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Transparency and the Expansion of the WTO Mandate

Padideh Ala'i
palai@wcl.american.edu

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TRANSPARENCY AND THE EXPANSION OF THE WTO MANDATE

PADIDEH ALA'I*

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I. INTRODUCTION: BRETTON WOODS INSTITUTIONS AND THE U.S. LEGACY

The World Trade Organization (“WTO”) and its predecessor, the General Agreement on Tariffs and Trade (“GATT”) of 1947,¹ were established to promote peace by putting a break on beggar-thy-neighbor protectionist policies, believed to have largely contributed to global economic depression and the rise of Adolf Hitler and fascism in Europe.² At the conference that led to their creation at

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1. General Agreement on Tariffs and Trade, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Apr. 15, 1994, 1867 U.N.T.S. 187.

2. See James M. Boughton, *The Role of the IMF in Peace and Security*, 20 AM. U. INT’L L. REV. 1117, 1117-22 (2005), reprinted in TRADE AS GUARANTOR

Bretton Woods, the Allied nations recognized that great differences in wealth between nations and peoples were not conducive to world peace. The architects of the post–World War II economic system, John Maynard Keynes and Harry Dexter White, hoped that the Bretton Woods institutions would be a bulwark against protectionism and assist countries during economic hardship, while rebuilding war-torn Europe and Japan.³

Ironically, with the decline of U.S. power, the influence of principles long championed by the United States, such as transparency, accountability, participation, and promotion of the rule of law, is on the rise. These “good governance” criteria (or at least the rhetoric surrounding them) have been adopted by nations and by international organizations and civil society groups.⁴ For example, the WTO promotes a U.S.-inspired vision of the regulatory state, emphasizing domestic transparency and predictability in the *administration* or *application* of trade-related measures (an ever-expanding category) and privileging procedure for its legitimation of

OF PEACE, LIBERTY AND SECURITY?—CRITICAL, EMPIRICAL AND HISTORICAL PERSPECTIVES 6 (Padideh Ala’i et al. eds., 2006) (highlighting the existence of a link between global free trade and peace and prosperity); Julio A. Lacarte, *The Role of the Bretton Woods Institutions in Securing the Peace*, 20 AM. U. INT’L L. REV. 1127, 1127-32, reprinted in TRADE AS GUARANTOR OF PEACE, LIBERTY AND SECURITY?—CRITICAL, EMPIRICAL AND HISTORICAL PERSPECTIVES, *supra*, at 1 (explaining that the GATT carried out trade liberalization rounds in response to post–World War II protectionist measures that curtailed international commerce).

3. See Boughton, *supra* note 2, at 1118-22 (arguing that the idea of an interconnection between free trade and peace and prosperity influenced Keynes’s and White’s work even before Bretton Woods in 1944). Importantly, the post–World War II economic order was built on an economic/non-economic distinction. Article I of the Articles of Agreement of the International Monetary Fund states that the purposes of the IMF are, among other things, to “provide[] . . . consultation and collaboration on international monetary problems,” to “promot[e] and maint[ain] high levels of employment and real income[,] and to . . . develop[] . . . the productive resources of all members.” See Articles of Agreement of the International Monetary Fund, art. I(i)-(ii), Dec. 27, 1945, 60 Stat. 1401, 2 U.N.T.S. 39. Article IV, on the other hand, states that the IMF, in fulfilling its surveillance duties, “shall [respect] . . . the domestic social [and] political policies of the members.” *Id.* art. IV(5)(f).

4. See generally *What is Good Governance?*, U.N. ECON. & SOC. COMM’N FOR ASIA AND THE PACIFIC, <http://www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.asp> (last visited Sept. 1, 2011) (defining “good governance” so as to include eight basic characteristics: “It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive[,] and follows the rule of law.”).

substance or end results despite their unpopularity.⁵ The WTO dispute settlement system has also gravitated towards U.S.-style litigation, as WTO members who have traditionally shied away from airing their grievances through litigation (for example, China) increasingly resort to litigation to resolve their concerns. In addition, the WTO Appellate Body conducts U.S.-style legal analysis, applying balancing tests to evaluate, on a fact-specific basis, competing policy objectives and public interests while emphasizing the need for consistency and predictability.

It is against this backdrop that this work discusses the creation, evolution, and future of the WTO and its role in promoting “sustainable development.”⁶ First, it explores the evolving mandate of the WTO. Then, it examines the evolution of GATT Article X (“Publication and Regulation of Trade Administration”). Third, it analyzes the evolution of GATT Article XX (“General Exceptions”). Finally, it concludes with some thoughts about what this evolution has meant and should mean for the future of the WTO.

5. See William Mock, *On the Centrality of Information Law: A Rational Choice Discussion of Information Law and Transparency*, 17 J. MARSHALL J. COMPUTER & INFO. L. 1069, 1082 (1999), available at http://ssrn.com/abstract_id=1027611 (defining “transparency” as “the provision of access to official information for social, political, and economic functioning,” or “a measure of the degree to which information about official activity is made available to an interested party”); cf. Press Release, WTO Trade Policy Review Body, Structural Problems Are Inhibiting Development, PRESS/TPRB/309 (Apr. 22, 2009), http://www.wto.org/english/tratop_e/tpr_e/tp309_e.htm (reporting that structural problems, such as diminished transparency and predictability, hinder the development of business and competitiveness in Mozambique).

6. See generally U.N. Env’t Programme, World Comm’n on Env’t & Dev. (Brundtland Comm’n), *Our Common Future: Rep. of the World Commission on Environment and Development in Accordance with Paragraph 10 of General Assembly Resolution 38/161 (1983)*, transmitted by Note of the Secretary-General, ch. 2, ¶ 1, U.N. Doc. A/42/427, Annex (Aug. 4, 1987) [hereinafter Brundtland Report], available at <http://www.un-documents.net/wced-ocf.htm> (defining “sustainable development” as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”). The term embodies “two key concepts: the concept of needs, in particular the essential needs of the world’s poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment’s ability to meet present and future needs.” *Id.*

II. EXPANSION OF THE WTO MANDATE

From 1947 to 1995, the GATT's mandate was limited to two goals: market access and non-discrimination.⁷ At first, this was a relatively simple task because the GATT was concerned primarily with the reduction of tariffs. Over time, the rise of the regulatory state resulted in the proliferation of non-tariff barriers ("NTBs"), such as health and safety requirements and environmental regulations. Thus, despite significant reduction, tariffs were eventually replaced by NTBs, creating new challenges for the global trading system.

GATT Contracting Parties recognized the limits of free trade, and this recognition is most visible in Article XX, the general exceptions to the GATT. Article XX acknowledged that, in some exceptional cases, other important policy objectives, such as human health, could (and should) trump the goal of free trade through liberalization of markets and application of non-discrimination principles.⁸ GATT panels, however, did not engage in the process of weighing and balancing non-trade interests with trade interests. As a result, no Contracting Party invoked Article XX in successful defense of a trade barrier.⁹

GATT panels and Contracting Parties also marginalized Article X ("Publication and Administration of Trade Regulations").¹⁰ The

7. See General Agreement on Tariffs and Trade pmbl., Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] (encouraging member states to "enter[] into reciprocal and mutually advantageous arrangements" that "substantial[ly] reduc[e] tariffs and other barriers to trade and . . . eliminat[e] . . . discriminatory treatment in international commerce"). Achievement of these goals would meet the ultimate objectives of "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world[,] and expanding the production and exchange of goods . . ." *Id.*

8. See *id.* art. XX ("[N]othing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . necessary to protect human, animal, or plant life or health . . .").

9. Cf. Padideh Ala'i, *Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalization*, 14 AM. U. INT'L L. REV. 1129, 1130-71 (1999) (analyzing the recent Article XX jurisprudence in which the Appellate Body has not automatically upheld the free trade goals of GATT over any other objective, including public health, sustainable development, or the environment).

10. See generally Padideh Ala'i, *From the Periphery to the Center? The*

rationale behind this marginalization was the relatively narrow mandate of the GATT 1947—that is, all barriers to trade in goods must be removed or applied in a non-discriminatory manner. GATT panels, in adherence to a substance-procedure distinction, deemed Article X (a procedural provision) to be far less important than the other, substantive provisions of the GATT. Their reasoning generally was as follows: A challenged measure is first assessed for its consistency with one or more of the “substantive” provisions of the GATT—for example, the MFN obligation under Article I, the “national treatment” requirement under Article III, or the prohibition of quantitative restrictions under Article XI. If the measure is found to be inconsistent with any of those “substantive” provisions, as many invariably were, the process, procedures, or regulations by which that measure is administered becomes a subsidiary issue. In other words, if a measure is “substantively” inconsistent with the obligations of the Contracting Parties, the publication of the measure or whether it is applied in an “impartial, uniform and reasonable manner” is irrelevant.¹¹

Evolving WTO Jurisprudence on Transparency and Good Governance, 11 J. INT’L ECON. L. 779 (2008), reprinted in REDESIGNING THE WORLD TRADE ORGANIZATION FOR THE TWENTY-FIRST CENTURY 165 (Debra P. Steger ed., 2009), available at <http://idl-bnc.idrc.ca/dspace/bitstream/10625/40859/1/128972.pdf> (contrasting GATT panels’ recognition of Article X as “‘subsidiary’ to other, ‘substantive’ provisions of the GATT and the WTO view of Article X to include fundamentally important obligations, such as transparency and due process). Article X was mentioned in only nine adopted GATT 1947 panel decisions. *Id.* at 783. Among these decisions, only two—*Canada—Provincial Liquor Boards (U.S.)* and *European Economic Community—Restrictions on Imports of Dessert Apples*—discuss Article X in detail. *See id.* at 786; *see also* Report of the Panel, *Canada—Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, DS17/R (Oct. 16, 1991), GATT B.I.S.D. (39th Supp.) at 27 (1992); Report of the Panel, *European Economic Community—Restrictions on Imports of Dessert Apples—Complaint by Chile*, L/6491 (Apr. 18, 1989), GATT B.I.S.D. (36th Supp.) at 93 (1990). In the remaining cases, the panels dismissed the Article X claims as subsidiary issues that did not need to be addressed. *See Ala’i, supra*, at 786.

11. GATT art. X:3. For instance, in *Japan—Leather II (U.S.)*, the panel did not examine the Article X claim because the measure had already been found to violate Article XI. *See* Report of the Panel, *Panel on Japanese Measures on Imports of Leather*, ¶¶ 56-57, L/5623 (Mar. 2, 1984), GATT B.I.S.D. (31st Supp.) at 94 (1985) [hereinafter *Japan—Leather II*] (finding Japanese arguments insufficient to “rebut the presumption that the quantitative restrictions on imports of leather had nullified or impaired benefits accruing to the United States under Article XI [as well as under Articles II and XIII:3] of the General Agreement”).

The creation of the WTO in 1995 brought GATT Article X (and other procedural provisions) as well as GATT Article XX to the forefront of WTO jurisprudence. The provisions of the WTO Agreements reflect the reality of the regulatory state and, with it, a recognition that certain categories of regulation, such as sanitary and phytosanitary regulations or technical regulations or standards, are legitimate despite their impact on trade. Therefore, in the past two decades, the focus of WTO panels and the Appellate Body has shifted from harmonization and mutual recognition to transparent application and administration.

In 1994, the preamble of the GATT was amended to reflect current environmental concerns and post-World War II changes in the trade landscape. As a result, today the preamble of the WTO Agreement also includes the following italicized language:

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods *and services*, while allowing for the optimal use of the world's resources *in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.*¹²

The Appellate Body's interpretation of GATT Article XX reflects

Similarly, in *Japan—Agricultural Products I*, the panel found the Japanese measure to be in violation of Article XI:1 and thus did not rule on the Article X claim. See Report of the Panel, *Japan—Restrictions on Imports of Certain Agricultural Products*, ¶ 5.4.2, L/6523 (Nov. 18, 1987), GATT B.I.S.D. (35th Supp.) at 163 (1988) [hereinafter *Japan—Agricultural Products*] (foregoing a finding on the quantitative restrictions because “the United States had, as a subsidiary matter, argued that Japan had also nullified or impaired benefits under Articles X:1, X:3 and XIII:3”). Once more, the panel in *Japan—Semi-Conductors* declined to rule on the Article X claim but impliedly acknowledged the transparency issue that existed with the Japanese system of “administrative guidance,” stating that the system “was a traditional tool of Japanese government policy based on consensus and peer pressure.” See Report of the Panel, *Japan—Trade in Semi-Conductors*, ¶ 107, L/6309 (Mar. 24, 1988), GATT B.I.S.D. (35th Supp.) at 116 (1989) [hereinafter *Japan—Semi-Conductors*].

12. See Marrakesh Agreement Establishing the World Trade Organization pmb., Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement] (emphasis added).

this amendment and is thus consistent with the requirements of Article 3.2 of the Dispute Settlement Understanding and Articles 31 and 32 of the Vienna Convention on the Law of Treaties.¹³ In *U.S.—Shrimp*, the Appellate Body held that the scope of Article XX has changed given the new preambular language referencing the “objective of sustainable development.”¹⁴ Specifically, it noted that the change to the GATT 1947 preamble, which originally had been used as a “template for the preamble of the new WTO Agreement,” clearly qualified the original objectives of the GATT 1947.¹⁵ The Appellate Body continued:

We note once more that this language demonstrates recognition by WTO negotiators that optimal use of the world’s resources should be made in accordance with the objective of sustainable development. As this preambular language reflects the intentions of the negotiators of the WTO Agreement, we believe it must add *color, texture and shading to our interpretation of the agreements annexed to the WTO Agreement*, in this case, the GATT 1994.¹⁶

In other words, the goal of the multilateral trading system can no longer be seen simply as market liberalization and non-discrimination.¹⁷ The preamble indicates that there is also a “development” goal. However, whether the goal of “sustainable development” supersedes the other, traditional goals of the trading system is unclear.¹⁸ The impact of the preambular language, if any,

13. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 114, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *U.S.—Shrimp*] (“The Panel did not follow all of the steps [required by Article 3.2 of the DSU when] . . . applying the ‘customary rules of interpretation of public international law.’”).

14. *See id.* ¶ 129 (noting that the “preamble of the WTO Agreement—which informs not only the GATT 1994, but also the other covered agreements—explicitly acknowledges ‘the objective of *sustainable development*’”).

15. *See id.* ¶ 152 (recognizing that the “full use of the resources of the world,” an objective included in the preamble of GATT 1947, was not suitable for the multilateral trading system of the 1990s).

16. *Id.* ¶ 153.

17. *See id.* ¶ 152 (implying that because the amended language references “different levels of economic development,” the preamble, as amended, also takes into account in interpreting the obligations contained therein the principle of special and differential treatment for less developed countries).

18. The Johannesburg Declaration on Sustainable Development states that the pillars of sustainable development are “economic development, social development and environmental protection at the local, national, regional and

on the “substantive” provisions of the WTO such as Article I (MFN), Article III (national treatment), Article XI (elimination of quotas and other non-tariff barriers), as well as the provisions of the other Annex 1A Agreements or other obligations (such as those contained in protocols of accession or working party reports) is also unclear and beyond the scope of this paper. However, the increasing emphasis on the principles of transparency and procedural due process is closely linked to the expansion of the WTO mandate and the promotion of the “objective of sustainable development.”

III. EXPANSION OF THE TRANSPARENCY GOAL OF THE WTO AND THE HISTORY AND EVOLUTION OF ARTICLE X

The oldest transparency provision of the WTO is contained in Article X of the GATT. Since the creation of the WTO, the scope and influence of Article X has increased dramatically. Moreover, the scope and influence of transparency as a goal of the multilateral trading system itself has expanded, through the proliferation of the values expressed in Article X and elsewhere in the WTO Agreements.

The text of Article X is identical to the language originally proposed by the U.S. State Department in 1946 as Article 15 of the International Trade Organization (“ITO”) Charter and, upon failure of the ITO, inserted into the GATT as Article X. The wording of Article X is clearly derived from the U.S. Administrative Procedure

global levels.” World Summit on Sustainable Development, Aug. 26-Sept. 4, 2002, *Johannesburg Declaration on Sustainable Development*, at 1, U.N. Doc. A/CONF.199/L.6/Rev.2 (Sept. 4, 2002) (Report/CONF.199/20). “The main link between trade and sustainable development,” according to the Brundtland Commission:

is the use of non-renewable raw materials to earn foreign exchange. Developing countries face the dilemma of having to use commodities as exports, in order to break foreign exchange constraints on growth, while also having to minimize damage to the environmental resource base supporting this growth. There are other links between trade and sustainable development; if protectionism raises barriers against manufactured exports, for example, developing nations have less scope for diversifying away from traditional commodities. And unsustainable development may arise not only from overuse of certain commodities but from manufactured goods that are potentially polluting.

Brundtland Report, *supra* note 6, ch. 3, ¶ 41.

Act (APA), passed in 1946.¹⁹ Article X:1 requires “all laws, regulations, judicial rulings, and administrative rulings of general application [(collectively ‘measures’) to be] published promptly in such manner as to enable governments and traders to become acquainted with them.”²⁰ Article X:2 prohibits enforcement of such measures before publication.²¹ Article X:3 requires all measures to be *administered* in a “uniform, impartial and reasonable manner” and compels Members to establish tribunals or procedures for review of the administrative actions relating to customs matters.²²

The creation of the WTO resulted in the proliferation of Article X-type provisions concentrating on transparency and procedural due process. Some of the other Annex 1A Agreements refer to Article X specifically.²³ Many of them, such as the Anti-Dumping (AD) Code and the Agreement on Subsidies and Countervailing Measures, have their own (additional) transparency and due process requirements, however.²⁴ In such cases, the relationship of Article X with the

19. *See generally* Administrative Procedure Act, 5 U.S.C. § 552(a) (2006) (directing U.S. federal agencies to make certain government-held information publicly available through publication in the Federal Register).

20. General Agreement on Tariffs and Trade 1994 art. X:1, Apr. 15, 1994, WTO Agreement, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT 1994].

21. It provides:

No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.

See id. art. X:2

22. *See id.* art. X:3.

23. *See* Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, WTO Agreement, Annex 1A, 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.”); Agreement on Rules of Origin, Apr. 15, 1994, 1868 U.N.T.S. 397 (“[L]aws, regulations, judicial decisions and administrative rulings of general application relating to rules of origin are published as if they were subject to and in accordance with, the provisions of paragraph 1 of Article X of GATT 1994.”); Agreement on Safeguards, Apr. 15, 1994, 1869 U.N.T.S. 154 (“A Member may apply 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.”).

24. *See, e.g.*, Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, 1869 U.N.T.S. 14 [hereinafter SCM

specific due process and transparency provisions of the other Annex 1A Agreements remains unclear.²⁵ The requirements of Article X were made applicable to trade in services and to intellectual property rights. Articles III (“Transparency”) and VI (“Domestic Regulation”) of the General Agreement on Trade in Services replicate the language of Article X of the GATT.²⁶ Similarly, Article 63 of the Trade-Related Aspects of Intellectual Property Rights Agreement establishes publication, notification, and independent judicial review requirements similar to those of Article X.²⁷ The Trade Policy Review Mechanism (“TPRM”) of the WTO is also primarily a transparency-related mechanism. TPRM’s explicit objective is to increase adherence by WTO members to the rules and disciplines, and their commitments, “by [the] achiev[ement of] greater transparency in, and understanding of, the trade policies and practices of Members.”²⁸ WTO transparency obligations may extend beyond the text of negotiations from the Uruguay Round as

Agreement] (requiring written application and sufficient evidence of a subsidy to penalize Members for violations).

25. *E.g.*, Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, 1867 U.N.T.S. 493; Agreement on Technical Barriers to Trade, Apr. 15, 1994, 1868 U.N.T.S. 120; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, 1868 U.N.T.S. 201; Agreement on Import Licensing Procedures, Apr. 15, 1994, 1868 U.N.T.S. 436; SCM Agreement, *supra* note 24.

26. *Compare* General Agreement on Trade in Services art. III, Apr. 15, 1994, WTO Agreement, Annex 1B, 1869 U.N.T.S. 183 (requiring WTO Members to publish all relevant measures including international agreements affecting trade in services, annually inform the WTO Council on Trade in Services about any changes made to the laws that affect trade in services and the commitments that each member has made under that agreement, and establish inquiry points to provide information to other WTO members), *and id.* art. VI (requiring members to maintain “judicial, arbitral or administrative tribunals . . . [to review] administrative decisions affecting trade in services”), *with* GATT 1994 art. X:3 (mandating publication of trade regulations and directing contracting parties to “maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals . . .”).

27. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights art. 63, Apr. 15, 1994, WTO Agreement, Annex 1C, 1869 U.N.T.S. 299 (mandating publication of all intellectual property measures and notification of the WTO Council for TRIPS as well as allowing member objection to judicial and administrative rulings).

28. Trade Policy Review Mechanism, Apr. 15, 1994, WTO Agreement, Annex 3, 1869 U.N.T.S. 480.

additional transparency and good governance provisions are found in WTO accession protocols. The most noteworthy example is the Protocol of Accession of the People's Republic of China, which requires publication and ready availability for enforcement.²⁹

The evolution of Article X from a peripheral and subsidiary obligation to a provision of fundamental importance to the multilateral trading system clearly supports the expansion of the transparency mandate of the WTO, from that of the GATT. This evolution is also important because it demonstrates the role of the Dispute Settlement Mechanism in fashioning how procedural fairness criteria are becoming central to the WTO system, particularly as it ventures into "non-economic" areas, such as public health, human rights, and the environment.

From 1947 to 1994, only nine panel decisions involving Article X of the GATT were adopted.³⁰ Article X was first mentioned in 1984 in a claim filed by the United States against Japan for the use of

29. See Protocol on the Accession of the People's Republic of China, art. 2(C)(1), WT/L/432 (Nov. 23, 2001) (directing China to enforce only those trade-related laws or regulations that have been published and are readily available to other WTO Members). Article 2(C) of the Protocol also requires China to establish enquiry points through which WTO Members can request information on the measures. See *id.* art. 2(C)(3) ("China shall make available to WTO Members, upon request, all laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange before such measures are implemented or enforced.").

30. Report of the Panel, *Canada—Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, DS17/R (Oct. 16, 1991), GATT B.I.S.D. (39th Supp.) at 27 (1992); Report of the Panel, *European Economic Community—Regulation on Imports of Parts and Components*, L/6657 (Mar. 22, 1990), GATT B.I.S.D. (37th Supp.) at 132 (1991); Report of the Panel, *Canada—Import Restrictions on Ice Cream and Yoghurt*, L/6568 (Sept. 27, 1989), GATT B.I.S.D. (36th Supp.) at 68 (1990); Report of the Panel, *European Economic Community—Restrictions on Imports of Apples—Complaint by the United States*, L/6513 (June 9, 1989), GATT B.I.S.D. (36th Supp.) at 135 (1990); Report of the Panel, *Republic of Korea—Restrictions on Imports of Beef—Complaint by the United States*, L/6503 (May 24, 1989), GATT B.I.S.D. (36th Supp.) at 268; Report of the Panel, *European Economic Community—Restrictions on Imports of Dessert Apples—Complaint by Chile*, L/6491 (Apr. 18, 1989), GATT B.I.S.D. (36th Supp.) at 93; *Japan—Semi-Conductors*, *supra* note 11, at 116; *Japan—Agricultural Products*, *supra* note 11, at 163; *Japan—Leather II*, *supra* note 11, at 94; see also Report of the Panel, *United States—Countervailing Duties on Non-Rubber Footwear from Brazil*, SCM/94 (Oct. 4, 1989) GATT B.I.S.D. (42d Supp.) at 208 (1995).

“administrative guidance.”³¹ In fact, the first three Article X cases focused on Japan’s practice of administrative guidance. In all of these initial cases, the issue of transparency—specifically, publication—was viewed as a subsidiary obligation to the more substantive provisions of the GATT found in Articles III and XI:1.

Under the WTO Agreements, over twenty cases have alleged violations of Article X specifically and many other disputes have focused on transparency-related obligations set forth in other provisions, such as the Anti-Dumping Code. Article X has been invoked by Argentina, Australia, Brazil, Chile, Costa Rica, Ecuador, Guatemala, Honduras, India, Indonesia, Korea, Mexico, Thailand, Turkey, and the United States. This diversity demonstrates the growing consensus among Members that the expectations for market access and the non-discrimination goals of the trading system cannot be met without transparency in *administration* of measures.

As early as 1997, the Appellate Body stated that Article X “may be seen to embody a principle of fundamental importance . . . known as the principle of transparency that has obvious[] due process dimensions.”³² The Appellate Body also has expanded the scope of Article X through interpretations of its provisions. It held that “measures of general application” covered under Article X:1 include even a single administrative ruling applicable to one company or shipment if the application establishes a principle which will be applicable in future cases. The Appellate Body interpreted the Article X:3 requirement of “uniform” application to entail equal treatment of importers and exporters under customs procedures, in keeping with their expectations, but also in “access to information” and “flow of information.” For example, in *Dominican Republic—Import and Sale of Cigarettes*, the WTO panel and the Appellate Body found violations of Article X when a survey used as the basis of a tax was not published.³³ In addition, the Appellate Body made Article X

31. Cf. *Japan—Leather II*, *supra* note 11, ¶ 16 (considering the claim by the United States that Japan violated the reasonableness requirements of Article X:3 in its administration of leather import quotas as well as in its refusal to publish global quotas and lists of license holders).

32. Appellate Body Report, *United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, at 19, WT/DS24/AB/R (Feb. 10, 1997).

33. See Panel Report, *Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶¶ 7.405-06, WT/DS302/R (Nov. 26,

applicable to the Agreement on Import Licensing despite the Agreement's silence on Article X and its provision of a separate procedure. Finally, in *EC—Selected Customs Matters*, for the first time a dispute centered *solely* on the provisions of Article X:3(a) and no other “substantive” provisions. In the dispute, the United States claimed that the European Community's system of customs administration was inconsistent with the Article X:3(a) requirement that measures be administered in a “uniform” manner. The Appellate Body held that although it was appropriate to challenge a measure “as a whole or overall” under Article X, and that the United States had appropriately raised that claim on appeal, there was not enough facts for the Appellate Body to rule on the claim “as a whole.”³⁴ Importantly, the Appellate Body undermined the substance/procedure distinction, stating that the substance of a measure can be challenged under Article X if such substance “necessarily leads to” lack of uniform application.³⁵

In sum, during the past fifteen years, WTO members and the Appellate Body have expanded the scope and reach of Article X incrementally. Such expansive interpretations have not yet resulted in many actual findings of inconsistency with Article X. However, there have been some. The scope of Article X is also important as it has been invoked by the Appellate Body as being applicable to the preamble or chapeau of Article XX. To elaborate on this point, the discussion turns to Article XX and, ultimately, the relationship between Articles X and XX.

2004) (concluding that the average-price surveys conducted for the determination of the tax base for cigarettes were a crucial element of an administrative ruling for the purpose of analyzing a violation of the publishing requirement of Article X).

34. See Appellate Body Report, *European Communities—Selected Customs Matters*, ¶¶ 172-73, 201, WT/DS315/AB/R (Nov. 13, 2006) [hereinafter *EC—Customs*] (finding that mere citation to the provisions of a challenged legal instrument under Article X:3(a) is insufficient to prove unallowable administration of such legal instrument).

35. See *id.* ¶ 201 (“The complainant must discharge the burden of substantiating *how* and *why* those provisions necessarily lead to impermissible administration of the legal instrument of the kind described in Article X:1.” (emphasis added)).

IV. HISTORY AND EVOLUTION OF ARTICLE XX

The general exceptions listed in Article XX of the GATT can be traced to the 1927 International Agreement for the Suppression of Import and Export Prohibitions and Restrictions.³⁶ The same general exceptions were subsequently incorporated during negotiations for the creation of the ITO.³⁷ As the drafting history of the ITO Charter indicates, the drafting of the General Exceptions provision—ultimately GATT Article XX—was controversial due to the proposed scope of the exceptions provided and the “divergence of national practices” on the issues addressed.³⁸ From the very beginning there was concern that the provision could be used to disguise protectionism. That is why the Netherlands and the Belgo-Luxembourg Economic Union proposed the addition of the italicized language, below:

Subject to the requirement that such measures not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

36. Compare GATT 1994 art. XX (excluding measures which are necessary for the protection of public morals, human, animal, or plant life or health, or those needed for the preservation of national treasures with artistic, historic, or archaeological value), with Convention for the Abolition of Import and Export Prohibitions and Restrictions, Nov. 8, 1927, 46 Stat. 2461, 97 L.N.T.S. 393, reprinted in 25 AM. J. INT'L L. 121 (1931) (detailing that Members' prohibitions based on moral or humanitarian grounds and the protection of public health, animal and plant life, and national treasures shall not be forbidden by the Convention). Article IV provides an exception for, among other things, rules and regulations that are “issued on grounds of public health” or “imposed for moral or humanitarian reasons . . .” GATT 1994 art. IV.

37. Appellate Body Report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 164, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000) (“We note that, in its analysis, the Panel also referred to the negotiating history of the GATT 1947, and particularly to the rejection of a proposal presented by India during the negotiations on the International Trade Organization (the “ITO”) Charter according to which Members would be permitted to justify, on a temporary basis, retaliatory measures under Article XX”).

38. See generally *The GATT Years: from Havana to Marrakesh*, WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited Sept. 1, 2011) (portraying the ITO draft charter as “ambitious” because it addressed not only trade but also rules on national issues such as employment, commodity agreements, restrictive business practices, and services).

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health; [or]
- ...
- (g) relating to the conservation of an exhaustible natural resources if such measures are made in conjunction with restrictions on domestic production or consumption.³⁹

This original amendment to the chapeau language (of what eventually became Article XX) has never been changed or amended. During the GATT years, the Article XX exceptions contained under the subparagraph were construed so strictly that the application of the preamble language on such measures was rarely discussed. GATT panels did not address Article XX concerns unless a party invoked the Article to defend a measure, and in all such cases, the invoking party lost.⁴⁰ At issue in the adopted decisions were subparagraphs (b) and (g) of Article XX. As far as subparagraph (g) was concerned, the words “relating to” and “in conjunction with” were interpreted to

39. GATT 1994 art. XX. “Indirect protectionism is an undesirable and dangerous phenomenon. Many times stipulations to ‘protect animal or plant life or health’ are misused for indirect protection. It is recommended to insert a clause which prohibits expressly [the use of] such measures [to] constitute an indirect protection” 1 WTO, WTO ANALYTICAL INDEX: GUIDE TO WTO LAW AND PRACTICE 344 n.655 (1st ed. 2003).

40. See, e.g., Report of the Panel, *United States—Restrictions on Imports of Tuna*, ¶ 5.22, DS21/R (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.) at 155 [hereinafter *U.S.—Tuna I*] (unadopted) (explaining that panels have traditionally interpreted Article XX narrowly, mandated that the movant justify the Article’s invocation, and not examined Article XX exceptions absent invocation). The GATT panel held in *U.S.—Tuna I* that the Panel did not have an obligation to examine Article XX exceptions unless raised by a party to the dispute. See *id.* Even if a party raised an Article XX defense, the traditional analysis of the provisions of Article XX by the GATT panels made it difficult, if not impossible, for the party to meet its burden of proof. For instance, the panel in *U.S.—Tuna I* held that a party can meet its burden of proof only when the party has: (1) adopted the least-GATT-inconsistent measure; (2) proven that it exhausted all alternatives before its adoption of the measure; and (3) applied the measure in the least-GATT-inconsistent manner. See, e.g., *id.* ¶¶ 4.4, 5.28. The largest hurdle was establishing that the measure in question was the least GATT-inconsistent measure available, as consideration was not granted to the whether a less GATT-inconsistent measure would achieve the level of protection sought by the measure in place. See *id.* ¶¶ 5.27-29.

mean “primarily aimed at.” The GATT panels held that even if a measure was about an “exhaustible natural resource,” it was not primarily aimed at preserving that resource, but rather primarily aimed at changing another government’s conservation policies!

The word “necessary” in subparagraph (b) was interpreted as when there “were no alternative measures consistent with the [GATT] or less inconsistent with [the GATT].”⁴¹ In other words, “only if” there was no other alternative would a trade barrier be justified under subparagraph (b).⁴² Because the defending party had the burden to show that there was no other alternative, the requirement proved to be insurmountable. Other issues continued to limit the scope of Article XX, including panel statements seeming to question whether measures that extra-territorial application could ever be justified under these exceptions.⁴³ As far as the chapeau of Article XX language was concerned, during the GATT 1947 years, it was referenced as evidence of the fear of the drafters that Article XX would be used for protectionist means, and therefore, mandating very strict interpretations of what would be a valid measure under Article XX. But because the measures invariably failed under the requirements of the subparagraph, the requirements of the chapeau were not discussed in any great depth.

The WTO Agreement, as applied by the Appellate Body, changed all this, resuscitating Article XX from its previously vegetative state.

41. Report of the Panel, *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶ 75, DS10/R (Oct. 5, 1990), GATT B.I.S.D. (37th Supp.) at 200.

42. *See id.* (recognizing the argument by the United States that the inconsistency of Thailand’s acts with Article XI:1 should not be considered “necessary” because Thailand could attain its public health objectives through domestic measures permissible under Article III:4).

43. *See, e.g., U.S.—Tuna I*, *supra* note 40, ¶ 5.28 (holding that although Article XX does not apply to extra-jurisdictional measures, this limitation is overcome by the occasional presence of dolphins in U.S. territorial waters). In *U.S.—Tuna II*, the Panel reversed the earlier analysis stating that there is no extra-jurisdictional limitation on Article XX-type measures. *See* Report of the Panel, *United States—Restrictions on Imports of Tuna*, ¶ 5.11, DS29/R (June 16, 1994) (unadopted) (accepting the argument by the United States that Article XX(g) does not mandate the presence of an “exhaustible natural resource” within the territorial jurisdiction of the country taking the measure). The Appellate Body had yet to rule on the extra-jurisdictional issue previously. *See U.S.—Shrimp*, *supra* note 13, ¶ 133 (“We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation.”).

First, in *U.S.—Gasoline*, the Appellate Body overturned the Panel, stating that the Gasoline Rule at issue was indeed consistent with requirements of subparagraph (g) because of its primary aim of conservation of natural resources and even-handed treatment vis-à-vis the domestic industry. It held, therefore, that the measure satisfied the requirements of the words “in conjunction with” as well as “relating to.” Instead, the Appellate Body moved the analysis away from the substance of the measure, and whether the measure on its face was consistent with the subparagraph (g) and focused instead on the *application* of the measure and the requirements of the Article XX chapeau. In other words, there is no question according to the Appellate Body that unilateral measures of this type are within the scope of Article XX and that the chapeau of Article XX should not be interpreted (as under the GATT 1947) to express merely the fear of disguised protectionism through conservation measures, but also to impose an additional procedural requirement that limits the trade distortive effects of the measure (to the extent possible) given that the measure had already been determined to be a legitimate measure fitting under one of the subparagraphs of Article XX. Also in 1996, in *U.S.—Gasoline*, the Appellate Body made clear that the meaning of Article XX is not what it used to be under the GATT 1947 given the preamble of the WTO Agreement and the Decision on Trade and Environment.⁴⁴ The Appellate Body, through its interpretation of the WTO preamble and other decisions, changed the status of Article XX from an exception narrowly interpreted for fear that it would undermine the multilateral trading system to a provision that is consistent with, and relevant to, the Appellate Body’s case-by-case balancing approach. This approach stems directly from the Body’s view of the WTO preamble and the expansion of the WTO mandate

44. See Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, at 29-30, WT/DS2/AB/R (Apr. 29, 1996). Nevertheless, “[t]he ability of any WTO Member to take measures to control air pollution, or more generally, to protect the environment is [not] at issue.” *Id.* Putting that ability at issue, according to the Appellate Body, would:

ignore the fact that Article XX of the *General Agreement* [GATT 1994] contains provisions designed to permit important state interests—including the protection of human health, as well as the conservation of exhaustible natural resources to find expression Indeed, in the preamble to the *WTO Agreement* and in the *Decision on Trade and Environment*, there is specific acknowledgement to be found about the importance of coordinating policies on trade and the environment.

Id.

to include the “objective of sustainable development.” The change in attitude towards Article XX from the GATT to the WTO has also meant increased emphasis on procedure and a two-step approach to application of Article XX. First, a measure is analyzed under an Article XX subparagraph for its substantive adequacy and, second, after finding that a measure meets the requirements of a subparagraph, the measure’s *application* is weighed, under the chapeau of Article XX, to ensure that the measure is not applied in an arbitrary or unjustifiably discriminatory manner or as a disguised restriction (although this latter category has yet to be subject to clarification or scrutiny from the Appellate Body). This two-step analysis originally set forth in *U.S.—Gasoline* was modified and further expanded and clarified in *U.S.—Shrimp*.⁴⁵

Other cases have clarified the scope of the subparagraphs of Article XX and have upheld measures that meet the requirements of a specific subparagraph. In *EC—Asbestos*, the Appellate Body found a ban on the importation of asbestos and products containing asbestos as permitted under Article XX(b) and the chapeau.⁴⁶ The Appellate Body could not find a reasonably available, less trade-restrictive alternative that would allow the French government to achieve its goal of zero health risk associated with asbestos. In other words, the analysis of the word “necessary” in Article XX(b) requires balancing the legitimate goals of the government with the WTO-inconsistent trade restrictions. The more compelling the values promoted by the government (for example, human health), the more the measure can be trade-restrictive (for example, a blanket import ban). This balancing act was explained further in *U.S.—Gambling*,⁴⁷ *Korea—Various Measures on Beef*,⁴⁸ *Brazil—Retreaded Tyres*,⁴⁹ and

45. See generally Ala’i, *supra* note 9, at 1162-69 (providing a full discussion of the United States’ import prohibition of certain shrimp and shrimp products).

46. See Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 75, 163, WT/DS135/AB/R (Mar. 12, 2001) (concluding that the measure protected human life or health within the meaning of Article XX(b)).

47. See Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 307, WT/DS285/AB/R (Apr. 7, 2005) (“It is on the basis of this ‘weighing and balancing’ and comparison of measures, taking into account the interests or values at stake, that a panel determines whether a measure is ‘necessary’ . . .”).

48. See Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 164, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11,

China—Publications and Audiovisual Products.⁵⁰ In all of these cases, the Appellate Body required a balancing act that also took into account other reasonably available (less trade-restrictive) alternatives.⁵¹

In the context of the chapeau of Article XX, the focus of the balancing of interests is on transparency and due process rather than the value of the objective pursued and the extent to which there may be a less trade-restrictive measure that would achieve an equivalent objective. The Appellate Body believes that the subparagraphs of Article XX require a balancing of trade liberalization and other, potentially overriding public policy considerations.⁵² In *U.S.—Shrimp*, the Appellate Body moved the focus of such balancing from the substance of the measure addressed in the subparagraph—that is,

2000) (“[D]etermination of whether a measure, which is not ‘indispensable,’ may nevertheless be ‘necessary’ within the contemplation of Article XX(d) involves in every case a process of weighing and balancing a series of factors . . .”).

49. See Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 178, WT/DS332/AB/R (Dec. 3, 2007) [hereinafter *Brazil—Retreaded Tyres*] (“[T]o determine whether a measure is ‘necessary’ within the meaning of Article XX(b) of the GATT 1994, a panel must consider the relevant factors, particularly the importance of interests or values at stake, the extent of the contribution to the achievement of the measure’s objective, and its trade restrictiveness.”).

50. See Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 251, WT/DS363/AB/R (Dec. 21, 2009) [hereinafter *China—Publications and Audiovisual Products*] (recalling that “the term ‘necessary,’ in the abstract, refers to a range of degrees of necessity . . . [which] involves a process of weighing and balancing a series of factors that prominently include the contribution made by the measure to secure compliance with the law or regulation, and the accompanying impact of the law or regulation on imports or exports”).

51. E.g., *Brazil—Retreaded Tyres*, *supra* note 49, ¶ 178. In some of these cases, of course, recourse was not made to the chapeau of Article XX because the measure itself failed to meet the “substantive” requirements of the subparagraph.

52. See *China—Publications and Audiovisual Products*, *supra* note 50, ¶ 310 (stating that “if a Member chooses to adopt a very restrictive measure, it will have to ensure that the measure is carefully designed so that the other elements to be taken into account in weighing and balancing the factors relevant to an assessment of the ‘necessity’ of the measure will ‘outweigh’ such restrictive effect”); see also *U.S.—Shrimp*, *supra* note 13, ¶ 159 (noting that the purpose of the chapeau of Article XX is to ensure that a Member’s invocation of an Article XX exception does not “cancel out the [rights of other Members under a substantive provision of the GATT 1994] and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement”).

whether the measure relates to “preservation of an exhaustible natural resource” and is primarily aimed at rendering effective “restrictions on domestic production or consumption”—to the *application* of the measure, including the procedural aspects of a measure (such as transparency-related criteria), addressed in the chapeau of Article XX. Significantly, the Appellate Body in *U.S.—Shrimp* acknowledged the importance of due process by making reference to Article X as follows:

It is also clear to us that Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations which, in our view, are not met here. The non-transparent and ex-parte nature of the internal governmental procedures applied by the competent officials . . . throughout the certification processes . . . are all contrary to the spirit, if not the letter, of Article X:3 of GATT 1994.⁵³

V. CONCLUDING OBSERVATIONS: WHERE DO WE GO FROM HERE?

The creation of the WTO has brought Articles X and XX from the periphery of GATT jurisprudence to the center of WTO jurisprudence. The evolution of the relationship between these two provisions must be understood within the context of the preamble to the WTO Agreement and the expansion of the trade mandate, which has resulted in the erosion of the economic/non-economic distinction that had dominated the post-World War II economic order. The WTO preamble, as interpreted by the Appellate Body, requires weighing and balancing trade-liberalization interests against the equally important objective of sustainable development. The result of such balancing, as may be expected, is an emphasis on procedural transparency and the fairness of the mechanisms in place, rather than a weighing of the substantive values at issue—for example, conservation of an endangered species versus the “costs” associated with restricting trade in violation of the WTO rules.

WTO panels and the Appellate Body cannot return to the simpler days of the GATT 1947 when they could rely on an ideological bias for the free market. That time is over. To retain its relevance and legitimacy, the WTO must promote free trade without undermining

53. *U.S.—Shrimp*, *supra* note 13, ¶ 183.

other important and increasingly universal values, such as protection and preservation of the environment, worker and human rights, and protection of public health and this will be done by turning towards transparency and predictability of a legal regime.

In the coming decades, the WTO will continue to tackle cutting-edge issues, such as climate change, renewable energy, and access to clean water or medicine, largely because there are no other global forums where countries can address conflicts between national regulatory schemes. Unfortunately, the multilateral trade negotiations are at an impasse as reflected by the failure of the Doha round of trade negotiations and the increasing number of new issues that are not adequately by the Doha agenda.

At the same time, the global economic downturn particularly in the United States and European Union, raise the possibility of increased protectionism. No other global forum has been able to unite humankind in addressing its common problems. It may well be however that that Bretton Woods System is no longer functioning appropriately to address global challenges. In the absence of other global forum, it is inevitable that the WTO members will continue to turn to the WTO Dispute Settlement System (the WTO panels and, ultimately, the Appellate Body) to address contentious issues and policies on a case by case basis. Will the Appellate Body be able to address such issues without undermining itself? The answer to this question is unclear. If the past is any indication, the future will see an increasing emphasis on transparency and due process by the Appellate Body and the WTO panels.

Case-specific balancing of interests will be a very difficult task requiring the WTO to focus on the legitimacy of the process at both the national and the WTO level. As such, the WTO increasingly will focus on: (1) internal transparency of its own decision-making and (2) domestic transparency and predictability in the application of measures that are trade-restrictive or discriminatory, but that nevertheless promote values important to sustainable development. Article X and Article XX values are inextricably linked for the foreseeable future. The evolution in interpretation and application of these two provisions and the values they represent will be crucial to the future of the WTO, its legitimacy, and its role in promoting sustainable development.