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THE HISTORY OF THE PRINCIPLE OF TRANSPARENCY IN INTERNATIONAL TRADE LAW

ABSTRACT

The present article focuses on the evolution of the principle of transparency and its role in international trade law. The basis of the study is the international legal framework for the transparency requirements, most notably GATT 1947 and GATT 1994. The article traces the roots of transparency in international law and analyses its consecutive development throughout the 20th century and early 21st century. Author applied a number of general scientific and specific legal methods during the study. They allowed to carry out a comprehensive research

and analysis the major international treaties in the area of international trade and their evolving provisions on transparency. Author concludes that transparency has become one of the fundamental provisions in the current WTO system. This is indeed confirmed by the WTO Dispute Settlement Mechanism, which now treats the transparency-related claims as substantive claims. Author shows that it was not the case under the GATT 1947 system, which was inefficient to tackle non-transparent measures that started to occur in early 1970s. As a result, such measures severely impacted bilateral trade between many contracting parties to GATT 1947, mostly between Japan and the United States. Author also shows that the United States were the original architect of the transparency provision in GATT 1947, which was largely based on the American administrative law and was called to create a level playing field for American companies in foreign markets, as the United States provided a high level of transparency domestically. Later on, it was also the United States who advocated for the expansion of the transparency requirements in GATT 1994, and eventually ended up being targeted by numerous transparency-related claims in the framework of the Dispute Settlement Mechanism.

The key words: transparency, international trade, Article X GATT 1947, Article X GATT 1994, history of the principle of transparency.

Introduction

One could not help but notice how transparency has become one of the fundamentally distinctive traits of contemporary Western culture (Bianchi, Peters, 2013, p. 1). Nowadays, it seems absolutely natural for any civil society in a democratic state to have access to and a possibility to comment on most decisions and even remote initiatives that affect citizens' rights and interests. In fact, now transparency extends far beyond the legal matters and greatly affects our daily lives in various ways, including our personal relationships, technologies, healthcare and many others. However, it was not always the case, and transparency had to fight its way through to the texts of international treaties and conventions, including in the area of international trade.

The need for transparency has evolved unprecedentedly over the last century together with the development of democratic rule-based societies. The demand for greater transparency is closely linked to

what is widely considered a fundamental human right, that is freedom of information (Van Tran, 2016, p. 2). The vital role of transparency in public law was underlined long ago by Immanuel Kant who considered all “actions that affect the rights of other men are wrong if their maxim is not consistent with publicity” (Kant, 1983, p. 135).

Despite the fact that transparency in one form or another had been in the focus of philosophers even back in the 18th century, it emerged as a legal concept much later and evolved most rapidly during the 20th century. Notably, the fates of international trade law and the principle of transparency have been closely interlinked and mutually influenced one another in many ways.

Methodology

The present article outlines the key evolutionary steps of the principle of transparency based on the analysis of the most significant international treaties in the area of international trade, such as the Customs Convention, GATT 1947 and GATT 1994. The author conducted research using the common scientific and special legal methods. Specifically, the dialectical method helped to trace the roots of the legal basis of the transparency requirements in international trade. The author also used the formal legal and comparative methods in order to analyse the texts of the international treaties relevant for the subject-matter. In addition, the author relied on the methods of analysis, synthesis and conceptual forecasting in order to elaborate possible changes in the future role of transparency for international trade.

1. The League of Nations makes a track for transparency

Transition from philosophical thinking to direct application of transparency on the intergovernmental began in 1919 with the adoption of the Treaty of Versailles. Article 18 of the Treaty established that “every treaty or international agreement shall be registered by the Secretariat of the League of Nations” and “shall as

soon as possible be published by it". It further stated with respect to the correlation between publication of international agreements and their entry into force that "no such treaty or international engagement shall be binding until so registered".

Shortly after, the League of Nations also acknowledged the importance of transparency for international trade by adopting one of the most fundamental international legal provisions on transparency in the International Convention Relating to the Simplification of Customs Formalities of 1923 (hereinafter – the "Customs Convention"). Most notably, the Customs Convention established the rules for transparency and review at the national level of the contracting states. Thus, pursuant to Article 4, the Customs Convention required the contracting States to promptly publish all customs regulations in order to ensure that persons, whose interests might be affected by these regulations, are duly informed about all customs formalities (paragraph 2), including tariffs and all import and export prohibitions or restrictions (paragraph 4). Importantly, the publication requirement extends to successive additions and alterations affecting a considerable number of articles. In case of such modifications, pursuant to Article 5, any contracting State whose tariff has been modified must publish a complete statement, in an easily accessible form, of all the duties levied as a result of all the measures in force.

Furthermore, a regulating country was not allowed to enforce any customs regulations before making the latter publicly available with an exception that will be described below. In addition, the Customs Convention provided for an administrative, judicial or arbitral procedure if a dispute arose regarding the transparency commitments, however, no party ever resorted to this mechanism (Charnovits, 2005, p. 3).

The above-described requirements allowed all persons affected by customs formalities to get acquainted with all legal modifications and, therefore, to avoid the prejudice which might result from the

application of customs formalities of which they are ignorant. As a result, the contracting states had effectively adopted a provision that ensured equal treatment of all persons dealing with customs formalities through higher transparency. Moreover, Article 7 confirms this interpretation by obliging the contracting states to also take all necessary and appropriate measures to prevent the arbitrary or unjust application of their laws and regulations with regard to customs and other similar matters, and to ensure redress by administrative, judicial or arbitral procedure for those who may have been prejudiced by such abuses. It goes without saying that the contracting states had to make all such measures available to public.

As to the practical aspect of publication, Article 6 required each contracting State to communicate to the diplomatic representative of each other State all publications in order to enable contracting States and their nationals to become promptly acquainted with all the measures affecting their trade.

As mentioned above, the Customs Convention provided an exception to the requirement of previous publication in cases of an exceptional nature. In particular, the Customs Convention stated that in cases when previous publication would be likely to injure the essential interests of the country, the previous publication requirements lose their obligatory force. However, even in such cases, publication must take place simultaneously with the enforcement of the measure in question.

Following the adoption of the fundamental transparency norms in the Customs Convention, transparency became increasingly widespread beyond the area of international trade in subsequent years. A right to fair and public hearing, which is enshrined in Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the "ECHR") is one of many examples of how transparency found its way to other areas of international law. In particular, the above-mentioned provision requires all judgments to be pronounced publicly, and entrenches the

right of everyone to fair and public hearing. However, similarly to the Customs Convention, the requirement to pronounce all judgements publicly is not universal, as the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

In light of above, it is clear that not only did transparency receive its first legal significance in the context of international trade but also that it took a long time to adopt it in other areas of international law. Arika Iriye explains this time gap by the fact that transnational private interactions constitute a cornerstone of international trade and require the transparency mechanism in order for trade to be sufficiently predictable and sustainable (Iriye, 2002, p. 12).

2. The transparency requirement under GATT 1947

Another important step for the promotion of transparency took place with the adoption of the Administrative Procedures Act (hereinafter – the “APA”) of the United States in 1946. The main objective of the APA was to use due process and transparency as the tools to reasonably limit the executive discretion (Ala’i, 2007, p. 105). The adoption of the APA expectedly led to more transparent administrative procedures benefiting the states with export interests in the United States. However, after the enactment of the APA, the United States came to realize that the states, who welcomed the APA, did not provide a comparable reciprocal level of transparency for U.S. traders who faced informal administrative structures in importing countries. History showed that this factor had resulted in the adoption of a fundamental provision boosting the importance of transparency for international trade.

Shortly after the adoption of the APA, the United States proposed to add Article X to the General Agreement on Tariffs and Trade of

1947 (hereinafter – “GATT 1947”). The preparatory work of GATT 1947 states that Article X was partially based on the above-described Articles 4 and 6 of the Customs Convention. In addition, the Havana Charter contained a corresponding provision regarding transparency in Article 38. Interestingly, all 56 delegations at the Havana meeting accepted the U.S. draft of Article 38 despite its direct connection to American administrative law. In fact, Article 38 of the Havana Charter directly implemented Article 15 of the U.S. State Department document entitled “Suggested Charter for an International Trade Organization of the United Nations”, which later became incorporated into Article X of GATT 1947 without substantive modifications (Alexandroff, Ostry, Gomez, 2003, p. 132).

The contracting parties most probably did not see it as one of the defining moments for the principle of transparency in international trade law. Indeed, during the validity of GATT 1947, Article X was “a silent provision dismissed by panels as ‘subsidiary’ to other ‘substantive’ GATT provisions”, such as market access and non-discrimination (Ala’i, 2008, p. 780). Essentially, the contracting parties to GATT 1947 considered Article X mostly as a procedural provision lacking any substantive force. For this reason, there was no substantive discussion or amendment before the adoption of the article. In fact, at the time of enactment, a senior Canadian negotiator is quoted as stating that Article X contained no additional substantive requirements and, therefore, should not be of any concern to GATT Contracting parties. Consistent with this view, GATT panels make no reference to Article X in any adopted dispute report from 1947 to 1984. As an additional proof of lack of any substantive requirements, GATT panels did not refer to Article X in any adopted dispute report in the period from 1947 to 1984 (Ala’i, Vaughn, 2014, p. 370).

Pursuant to the final version of Article X of GATT 1947, all “laws, regulations, judicial decisions and administrative rulings of general application” (collectively “measures”) must be “published promptly in such manner as to enable governments and traders to

become acquainted with them.” Notably, the word transparency does not appear in the text but Article X establishes detailed rules for “publication and administration” of trade-related regulations emphasizing the desirability of independent tribunals and judicial review. In this respect, it should be noted that Article X ended up being weaker than the APA providing for the desirability rather than the necessity of independent tribunals and judicial review, potentially as a result of compromise in the negotiating process (Alexandroff, Ostry, Gomez, 2003, p. 30).

To some extent, the transparency provision might have appeared non-controversial or insignificant to the drafters of GATT 1947 because at the time it actually was. Practically speaking, the drafters concentrated on border barriers such as tariffs and quotas, which were quite clear and already transparent. The border barriers started to appear during the 1930s and led to catastrophic results for international trade even before World War II.

3. Expansion of transparency in the WTO

In early 1970s, the GATT system faced a new enemy that completely changed the perception of transparency by the contracting states. The 1973 oil crisis provoked the growth of the “new protectionism” measures, including voluntary export restraints (VERs), quasi-legal market sharing agreements (orderly marketing arrangements, or OMAs) and a spike in subsidies to support declining industries. The GATT system was not ready to tackle any of those non-transparent measures. The United States responded to the new challenge by proposing to cover the rules governing domestic policy directly and indirectly affecting trade during the Tokyo Round. Unfair trade practices and the “free ride” of the 1950s and 1960s in other countries only fueled the change in American trade policy stemming from the dissatisfaction of their large business groups and labour unions (Alexandroff, Ostry, Gomez, 2003, p. 133).

Furthermore, the Tokyo Round explicitly expanded the scope of transparency by adopting an “Understanding Regarding Notification,

Consultation, Dispute Settlement and Surveillance”. In particular, paragraph 3 of the Understanding introduced a modified version of surveillance and emphasized the desirability of prior notice. Both concepts were later significantly expanded in the WTO Trade Policy Review Mechanism (TPRM) promoted by the Functioning of the GATT System (FOGS) negotiating group during the Uruguay Round. The OECD “country studies” aimed at enhancing the effectiveness of the policymaking process through informed public understanding, that is transparency, served as the basis for the TRPM.

Nevertheless, the expansion of non-tariff barriers, including non-transparent administration of customs regulations, remained in place and became a growing concern for the contracting parties and especially the United States in the 1980s. As a result, starting from 1984, the United States started to invoke Article X of GATT 1947 in view of the difficulties faced by U.S. businesses with accessing the Japanese domestic market and strong competition from Japan in the U.S. domestic market (Ala’I, Vaughn, 2014, p. 371). The United States focused their Article X claims on non-transparent administration of import quota systems and on the extensive use of “administrative guidance”, targeting informal channels of communication used by the Japanese Government. Such non-binding guidance was very effective in limiting imports while the Government of Japan insisted that the guidance did not constitute governmental measures. The GATT panels confirmed in three adopted GATT reports that the practice of administrative guidance indeed constituted “a measure” within the meaning of Article XI of GATT 1947 (Elimination of Quantitative Restrictions) and was inconsistent with that provision. Interestingly, the GATT panels found it unnecessary to address the transparency claims under Article X, namely lack of publication or independent judicial review, since the measure itself was GATT-inconsistent regardless of whether it had been published or not (Panel report, *Japan – Leather*, paras. 24, 44, 57; Panel report, *Japan – Agricultural Products I*, supra note 24, 5.4.2, 6.2; Panel

report, *Japan – Semi-Conductors*, supra note 24, 35, 53, 128). Only one adopted GATT panel report adopted in the period from 1947 to 1995 confirmed a violation of Article X.2. In particular, the GATT panel ruled that the specific act of back-dating quotas on imports of dessert apples by the European Economic Community (EEC) was inconsistent with the publication requirement of Article X. At the same time, the panel found that the requirement of “uniformity” in administration provided for by Article X:3(a) did not require EEC Members to have identical administrative procedures concerning the import of dessert apples (Panel report, EEC – *Restrictions on Imports of Dessert Apples*, paras. 12.29-12.30).

With the establishment of the World Trade Organization (hereinafter – “WTO”) in 1995, transparency of trade-related measures has become a fundamental objective of the multilateral trading system with trade disputes increasingly focusing on the transparency obligations of Member States under the WTO covered agreements. This further evolution of transparency was possible mainly due to the transformation of the consensus-based system of GATT 1947 into a rule-based system, expanding beyond trade in goods (GATT 1994) and encompassing trade in services (GATS) and trade-related aspects of intellectual property rights (TRIPS).

Article X of GATT 1947 became Article X of GATT 1994 without any revision or modification. Most notably, Article X greatly extended its scope by being incorporated and cross-referenced in the following agreements: 1) the Agreement on Implementation of Article VII of the GATT 1994 (Customs Valuation Agreement), an agreement that addresses procedures for customs valuation; 2) Agreement on Rules of Origin establishing procedures for determination of the origin of a good for customs purposes; 3) Agreement on Safeguards establishing procedures necessary for emergency action in order to prohibit serious economic injury including dislocation and unemployment of workers. Some covered agreements listed in GATT 1994 Annex 1A

do not incorporate Article X directly, but they do contain provisions addressing internal and border measures related to due process and transparency. For instance, such provisions exist in but are not limited to the following agreements: 1) the SPS agreement covering sanitary and phytosanitary measures (namely measures addressing food safety and pest control); TBT Agreement covering technical regulations or voluntary and non-binding standards; Agreement on Import Licensing Procedures providing for administration of border measures; SCM Agreement covering administration of trade remedies such as anti-dumping and countervailing measures. Pursuant to the transparency-related provisions of the above-mentioned agreements, Member States must notify the WTO when they intend to adopt new legislation or to modify existing legislation in order to enable other countries to comment before the legislation comes into force.

While the WTO agreements demand transparency from Member States, the WTO itself monitors how they comply with the transparency-related requirements through the above-mentioned TPRM. The WTO issues periodic reports on each Member States, describing governmental policies and identifying the procedures that require higher transparency. Finally, the TPRM also promotes domestic transparency of WTO Member States, which goes beyond the transparency of trade-related measures as a substantive requirement of the WTO agreements (Ala'i, Vaughn, 2014, p. 386).

The above-described changes stemming from the establishment of the WTO have significantly enhanced the role of transparency. Indeed, since 1994, there have been no less than 20 cases involving the provisions of Article X of GATT 1994. A wide range of countries at different stages of economic development have invoked Article X, including Australia, Chile, Ecuador, Honduras, India, Korea, Thailand and the United States. Contrary to the era of GATT 1947, WTO Members did not refer to their Article X claim as a 'subsidiary' claim. Interestingly, nearly half of these cases have been

brought against the original advocate for the higher transparency in the GATT system, that is the United States. They have mostly concerned the administration of laws on safeguard, anti-dumping and countervailing measures.

The recent evolution of WTO case law concerning Article X has expanded its scope through interpretation of its provisions. However, due to the culture of the WTO DSM, expansive interpretation of Article X is not necessarily followed by application of the requirements established by Article X in specific cases. Since some WTO Members consider that the U.S. trade defense laws fail to meet the requirements of uniformity, impartiality, and reasonableness, they are likely to continue invoking Article X in order to emphasize the fundamental elements of due process, such as transparency and access to information (Ala'I, Vaughn, 2014, p. 200). In addition, the ruling in *EC–Selected Customs Matters*, confirming that WTO Members can challenge a system as a whole under Article X:3(a), gives additional motivation for Members to submit similar claims. In particular, challenges to the EC's system of customs administration under Article X are not likely to disappear given the opinion of the panel that the EC customs regulations can be indeed opaque and confusing. Since we can observe a great discrepancy between WTO Members as to their compliance with Article X of GATT 1994, the future of its provisions will largely depend on two factors, namely how the DSM addresses future transparency claims and how the WTO itself coordinates the transparency-related work of its various committees and the TPRM's mandate to monitor domestic transparency in the trade decision-making area.

Conclusions

Thus, the principle of transparency has covered a long yet intense way that started in 1919 and was not directly related to international trade. Nevertheless, in the consecutive years, the importance of transparency was constantly growing with every adopted

international treaty in the area of trade. While for the most part of the 20th century transparency had to make do with a minor role of a formal requirement pushed through by the United States, towards the end of the century it became one of the fundamental provisions of the legal framework for international trade. Simultaneously, transparency made its way to other area of international law, as evidenced by the European Convention on Human Rights. Now transparency keeps increasing its influence on due process and good governance practices in all WTO Members through the numerous WTO Agreements, the WTO Trade Policy Review Mechanism and the Dispute Settlement Mechanism.

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Дараган В. Історія принципу прозорості в міжнародному торговельному праві. – Стаття.

Стаття присвячена історичній еволюції принципу прозорості та його ролі у міжнародному торговельному праві. Основою дослідження є міжнародно-

правова база вимог щодо прозорості, зокрема ГАТТ 1947 та ГАТТ 1994. У статті простежено коріння прозорості у міжнародному праві та проаналізовано її послідовний розвиток упродовж ХХ століття та на початку ХХІ століття. Автор застосував під час дослідження низку загальнонаукових та спеціальних юридичних методів. Вони дозволили провести комплексне дослідження та проаналізувати основні міжнародні договори у сфері міжнародної торгівлі та еволюцію положень щодо прозорості. Автор робить висновок, що прозорість стала одним із основних положень у сучасній системі СОТ. Це підтверджується Механізмом врегулювання спорів СОТ, який зараз розглядає вимоги щодо прозорості як суттєві претензії. Автор відзначає, що це було не так у системі ГАТТ 1947, яка була неефективною для подолання непрозорих заходів, що почали здійснюватися на початку 1970-х. Як результат, такі заходи вагомо вплинули на двосторонній товарообіг між багатьма договірними сторонами ГАТТ 1947, в основному між Японією та США. Автор також зазначає, що Сполучені Штати були оригінальним архітектором положення про прозорість у ГАТТ 1947, яке значною мірою ґрунтувалося на американському адміністративному законодавстві та було покликане створити рівні умови для американських компаній на зовнішніх ринках, оскільки США надавали високий рівень прозорості на внутрішньому рівні. Згодом США також виступали за розширення вимог щодо прозорості у ГАТТ 1994 р., і, врешті-решт, опинилися мішенню для численних вимог, пов'язаних з прозорістю, у рамках Механізму врегулювання спорів.

Ключові слова: прозорість, міжнародна торгівля, стаття Х ГАТТ 1947, стаття Х ГАТТ 1994, історія принципу прозорості.

Дараган В. История принципа прозрачности в международном торговом праве. – Стаття.

Статья посвящена исторической эволюции принципа прозрачности и его роли в международном торговом праве. Основой исследования является международно-правовая база положений касательно прозрачности, в частности ГАТТ 1947 и ГАТТ 1994. В статье прослеживаются корни принципа прозрачности в международном праве и проанализировано его последовательное развитие в течение ХХ века и в начале ХХІ века. Автор применил в ходе исследования ряд общенаучных и специальных юридических методов. Они позволили провести комплексное исследование и проанализировать основные международные договоры в сфере международной торговли и эволюцию положений относительно прозрачности. Автор делает вывод, что прозрачность стала одним из основных положений в современной системе ВТО. Это подтверждается Механизмом урегулирования споров ВТО, который сейчас рассматривает требования по прозрачности как суще-

ственные претензии. Автор отмечает, что это было не так в системе ГАТТ 1947, которая была неэффективной для преодоления непрозрачных мер, начавших осуществляться в начале 1970-х. Как результат, такие меры значительно повлияли на двусторонний товарооборот между многими договаривающимися сторонами ГАТТ 1947, в основном между Японией и США. Автор также отмечает, что Соединенные Штаты были оригинальным архитектором положения о прозрачности в ГАТТ 1947, в значительной степени основывавшемся на американском административном законодательстве и призванном создать равные условия для американских компаний на внешних рынках, поскольку США обеспечивали высокий уровень прозрачности на внутреннем уровне. Впоследствии США также выступали за расширение требований к прозрачности в ГАТТ 1994, и, в конце концов, оказались мишенью для многочисленных требований, связанных с прозрачностью, в рамках Механизма урегулирования споров.

Ключевые слова: прозрачность, международная торговля, статья X ГАТТ 1947, статья X ГАТТ 1994, история принципа прозрачности.

