
МІЖНАРОДНЕ ТОРГОВЕЛЬНЕ ТА МИТНЕ ПРАВО



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OBSTACLES TO FREE INTERNATIONAL TRADE: PRESSING CHALLENGES OF THE FREEDOM OF TRANSIT

ПЕРЕШКОДИ ДЛЯ ВІЛЬНОЇ МІЖНАРОДНОЇ ТОРГІВЛІ: АКТУАЛЬНІ ПРОБЛЕМИ ПРИНЦИПУ СВОБОДИ ТРАНЗИТУ

ABSTRACT

The principle of freedom of transit has always played a vital role in the functioning of the international trade system. In order to facilitate free trade, many states started to conclude basic transit agreements back in the XIX century. international community has achieved a significant success in promoting the freedom of transit and, as a result, international trade since then. For instance, various international conventions, such as Convention on Freedom of Transit (1921), Convention on the High Seas (1958), Convention on Transit Trade of Land-Locked States (1965) and,

of course, Article V of General Agreement on Tariffs and Trade (1994) were adopted maintaining the discussion around the importance of freedom of transit for international trade. This paper deals with a principle of freedom of transit in the understanding of international conventions and WTO law, as well as the EU customs legislation. In order to fully understand the evolution of freedom of transit and its importance for the international community, this paper outlines the first international treaties concluded to facilitate free trade between several states, and also touches upon the first disputes arising out violation of freedom of transit. Despite the significant success achieved by the international community, including the World Trade Organization, in promoting the freedom of transit, a number of issues continue to exist. Seizure of goods in transit by customs authorities of the European Union is one of the most important and arguable issues. For this reason, the paper analyses the existing transit rules in the European Union and their compliance with the WTO law. Moreover, freedom of transit of gas is analysed in light of the WTO law and fundamental principle of international law at large. Finally, author assess one of the recent landmark cases concerning the freedom of transit, namely the transit dispute between Ukraine and the Russian Federation in the WTO.

The key words: freedom of transit, transit of gas, seizure of goods in transit, transit disputes, Article V GATT.

The words of Charles Chaney Hyde regarding the boundaries of freedom of transit hold true after almost 100 years since the author's landmark work: "*it may be doubted whether as yet practice has established general acquiescence in the principle that a State owes a legal duty to another to agree to yield to it on equitable terms privileges of transit by land across the national domain*" (Hyde, 1922, p. 25). In order to facilitate free trade, many states started to conclude basic transit agreements back in the XIX century. For instance, The United States has on occasion entered into conventions containing provision for transit by land. By means of Article XXXV of the treaty with New Granada (Colombia) of December 12, 1846, the former acquired a right of way or transit for commercial purposes across the Isthmus of Panama by any mode of interoceanic communication. According to Article XXIX of the Treaty of Washington of May 8, 1871, it was agreed that for a term of years goods arriving at certain American ports and destined for British North American possessions might be "entered at the proper custom-house and conveyed in transit, without the payment of duties, through the territory of the United States", under such rules, regulations and conditions for the protection of its revenue as it might prescribe; it was declared that and under like rules, regulations and conditions, goods might be conveyed in transit without payment

of duties, from such British possessions through the territory of the United States for export from its ports.

Conventions resulting from The World War I made significant provisions for transit by land. Thus Germany, by the Treaty of Versailles of June 28, 1919, and Austria, by the Treaty of Saint-Germain-en-Laye, of September 10, 1919, were obliged to undertake to grant freedom of transit through their respective territories, by the routes most convenient for international transit, by rail as well as by water, to persons, goods and vehicles of transportation coming from or going to the territories of any of the Allied or Associated Powers, whether or not contiguous, and without the imposition of transit or customs duties, or undue delays or restrictions, or unreasonable charges for transportation, or adverse discriminatory treatment. The obligation not to maintain control over transmigration traffic through those territories, save with respect to specified measures, was accepted. Arrangements in pursuance of these general requirements were amplified and given also particular application to international transport by rail. It was provided, however, that after periods of years, the continued right of an Allied or Associated Power to claim the benefits of the general stipulations respecting freedom of transit and certain special ones respecting railways, should depend upon the concession of reciprocal privileges.

It should be noted that international community has achieved a significant success in promoting the freedom of transit and, as a result, international trade since then. For instance, various international conventions, such as Convention on Freedom of Transit (1921), Convention on the High Seas (1958), Convention on Transit Trade of Land-Locked States (1965) and, of course, Article V of General Agreement on Tariffs and Trade (hereinafter – GATT) (1994) were adopted maintaining the discussion around the importance of freedom of transit for international trade. Despite the above-mentioned developments, numerous issues continue to exist in the area of transit, thus creating obstacles to free trade. Their existence inevitably leads to trade discrepancies and disputes between the states affected by such transit issues.

One of the earliest disputes regarding the freedom of traffic in transit arose in 1989–1990 after the Austria's announcement to restrict traffic of certain heavy trucks (from all countries) on some of its roads during night-time. In response, Germany introduced a ban on specific Austrian vans, which were forbidden to circulate anywhere in Germany during night hours. Austria considered the German measure to violate Article V

of GATT due to its discriminative targeting at trucks coming from Austria. However, the two parties managed to settle the dispute by mutual agreement (C/M/241, 1990, p. 29).

There were several other transit-related disputes after the Germany – Austria conflict, however, the extent of a state's right to freedom of transit became the centre of much controversy following the implementation of EC Regulation 1383/2003, which authorized the EU customs authorities to seize goods that infringe any intellectual property right in the European Union. In addition, according to the Regulation, the goods can be seized regardless of whether they were to be sold on the EU market or are simply goods in transit (EC Regulation 1383/2003, 2003). Specifically, the Regulation provided that member nations' customs authorities have the right to take action against goods suspected of infringing an intellectual property right, stating in particular that *"in cases where... goods infringing an intellectual property right originate in or come from third countries, their introduction into the Community customs territory, including their trans-shipment, ... should be prohibited and a procedure set up to enable the customs authorities to enforce this prohibition as effectively as possible"*.

EC Regulation 1283/2003 was in the compliance with the TRIPS Agreement which seems to allow members to impose measures on goods in transit. Indeed, the Regulation's objective was in furtherance of protection of IPR. However, the wording of GATT Article V goes contrary to the TRIPS Agreement. Article V:1 defines transit as *"...the passage across such territory, with or without trans-shipment...only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes"*. Therefore, the scope of the term "traffic in transit" must be extended to all traffic in transit when the goods' passage across the territory of a member is a only a portion of a complete journey beginning and terminating beyond the frontier of the member (Mukherjee, 2013, p. 63).

Despite the wide margin of discretion granted to the customs authorities by EC Regulation 1283/2003, it did not entitle or require customs authorities to detain or seize counterfeit goods in transit where there was no evidence that the goods would be diverted onto the market in Member States because such goods were not 'counterfeit goods' under its Article 2(1)(a) (i) (C-446-09, 2011).

However, before that, the ECJ established the exception known as the '*Montex Exception*' following from the *Montex Holdings v. Diesel SpA*

dispute (C-383/98, 2006). The Court established that the goods could be seized if there were sufficient grounds for suspecting that they were counterfeit goods and, in particular, that they were to be put on the market in the European Union, either in conformity with a customs procedure or by means of an illicit diversion.

It should be noted however, that while Article V of the GATT does not directly make any reference to the possibility of such an exception, a close reading of the definition of transit in Article V:1 could perhaps entail that situations such as those envisaged under the Montex Exception, do not fall within the purview of Article V (Mukherejee, 2013, p. 65).

In early 2014, EC Regulation 1383/2003 was repealed and replaced by the EU Regulation 608/2013 which is currently in force and called to regulate the customs enforcement of intellectual property rights. In essence, EU Regulation 608/2013 strengthened the role of customs authorities in the interception and the destruction of counterfeit goods in transit through European Union territory. Under this new regulation, when certain conditions are met, the seized goods may be destroyed under the control of the customs authorities “*without there being any need to determine whether an intellectual property right has been infringed under the law of the Member State where the goods are found*” (EU Regulation 608/2013, art. 23). Moreover, when the requirements specified in by the text are fulfilled, the destruction may be implemented without the intervention of a judge.

Finally, contrary to what was expected during the inaugural conference of the exhibition “*Contrefaçon, sans façon*” held on the 29th January 2013, the new regulation did not modify the solution set out by the Nokia-Philips case law (European Court of Justice, C-446/09 and C-495/09, 2011) relating to counterfeit goods in transit coming from third-party countries into the European Union and intended for another third-party country.

In this decision, the Court of Justice had decided that the goods, *prima facie* not intended for introduction into Union territory, could nevertheless be seized by the customs authorities, if they had convincing evidence or strong clues of marketing of goods in the Union territory, which is evidence that is very difficult to provide.

Despite the adoption of EU Regulation 608/2013, no clear solution has been found to the issue of actions against goods in transit. Therefore, measures against goods in transit are still possible in cases where there is a good suspected of infringing an intellectual property rights (hereinafter – IPR). In transit situations, the ECJ’s standards of determining an infringe-

ment have to be applied (Rinnert, 2013, p. 40). Nevertheless, the European Commission considers that the Regulation even implements the non-binding requirements of TRIPS in terms of border enforcement such as controls on counterfeit goods in export and transit, thereby reflecting the EU's commitment to high protection of IPR.

At the same time, while combating counterfeiting at the international level is a mutual objective of most countries, achieving this objective should not be such as to give rise to potential conflicts with other international principles protecting free trade between countries. In this regard, one can conclude that the detention of non-Union goods at EU borders, is more likely to contravene one of the fundamental GATT principles, namely freedom of transit as set down in Article V (Abdelgawad, 2018, p. 473).

Apart from the seizure of goods in transit by the Member States of the European Union, the issue of free trade in gas has become increasingly important for the international community in light of the latter's growing concern over energy security. Energy security can generally be defined as access, availability and acceptability of energy sources (WTO Secretariat, 2010). The problem of energy security gained significant attention following the 2009 gas crisis between Russia, Ukraine, and the European Union (EU). Peter D. Cameron describes it as 'the most serious gas supply crisis to hit the EU in its history' (Cameron, 2009, p. 55). So far, the most economically viable way to link the supply and demand sides has been through the construction or expansion of gas pipelines, which often inevitably involves transit (Stevens, 2003, p. 131).

However, the WTO rules on transit remain quite vague and fail to address either third-party access or capacity establishment in specific (Pogoretsky, 2013). In order to enhance the clarity and predictability of WTO transit rules, during the Doha negotiations on trade facilitation, launched in July 2004, some WTO Members even suggested that the issues of third-party access and capacity establishment be explicitly ruled out from WTO law (WTO Secretariat, 2011, p. 23).

The problem of gas transit regulation under WTO law involves a range of intermediate questions. One of the traditional questions in this regard is whether, taking into account that gas transit depends on the provision of gas transportation services, is it subject to the GATT, or the General Agreement on Trade in Services (GATS) (Pogoretsky, 2013)?

There appears to be a common understanding that WTO law covers gas transit, and from the perspective of trade in goods, gas is generally

considered to constitute a ‘good’ in the sense of the GATT, as it falls under GATT Article V. Consequently, it is subsumed under the definition of ‘traffic in transit’ thereof.

It is also generally accepted that despite the fact that some aspects of gas transit are also covered by the GATS (for instance, each WTO Member’s Schedule of Specific Commitments, annexed thereto, may contain services-specific commitments relevant to energy transportation, such as the pipeline transportation of fuels).

Article V:2 (first sentence) of the GATT incorporates the principle of freedom of transit into WTO law. It provides the following: *“There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties”*.

Overall, GATT Article V on its own (that is when read in isolation from the broader system of public international law) is silent or unclear on whether third-party access and capacity establishment could be invoked to operationalize freedom of transit. Although the problem of transit barriers caused by the lack of adequate transit infrastructure is not new in international law and there are even traces of the explicit regulation of third-party access and capacity establishment rights in some treaties, it is hardly conceivable that such regulation has entered the corpus of general international law, applicable to all nations and all subject matters (Pogoretsky, 2013).

Nevertheless, in addition to the above-mentioned international conventions and treaties, there is a gradual development of two general principles of international law: ‘effective right’ and ‘economic cooperation’, which have indirect bearing on the third-party access and capacity establishment rights. The nomenclature here is used loosely to characterize the on-going trends in State practice, as well as the already emerged principles of international law relevant to this subject.

A “principle” as such is a reflection of certain values or goals of the international community, which evolve over time and can develop into binding general principles of law, or further into customary international law in the sense of the Statute of the International Court of Justice (ICJ) Article 38(1)(c) or (b). Principles can be described as, for instance, norms or standards used to judge or direct human conduct, derived from a set of premises, such as moral, economic, and social premises. If legal principles of a legal system are supported by those premises, this lends legiti-

macy to this system as a whole (Mitchell, 2008, p. 12). It is worth looking at these principles' content, sources, and the process of crystallization; as well as their implications for understanding and enforcing freedom of transit. While these principles are rarely directly addressed in international jurisprudence and academic literature, they are not substantially different from such well-known principles of international law as good faith, *abus de droit*, and *pactum de contrahendo* (Degan, 1997, p. 503). To the opposite, they may frequently constitute an expression of the last three principles in a specific factual situation or a particular area of international law.

It is clear that energy was not a primary target of GATT. For this reason, the third-party access and capacity establishment rights were hardly envisaged by the GATT creators. (Marceu, 2010, p. 83). Moreover, the biggest energy-exporting countries, such as Qatar, Russia, and Saudi Arabia were still outside this Organization, when the WTO framework was being negotiated (WTO Secretariat, 2018). However, the fact that WTO law exists so closely with general international law is one of the grounds to believe that, in the context of gas transit where there is no adequate pipeline infrastructure, the interpretation of the principle of freedom of transit, expressed in GATT Article V:2, must be informed by other relevant principles in a broader legal environment, such as the principles of effective right and economic cooperation (Pogoretsky, 2013).

In addition, the interpreter of GATT Article V:2 should not neglect the fact that some norms in treaty law, although fixed in relevant documents, continue to evolve over time. Although initially WTO Members most probably did not attach any particular importance to energy regulation, they have declared, in the preamble of the WTO Agreement, that the expansion of the regime of 'trade in goods' is one of the objectives of the Organization. In particular, the preamble of the WTO Agreement refers to '*expanding the production of and trade in goods*'. This objective imparts to a range of generic terms in the GATT, including 'traffic in transit' and 'freedom of transit', the feature of evolution, which, in turn, allows their interpretation in light of the contemporary needs and issues of WTO Members. The principle of evolutionary interpretation denotes the idea that '*no legal relationship can remain unaffected by time*'. The speedily rising issues, in this context, include energy trade and security, which are highly dependent on the development of international transit infrastructure.

In addition, a ruling of the Panel in EC–IT Products also indicated that new commitments can indeed evolve in the course of technological deve-

lopment, especially when the initial wording of the obligation is overly broad, as it appears to be in GATT Article V:2. In the case at issue, one of the main questions was whether the EU's duty-free treatment of certain IT goods, granted pursuant to the Information Technology Agreement (ITA) incorporating the EU's GATT Schedule of Concessions and subject to GATT Article II:1(a) and (b) (Schedules of Concessions), was also extended to 'new', multifunctional products. The EU took the position that new technological functions put such products outside the EU's original concession and covered by other dutiable headings of its Schedule (WTO Panel Report, DS375, 2010). Nevertheless, the Panel did not find anything in the broad language of the Schedule that would exclude the evolved new technologies from the concession and duty-free treatment (WTO Panel Report, 2010). One of the arguments supporting the Panel's decision was that the object and purpose of the WTO Agreement and the ITA is: *'to provide security and predictability in the reciprocal and mutually advantageous concessions negotiated by parties for the reduction of tariffs and other barriers to trade.'* (DS375, 2010, para. 7.704).

This interpretative approach is further supported by the principle of 'technological neutrality', which is widely recognized by WTO Members. In the context of trade in services, in US – Gambling, the Panel has explained this principle as follows: *'a market access commitment for mode 1 [in the GATS] implies the right for other Members' suppliers to supply a [cross-border] service through all means of delivery, whether by mail, telephone, Internet etc., unless otherwise specified in a Member's Schedule.'* (WTO Panel, DS285, 2004).

In light of EC–IT Products and the principles of evolutionary interpretation and technological neutrality, it appears that the goal of the expansion of 'trade in goods' can impart the evolutionary meaning to a range of generic terms in WTO rules, including those in GATT Article V. The broad language of this provision does not create obstacles to such evolution. As a matter of fact, the latter goes hand-in-hand with naturally occurring technological progress, posing new challenges for international trade, such as a rapidly developing cross-border gas trade (Pogoretsky, 2013).

In turn, the above-explained process of evolution inevitably expands the scope of rights and obligations assumed under GATT Article V. However, it would be safer and more politically comfortable for WTO Members and adjudicators in their reading of GATT Article V:2 to fall back on the

commonly acknowledged principles of public international law in order to avoid arbitrariness and ‘cherry-picking’ as to which new rights and obligations should be presumed in the emerging new factual environment. For instance, the main criticism of the evolutionary interpretation is based on the fact that, apart from using generic meanings, judges often fail to explicitly support their reference to this method with other evidence (Dawidowicz, 2011, p. 221).

The question arises whether the principles of effective right and economic cooperation could be those principles? The definite answer to this question may require a more extensive study on their status and effect in public international law, covering common trends in energy governance evolving between States as well as within their national jurisdictions. Nevertheless, it appears that the principles of effective right and economic cooperation can indeed play an important role in interpreting and enforcing GATT Article V:2 in the context of gas transit.

In light of the above, there is no reason why a WTO panel may not rule on whether a precise measure restricting transit, such as the refusal of a transit state to negotiate the terms and modalities of its practical implementation through a third-party access or capacity establishment mechanism, is consistent with GATT Article V:2.

Apart from the above-mentioned existing issues related to the freedom of transit, there is an on-going debate on whether one state may legally restrict the freedom of transit through its territory due to national security reasons. This issue is of high importance in the WTO dispute between Ukraine and the Russian Federation where Ukraine claims that Russian authorities violated WTO rules on freedom of transit by limiting or applying discriminating requirements for the passage of goods in transit of Ukrainian origin.

On 14 September 2016, Ukraine requested consultations with the Russian Federation regarding alleged multiple restrictions on traffic in transit from Ukraine through the Russian Federation to third countries.

Ukraine claimed that the measures appear to be inconsistent with the following provisions: Articles V:2, V:3, V:4, V:5, X:1, X:2, X:3(a), XI:1, XVI:4 of the GATT 1994; and Paragraph 2 of Part I of the Russian Federation’s Accession Protocol (to the extent that it incorporates paragraphs 1161, 1426 (first sentence), 1427 (first and third sentences) and 1428 of the Report of the Working Party on the Accession of the Russian Federation).

On February 9, Ukraine requested that a WTO panel be established to review the alleged restrictions on transit of goods from Ukraine through Russia to other countries, arguing that these violate the General Agreement on Tariffs and Trade (GATT 1994) and Russia's commitments made when joining the WTO. Initially, some estimates placed the level of negatively affected exports at 79 percent in the case of Ukraine – Kazakhstan trade, and 95 percent with Ukraine –Kyrgyzstan trade.

At the initial stage, Ukraine suggested that Russia's move came in the wake of the January 2016 application of an EU-Ukraine trade deal, along with the suspension of Ukraine's involvement in a Russian-led trade accord, including the refusal to integrate into the Customs Union. It should be noted that the dispute at hand constitutes a shining example of the interaction between international politics and particular trade measures.

The measures targeted by the complaint included a requirement that international road and rail transit of cargo from Ukraine through Russia must be carried out only via Belarus (pursuant to Decree of the President of the Russian Federation No. 1 and Resolution of the Government of the Russian Federation No. 1). Moreover, the Russian Federation has also banned the transit of all products affected by tariff rates higher than zero, as defined by the Common Customs Tariff of the Eurasian Economic Union, as well as goods falling under the import ban pursuant to Resolution of the Government of the Russian Federation No. 778.

Apart from the above-mentioned measures, Ukraine was also challenging the rule introduced by the Russian Federation in August 2014 compelling the operators of trains or trucks transporting Ukrainian freight to use identification seals. These vehicles are forced to carry trackers that use the Global Navigation Satellite System, or Glonass – the Russian Federation's alternative to the Global Positioning System, or GPS.

Furthermore, Ukraine claimed that the Russian Federation illegally forces trucks carrying Ukrainian goods to use specifically designated checkpoints to be considered compliant with Russian laws.

Moreover, Ukraine accused Russia of violating international trade law by forcing trucks in transit to move in caravans accompanied by Russian convoys, and by creating obstacles for Ukrainian drivers entering Russia via its border with Belarus.

The legal framework was significantly amended after the Russian Federation suspended its free-trade treaty with Ukraine following Russia's invasion of Crimea, a part of Ukraine, in March 2014. At the time, Russia

argued that Ukraine's open borders with the EU compromised the Russian Federation's interests and economic security, and could result in Ukraine illegally supplying embargoed European goods to Russia.

In its turn, Ukraine maintained that those measures violate Russia's WTO obligations to allow other members freedom of goods transit, along with transparency rules on publishing trade regulations.

On 17 November 2017, the Chair of the panel informed the Dispute Settlement Body (hereinafter – DSB) that the panel expected to issue its final report to the parties by the end of 2018, in accordance with the timetable adopted after consultation with the parties. However, on 28 September 2018, the Chair of the panel informed the DSB that, in the light of the complexity of the legal and factual issues in this dispute, the panel expected to issue its final report to the parties in the first quarter of 2019. In its communication, the Chair also informed the DSB that the report would be available to the public once it was circulated to the Members in all three official languages, and that the date of circulation depends on completion of translation. In this regard, Ukraine has repeatedly claimed that Russia was delaying the settlement process at the stage of composition of the Panel in disputes filed by Ukraine using procedural tools. Such a delay is particularly tangible in the case in question, as the transit restrictions through Russia's territory hurt Ukrainian industries with traditional export markets in Kazakhstan and other Central Asian states.

In its defence, the Russian Federation relied on the Article XXI(b) of GATT which allows WTO Members to impose the transit restrictions for the purposes of national security. Indeed, Article XXI of the GATT 1994, in relevant part, states that “[n]othing in this Agreement shall be construed... to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests... taken in time of war or other emergency in international relations[.]” That is, a Member has the discretion and responsibility to make the serious determination, with attendant political ramifications, of what is required to protect the security of its nation and citizens. It should be noted that the text of Article XXI(b) reflects the shared concerns of the drafters, understandable in light of two world wars, regarding the interplay of national security and sovereignty in the realm of international trade. The specific reference to fissionable materials reflects concerns regarding the devastating nuclear experience during World War II. A call for coherence with

the United Nations Charters reflects the expectation that the “International Trade Organisation” would function as a UN organisation, like other Bretton Woods institutions.

The self-judging nature of Article XXI is established through use of the crucial phrase: “*which it considers necessary for the protection of its essential security interests*”. In Article XXI(b), the term “*necessary*” is preceded and qualified by the terms “*which it considers*”. These terms imply that, in principle, it is for each Member to assess by itself whether a measure is “*necessary*”. However, this does not mean that Members enjoy unfettered discretion and that panels must accord complete deference to a Member asserting the necessity of the measure.

It seems that the Panel must review, within the analytical framework described above, whether invoking Member can plausibly consider that the measure is necessary. This limited review is necessary in order to ensure that the exception is applied in good faith by the invoking Member and prevent abuses. In order to allow panels to conduct this limited review, the invoking Member, which bears the burden of proof, must provide the panel with an explanation of why it has considered that the measure at issue was necessary having regard to the factors mentioned above. Where, as in the case at issue, the invoking Member fails to provide such explanations, it must be concluded that that Member has failed to meet its burden of proof.

The on-going dispute will with a high degree of certainty become a landmark case for the freedom of transit, regardless of its outcome, due to several reasons. First, there have been only a few transit disputes in the WTO history where the national security grounds were used to justify transit restrictions. Therefore, the ruling in the dispute at hand will establish whether one state may legally apply Article XXI of GATT in order to block the transit from another state due to national security reasons. Second, the dispute is fuelled by the political and economic tension that exists between two Ukraine and the Russian Federation. Consequently, the reaction of international community and the final decision will to a great extent signify a triumph of one of the states on international arena.

In light of the above, it may be concluded that Article V of the GATT definitely grants all the member countries the right to freedom of transit. The MFN clause under this article makes it almost impossible to envisage a measure such as the one allowed by the EC Regulation, i.e. restriction of freedom of transit and seizure of goods in transit. Though the measure has been considered under Article XX(d) of the GATT, the wording

of the Regulation is such that it would not satisfy even the first test of Article XX(d) that is, the Regulation is in itself consistent with the GATT. By allowing for seizure of goods even in case of trans-shipment, the Regulation certainly violates Article V:1 and V:2 of the GATT.

Regarding the transit of gas issue, it may be concluded that the third-party access and capacity establishment rights were hardly envisaged by the GATT creators, since energy was not a primary target of the Agreement. In general, GATT Article V in isolation from the broader system of public international law does not provide or provides a little guidance on whether third-party access and capacity establishment could be invoked to operationalize freedom of transit. Obviously, there are different arguments suggesting what this provision should potentially mean in different hypothetical situations. Nevertheless, those arguments most of the time fall short of demonstrating the particular sources of legal rights and obligations, transforming the basic principle of freedom of transit into third-party access and capacity establishment obligations.

It is also of importance to emphasize that the on-going WTO dispute DS512 will almost certainly become a landmark case in the area of the freedom of transit, regardless of its outcome. The dispute underlines that Article XXI(b) reflects the critical importance of national security interests to Members' fundamental sovereignty. Deference to a Member's determination of what action "*it considers necessary*" to protect its essential security interests is explicit in the text of this provision and must be given proper effect. At the same time, this deference is not absolute. In addition, there are other reasons for the on-going dispute to become a very important precedent, such as the fact that there have been only a few purely transit disputes in the WTO history dealing with the possibility to justify transit restrictions due to national security reasons by applying article XXI of GATT. Indeed, it is no accident that, in over two decades of WTO jurisprudence, this is the first time a WTO panel has been called upon to consider a Member's invocation of Article XXI. Moreover, DS512 dispute plays an important role for both countries concerned in light of the political and economic tension that exists between Ukraine and the Russian Federation.

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АНОТАЦІЯ

Дараган В. Є. Перешкоди для вільної міжнародної торгівлі: актуальні проблеми принципу свободи транзиту. – Стаття.

Принцип свободи транзиту завжди відігравав важливу роль у функціонуванні системи міжнародної торгівлі. З метою сприяння вільній торгівлі багато країн почали укладати основні транзитні угоди ще у XIX столітті. Міжнародна спільнота досягла значних успіхів у сприянні свободі транзиту та, як наслідок, міжнародній торгівлі саме з тих часів. Наприклад, різні міжнародні конвенції, такі як Конвенція про свободу транзиту 1921 року, Конвенція про відкрите море 1958 року, Конвенція про транзитну торгівлю держав, які не мають виходу до моря 1965 року та, звичайно ж, стаття V Генеральної угоди з тарифів і торгівлі 1994 року були прийняті під час обговорення важливості свободи транзиту для міжнародної торгівлі. У цій статті розглядається принцип свободи транзиту у розумінні міжнародних конвенцій та правил Світової організації торгівлі, а також митного законодавства Європейського Союзу. Вона містить короткий вступ щодо перших міжнародних договорів, укладених з метою сприяння вільній торгівлі між кількома країнами, а також розглядає перші спори, що виникають у зв'язку з порушенням свободи транзиту. Незважаючи на значний успіх, досягнутий міжнародним співтовариством, у тому числі Світовою організацією торгівлі, у сприянні свободі транзиту існує ряд проблем. У статті аналізуються існуючі правила стосовно транзиту в Європейському Союзі та їх відповідність законодавству Світової організації торгівлі. Більше того, у світлі законодавства СОТ та основних принципів міжнародного права в цілому проаналізована проблема свободи транзиту газу. Нарешті, автор розглядає одну з останніх знакових справ, що стосуються свободи транзиту, а саме транзитний спір між Україною та Російською Федерацією у Світової організації торгівлі.

Ключові слова: свобода транзиту, транзит газу, арешт товарів під час транзиту, транзитні спори, Стаття V ГАТТ.

АННОТАЦИЯ

Дараган В. Е. Препятствия для свободной международной торговли: актуальные проблемы принципа свободы транзита. – Статья.

Принцип свободы транзита всегда играл важную роль в функционировании системы международной торговли. С целью содействия свободной торговле многие государства начали заключать основные транзитные соглашения

еще в XIX веке. Международное сообщество достигло значительных успехов в содействии свободе транзита и, как следствие, международной торговле именно с тех времен. Например, различные международные конвенции, такие как Конвенция о свободе транзита 1921 года, Конвенция об открытом море 1958 года, Конвенция о транзитной торговле государств, не имеющих выхода к морю 1965 года и, конечно же, статья V Генерального соглашения по тарифам и торговле 1994 года были приняты во время обсуждения важности свободы транзита для международной торговли. В этой статье рассматривается принцип свободы транзита в понимании международных конвенций и правил Всемирной торговой организации, а также таможенного законодательства Европейского Союза. Она содержит краткий обзор первых международных договоров, заключенных с целью содействия свободной торговле между несколькими странами, а также рассматривает первые споры, возникающие в связи с нарушением принципа свободы транзита. Несмотря на значительный успех, достигнутый международным сообществом, в том числе Всемирной торговой организацией, в содействии свободе транзита существует ряд проблем. В статье анализируются существующие правила о транзите в Европейском Союзе и их соответствие законодательству Всемирной торговой организации. Более того, в свете законодательства Всемирной торговой организации и основных принципов международного права в целом проанализирована проблема свободы транзита газа. Наконец, автор рассматривает одно из последних знаковых дел, касающихся свободы транзита, а именно транзитный спор между Украиной и Российской Федерацией во Всемирной торговой организации.

Ключевые слова: свобода транзита, транзит газа, изъятие товаров при транзите, транзитные споры, Статья V ГАТТ.

