine and their review by the WP members) would take place approximately in late June – early July 2005 and would review the WP's draft report. It would also decide on a list of the draft report chapters that have to be finalized before the start of the next 15<sup>th</sup> WP session. It is expected that during this WP meeting, the plurilateral discussions of the aggregate measure of support (AMS) to agriculture by and large will be completed, while multilateral meetings on individual sectors of Ukraine's foreign trade regime (like *sanitary and phyto-sanitary measures (SPS)*, *technical barriers to trade (TBT)*, *TRIPS*, *trade-related investment measures (TRIMS)*, etc.) do not figure as part of an optimistic scenario. As the experience suggests, such thematic meetings may considerably slow down the pace of decision making over the WP draft report.

Thus, one of the key outcomes of the WP's 15<sup>th</sup> session must be a consensus over all problematic chapters of the draft report that have to be revised in order to accommodate decisions of the previous session: taxation regime, subsidies provided to individual production sectors, trade-related investment measures, technical, sanitary and veterinary control regimes, etc. In this respect as well, the completion of plurilateral negotiations on AMS to agriculture is contingent upon a study of a finalised regulatory mechanism for financing the agricultural sector.

A necessary outcome that must cap the preparations for and proceedings of the final 16<sup>th</sup> session of the WP has to be approval of the WP draft report and formation of a protocol on Ukraine's WTO accession for subsequent approval at the Hong Kong Ministerial. It should be underlined, however, that the proposed scenario takes into account a concurrent completion of bilateral negotiations on access to goods and services markets with the remaining nine member-states, which only increases the uncertainties of its implementation.

From a procedural standpoint, a decision on Ukraine's accession may be passed by the General Council prior to the 2005 Ministerial Conference. However, given the experience of prior WTO accessions and the importance of a longer period of time for a final review of the Ukrainian documents package, it is more likely that such a rec-

ommendation may be issued to the Ministerial Conference or the General Council which in turn will approve a recommendation to the Conference to pass a positive decision. In case Ukraine's accession is not approved by the 2005 Ministerial Council, from a procedural perspective the General Council may decide on Ukraine's admission at any of its meetings subject to an appropriate submission of the WP.

In addition to a settlement of all outstanding legislative issues, it should be noted that completion of the accession process in 2005 requires a decision at the highest intergovernmental level, in the first instance among the United States, Australia and China. Most importantly, such agreements must be achieved literally within the next few months since an informal session of the WP will have to substantially review and edit them. In addition, the 15<sup>th</sup> WP session must consider a final draft version of the accession protocol as well as other elements of the accession package.

An optimistic scenario of the completion for the negotiations within the WP is based on five principal stages<sup>2</sup> which will allow Ukraine to achieve a fully fledged membership.

During the first stage (late June – early July) the regular informal session of the WP must prepare, conduct and agree to a list of the outstanding chapters of the draft report that have to be finalized during the next 15<sup>th</sup> WP session. Plurilateral negotiations on AMS must be completed by and large, as well as submission of recommendations on *support volumes calculations adjustment*. The implementation of these activities may be hindered by uncertainties associated with the legislative process of Ukraine's membership in the WTO, an inconsistency in the positions of individual ministries and agencies with respect to Ukraine's draft commitments as reflected in respective chapters of the WP report, and the necessity of reviewing the calculated volumes of AMS to agriculture and their respective reductions.

In the second stage (September) it would be necessary to guarantee the preparation, passage and acceptance of conclusions of the 15<sup>th</sup> WP session as per the WP draft report. The acceptance of these conclusions should be preceded by a resolution of all problematic chapters of the draft which remain to be resolved before the next WP session. Plurilateral negotiations on AMS must be completed. The realization of these measures may be hampered by uncertainties pertaining to delays in the legislative process involving the most problematic chapters of the WP report, such as a tax regime, TRIMS, technical, sanitary and veterinary control regimes, etc., disagreement among the WP members on revised volumes of AMS to

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<sup>2</sup> As suggested by the author.

agriculture, as well as a loss of momentum in the process of a regulatory mechanism for financing the agriculture sector.

During the third stage (late October – early November), the final and 16<sup>th</sup> session of the WP must be planned and meet in order to approve the draft report. Following this the WP would instruct the Secretariat to prepare a protocol on Ukraine's WTO accession for subsequent approval by the Ministerial Conference in Hong Kong. The challenges that may arise at this stage include a delay in the legislative process that is necessary to harmonize national laws with WTO rules and principles, problems with the application of the most challenging chapters of the WP report (tax regime and subsidies to individual sectors, TRIMS, technical, sanitary and veterinary control regimes, intellectual property rights protection, etc.) and which were enacted as a condition for WTO membership, and the necessary finalization of AMS calculations.

At the fourth stage (tentatively 30 November), the WP Secretariat would prepare a protocol and finalise revisions to the WP draft report, while the WTO Secretariat would consider the Protocol of Ukraine's WTO accession as an agenda-item for the WTO Ministerial Conference. This stage is potentially undermined by a very limited timeframe in which a protocol by the WP Secretariat would have to be prepared and which is aggravated by disagreements among the WP members about including Ukraine's accession in the agenda of the Ministerial Conference.

At the fifth stage (15-19 December, Hong Kong) the protocol on Ukraine's accession to the WTO would be approved at the Ministerial Conference and without any apparent challenges.

### **Trade Policy Development and Institutional Capacity Building: Problems**

Presently, certain problems exist concerning the development of a national trade policy and effective interdepartmental coordination of a foreign trade policy. These problems obtain for two important reasons. First, there has been no clear and consistent trade policy in place. Indeed, the legal framework governing foreign trade has not always been sustainable and predictable. For instance, until recently, laws and regulations were passed that conflicted with the rules and principles of the WTO. Thus, such problems of inadequate coordination, which occur between the government and the Verkhovna Rada as well as interdepartmentally, concerning WTO accession-related matters are ultimately significant since they challenge the accession process. Accordingly, draft laws are likely to contra-

dict WTO principles and rules because their compatibility from a legal perspective is not previously examined.

This problem is exemplified by the 23 December 2004 draft resolution of the Cabinet of Ministers of Ukraine, On the Approval of the Procedure of Payment of Fees Connected with the Protection of Objects of Intellectual Property Rights, that established a mechanism for collecting fees related to the protection of intellectual property rights and which conflicts with WTO requirements. This bill was approved notwithstanding comments provided by the Ministry of Economy. In this context, effective interaction among units even within the Ministry of Economy is of particular significance to ensure that draft laws and regulations contradicting WTO and other related standards are not enacted.

Some time ago, a decree of the Ministry of Economy On the Compulsory Coordination with the Interdepartmental Commission on WTO Accession of Draft Regulations Pertaining to Ukraine's Foreign Trade Regime Reforms had been approved. Among other things, this decree established the compulsory examination of draft regulations, being either developed or submitted for approval, that deal with Ukraine's foreign trade regime to verify their compatibility with WTO requirements and requires that such drafts be approved by the Department for WTO Cooperation, the secretariat of the Interdepartmental Commission on WTO Accession. In this respect, some individual foreign trade-related acts have not always been submitted to the WTO cooperation department.

The second reason for problems concerning the development of a national trade policy and interdepartmental coordination is the inadequate capacity of Ukraine's governmental agencies to develop and effectively pursue trade policy in general. This problem of inadequate capacity is exacerbated by the lack of coordinated activities between the government and the Verkhovna Rada concerning WTO accession. As a result, it is difficult to talk about any national consensus on WTO accession. Such a state of affairs may seriously hamper accession in 2005 and obstruct parliament's anticipated ratification of the results of accession negotiations, thereby hindering the implementation of related commitments.

### **The Legal and Regulatory Framework as a Precondition for WTO Membership**

One of the key tasks for preparing Ukraine's accession is the harmonization of domestic legislation with WTO rules and principles. Thus, any acceleration in the bilateral and multilateral negotiations

and their completion as well as movement towards WTO membership depends on the passage of appropriate laws and regulatory acts. Despite the efforts of relevant agencies to address the problem of legislative guarantees, periodically problems occur which, as was mentioned above, result from the absence of an efficient legislative mechanism to coordinate among all branches of power. Specifically, the introduction of a law on new tariff and non-tariff barriers in trade implies a shift in trade policy away from liberalization and thereby reduces the likelihood of WTO membership in 2005.

The following developments are illustrative:

- Approval of the Resolution of the Cabinet of Ministers of Ukraine on 19 January 2005 to introduce licenses and quotas on the export of coal tar pitch that is unrelated whatsoever to the protection of domestic producers and instead is a blatant example of lobbying on behalf of individual business interests;
- Failure by the Verkhovna Rada of Ukraine to pass «priority» laws, including the draft Law of Ukraine On Amendments to Certain Laws of Ukraine (dealing with a new procedure for effecting transactions associated with the transfer across Ukraine's customs border of media for laser reading systems). The bill, which the Ukrainian delegation expected at the next informal WP meeting considering Ukraine's membership in the WTO, never received the necessary political support and was rejected by the Verkhovna Rada on 31 May 2005 after the second hearing.

Another example of the protraction of Ukraine's WTO accession is that concerning the approval of a prepared package of draft laws governing sanitary, phytosanitary and veterinary measures. Due to the failure of state authorities, specifically the Ministries of Health and Agrarian Policy, to agree on a division of powers, these bills have not been submitted for review by the Cabinet of Ministers of Ukraine for several months now.

At the next informal meeting of the WP tentatively scheduled for late June or early July 2005, the Ukrainian delegation must show convincing progress towards the harmonization of domestic laws. Otherwise any failure to meet agreed-to commitments compromises the WTO member-states' decision on Ukraine's admission in 2005. Therefore, in order to bolster Ukraine's accession in 2005 as instructed by President Viktor Yushchenko and to secure a positive decision to this end by the WTO member-states, today it is imperative that expedient, consistent and coordinated efforts be taken by the state authorities — primarily the Verkhovna Rada and the government — in order to formulate a transparent and non-discriminatory trade policy of Ukraine and obtain respective legislative support over the next one hundred days. This has

very specific implications, such as the abolition of approximately ten resolutions of Cabinet and the passage or amendment of some 20 – 25 laws to indicate the approval of respective governmental decisions. Mr. Sergio Marchi, Chairman of the Working Party on Ukraine's accession, has repeatedly pointed out that «the WP members are trying to receive an explanation of how and when legislation consistent with the WTO requirements will be enforced and implemented.»<sup>3</sup>

In order to meet this expectation, address legislative problems and harmonize Ukraine's regulatory framework with WTO rules and principles, Ukraine's foreign economic laws were scrutinized, resulting in a list of required draft laws in order that Ukraine's legislation conform with WTO standards. This list also justifies from the WTO standpoint the necessity of approving a statute and is structured by economic sectors or types of business activity.

Thus, in the field of foreign economic and export regulation, this list includes the following:

- a Draft Law on Amendments to the Law of Ukraine on Foreign Economic Activity (new edition) with respect to conforming provisions of the law with WTO agreements, including in particular issues of import quotas, licenses, regulation measures, etc.;
- a Draft Law on Amendments to the Law on Export Duty on Waste and Scrap of Ferrous Metals which reduces export duty from 30 to 25 Euros per ton effective 2006, and to 18 Euros per ton effective 2007;
- a Draft Law on an Export Duty on Waste and Scrap of Non-ferrous Metals and Alloy Steels which effectively replaces the ban on non-ferrous scraps with the institution of an export duty on these products (WTO agreements prohibit the restriction of foreign economic activities in this way);
- a Draft Law on an Export Duty Rates for Seeds of Individual Oil Crops which, at the time of Ukraine's accession, institutes a 16 per cent export duty on sunflower seeds, *flax* and *false flax* with subsequent one percent annual reduction until the duty reaches ten percent;
- a Draft Law on an Export Duty on Live Animals and Raw Hides which reduces export duty on cattle hides and eliminates duty on livestock.

In agriculture, the list of laws required for Ukraine to conform with WTO regulations includes:

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<sup>3</sup> Marchi, S., 'Ukraine's Membership in the World Trade Organization', *Mizhnarodna ekonomichna polityka*, Kiev, vol. 1 (31), June 2004, pp. 3—10.

- ◆ a Draft Law on Amendments to the Law of Ukraine on State Regulation of Sugar Production and Distribution which removes the mandatory export of sugar refined from imported raw sugar and the abrogation of *B and C quotas* within the existing quota system that are not being used and that run counter to the WTO Agreement on Agriculture;

- ◆ a Draft Law on Amendments to Certain Laws of Ukraine which reduces import duties on a group of agricultural products to ensure conformity with agreements reached during negotiations on Ukraine's WTO accession;

- ◆ a Draft Law on Amendments to the Law of Ukraine on AMS for Agriculture of Ukraine which conforms with the system and tools of state support to agriculture in the WTO Agreement on Agriculture and Agreement on Subsidies and Countervailing Measures, and eliminates articles that apply minimum and maximum purchase prices to imports and exports of agricultural products, grants the government the right to institute «non-tariff restrictions (quotas) with respect to the import and export» of certain types of agricultural products and the establishment of a «special budget subsidy for the export» of agricultural products;

- ◆ a Draft Law on Amendments to the Law of Ukraine on Milk and Dairy Products which removes export subsidies on dairy products;

- ◆ a Draft Law on Amendments to Certain Laws of Ukraine with Respect to Taxation of Agribusinesses and Maintaining Social Standards of Their Employees which terminates the discriminatory VAT taxation system whereby a ten per cent rate applies to domestic producers and twenty percent to foreign suppliers.

In the automobile industry, the list of laws required includes:

- a Draft Law on Amendments to the Law of Ukraine on the Development of the Automobile Construction Industry in Ukraine which abrogates Article 4 that laid grounds for granting privileges and provided for the mandatory use of domestically produced parts and components contrary to the WTO TRIMS agreement;

- a Draft Law on Certain Aspects of the Importation of Vehicles into the Customs Territory of Ukraine which cancels the ban on the importation of used buses and trucks that had been in service for over 5 years and restricts the service life for buses and trucks to eight years; the bill also raises requirements concerning the environmental and technical condition of vehicles over 5 years old for import into Ukraine;

- a Draft Law on Amendments to Certain Laws of Ukraine which cancels advantages to auto makers, in particular VAT and excise duty payments.

The list also includes the following required laws in the field of taxation:

- a Draft Law on Amendments to Certain Laws of Ukraine on Taxation, including the Laws on Taxation System of 25 June 1991 and on the Value Added Tax of 3 April 1997 in order to consolidate national treatment in taxation;
- a Draft Law on an Excise Duty consolidating the application of national treatment on excise duty on any goods;
- a Draft Law on Amendments to the Law of Ukraine on Rates of Excise Duty on Ethyl Alcohol and Spirits which lifts discriminatory rates of excise duty on the importation of spirits;
- a Draft Law on Local Taxes and Charges which establishes national (equal) taxation treatment for foreign legal entities and persons without citizenship.

In the field of subsidies, the list includes the following required laws:

- ◆ a Draft Law on State Assistance which establishes legal, economic and organizational foundations for the provision, use of and control over state assistance rendered to business entities in Ukraine in compliance with WTO requirements, specifically with the *Subsidy and Compensation Measures Agreement*;

- ◆ a Draft Law on Amendments to the Law of Ukraine on the 2005 National Budget of Ukraine which cancels target subsidies to individual enterprises and discriminatory use of treasury bills for non-residents, specifically, the termination of VAT advantages for individual sectors is advised:

- automobile construction, namely with respect to the two enterprises that are operating under the former Law № 535/97 (Companies operating under Law № 1624-IV since 2004 receive no VAT benefits);

- shipbuilding (Law No. 1766-IV of 15 June 2004 extended the VAT benefit until 1 January 2012);

- aircraft construction (according to item «r» of Article 19 of the Law of Ukraine on Single Customs Tariff of 5 February 1992 № 2097-XII, taxation benefits apply during the period from 1 January 2002 until 1 January 2007 to materials, components and equipment; pursuant to Article 3 of the Law on State Support to Aircraft Construction Industry in Ukraine of 12 June 2001 № 2660-III);

- a Draft Law on Amendments to Certain Laws of Ukraine in Regard to the Establishment and Operation of Special (Free) Economic Zones (SEZs) and the Institution of Special Investment Regimes Within Priority Development Areas (PDAs) which addresses the outstanding problems of preferential taxation of entities within SEZs and PDAs, and the institution of provisions that will ensure special territories develop in line with international standards;

—a Draft Law on Amendments to Certain Laws of Ukraine in Regard to the Establishment and Operation of Special (Free) Economic Zones (SEZs) and the Institution of Special Investment Regimes Within Priority Development Areas (PDAs) which restrict the granting of VAT privileges to SEZ and PDA entities and establishes a mechanism for preventing the use of a special economic zone to claim ungrounded VAT refunds from the budget of Ukraine;

—a Draft Law on a Moratorium on the Review and Approval of New Investment Projects Within Special (Free) Economic Zones (SEZs) and Areas with Special Investment Regime (until 2010) which prohibits preferential conditions for goods production during the implementation of new investment projects.

The required laws for customs regulation include:

- a Draft Law on Amendments to the Customs Code of Ukraine that conforms provisions of the Code with WTO requirements, more specifically the determination of the origin country of goods and customs duty, and enforcement of Annex 1 (Explanatory Note) according to the WTO Customs Valuation Agreement;

- a Draft Law on Amendments to Certain Laws of Ukraine to change customs inspection procedures of goods and vehicles at the customs border.

In the field of safeguard measures, required laws include:

- a Draft law on Amendments to the Law of Ukraine on the Protection of Domestic Producers Against Dumping that regulates the dynamics that stem from antidumping violations and the investigations of such, and the application of antidumping measures according to investigation outcomes;

- a Draft Law on Amendments to the Law of Ukraine on the Application of Safeguard Measures with Respect to Imports into Ukraine that establishes international standards of safeguard investigations.

In the field of sanitary, phytosanitary measures and technical barriers in trade, the necessary laws include:

- ◆ a Draft Law on Amendments to Certain Laws of Ukraine governing the application of sanitary and phytosanitary measures, as well as:

- ◆ a Draft Law on Amendments to the Law of Ukraine on the Safety and Quality of Foodstuffs and Raw Materials;

- ◆ a Draft Law on Amendments to the Law of Ukraine on Veterinary Medicine;

- ◆ a Draft Law on Amendments to the Law of Ukraine on Quarantine of Plants;

- ◆ a Draft Law on Amendments to Certain Laws of Ukraine.

These draft laws harmonize regulation in respective areas with the WTO's SPS Agreement.

- a Draft Law on Development and Application of Standards, Technical Regulations and Conformity Assessment Procedures to harmonize domestic legislation with the WTO's TBT Agreement;
- a Draft Law on the General Safety of Products establishing legal and organizational foundations for assuring the safety of marketed products and drafted according to the European Union Directive on General Safety of Goods № 2001/95/EU.

In the field of trade in services, the following laws are required:

- ◆ a Draft Law on Amendments to the Law of Ukraine on Insurance which promotes effective market access by liberalizing the operation of branches of non-residents in Ukraine within five years of Ukraine's accession to the WTO;
- ◆ a Draft Law on Amendments to the Law of Ukraine on Banks and Banking granting foreign banks the right to open branches in Ukraine;
- ◆ a Draft Law on Amendments to Article 13 of the Law of Ukraine on TV Radio Broadcasting which increases the foreign capital share in the TV and radio companies equity from 30 to 35 per cent;
- ◆ a Draft Law on Amendments to the Law of Ukraine on Auditing which grants to any person the right to perform audits on the condition that a certificate of qualification to perform auditing activities in Ukraine is obtained;
- ◆ a Draft Law on Advocacy which lifts the citizenship requirement for performing attorney services in Ukraine.

The required laws in the sphere of intellectual property rights include:

- a Draft Law on Matters Related to the Harmonization of Ukrainian Laws with the WTO's Multilateral Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) to improve the legal protection of intellectual property rights with respect to licensing, production, export, import of discs and matrixes for their production, harmonize domestic laws with TRIPS requirements and remove any conflicts with the laws of Ukraine.

It is apparent that a substantial legislative effort remains for Ukraine to harmonize its laws with WTO rules: the total number of laws required to be passed is 38 of which six have to be approved in the field of SPSS measures and technical barriers in trade. Five laws have to be enacted in each of such important areas as agriculture, subsidies, trade in services and foreign trade and export regulation. These acts account for 68 per cent of all draft laws, although this is not to suggest that legislation in the remaining domains is of lesser importance.

Nonetheless the legislative effort must be sustained by a set of organizational measures, including:

- the urgent development and approval by ministries and agencies of the laws and regulations necessary for WTO accession, including those mentioned above;
- submission of these bills for top priority review by the Verkhovna Rada;
- support of these bills for processing by the relevant Verkhovna Rada committees and their passage by the Verkhovna Rada.

Rapid decisions and movement on these matters will prove Ukraine's commitment on the one hand and readiness of the WTO member-states on the other to signal positively Ukraine's accession in December 2005 at the Hong Kong Ministerial.

### **Systemic Problems of Ukraine's Foreign Trade Regime Incompatibility with WTO Rules**

Ukraine's WTO accession negotiations are a systemic determinant of Ukraine's trade policy and relations with WTO member-states and are about more than reaching agreements on import duty reduction schedules and access to services market with WP members.

Thus, the following major issues have resulted in the delays in Ukraine's accession ranked according to the degree of priority, namely, top priority, high priority and situational priority, and their outcome is dependent on the further course of negotiations, including the loss of their significance for the negotiation parties, depending on the current agenda.

#### ***In agriculture***

*Reforming the system of state support to agriculture to instead feature heavier reliance on WTO-permitted support measures, the so called «green box», and agreement on the real amount of the aggregate measure of support (AMS) to agriculture (top priority).* Negotiations on agriculture as part of Ukraine's accession process began in 1997 and focused on identifying 1994-1996 as the base period for further discussions and which was in line with the WTO practice and Secretariat's recommendations. Accordingly, Ukraine determined its AMS, i.e. direct financial support, at US\$1.14 billion. In light of the lengthy negotiations process, Ukraine subsequently was asked to alter the base period to 2000 – 2002 which was considered to be more indicative and realistic (AMS equals al-

most US\$1.1 billion). Australia has been the most firm on this question. Ukraine prepared and submitted to the WTO Secretariat a «Background materials on the scope of state support necessary for the agriculture development strategy implementation in Ukraine» to substantiate 1994–1996 as the base period for calculating AMS, complete with supporting reference calculations for 2000–2002. Negotiations over the level of support to agriculture are still ongoing.

Moreover, trade in agricultural products is the most pressing area of relations where agreements among the WTO member-states may substantially impact on Ukrainian agribusinesses. The largest volumes of support to agriculture are concentrated in three developed countries, which is why today Ukraine must comprehensively amend its level of domestic support to ensure a fair completion of reforms in this domain and avoid further trade distortions, in other words, to reach an agreement on the base period and amount of domestic support to agriculture at its negotiations with the WP members.

*Taxation (situational priority)* also raises a lot of concern and criticism in the view of the WP membership, in particular a special value added taxation regime. It should be noted that under Law #6363 on Amendments to Certain Laws of Ukraine (with Respect to Taxation of Agricultural Enterprises), the existing procedures for VAT collection from agribusiness continue for 2005. More specifically, VAT accumulation and a zero rate for milk and meat as a form of subsidy remain in place. Introduction of a new regime with a ten per cent VAT is suspended until 1 January 2006.

In addition, *the Law #1877 Ukraine on State Support to Agriculture in Ukraine of 24 June 2004* reflected an attempt to consolidate legislatively the Ukrainian government's position in negotiations over agriculture. However, in order for this Law to be implemented based on an integrated and long-term policy of support to the relevant sector, measures and programs have to be devised that reflect the necessary regulations concerning the agreed base period and substantiate the level of support to agriculture in Ukraine which will strengthen the effective enforcement of this law.

### ***In the sphere of access to service market***

*Ensuring conditions for access to the insurance services market and permission to establish insurance companies branches (top priority).* The transition period of five years following Ukraine's accession as suggested by Ukraine for lifting restrictions on the establishment and operation of branches of insurance companies and for drafting the necessary legislation will require further coordination

and discussion with interested countries, primarily with the US, on the acceptability of such commitments for the WP members. Moreover, a separate strategy for the development of Ukraine's insurance sector after accession needs to be formulated.

*Securing conditions of access to audiovisual services markets (high priority).* Ukraine maintains a firm position that was adopted jointly with the European Union and reflected in a corresponding bilateral protocol. This stance presupposes the non-assumption of specific commitments in regard to audiovisual services. It is of paramount importance inasmuch as Ukraine, being a European country negotiating WTO accession, must provide for commitments in this sector based on its national interests and in correlation with the commitments of its European Union partners which offer MFN exemptions that ensue from relevant conventions and agreements of the Council of Europe, and in particular without compromising Ukraine's membership in the *Euroimages* Film Co-production Fund, accession to the European Convention on Cinematographic Co-production and participation in the Union's cultural programs. This position is unacceptable for the US which insists on the assumption of certain commitments in the sector which require the European Union's agreement.

*With respect to access to information agencies and services, the US is not satisfied with the increase in the foreign investment amount from 30 to 35 per cent (situational priority)* as per the Law № 1379-IV on Amendments to the Law of Ukraine on Information Agencies of November 2003.

*Regarding the assumption of commitments on non-discriminatory taxation in the services sector (situational priority),* Panama insists that this lead to the cancellation of a special regime of foreign trade taxation applied to countries who are included in an offshore zones list.

### ***Multilateral matters of foreign trade regime***

*Harmonization of technical regulation system, application of Ukrainian sanitary, phytosanitary and veterinary measures (high priority).*

In order to reform the standardization system and to harmonize it with the WTO Agreement on Technical Barriers in Trade (TBT), the Law on Standards and Technical Regulation and on Conformity Confirmation Procedures must be passed. In addition, an action plan for achieving complete conformity of technical regulations and standards with the TBT Agreement must be devised to substantiate the

necessity of a transitional period for such an exercise. However, the current pace of work in this direction does not correspond with the imperative completion of the accession process in the nearest future.

The harmonization of Ukrainian laws governing sanitary, phytosanitary and veterinary controls with WTO requirements depends on Ukraine's approval of a series of draft laws, including on Amendments to the Law of Ukraine on Safety and Quality of Food and Raw materials, on Amendments to the Law of Ukraine on Veterinary Medicine, on Amendments to the Law of Ukraine on Plants Quarantine and on Amendments to Certain Laws of Ukraine.

Bearing in mind that a successful harmonization of Ukrainian laws with the WTO's SPS Agreement will enable the conclusion of Ukraine's accession negotiations, of utmost urgency is to find the right methods for addressing this challenge and avoid unnecessary delays in preparing the submission of these bills to Cabinet and the Verkhovna Rada.

***Ensuring equality in taxation conditions  
for domestic and foreign producers,  
and improvement of a mechanism of VAT refund  
to exporters (high priority)***

*Budgetary policy of Ukraine (high priority).* Some of the provisions of Ukraine's budgetary policy include a discriminatory application of treasury bills for residents and non-residents and the introduction by the government of a minimum customs value. It also includes the postponement until 1 January 2006 of the enactment of provisions of the Customs Code of Ukraine which deals with the clearance of goods and vehicles off the premises of customs authorities or during off-business hours, which, despite proposals to delete them, otherwise remain part of the Law #2285 on the State Budget of Ukraine dated 23 December 2004 and conflict with WTO agreements, thereby obstructing Ukraine's accession to the WTO.

*The question of protection of intellectual property rights in laser disks production (top priority) lingers on as an outstanding issue in bilateral negotiations with the US.* A related Draft Law was rejected by the Verkhovna Rada and a review of its latest version has been postponed several times. The US has sent a clear message that a lack of progress on this matter will complicate significantly the conclusion of bilateral negotiations on accession.

*The cancellation by Ukraine of compulsory sanitary and epidemiological examination of imported audio and video electronic de-*

*vices (TV sets, VCRs, etc.) and shortening of a list of products subject to mandatory certification.*

Ukraine has been consistently working to reduce the list of products subject to sanitary and epidemiological inspection, a list which is already shrinking annually. Nevertheless, an extensive list remains of information-technology related products which still require mandatory inspection. Even so, according to a risk assessment conducted by the Ministry of Health, the list of products exempted from sanitary and epidemiological inspection now includes 23 groups and, out of another 44 product groups, which is the subject of Japan's concerns. However, the Ministry of Health considers that the lifting of mandatory inspection is ungrounded as its cancellation may lead to an uncontrolled flow of products hazardous for human health into Ukraine.

*Legal arrangements for employment of foreign nationals, specifically the category of intracorporate transferees (situational priority).* The WTO members expect that commitments in the services schedule (granting three-year visas with permanent automatic two-year extensions for intracorporate transferees, and cancellation of a requirement to obtain an employment permit for these categories) will be duly enshrined in the appropriate laws.

A serious factor delaying the completion of bilaterals with the European Union is the existing discriminatory provisions of the national laws on taxation (VAT and excise duty collection) of automobiles production and distribution (top priority) in the Law № 1624 on Development of Automobile Production Industry dated 18 March 2004. These provisions conflict with the agreement in place and the harmonization of Ukrainian laws with WTO agreements. They also conflict with the Ukraine – EU Partnership and Cooperation Agreement and WTO rules. The Law, among other things, raises the level of tariff protection to vehicles from that agreed to with other WTO members and envisaged by Ukraine's Customs Tariff Transformation Concept. A rise in import duty rates during the negotiations process violates one of WTO's key principles – the standstill principle, and is negatively perceived by counterparts in the negotiations.

*Application of discriminatory excise duties (situational priority).* The Moldova delegation has demanded that the regime of discriminatory excise duties on wines and spirits be lifted.

*The import into Ukraine from SEZ goods produced or processed in special customs zones [customs duty (import or export)] (high priority).* For some zones, goods produced in ??? zones and cross a customs border are exempt from duties, including import duty, that are levied on imported materials and other components provided

that the good qualifies as having been produced in a zone that is subject to Ukraine's rules of origin. This violates a principle of non-discrimination of foreign trade entities operating in free economic and special customs zones.

*Furthermore, a draft law that incorporates the WTO's Customs Valuation Agreement into national legislation (high priority) has not yet been developed.* Such a law would provide for a binding publication of court or administrative decisions pertaining to customs issues.

Finding solutions to the challenges described above depends on appropriate decisions at the highest levels of government that also accelerate negotiations with WP members and nearly complete them. Other prerequisites to Ukraine's accession to the WTO include Ukraine's compliance with agreements reached with the WP members and confirmed in respective bilateral protocols as well as fulfilling commitments assumed during the multilateral process without any changes (worsening) to them.

## Conclusions

Ukraine's WTO accession must be viewed not only as membership in an international organization, but rather as joining a United Nations for trade and economics. Membership in this organization is associated with profound changes in the foreign trade regime of the nation as well as with the entire regulatory system that must be compatible with essential features of a competitive market economy. Of this process, the interdependence between the liberalization of trade and economic activities and development of a regulated civilized market economy are essential components. WTO membership will provide a powerful impetus for several developments, including: an effective legal framework, a favorable market and investment environment, substantial structural transformations in the economy generally as well as in individual sectors, increased potential of export-oriented and hi-tech goods, and an enlarged presence in global markets. In addition, membership is instrumental for eliminating smuggling; in this respect, Ukraine's responsibility for fighting illegal imports has intensified since contraband threatens not only the Ukrainian market but also the markets of its trading partners.

In this context, of particular significance is Ukraine's national capacity to address rapidly the issues described above and to harmonize Ukrainian laws with WTO rules. At the same time, whether or

not Ukraine will join the WTO in the near future depends on a number of significant conditions:

(1) the government has to demonstrate strong political will (rather than wishful thinking) through its deeds and by creating institutional conditions for achieving accession;

(2) trade policy must be properly formulated and implemented;

(3) the negotiating skills and technical capacity of negotiators must continuously improve by way of respective training activities; and

(4) a comprehensive awareness campaign concerning trade in general and the WTO in particular must be launched to persuade political decision makers and the public of the necessity for Ukraine to become an equal player in the global trading system.

As a whole, given the current negotiations status, the level of arrangements made and the extent of agreed positions, it would be fair to argue that completing the bilateral process of Ukraine's WTO accession is possible in the current year if the right actions are taken.

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