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The Many Faces of Transparency

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TRANSPARENCY AND PROCEDURAL DUE PROCESS IN INTERNATIONAL ECONOMIC LAW

This panel was convened at 3:00 p.m., Friday, April 10, by its moderator Jarrod Wong, of the University of the Pacific, McGeorge School of Law, who introduced the panelists: Padideh Ala'i of American University Washington College of law; Mélida Hodgson of Foley Hoag LLP; Julia Salasky of Crowd Justice; and Gregory Shaffer of the University of California, Irvine School of Law.

INTRODUCTORY REMARKS BY JARROD WONG*

Ironically, the idea of transparency is rather opaque, or at least a thick concept. We can investigate transparency of different aspects and at different levels of the relevant legal regime. For instance, in the investment context, we might talk about transparency of dispute resolution procedures, such as opening hearings to the public, expressly allowing for amici participation, and the mandatory publication of awards that Julia Salasky and Mélida Hodgson will be discussing in relation to the Mauritius Convention and 2012 U.S. Model Bilateral Investment Treaty (BIT), respectively. But we might also talk about transparency of the arbitral institution, such as how arbitrators are appointed when parties disagree or refuse to participate, or transparency of the negotiation of investment treaties. Or we could talk about how transparently any particular rule is administered or applied, which Padideh Ala'i will be considering with respect to commitments in agreements covered by the World Trade Organization (WTO) as applied by the panels and appellate body of the WTO dispute settlement body. Indeed, transparency initiatives go beyond codified rules like treaty provisions, and include soft law, such as the subsidy disciplines that exist both within and without the WTO, on which Greg Shaffer will be focusing. Much like love then, transparency is a many-splendored thing.

Recognizing the many layers of transparency but also that we can only touch on limited aspects and then in discrete areas of international economic law under the space constraints, this panel nonetheless endeavors to answer some of the following questions as qualified:

- The what and the how? What transparency initiatives have there been, what are their goals or intended outcomes, and how do these initiatives ostensibly meet those goals? These questions encompass the definition and purpose of transparency.
- The how much and now what? That is, how successful are these transparency measures, and to the extent we find them ineffective, how would we revise them?

THE MANY FACES OF TRANSPARENCY

By Padideh Ala'i[†]

The term “transparency” has many faces. In recent decades, transparency has become a ubiquitous, but stubbornly ambiguous term. In a recent publication, *Research Handbook on Transparency*,¹ Robert Vaughn and I tried to explore these many faces of transparency and

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¹ RESEARCH HANDBOOK ON TRANSPARENCY (Padideh Ala'i & Robert Vaughn eds., 2014).

the fact that the term transparency, despite its popularity, conceals rather than exposes the debates and values involved in its invocation. The term “transparency” is used to promote a number of values, such as: rule of law; due process; democratic participation; anti-corruption initiatives; human rights; economic efficiency; environmental protection; and, promotion and growth of trade and investment. At the same time, transparency can also legitimize bureaucratic power, advance undemocratic forms of governance, aid in the global centralization of power, and enable multinational corporations to consolidate power through rules of trade and investment.

Notwithstanding the many different faces of transparency, we have identified three inter-related perspectives from which the topic of transparency can be analyzed. The first is a *good government perspective* on transparency that includes the concept of procedural due process and rule of law. The second perspective on transparency seeks to deal with concentrations of private power and can be called *the market-regulation perspective*. Finally, there is a *human rights perspective* on transparency that connects transparency to human rights by exposing human rights abuses and thereby promoting deterrence and enforcement of rights.²

The topic of this panel is transparency and procedural due process in international economic law, and I limit myself to discussing the role of transparency at the World Trade Organization (WTO). In discussing transparency at the WTO we can focus on *internal* transparency of the WTO as a multilateral institution *or* we can focus on the role the WTO commitments play in promoting transparency within and among member states (*external* transparency).

Many others have addressed the topic of internal transparency of the WTO, including the need for greater transparency.³ I believe much progress has been achieved in this regard although more can still be done. Through its website, the WTO has made the internal workings of the organization more accessible and comprehensive, including timely publication of reports of its dispute settlement panels and the Appellate Body. The WTO also engages with civil society through public lectures and gatherings. The most extensive outreach event is the Public Forum that happens annually and attracts over 1,500 registrants from civil society, academia, business, media, as well as governments, parliamentarians, and other intergovernmental organizations. The hearings of the dispute settlement bodies, with the agreement of the parties, are increasingly open to the public, and many governments make their submissions public. There is still a lot of room for improvement, however, for example: there should be easy public access to WTO’s staff directory and the selection process for the members of the Appellate Body is still opaque. The continuing opacity of the multilateral system reflects the preferences of its members, as well as, the non-transparent nature of bargaining and trade negotiations.

The WTO’s role in encouraging domestic transparency within member states and in trade relations is of great significance.⁴ Transparency was always one of the pillars of the multilateral trading system dating back to the General Agreement on Tariffs and Trade (GATT) 1947.⁵ However, the WTO agreements expanded the number and scope of transparency obligations of the member states, and administration of trade regulation and procedural due process has

² See *id.* at 400-05 (for a more full discussion of the three perspectives).

³ See, e.g., Debra Steger, *The Future of the WTO: The Case for Institutional Reform*, 12 J. INT’L ECON. L., 803, 833 (2009); Steve Charnovitz, *Transparency and Participation in the World Trade Organization*, 56 RUTGERS L. REV. 927, 960 (2005).

⁴ Padideh Ala’i, *From the Periphery to the Centre? The Evolving WTO Jurisprudence on Transparency and Good Governance*, 11 J. INT’L ECON. L., 779, 802 (2008).

⁵ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

increasingly become central to many WTO disputes. More and more there is the recognition that many regulations cannot be removed and governments have the right to regulate certain commercial activity, but such regulation must comply with transparency and due process norms as set out in the WTO agreements including, but not limited to, publication that is prompt, easily accessible, and administered in a transparent (even if discriminatory) manner.

The oldest transparency provision of the WTO agreements is Article X of GATT 1994 (Publication and Administration of Trade Regulations). Article X has remained unaltered from Article X of GATT 1947,⁶ and traces its origin to the 1923 International Convention Relating to the Simplification of Custom Formalities.⁷ Article X generally requires that all measures (i.e. laws, regulations, judicial decisions, and administrative rulings of general application) be published promptly and in such manner as to enable governments and traders to become acquainted with them.⁸ Article X also requires that measures be only enforced after they have been officially published, and be administered in a “uniform, impartial and reasonable manner.”⁹ Finally under Article X, WTO members must create and maintain judicial, arbitral, or administrative tribunals or procedures for the purpose of the prompt review and correction of administrative action relating to custom matters.¹⁰ The wording of Article X has been incorporated directly into many WTO agreements, including General Agreement on Trade in Services (GATS),¹¹ the Agreement on Trade Related Intellectual Property Rights (TRIPS),¹² Customs Valuation Agreement,¹³ Agreement on Rules of Origin,¹⁴ and Agreement on Safeguards.¹⁵ The due process, publication and independent judicial review type provisions can be found in all other WTO-covered agreements.¹⁶ The WTO also imposes notification and reporting requirements on WTO members. Finally, the WTO Trade Policy Review Mechanism (TPRM) itself functions as a transparency mechanism and encourages greater domestic transparency.¹⁷

⁶ General Agreement on Tariffs and Trade, art. X, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

⁷ International Convention Relating to the Simplification of Customs Formalities, arts. 4, 6, Nov. 3, 1923, 190 U.N.T.S. 253.

⁸ Marrakesh Agreement, *supra* note 5 at art. X:1.

⁹ *Id.*, arts. X:2, X:3(a).

¹⁰ *Id.*, art. X:3(b).

¹¹ General Agreement on Trade in Services, arts. III, IV, Apr. 15, 1994, 1869 U.N.T.S. 183.

¹² Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 63, Apr. 15, 1994, 1869 U.N.T.S. 299.

¹³ Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, art. 12, Apr. 15, 1994, 1868 U.N.T.S. 279 (“Laws, regulations, judicial decisions and administrative rulings of general application giving effect to this Agreement shall be published in conformity with Article X of GATT 1994 by the country of importation concerned.”).

¹⁴ Agreement on Rules of Origin, arts. 2(f), 3(h), Apr. 15, 1994, 1868 U.N.T.S. 397 (providing that any administrative action taken in relation to the determination of origin “is reviewable promptly by judicial, arbitral or administrative tribunals or procedures, independent of the authority issuing the determination, which can affect the modification or reversal of the determination”).

¹⁵ Agreement on Safeguards, art. 3., Apr. 15, 1994, 1869 U.N.T.S. 154 (allowing a member to apply for a safeguard measure “only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994”).

¹⁶ Agreement on the Application of Sanitary and Phytosanitary Measures, art. 7, Apr. 15, 1994, 1867 U.N.T.S. 493 (“Members shall notify changes in their sanitary and Phytosanitary measures and shall provide information on their sanitary or Phytosanitary measures in accordance with the provisions of Annex B.”); Agreement on Technical Barriers to Trade, art. 2.9, Apr. 15, 1994, 1868 U.N.T.S. 120 (stating that a member shall notify other members through the secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale); and Agreement on Subsidies and Countervailing Measures, arts. 25, 26, Apr. 15, 1994, 1869 U.N.T.S. 14 (outlining the content, scope, and nature of notification that member states must provide regarding specific subsidies and the surveillance that the committee will conduct regarding new and full notifications).

¹⁷ Marrakesh Agreement, *supra* note 5 at Annex 3.

In explaining the importance of the transparency norms referenced above, the WTO panels and the Appellate Body have repeatedly stated that the guiding policy behind the transparency and due process requirements of the WTO provisions is the protection of the expectations of private traders.¹⁸ While the panels and the Appellate Body recognize that “transparency and fundamental due process” are important values,¹⁹ they have not explicitly indicated that the role of the WTO transparency provisions is to promote good governance within member states.²⁰

An analysis of disputes invoking the transparency provisions of the WTO covered agreements reveals that member states, regardless of their level of development, structure of government, or approach to transparency in governance, have found it difficult to comply with the WTO’s transparency obligations when challenged in dispute settlement.²¹ In many of these cases, the WTO dispute settlement system privileges uniformity and the role of the central government over local diversity. For example, in *China-Measures Related to the Exportation of Various Raw Materials [China-Raw Materials]*, the panel concluded that even if an export quota was justified, the non-uniform administration of the export quota by thirty-two local departments in charge of foreign trade violated Article X:3(a).²²

The *China-Raw Materials* case and other similar cases force us to ask whether the promotion of uniformity and centralization of authority (in the name of increased transparency), has potential downsides. There is no question that the culture of transparency that the WTO promotes has important societal values, but in view of the fact that the stated objective of those WTO transparency provisions is limited to protecting the expectations of private traders, one needs to ask the question: At what cost?

TRANSPARENCY AND THE GOVERNANCE OF SUBSIDIES

By Gregory Shaffer*

This talk takes from a forthcoming article with Robert Wolfe and Vinhcent Le on transparency obligations in the area of subsidies and how transparency disciplines work or might work in this area.¹ Subsidies are important mechanisms for the provision of public goods, the correcting of market failures, and the furthering of economic development. Yet they also create transnational externalities, whether through providing advantages to certain traders or

¹⁸ Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, 20, WT/DS24/AB/R (Feb. 25, 1997); Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R (June 17, 2011), ¶ 202.

¹⁹ See e.g. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Nov. 6, 1998), ¶¶ 181–82 (the Appellate Body held that where a WTO-inconsistent measure is justified as an exception under Article XX, the measure must nevertheless meet a high standard of transparency and due process to ensure that the restriction is not applied in an “arbitrary” or “discriminatory” manner, or as a “disguised restriction on international trade”).

²⁰ Although as part of the TPRM the WTO members “recognize the inherent value of domestic transparency” and they “agree to encourage and promote greater transparency within their own systems” on a voluntary basis. See Marrakesh Agreement, *supra* note 5 at Annex 3, part B (Domestic Transparency).

²¹ For review of the cases, see RESEARCH HANDBOOK ON TRANSPARENCY, *supra* note 2 at 373–78.

²² Panel Report, *China Measures Related to the Exportation of Various Raw Materials*, WT/DS398/R, WT/DS395/R, WT/DS394/R (July 5, 2011), ¶ 7.636. See also Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS398/AB/R WT/DS395/AB/R, WT/DS394/AB/R (Jan. 30, 2012).

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¹ For the full article, see Gregory Shaffer, Robert Wolfe and Vinhcent Le, *Can Informal Law Discipline Subsidies?*, 18 J. INT’L. ECON. L. 711 (2015).