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PADIDEH ALA'I  
FROM THE PERIPHERY TO  
THE CENTER?  
THE EVOLVING WTO  
JURISPRUDENCE  
ON TRANSPARENCY  
AND GOOD GOVERNANCE



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**From the Periphery to the Center? The Evolving WTO Jurisprudence on  
Transparency and Good Governance**

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This paper traces the jurisprudence of Article X of the General Agreement on Tariffs and Trade (GATT) 1994<sup>2</sup> entitled: *Publication and Administration of Trade Regulation* from 1947 to the present. Article X is significant because it “goes to the heart of a country’s legal infrastructure, and more precisely to the nature and enforcement of its administrative law regime.”<sup>3</sup> Article X was proposed by the United States Department of State in 1947 and was influenced by the contemporaneous enactment of the United States Administrative Procedures Act (APA).<sup>4</sup> Its provisions generally require that all trade related measures be promptly published, administered in a uniform, impartial and reasonable manner and subject all administrative actions that relate to customs matters to some sort of independent judicial review.

During the GATT years (1947-1995) Article X was a silent provision which was dismissed by panels as “subsidiary” to the other “substantive” GATT provisions. Since the inception of the World Trade Organization (WTO),<sup>5</sup> Article X has emerged from

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<sup>2</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, Art. X, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

<sup>3</sup> Sylvia Ostry, *China and the WTO: The Transparency Issue*, 3 UCLA J. INT’L L & FOR. AFF. 1, 2 (1998).

<sup>4</sup> Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946), 5 U.S.C. §§ 551-559 (2000).

<sup>5</sup> Marrakesh Agreement Establishing the World Trade Organization, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

obscurity as a provision of fundamental importance for its embodiment of the principles of “transparency”<sup>6</sup> and due process. The relative prominence of Article X in trade disputes at the WTO is a manifestation of the emerging role of the WTO as a global (supra-national) regulatory body. The increased emphasis on Article X also highlights the potential role of the WTO in promulgating “good governance”<sup>7</sup> norms in both the transnational and domestic context.<sup>8</sup>

This paper will show that in trade disputes WTO members are increasingly resorting to basic good governance principles, such as transparency and due process. These good governance principles as embodied in Article X are most often invoked in connection with the most contentious trade issues facing the multilateral trading system including administration of anti-dumping or countervailing measures by the United States Department of Commerce (DOC).

The move of Article X from the periphery to the center in trade disputes also reflects: (1) an emerging global consensus regarding the good governance values that

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<sup>6</sup> Transparency is generally defined as “sharing information or acting in an open manner” or “a measure of the degree of which information about official activity is made available to an interested party.” 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). In the legal context, the focus of transparency is on procedural due process, e.g., publication, access to and flow of information, and independent judicial review. This paper is not concerned with the internal governance of the WTO or the external transparency of the WTO as it relates to public (non-state) participation.

<sup>7</sup> In this paper “governance” is defined as the “process of decision-making and the process by which decisions are implemented.” See U.N. Econ. & Soc. Comm’n for Asia and the Pacific [ESCAP], *What is Good Governance?* Available at [www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.pdf](http://www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.pdf) (last visited May 16, 2008). The term “good governance” is defined to include five basic characteristics which are: (1) participation, (2) transparency, (3) responsibility, (4) accountability, and (5) responsiveness. Role of Good Governance in the Promotion of Human Rights, Comm’n on Human Rights Res. 2000/64, U.N. CHR, 56th Sess., 66th mtg., U.N. Doc. E/CN.4/RES/2000/64 (Apr. 27, 2000).

<sup>8</sup> Indeed, a strong argument can be made that the cumulative effect of the many “good governance” provisions of the WTO, e.g. requiring notification, publication, participation, responsiveness, access to information has potentially a far greater impact on domestic governance of states than the direct attempts at legal and institutional reform by the World Bank, the International Monetary Fund (IMF) and others. A prominent example of the influence of WTO’s transparency and good governance provisions is seen in the case of China where thousands of pieces of legislation were promulgated in connection with China’s accession to the WTO.

must inform both domestic and global administrative systems such as transparency, access to information, participation etc.; (2) the evolution of the GATT from a system based on tariffs, reciprocal bargaining and exchanging concessions to one primarily concerned with rule-making; and (3) an attempt by the dispute settlement system to accommodate the emerging role of the WTO as a rulemaking body by enforcing its good governance mandate in a manner that avoids political controversy and charges of overreaching by the membership of the WTO against the Panels and the Appellate Body. For example, as the discussion below will elaborate, a Panel may interpret expansively a provision of Article X but then either refuse to address the Article X claim in the name of judicial economy or find that the measure in question does not in fact violate Article X requirements of transparency or due process.<sup>9</sup>

This paper will first, define terms and explore the roots and the scope of Article X of GATT 1994; second, discuss the application of Article X during the GATT years (1947-1994) when after being a dormant provision for almost forty years it was dismissed in the 1980s and early 1990s as containing an obligation that is “subsidiary” to the more “substantive” GATT provisions; third, explore the impact of the WTO on the scope and application of Article X requirements of transparency and due process; fourth review the most prominent Article X cases brought under the WTO Dispute Settlement Mechanism (DSM) culminating with *EC-Selected Customs Matters* where all the claims were based on violations of provisions of Articles X;<sup>10</sup> and finally make some observations about the

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<sup>9</sup> In such cases, the Panel’s extensive discussion of Article X provisions nevertheless set the stage for the future where the Panels review of domestic administrative regimes may be less politically controversial. See discussion, *infra* Part VI

<sup>10</sup> See discussion, *infra* Part V.

future of Article X under the DSM and its implications for the overall goal and mandate of the WTO.

## **I. Introduction**

The United States State Department initially proposed the text of Article X as Article 15 of the suggested Charter of the International Trade Organization (ITO),<sup>11</sup> which was subsequently adopted by the GATT Contracting Parties as Article X of GATT 1947. At the time of its adoption no other country expressed an interest in Article X and it was adopted and included into the GATT without any discussion or amendment. The proposed language of the text of Article X generally follows the text of the APA which was enacted in 1946.<sup>12</sup> At the time of its adoption, the Contracting Parties viewed Article X as not imposing any new obligations.<sup>13</sup> The text of Article X of GATT 1947 (which remains unchanged under GATT 1994), provided:

(1) “Laws, regulations, judicial decisions and administrative rulings of general application...pertaining to classification or valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports, or on the transfer or payments therefore, or *affecting* their sale, distribution, transportation... or other use shall be *published promptly* in such manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy ...shall also be *published*.  
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<sup>11</sup> Ostry, *supra* note 3, at 3.

<sup>12</sup> Article X was also “partially based on Articles 4 and 6 of the 1923 International Convention Relating to the Simplification of Customs Formalities.” See GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE, vol. I, 309 (WTO & Bernan Press updated 6th ed. 1995). See also Padideh Ala’i, *The Multilateral Trading System and Transparency, in Trends in WORLD TRADE: ESSAYS IN HONOR OF SYLVIA OSTRY* 105, 108-112 (Alan S. Alexandroff ed., Carolina Academic Press 2007) (discussing the history and evolution of the APA and its relationship with Article X of GATT 1947).

<sup>13</sup> In fact, a senior Canadian negotiator is quoted as stating at the time of the original enactment of Article X that it contained no additional substantive requirements and should therefore not be of any concern. Sylvia Ostry, *Article X and the Concept of Transparency in the GATT/WTO, in CHINA AND THE LONG MARCH TO GLOBAL TRADE: THE ACCESSION OF CHINA TO THE WORLD TRADE ORGANIZATION* 123, 124 (Alan S. Alexandroff, Sylvia Ostry & Rafael Gomez eds., Routledge UK 2002). See also Ostry, *supra* note 8, at 4.

(2) *No* measure of general application...effecting an advance in a rate of duty...or imposing new or *more* burdensome requirement, restriction or prohibition on imports...shall be *enforced* before such measure has been officially *published*.

(3) (a) Each [Member] shall administer in a *uniform, impartial and reasonable manner* all its law, regulations, decisions and rulings of the kind described in paragraph 1....

(b) Each [Member] shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose...of prompt review and correction of administrative action relating to custom matters...Such tribunals shall be independent of the agencies trusted with administrative enforcement....<sup>14</sup>

It has been argued that the motivation of the United States in proposing Article X was to level the playing field for United States traders who faced opaque and informal administrative structures in other countries while its administrative process was made more transparent with the enactment of the APA.<sup>15</sup> Article X may have been intended to assist US exporters in the post World War II world, but that does not detract from the fact that those provisions may also be interpreted as expressing the values that led to the enactment of the APA, such as imposing limitations on the exercise of executive discretion through transparency and due process.<sup>16</sup>

From 1947-1984 there is no mention of Article X in any adopted GATT decision.<sup>17</sup> By the mid-1980s the United States, faced with loss of competitiveness,

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<sup>14</sup> GATT, *supra* note 2, Art. X. (emphasis added)

<sup>15</sup> See JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 461-64 (The Michie Company 1969) (citing Kelly, *Nontariff Barriers*, in STUDIES IN TRADE LIBERALIZATION: PROBLEMS AND PROSPECTS FOR THE INDUSTRIAL COUNTRIES 268 (B. Balassa ed. 1967) (maintaining that secrecy combined with a lack of information about trade barriers can have a disparate impact on trade from different nations).

<sup>16</sup> See Ala'i, *supra* note 12, at 109-12 (noting that while the APA may have been an attempt to limit executive discretion it also led to the rise of the administrative state with the proliferation of agencies under the executive branch of government).

<sup>17</sup> Prior to the formation of the WTO, the GATT dispute settlement panel was driven by consensus that required agreement of all parties for the formation or adoption of panel decisions. The result of this consensus-driven approach was that there are few adopted decisions, and the few that exist have gone out

became increasingly concerned about the proliferation of non-tariff barriers (NTBs) including non-transparent and *ad hoc* administration of customs regulations.<sup>18</sup> The initial GATT Panel decisions involving Article X were filed by the United States against Japan's non-transparent administration of import quota systems and the extensive use of the informal system of "administrative guidance" by Japan.

## II. Article X and the GATT (1947-1994)

During the GATT years the mention of Article X appears in only nine adopted GATT Panel cases starting as late as 1984.<sup>19</sup> The United States was involved in all these cases: six as the complainant,<sup>20</sup> one as respondent,<sup>21</sup> and two as an interested third party.<sup>22</sup> A review of these decisions shows that although the United States and other

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of their way not to address difficult issues that may threaten the legitimacy of the system. This may have included avoiding Article X transparency claims.

<sup>18</sup> These issues were addressed more frequently through other mechanisms. For example, in 1977 the United States had passed the Foreign Corrupt Practices Act (FCPA). Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, § 102, 91 Stat. 1494, 1494 (codified at 15 U.S.C. § 78m(b)(2)(B) (1982)).

<sup>19</sup> Report of the Panel on *United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*, June 19, 1992, GATT B.I.S.D. DS18/R – 39S/128 [hereinafter US – Non-Rubber Footwear]; Report of the Panel on *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, Feb. 18, 1992, GATT B.I.S.D. DS17/R – 39S/27 [hereinafter Canada – Alcoholic Drinks II]; Report of the Panel on *European Economic Community – Regulation on Imports of Parts and Component*, May 16, 1990, GATT B.I.S.D. L/6657 – 37S/132 [hereinafter Screwdriver Case]; Report of the Panel on *Canada – Import Restrictions on Ice Cream and Yoghurt*, Dec. 5, 1989, GATT B.I.S.D. L/6513 – 36S/135 [hereinafter Canada – Ice Cream and Yoghurt]; Report of the Panel on *European Economic Community – Restrictions on Imports of Apples – Complaint by the United States*, June 22, 1989, GATT B.I.S.D. L/6513 – 36S/135 [hereinafter EEC – Dessert Apples – Complaint by the US]; Report of the Panel on *European Economic Community – Restrictions on Imports of Apples – Complaint by Chile*, June 22, 1989, GATT B.I.S.D. L/6491 – 36S/93 [hereinafter EEC – Dessert Apples – Complaint by Chile]; Report of the Panel on *Republic of Korea – Restriction on Imports of Beef – Complaint by the United States*, Nov. 7, 1989, GATT B.I.S.D. L/6503 – 36S/268 [hereinafter Korea – Beef (US)]; Report of the Panel on *Japan – Trade in Semi-Conductors*, May 4, 1988, GATT B.I.S.D. L/6309 – 35S/116 [hereinafter Japan – Semi-Conductors]; Report of the Panel on *Japan – Restrictions on Imports of Certain Agricultural Products*, Feb. 2, 1988, GATT B.I.S.D. L/6253 – 35S/163 [hereinafter Japan – Agricultural Products]; Report of the Panel on *Japanese Measures on Imports of Leather*, May 15-16, 1984, GATT B.I.S.D. L/5623 – 31S/94 [hereinafter Japan – Leather].

<sup>20</sup> Out of the seven cases initiated by the United States three were against Japan. See Japan – Semi-Conductors, *supra* note 18; Japan – Agricultural Products, *supra* note 19; Japan – Leather, *supra* note 19. Two were against Canada. See Canada – Alcoholic Drinks II, *supra* note 19; Canada – Ice Cream and Yoghurt, *supra* note 19. And one was against Korea. See Korea – Beef (US) *supra* note 19.

<sup>21</sup> See US – Non-Rubber Footwear, *supra* note 19.

<sup>22</sup> Although not an official third party, the measure at issue was related to U.S. actions forcing Japan to limit its exports to the European market. See Japan – Semi-Conductors, *supra* note 19, ¶4 (acknowledging

Contracting Parties to the GATT recognized that “administration” of a measure can be an issue, they still preferred to address a measure as being inconsistent with the “substantive” provisions of the GATT such as Article XI:1.<sup>23</sup> Article XI:1 prohibits quotas, import or export licenses, or any “other measure” that in any manner restricts trade. The term “other measure” has been interpreted to cover the never ending list of NTBs, including import licensing requirements, anti-dumping measures, regulation of health and safety etc. The breadth of the Article XI:1 obligation allowed the GATT Panels to find any measure inconsistent with the GATT without having to refer to the “administrative” or “subordinate” claim of Article X.

Three of the nine adopted GATT cases involving Article X were brought by either the United States or the European Economic Community (EEC) against Japan.<sup>24</sup> In all three cases at issue is the level of transparency that is required under Article X.<sup>25</sup> In *Japan-Leather* the United States challenged the *administration* of the Japanese quota system on imported leather.<sup>26</sup> The United States argued that the Japanese import leather quota system was a violation of Article X:1 and X:3 because Japan failed to publish the

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the special nature of the matter and providing for an adequate opportunity for the United States to participate). *See also* Screwdriver Case, *supra* note 19.

<sup>23</sup> Article XI:1 states:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

GATT, *supra* note 2, art. XI:1.

<sup>24</sup> *See* Japan – Semi-Conductors, *supra* note 19; Japan – Agricultural Products, *supra* note 19; Japan – Leather, *supra* note 19.

<sup>25</sup> *See* Japan – Agricultural Products, *supra* note 19, ¶ 5.4.1.4 (finding that the practice of “administrative guidance” is “a traditional tool of Japanese Government policy based on consensus and peer pressure” and thus finding that under the special circumstances in Japan such administrative guidance could be considered a governmental measure). *See also* Japan – Semi-Conductors, *supra* note 19, ¶ 107 (clarifying the Panel’s analysis of “administrative guidance” as a governmental measure in *Japan – Agricultural Products*).

<sup>26</sup> Japan – Leather, *supra* note 19.



total import quota and certain administrative rulings related to it.<sup>27</sup> Of particular concern to the United States was the fact that in administering the leather quotas, the Government of Japan allocated licenses so as to channel import trade through Japanese producers and distributors. The United States argued that such producers had “no incentive to fully utilize the quota amounts allocated to them.”<sup>28</sup> The *Japan-Leather* Panel ruled that the quota system was in violation of Article XI:1<sup>29</sup> and need not be addressed under Article X.<sup>30</sup>

The second Article X case, *Japan – Agricultural Products*, was adopted in 1988. In that dispute, the United States argued that the Japanese quota system on certain agricultural products was, in addition to being a violation of Article XI:1, also a violation of Articles X:1 and X:3. The United States alleged that in administering the agricultural quota system the Japanese had failed to “publish adequate and timely information on quota volume or value” in violation of Article X:1 and such failure to publish resulted in an *unreasonable* administration of the import quota system in violation of Article X:3 (a).<sup>31</sup> Japan responded that there was no requirement to publish beyond the total amount of the quota and criteria for application. Japan argued that any additional disclosure of information as to the identity of the quota holders and other related information was not acceptable as it would only “create unnecessary confusion” and induce “anti-competitive

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<sup>27</sup> *Id.* ¶ 16.

<sup>28</sup> *Id.* ¶ 28.

<sup>29</sup> *Id.* ¶ 44.

<sup>30</sup> *Id.* ¶ 57 (holding that it was unnecessary for the Panel to make findings under arts. II, X:1, X:3, or XIII:3).

<sup>31</sup> *Japan – Agricultural Products*, *supra* note 19, ¶ 3.1.1. The United States also argued that Japan had failed to meet the requirements of Articles X:1 and 3 “in terms of transparency, specificity and timing of notice given.” *Id.* ¶ 3.5.1.

intervention among importers.”<sup>32</sup> In this case the Panel found Japan’s import quota restrictions inconsistent with Article XI:1 and did not rule on the Article X claims.<sup>33</sup>

Finally, in *Japan- Semi-Conductors*,<sup>34</sup> the European Economic Community (EEC) invoked Article X in connection with the Third Country Monitoring System (Monitoring System) that was created by the Japanese pursuant to an arrangement with the United States. At issue was the use of “administrative guidance” by the Japanese government in implementing the Monitoring System that kept record of both cost and sales prices of semi-conductors that were exported to Europe and “encouraged” Japanese exporters not to dump in the European market.<sup>35</sup> Although the Panel decided that the case did not warrant a decision on the Article X claim, it did recognize the important role “administrative guidance” plays in the promotion and enforcement of governmental policy in Japan.<sup>36</sup> The Panel, citing to *Japan-Agricultural Products*, stated that: “the practice of administrative guidance...was a traditional tool of Japanese Government policy based on consensus and peer pressure,”<sup>37</sup> implying that the workings of the Japanese system of administrative guidance is not meant to be transparent.

In the GATT years, discussions of Article X appear in only two adopted panel decisions. First, in *Canada-Alcoholic Drinks II*<sup>38</sup> where the Panel concluded that Article X does not require Canadian provinces to provide “information affecting trade available

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<sup>32</sup> *Id.* ¶ 3.5.2.

<sup>33</sup> *Id.* ¶¶ 5.4.2 and 6.2.

<sup>34</sup> *Japan – Semi-Conductors*, *supra* note 19.

<sup>35</sup> *See* *Japan – Semi-Conductors*, *supra* note 19, ¶ 35 (outlining the argument of the European Economic Community that Japanese administrative guidance controlled export prices, export volume, production volume and other aspects related to exports. It was also stated in Japan’s Position Paper that “Japan exercised administrative guidance to achieve production cutbacks”).

<sup>36</sup> *Id.* ¶ 128. In that case, the Monitoring System had already been found to be inconsistent with Article XI:1 of GATT 1947.

<sup>37</sup> *Id.* ¶ 107.

<sup>38</sup> *Canada – Alcoholic Drinks II*, *supra* note 19.

to domestic and foreign suppliers *at the same time*, nor did it require Contracting Parties, to publish trade regulations *in advance* of their entry into force.”<sup>39</sup> Second, in *EEC-Dessert Apples*<sup>40</sup> which is the only adopted GATT Panel decision to find a violation of Article X. The Panel ruled that the specific act of back dating of quotas on imports of dessert apples by the EEC to the date prior to publication of the quota was inconsistent with the publication requirement of Article X. But the same Panel also held that the administration of the quota system was not in violation of the “uniformity” requirement of Article X:3 (a). The Panel concluded that the requirement of “uniformity” in administration imposed by Article X:3(a) did not require that all EU members have identical administrative procedures with regards to the imports of dessert apples. In reaching its conclusion the Panel emphasized that *other* substantive provisions of the GATT 1947 are the major determinants of a violation under the GATT rule and not Article X.<sup>41</sup>

In the remaining cases, the Panels merely dismissed the Article X claim as a subsidiary point that need not be discussed or even, at times, mentioned.<sup>42</sup> The last adopted GATT case involving an Article X claim was *United States-Non-Rubber Footwear*.<sup>43</sup> The Panel dismissed the Article X:3 (a) claim for not being within the Terms of Reference of the Panel.<sup>44</sup> Brazil’s use of Article X in the context of U.S. countervailing duty law does however foreshadow a trend by being the first of many WTO Article X challenges to the administration of trade remedies by the United States.

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<sup>39</sup> *Id.* ¶ 5.34 (emphasis added).

<sup>40</sup> EEC – Dessert Apples – Complaint by Chile, *supra* note 19.

<sup>41</sup> *See id.* ¶¶ 12.29-30, (finding that minimal administrative differences by themselves could not constitute a violation of Article X:3 and that the administration of the quotas was a violation of Article XIII).

<sup>42</sup> *See, e.g.*, Canada – Ice Cream and Yoghurt *supra* note 19; Korea – Beef (US) *supra* note 19.

<sup>43</sup> US – Non-Rubber Footwear, *supra* note 19.

<sup>44</sup> *Id.* ¶ 6.2

### III. Expansion of the Trade Mandate and its impact on Article X

Upon the creation of the WTO, Article X of GATT 1947 became Article X of GATT 1994 and was included as part of Annex 1A of the WTO Charter without any amendment. Annex 1A also includes other trade agreements that had been negotiated under the auspices of the GATT 1947 on trade in goods (the Covered Agreements).<sup>45</sup> Article X is specifically mentioned in the following Covered Agreements: Customs Valuation Code,<sup>46</sup> Agreement on Rules of Origin,<sup>47</sup> and Agreement on Safeguards.<sup>48</sup> The other Covered Agreements do not mention Article X but do contain provisions addressing transparency and due process in administration of measures, such as, the Sanitary and Phytosanitary Agreement (SPS Agreement),<sup>49</sup> the Technical Barriers to Trade Agreement (TBT Agreement);<sup>50</sup> the Anti-dumping Code (AD Agreement);<sup>51</sup> the Subsidies and Countervailing Measures Agreement (SCM Agreement),<sup>52</sup> and the Import Licensing

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<sup>45</sup> Under the GATT 1947 members could pick and choose which agreements they wanted to sign and ratify while still maintaining their membership in the GATT. This changed with the creation of the WTO where members were forced to accept as condition of membership the whole package including many agreements that they had previously failed to sign. The Covered Agreements are the Agreements on Agriculture, Sanitary and Phytosanitary Measures, Textiles and Clothing, Technical Barriers to Trade, Trade-Related Investment Measures, Anti-Dumping Code, Valuation Code, Preshipment Inspection, Rules of Origin, Import Licensing Agreement, Subsidies and Countervailing Measures, and Safeguards.

<sup>46</sup> Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, WTO Agreement, *supra* note 4, Annex 1A, Legal Instruments – Results of the Uruguay Round, 1868 U.N.T.S. 279 (1994).

<sup>47</sup> Agreement on Rules of Origin, Apr. 15, 1994, WTO Agreement, *supra* note 4, Annex 1A, Legal Instruments – Results of the Uruguay Round, 1868 U.N.T.S. 397 (1994).

<sup>48</sup> Agreement on Safeguards, Apr. 15, 1994, *supra* note 4, Annex 1A, Legal Instruments – Results of the Uruguay Round, 1869 U.N.T.S. 154 (1994).

<sup>49</sup> Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, *supra* note 4, Annex 1A, Legal Instruments – Results of the Uruguay Round, 1867 U.N.T.S. 493 (1994).

<sup>50</sup> Agreement on Technical Barriers to Trade, Apr. 15, 1994, *supra* note 4, Annex 1A, Legal Instruments – Results of the Uruguay Round, 1868 U.N.T.S. 120 (1994).

<sup>51</sup> Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, *supra* note 4, Annex 1A, Legal Instruments – Results of the Uruguay Round, 1868 U.N.T.S. 201 (1994).

<sup>52</sup> Agreement on Subsidies and Countervailing measures, Apr. 15, 1994, *supra* note 4, Annex 1A, Legal Instruments – Results of the Uruguay Round, 1869 U.N.T.S. 14 (1994).

Agreement (ILA).<sup>53</sup> In addition, the Trade Policy Review Mechanism (TPRM)<sup>54</sup> of the WTO has within its mandate the obligation to monitor “domestic transparency in government decision-making in the trade policy-making area.”<sup>55</sup>

The relationship between the transparency and due process obligations of Article X of GATT 1994 and the provisions of the Covered Agreements is far from clear.<sup>56</sup> The General Interpretative Note to Annex 1A (Interpretative Note) provides:

In the event of a *conflict* between a provision of [GATT] 1994 and a provision of another agreement of Annex 1A to the Agreement Establishing the [WTO], the provision of the other agreement shall prevail to *the extent of a conflict*.<sup>57</sup>

There is no agreement on the interpretation of the term “conflict” except in cases where provisions directly contradict one another. An example of such a “conflict” may be found involving a NTB that is prohibited under Article XI:1 of GATT 1994 but allowed under a specific Covered Agreement, e.g., a health and safety measure. Such a direct substantive conflict is unlikely to arise in the context of Article X as it is concerned with transparency and due process in the administration of a measure. In view of such lack of clarity we are forced to ask: What is the relationship between Article X and the Covered Agreements? When a measure falls within the scope of a Covered Agreement is it still

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<sup>53</sup> Agreement on Import Licensing Procedures, Apr. 15, 1994, *supra* note 4, Annex 1A, Legal Instruments – Results of the Uruguay Round, 1868 U.N.T.S. 436 (1994).

<sup>54</sup> Trade Policy Review Mechanism, Apr. 15, 1994, *supra* note 4, Annex 3, Legal Instruments – Results of the Uruguay Round, 1869 U.N.T.S. 480 (1994).

<sup>55</sup> *See id.* at Part B. Part B of Annex 3 to the WTO Charter setting up the TPRM provides:

Domestic Transparency—Members recognize the inherent value of domestic Transparency of government decision-making on trade policy matters for both Members’ economies and the multilateral trading system, and agree to encourage and promote greater transparency within their own systems, acknowledging that the implementation of domestic transparency must be on a voluntary basis and take account of each Member’s legal and political systems.

<sup>56</sup> This is important not only within the context of Article X, but also the other “substantive” provisions of GATT 1994, including: Articles I (MFN), II (tariff commitments), III (non-discriminatory application of internal measure) and, Article XI:1 (prohibition on quotas and NTBs).

<sup>57</sup> General Interpretative Note to Annex 1A, Apr. 15, 1994, *supra* note 4, Legal Instruments – Results of the Uruguay Round, 1867 U.N.T.S. 154 (1994) [hereinafter General Interpretative Note] (emphasis added).

subject to the transparency and due process requirements of Article X? Are Article X obligations independent of the due process requirements of a Covered Agreement? How should the term “to the extent of the conflict” as stated in the Interpretative Note be defined as it relates to Article X?

As the discussion of the following cases will show, the WTO Panels and Appellate Body have held that the Interpretative Note does not prohibit concurrent application of Article X and a Covered Agreement to a measure at issue. But, as a general rule, the Panels and the Appellate Body focus on the more specific provisions of the Covered Agreements. The emphasis on consistency with the Covered Agreement, unlike the GATT years, has not resulted in marginalizing Article X or its requirements of transparency and due process.

#### IV. Evolution of Article X from 1995-2006: Emerging from Obscurity

Since the formation of the WTO, there have been at least twenty cases involving extensive discussions of Article X<sup>58</sup> and almost half of these cases have been brought

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<sup>58</sup> Panel Report, *United States – Measures Relating to Shrimp from Thailand*, WT/DS343/R (Feb. 29, 2008); Panel Report, *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS345 /R (Feb 29, 2008) [hereinafter US – Customs Bond Directive]; Panel Report, *Turkey – Measures Affecting the Importation of Rice*, WT/DS334/R (Sept. 21, 2007); Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R (Nov. 13, 2006) [hereinafter EC – Selected Customs Matters]; Panel Report, *European Communities – Selected Customs Matters*, WT/DS315/R (June 16, 2006); Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (Mar. 6, 2006) [hereinafter Mexico – Taxes on Soft Drinks Appellate Body]; Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R (Oct. 7, 2005); Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R (Apr. 25, 2005); Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R (Nov. 26, 2004) [hereinafter Dominican Republic – Import and Sale of Cigarettes]; Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R (Nov. 29, 2004) ; Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/R (July 16, 2004) [hereinafter US - Oil Country Tubular Goods Sunset Reviews]; Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS234/AB/R (Jan. 16, 2003); Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS234/R (Sept. 16, 2002); Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R (Aug. 8, 2002); Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*,

against the United States for administration of its safeguard, anti-dumping and countervailing duty regulations. A wide variety of countries at different levels of economic development have invoked Article X including: Argentina, Australia, Brazil, Chile, Costa Rica, Ecuador, Guatemala, Honduras, India, Indonesia, Korea, Mexico, Thailand, Turkey, and the United States. In contrast to the GATT days, no WTO Member has referred to their Article X claim as a “subsidiary” claim.

In some cases the response of the WTO Panels and the Appellate Body to Article X claims has been to continue the GATT practice of not addressing Article X when a violation of another provision has been found. However, even in such cases the Panels and the Appellate Body have refrained from stating that an Article X claim is a “subsidiary” issue. In many cases the Panels and the Appellate Body do not find the measure at issue inconsistent with Article X, but reach that conclusion only after

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WT/DS184/AB/R (July 24, 2001); Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R (Feb. 28, 2001) [hereinafter US – Hot-Rolled Steel]; Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R (Dec. 22, 2000) [hereinafter United States - Steel from Korea]; Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R (Dec. 19, 2000) [hereinafter Argentina – Hides and Leather]; Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea*, WT/DS99/R (Jan. 29, 1999) [hereinafter US – Countervailing Duty Investigation on DRAMS]; Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R (Feb. 22, 1999); Panel Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/R (Oct. 27, 1998); Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58AB/R (Oct. 12, 1998) [hereinafter United States – Shrimp]; Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (May 15, 1998); Appellate Body Report, *European Communities – Measures Affecting Importation of Certain Poultry Products*, WT/DS69/AB/R (July 13, 1998) [hereinafter EC – Poultry Appellate Body]; Panel Report, *European Communities – Measures Affecting Importation of Certain Poultry Products*, WT/DS69/R (Mar. 1998) [EC – Poultry]; Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (July 2, 1998); Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (Mar. 31, 1998) [hereinafter Japan – Film]; Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R (May 22, 1997) [hereinafter EC – Bananas Mexico]; Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997) [EC – Bananas III]; Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R (Feb. 10, 1997) [hereinafter US – Underwear]; Panel Report, *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/R (Nov. 8, 1996).

extensive discussion of the meaning of the specific provisions or wording of Article X. Finally, in a handful of important disputes the Panels and the Appellate Body have found inconsistency with the provisions of Article X, including: *Argentina – Hides and Leather*,<sup>59</sup> *Dominican Republic – Import and Sale of Cigarettes*,<sup>60</sup> *EC - Selected Customs Matters*,<sup>61</sup> and *United States - Customs Bond Directive*.<sup>62</sup> The discussion below will show that the ultimate outcome of the cases is not important to the evolution of the jurisprudence of Article X. Instead we shall focus on discussions of Article X by the parties, Panels and the Appellate Body.

The first recognition of Article X of GATT 1994 was expressed by the Appellate Body in *United States - Underwear* in 1997 when it stated that:

Article X:2....may be seen to embody a principle of fundamental importance—that of promoting full disclosure of governmental acts affecting Members and private persons and enterprises, *whether of domestic or foreign nationality*. The relevant policy principle is widely known as the principle of transparency and has obviously due process dimensions. The essential implication is that Members *and other persons affected*, or likely to be affected, by governmental measures imposing restraints, requirements, or other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to see modification of such measures....<sup>63</sup>

The identification of the fundamental importance of Article X is in sharp contrast to the earlier discussions of Article X under GATT 1947 and the reference to transparency and due process values enshrined in the text of Article X have been widely quoted by subsequent WTO panels. Of significance is the Appellate Body's view that the Article X

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<sup>59</sup> *Argentina – Hides and Leather*, *supra* note 58.

<sup>60</sup> *Dominican Republic – Import and Sale of Cigarettes*, *supra* note 58.

<sup>61</sup> *EC – Selected Customs Matters*, *supra* note 58.

<sup>62</sup> *US – Customs Bond Directive*, *supra* note 58.

<sup>63</sup> *US – Underwear*, *supra* note 58, at 19 (emphasis added).



transparency and due process protections extend to administrative actions taken by Members in relation to their own citizens, i.e., internal governance, as well as in relation to foreign traders. Another distinguishing feature of Article X highlighted by the Appellate Body in *United States - Underwear* is that Article X (unlike other GATT provisions) is explicitly concerned with the rights and expectations of traders. Finally, it is clear that Article X allows challenges to the “administration” of measures that are on their face and in “substance” WTO consistent.

The importance of Article X was also underscored by the Appellate Body in *United States - Shrimp*.<sup>64</sup> In that case, the Appellate Body held that the U.S. measure prohibiting importation of shrimp or shrimp products fell within the scope of subparagraph (g) of Article XX as a measure that was primarily aimed at the conservation of an exhaustible natural resource and primarily aimed at rendering effective restrictions on domestic production or consumption.<sup>65</sup> But the conservation measure of the United States failed the requirements of the chapeau of Article XX because it applied the measure in a manner that constituted “arbitrary or unjustifiable discrimination between countries where the same condition would prevail.”<sup>66</sup> In the context of such application, the Appellate Body stated:

Provisions of Article X:3 of the GATT 1994 bear upon this matter. In our view Section 609 [the United States restriction on shrimp imports] falls within the [scope of] Article X:1. Inasmuch as there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that *rigorous compliance with the fundamental requirements of due process* should be required in the application and administration of a measure which purports to be an exception to the treaty obligations....

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<sup>64</sup> United States – Shrimp, *supra* note 58.

<sup>65</sup> *Id.* ¶ 113.

<sup>66</sup> *Id.* ¶ 177.

It is also clear to us that Article X:3 of the GATT establishes certain minimum standards of transparency and procedural fairness in the administration of trade regulation which, in our view, are not here. The non-transparent and ex-parte nature of internal governmental procedures applied by competent officials [in the United States] ... are all contrary to the *spirit*, if not the letter, of Article X:3 of GATT 1994.<sup>67</sup>

This reference to Article X by the Appellate Body reinforces the importance of Article X and the transparency and due process obligations it represents as well as its relevance to the other provisions of the GATT 1994, including Article XX. It also opens the door to Article X's possible relevance "in spirit" as well as "in letter" to the provisions of the Covered Agreements. The following section looks at the extent to which the Panels and Appellate Body have developed the jurisprudence of Article X by building upon the early statements of the Appellate Body in *United States - Underwear* and *United States - Shrimp*.

A. *The Scope of Measures Covered under Article X:1*

As quoted earlier, Article X requires that "laws, regulations, judicial decisions and administrative rulings of *general application*" (collectively Measures) be promptly published and administered "uniformly, impartially and reasonably."<sup>68</sup> Panels and the Appellate Body, on the whole, have not interpreted the term "general application" narrowly so as to limit the scope of measures that can be covered under Article X:1. In *EC-Bananas III*<sup>69</sup> both the Panel and the Appellate Body stated that Article X applies to

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<sup>67</sup> *Id.* ¶¶ 182- 83 (emphasis added).

<sup>68</sup> GATT, *supra* note 2, arts. X:1, X:3(a).

<sup>69</sup> EC – Bananas III, *supra* note 58.

internal measures AND border measures.<sup>70</sup> In *Japan-Film* the Appellate Body held that a measure qualifies under Article X:1 as an administrative ruling of “general application” even if addressed to only a specific company or shipment if such a ruling establishes or revises principles applicable in future cases.<sup>71</sup> This reasoning was followed in *Argentina-Hides and Leather*<sup>72</sup> when the Panel held that a Resolution that permitted representatives of the domestic tanning industry to be present during the Customs process of export clearance was an “administrative measure of general application” even if only one company benefited from it.<sup>73</sup>

In the anti-dumping context, however, the Panel’s have been reluctant to find specific dumping determinations as “measures of general application.” In *United States - Hot Rolled Steel*,<sup>74</sup> the Panel held that a specific anti-dumping ruling in a particular case does not qualify as a measure of “general application.” Nevertheless, the Panel did state that in certain circumstances the outcome of a single case has “significant impact on the overall administration of the law” and therefore could be considered a measure of “general application” within the scope of Article X:1.<sup>75</sup> In 2004, in *Dominican Republic—Import and Sale of Cigarettes*, the Panel decided that a survey taken by the Dominican Republic’s Central Bank on average prices of cigarettes was an “administrative ruling of general application” and should have been published because it was “an essential element of an administrative ruling” within the scope of Article X:1.<sup>76</sup>

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<sup>70</sup> EC – Bananas Mexico, *supra* note 58, para.¶ 7.206; EC – Bananas III, *supra* note 58, ¶ 70. Interestingly, the EC responded that Article X “only applies to *internal* measures and therefore not applicable in this case” involving a border measure. *Id.* ¶ 33.

<sup>71</sup> Japan – Film, *supra* note 58, ¶ 10.388.

<sup>72</sup> Argentina – Hides and Leather, *supra* note 58.

<sup>73</sup> *Id.* ¶ 10.5.

<sup>74</sup> US – Hot Rolled Steel, *supra* note 58.

<sup>75</sup> *Id.* ¶ 7.268

<sup>76</sup> Dominican Republic - Import and Sale of Cigarettes, *supra* note 58, ¶¶ 7.405-406.

In sum, Panels and the Appellate Body have adopted an expansive interpretation of the term “measures of general application” which includes any specific act of administration that has a “significant impact” on the overall administration of the law or any government action, including even a survey, which subsequently forms a basis of an administrative ruling. At the same time, however, the Panels and the Appellate Body have retained the flexibility to exclude a measure from the scope of Article X:1 if they determine that such specific action does not have a significant impact on the overall administration of a measure.

B. *The Scope of Article X:3*

Subparagraph (a) of Article X:3 requires a WTO Member to “administer in a uniform, impartial and reasonable manner all its laws, regulations....administrative rulings of the kind referred to in Article X:1.”<sup>77</sup> Article X:3 subparagraphs (b) and (c) require independent or at least “objective and impartial review” of all administrative actions that relate to custom matters.”<sup>78</sup>

The WTO Panels and Appellate Body have defined the term “applied uniformly” to mean that the “customs laws should not vary, that every exporter and importer should be able to expect treatment of the same kind, in the same manner over time and in different places and with respect to the other persons.”<sup>79</sup> Panels have also stated that “access to” and “flow of information” are essential to meeting the due process requirements of Article X:3 (a). The Panel in *Argentina - Hides and Leather* stated that “the requirement of reasonableness and impartiality...both relate to the question of information” and that unless “access to information” is uniform and reasonable the

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<sup>77</sup> GATT *supra* note 2, art. X:3 (a).

<sup>78</sup> *Id.* art. X:3 (b)-(c).

<sup>79</sup> *Argentina – Hides and Leather*, *supra* note 58, ¶ 11.83.

administration of a measure cannot be impartial.<sup>80</sup> Panels have also emphasized that the three requirements of Article X:3 (a) are not cumulative, and that a measure must satisfy all three requirements separately.<sup>81</sup> In *Argentina – Hides and Leather* the Panel pointed out that Article X:3 (a) applies to the “substance of an administrative measure.”<sup>82</sup> Panels have also held that the scope of Article X:3 (a) is not limited by the MFN requirement, i.e., that there is no requirement that Article X:3 (a) be applied only in situations where the measure has been applied in an inconsistent manner with respect to the imports of or exports to *two or more* Members.<sup>83</sup>

There has been great reluctance to apply the provision of Article X:3 (a) to anti-dumping actions. In *United States – Countervailing Duty Investigation on DRAMS*, Korea argued that Article X:3 (a) applied to every action taken by the United States Department of Commerce (DOC) in administering the anti-dumping measures because of the fundamental values of due process it contains.<sup>84</sup> Similarly, in *United States - Hot-Rolled Steel* Japan argued that the scope of Article X:3 (a) was broader than the Covered Agreements because the “standards contained in Article X:3 represent in one sense the notion of good faith and in another sense the “fundamental requirements of due process” and that these principles should be applied to the manner in which the DOC administered the anti-dumping laws.<sup>85</sup>

In *Dominican Republic - Import and Sales of Cigarettes* the Panel defined the term “reasonable” as “in accordance with reason, not irrational or absurd, proportionate.”<sup>86</sup>

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<sup>80</sup> *Id.* ¶ 11.86.

<sup>81</sup> Dominican Republic - Import and Sale of Cigarettes, *supra* note 58, ¶ 7.383

<sup>82</sup> Argentina—Hides and Leather, *supra* note 58, ¶ 11.71

<sup>83</sup> *Id.* ¶ 10.67

<sup>84</sup> US – Countervailing Duty Investigation on DRAMS, *supra* note 58.

<sup>85</sup> US - Hot-Rolled Steel, *supra* note 58, ¶ 7.626.

<sup>86</sup> Dominican Republic - Import and Sale of Cigarettes, *supra* note 58, ¶ 7.385.

The Panel ruled that the administration of the provisions of the Selective Consumption Tax was “unreasonable” and in violation of Article X:3 (a) because it used the “nearest similar product” to determine the tax rate on imported cigarettes while such criteria was not stated in any of the regulations. The Dominican Republic acknowledged the problem with using the “nearest similar product” and changed the measure at issue after the formation of the WTO Panel and it was no longer enforced at the time of the final Panel ruling. Nevertheless, the Panel engaged in a relatively extensive discussion of the meaning of the term “reasonable” in Article X:3 (a) and ruled that the Selective Consumption Tax as it was administered prior to the change had been administered “unreasonably” and therefore was inconsistent with Article X:3 (a).

*C. Protecting Expectations of Traders*

The cases involving Article X have used the expectations of traders as the basis for determining whether a measure is applied in a uniform, impartial, or reasonable manner. This is unique within the context of the DSM where the explicit basis of dispute settlement under the GATT and (subsequently the WTO) has always been the “expectations of a competitive relationship” of *the Members* based on a system of reciprocity and mutual concessions. In the context of Article X, for the first time, the Parties, the Panels, and the Appellate Body address the importance of transparency and due process from the perspective of traders taking into account “expectations of traders” and the “real effect on traders operating in the commercial world.”<sup>87</sup> In *Argentina –Hides and Leather* the Panel addressed the need to look at the “expectations of traders” as follows:

Article X:3 (a) requires an examination of the real effect that

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<sup>87</sup> US - Oil Country Tubular Goods Sunset Reviews, *supra* note 58, ¶ 201.

a measure might have on traders operating in a commercial world. This does not require a showing of trade damage, as that is not generally a requirement with respect to violations of GATT 1994. But it can involve an examination of whether there is possible impact on the competitive relationship due to alleged partiality, unreasonableness or lack of uniformity in application of custom rules....<sup>88</sup>

In the context of WTO dispute settlement any discussion of “real impact on traders” means is only concerned with impact on importers and not domestic enterprises. While it is true that interests of private traders, such as multinational corporations, have been the driving force behind trade disputes at the GATT and the WTO, it is a significant departure from past decisions where Panels only speak in terms of expectations of sovereign states and not private actors.

*D. Relationship of Article X of GATT 1994 and the Covered Agreements of Annex 1A to the WTO Charter.*

As mentioned earlier, there is a great deal of uncertainty regarding the relationship between the provisions of GATT 1994 (including Article X) and other Covered Agreements of Annex 1A to WTO Charter. The Interpretative Note to Annex 1A does not solve the problem as it only provides that in cases of “conflict” between Article X and a Covered Agreement the provision of the other agreement prevails but then only to the “extent of the conflict.”<sup>89</sup> What does “conflict” mean when dealing in the context of Article X’s relationship to a Covered Agreement?<sup>90</sup> The answer to this question as may be expected is not clear and seems to vary depending on the Covered Agreement at issue.

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<sup>88</sup> Argentina –Hides and Leather, *supra* note 58, ¶ 11.77.

<sup>89</sup> See General Interpretative Note, *supra* note 57.

<sup>90</sup> GATT, *supra* note 2, art. X:3 (a).

In *United States - Underwear* Costa Rica argued that the United States' safeguard action against imports of cotton and manmade fiber underwear was inconsistent with both the Agreement on Textiles and Clothing (ATC) and Article X:2 of GATT 1994.<sup>91</sup> The Panel held that a transitional safeguard measure was subject to the requirements of publication under Article X:2 as well as the ATC. On appeal, the Appellate Body overturned the Article X:2 violation, but on the ground that Article X:2 does not address whether or not a member can give retroactive effect to a safeguard measure. The Appellate Body in *United States - Underwear* did not explicitly address the relationship between the provisions of GATT 1994 and the text of the Covered Agreements of Annex 1A of GATT 1994 but clearly implied that both can apply.<sup>92</sup>

The relationship between the International Licensing Agreement (ILA) and Article X was explicitly addressed in *EC-Bananas III* where the Panel interpreted the term "conflict" in the Interpretative Note narrowly to include only those instances where a provision in one agreement prohibits what a rule in another agreement explicitly permits or where a member cannot comply with both the requirements of a Covered Agreement and Article X.<sup>93</sup> The Appellate Body modified the Panel decision by agreeing with the Panel that the Interpretative Note allows for the application of both Article X:3 and the ILA, but ruled that the Panel must have applied the ILA first, as it is the more specific and detailed agreement.<sup>94</sup> If the Panel had applied the ILA first, the

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<sup>91</sup> *US - Underwear - Panel Report*, *supra* note 58.

<sup>92</sup> *US - Underwear*, *supra* note 58 (specifically concluding that Article X:2 does not address the issue of whether or not a member can give retroactive effect to a safeguard measure).

<sup>93</sup> *EC - Bananas Mexico*, *supra* note 58, ¶ 7.159.

<sup>94</sup> *EC - Bananas III*, *supra* note 58, ¶ 204.



Appellate Body argued, “then there would be no need for it to address...Article X:3 (a) of GATT 1994.”<sup>95</sup>

This GATT like approach of ignoring the requirements of Article X:3 was challenged in *EC - Poultry*.<sup>96</sup> The Panel in *EC - Poultry* explicitly distinguished the situation from *EC – Bananas III* when it stated that unlike the *EC - Bananas III* case, even after the review of the ILA the Panel must look to Article X:3 (a). The Panel reasoned that this was the case because the ILA was only relevant to a portion of the measure at issue while the scope of Article X was broader.<sup>97</sup>

The relationship of Article X:3 and the AD Agreement is treated differently by the Panels. In contrast to the ILA, the Panels have been reluctant to make Article X:3 (a) requirements also applicable to a measure that falls within the scope of an AD Agreement. In *United States – Hot-Rolled Steel*, the Panel stated:

Where we have found a particular action or category of action is not inconsistent with a specific provision of the AD Agreement, we are faced with the question whether a Member can be found to have violated Article X:3 (a) of GATT 1994....We have serious doubts as to whether such a finding would be appropriate.<sup>98</sup>

This statement is not determinative but indicates a lack of willingness, at least in the anti-dumping context, to subject an anti-dumping measure to the “uniformity” requirement of Article X:3 (a) viewing it perhaps as intervening too much into the internal governance of Members. The applicability of the terms of Article X:3 (a) to the administration of the

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<sup>95</sup> *Id.*

<sup>96</sup> *EC – Poultry*, *supra* note 58. In *EC – Poultry*, Brazil had argued that the European Communities’ rules relating to imports of frozen poultry were applied in violation of Article X since Brazilian traders cannot know whether a particular shipment is subject to in or out of quota rules. *Id.* ¶ 267. The Appellate Body rules that “Article X. . .does not impose an obligation on Member governments to ensure that exporters are continuously notified by importers as to the treatment of particular impending shipments.” *Id.* ¶ 114.

<sup>97</sup> The Panel held that “the examination of Article X as well as the [ILA] is warranted since....the [ILA] is relevant to only in quota trade and Article X to the total trade.” *EC – Poultry*, *supra* note 58, ¶ 268.

<sup>98</sup> *United States – Hot-Rolled Steel*, *supra* note 58, ¶ 7.267.

anti-dumping law by the United States was argued forcefully by Korea in *United States – Countervailing Duty Investigation on DRAMS*:

WTO Agreements are a unitary whole. The transparency and uniformity of obligations of Article X apply to the WTO Agreements, including the Anti-Dumping Agreement... the Member must administer each statute, regulation, and administrative ruling in a way that complies with Article X:3. Thus Article X applies to each and every action of the [DOC] ....<sup>99</sup>

The response of the Panel in *United States – Steel from Korea* to Korea’s argument shows a reluctance to apply Article X:3 (a) to actions of the United States DOC:

...we have grave doubts as to whether Article X:3 (a) can or should be used in the manner advocated by Korea. As the United States correctly points out ... [Article X:3 (a)] was not intended to function as a mechanism to test the consistency of a Member’s particular decision or rulings with the Member’s own domestic law and practice; that is a function reserved for each Member’s domestic judicial system...<sup>100</sup>

The Panels’ discomfort in reviewing the administrative structure of a member is understandable. However, that is precisely what Article X:3 (a) requires it to do. On its face, subparagraph 3 (a) does require the WTO to investigate the internal administrative structures for lack of uniformity in application of its laws.

#### V. The EC – Selected Customs Dispute

In 2006, approximately sixty years after its inclusion into the text of the GATT, Article X was invoked as the sole legal basis for a trade dispute. In *EC – Selected Customs Matters*,<sup>101</sup> the United States claimed that the EU systems of custom administration were not administered “uniformly” as required under Article X:3 (a).<sup>102</sup>

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<sup>99</sup> United States – Countervailing Duty Investigation on DRAMS, *supra* note 58, ¶ 4.461.

<sup>100</sup> US- Steel from Korea, *supra* note 58, ¶ 6.50.

<sup>101</sup> EC – Selected Customs Matters – Panel Report, *supra* note 58.

<sup>102</sup> The Appellate Body defined the crux of the United States position as:

In its complaint, the United States pointed to the non-uniform application of valuation rules and administration of customs regulation as they related to imports of LCD monitors and blackout drapery. The United States argued, the lack of any mechanism at the EU level to address divergences in customs administration was a violation of the “uniformity” requirement of Article X:3 (a).<sup>103</sup>

The Panel agreed that the “European Communities’ system of custom administration as a whole...is complicated and, at times, opaque and confusing”, but dismissed the claim on the basis that “as a whole” claim was not within the scope of the Terms of Reference of the Panel. The Panel did mention that “there is nothing in the [Dispute Settlement Understanding] DSU nor in other WTO Agreements that would prevent a complaining Member from challenging a Member’s system as a whole or overall.” The Panel did find violations of Article X:3 (a) due to non-uniform application of: (a) classification of LDC monitors; (b) classification of blackout drapery linings and (c) administration of its valuation rules by EU members.<sup>104</sup>

On appeal, the Appellate Body held that: First, the European Communities system of customs administration can be challenged “as a whole or overall” under Article X:3 (a).<sup>105</sup> Second, the administrative-substantive distinction maintained by the Appellate Body in *EC – Bananas III* and *EC - Poultry* does not exclude the possibility of allowing

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European Union administers its customs laws through twenty five separate independent customs authorities and does not provide any institution or mechanism [at the community level] to reconcile the divergences automatically and as a matter of right when they occur.

EC – Selected Customs Matters, *supra* note 58, ¶ 22.

<sup>103</sup> The United States also claimed that violation of Article X:3 (b) based on the fact that decisions of administrative agencies and customs authorities in one member state does not govern the practice of European Communities’ agencies throughout the European Union. EC - Selected Customs Matters, *supra* note 58, ¶ 304.

<sup>104</sup> *Id.* (also holding in addition that there was no violation of Article X:3 (b)).

<sup>105</sup> The Appellate Body stated that the Panel was wrong in determining that the claim “as a whole or overall” was outside the scope of the terms of reference of Article X:3 (a) and it could not be ruled on. *See generally* EC – Selected Customs Matters *supra* note 58.

challenges to the substance of a measure that leads to administration of the measure that is inconsistent with the WTO. The Appellate Body stated that those earlier rulings do “not exclude...the possibility of challenging under Article X:3 (a) the substantive content of a legal instrument that regulates the administration of a legal instrument of the kind described in Article X:1.”<sup>106</sup> According to the Appellate Body, a Member can challenge the substantive content of a legal instrument if such content determines the administration of that regulation, so long as the Complaining Member can show that the substantive measure *necessarily* leads to lack of uniform, impartial or reasonable administration in violation of Article X:3 (a).<sup>107</sup> The Appellate Body held that mere differences in the laws themselves are not sufficient to show a breach of the uniformity requirement in Article X:3 (a), but that such differences must actually lead to non-uniform administration in specific cases.<sup>108</sup>

The Appellate Body does not address the challenge to the EU system “as a whole” stating that the Panel did not provide it with enough facts to decide that claim. It also reverses two specific Panel findings of inconsistency with Article X:3 (a) with regards to administration of customs penalty laws and audit procedures and the tariff classification of black out drapery. The Appellate Body upheld the Panel’s finding that the tariff classification of certain LCD monitors amounts to non-uniform administration in violation of Article X:3 (a) and the Panel’s dismissal of the claim relating to Article X:3 (b).<sup>109</sup>

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<sup>106</sup> EC - Selected Customs Matters, *supra* note 58, ¶ 200.

<sup>107</sup> *Id.* ¶ 201

<sup>108</sup> *Id.* ¶ 304.

<sup>109</sup> *Id.*

In this landmark case by further blurring the administrative-substantive distinction the Appellate Body has sanctioned the use of Article X more widely and opened the door for future claims under Article X including challenges to substance of laws “as a whole”.<sup>110</sup>

#### VI. The “Culture” of the WTO DSM and the Future of Article X

Many Members of the WTO view the administration of United States trade remedy law (specifically in the anti-dumping context) by the DOC to be inconsistent with Article X:3 (a) requirements of “uniformity, impartiality and reasonableness.”<sup>111</sup> It is likely therefore that Article X will continue to be used against the United States as countries reassert the values of fundamental due process, such as transparency and access to information, against the country that initially inserted those values into the GATT 1947. Panels and the Appellate Body are unlikely to pursue Article X claims against the trade remedy laws of the United States. Instead, Panels will continue to focus on the narrower provisions of the applicable Covered Agreement, such as AD Agreement or the SCM Agreement. Such an approach is consistent with the culture of the DSM where the

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<sup>110</sup> This decision may have also expanded the scope of measures more generally by weakening further the mandatory/discretionary distinction which was first formulated under the GATT 1947 and was adhered to in varying degrees in the WTO. The mandatory/discretionary distinction states that only measures that “mandate” WTO –inconsistent action should be challenged “as such,” all discretionary measures that may or may not result in WTO inconsistent administration should be challenged “as applied.” In *EC - Selected Customs Matters*, the Appellate Body held that member states can challenge the substance of measures regardless of the mandatory or discretionary substance of the measure. A fuller discussion of this distinction is beyond the scope of this paper. For further discussion of mandatory/discretionary distinction, see e.g., Appellate Body Report, *United States—Anti-dumping Act of 1916*, WT/DS136/AB/R. WT/DS136/R (August 28, 2000); Panel Report, *United States—Section 301-310 of the Trade Act of 1974*, WT/DS194/R (Dec. 22, 1999).

<sup>111</sup> Most recently, in 2008 India brought an action against the imposition of anti-dumping duty by United States on imports of shrimp from India claiming a violation of Article X:3 in addition to the AD Agreement, Articles XI, XIII, and II of the GATT. The Panel however did not address any of the GATT 1994 claims on the basis of judicial economy after having found inconsistency with the AD Agreement. It is noteworthy however that India attempted to make both “as applied” and “as such” claims under Article X:3 (a) with the latter being rejected by the Panel for being untimely. See US – Customs Bond Directive, *supra* note 58.

Panels and the Appellate Body may make gradual and incremental change in the doctrine while being very cautious in their actual application of a new line of reasoning or interpretation to the resolution of a specific case. For example, while in *EC – Selected Customs Matters* the Appellate Body expanded the scope of measures that can be challenged under Article X:3 (a) at the same time it largely reversed the Panel’s actual finding of inconsistency with Article X:3 (a) requirement of “uniformity.” The Appellate Body only affirmed the Panel’s finding that the non-uniform administration of the tariff classification of LCD monitors by EU members was a violation of Article X:3 (a). Similarly, in *Dominican Republic – Import and Sale of Cigarettes* there is an extensive discussion of the meaning of the term “reasonable” in Article X:3 even though the measures at issue has already been withdrawn. In *United States – Countervailing Duty Investigation on DRAMS* a large portion of the Panel decision is spent discussing Article X:3 only to conclude that given the inconsistency of the measure with the AD Agreement it is not necessary to examine Korea’s claims under Article X. The seeming discrepancy between, on one hand, the extensive discussions of the requirements of Article X:3 (a) and, on the other hand, the refusal of the same Panels to rule on an Article X claim is consistent with the “culture” of the DSM and its *modus operandi*. The practice of the DSM is to avoid making controversial decisions while working incrementally at evolving the jurisprudence so that future Panels and the Appellate Body can accommodate the expansion of the WTO mandate into areas that go beyond the GATT’s traditional mandate of securing or promoting trade liberalization such as promoting the goal of good governance in a manner that would seem least objectionable.<sup>112</sup>

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<sup>112</sup> See Debra P. Steger, *The Culture of the WTO: Why It Needs to Change*, 10 J. INT’L ECON. L. 483, 485-

The interpretations of the scope of Articles X:1 and X:3 (a) have opened the door to more Article X claims. The ruling in *EC – Selected Customs Matters* that a system “as a whole” can be challenged under Article X:3 (a) will likely encourage Members to bring cases involving administrative systems “as a whole.” The extent to which such “as a whole” claim under Article X will be addressed by the WTO Panels or the Appellate Body will depend on the facts of each case and whether a ruling of inconsistency is capable of being implemented. Specifically, Article X challenges to the EU’s system of customs administration are likely to continue given the view expressed by the Panel that the EU customs regulations can be “opaque” and “confusing.” In addition, *United States - Shrimp* has made the jurisprudence of Article X applicable “in spirit” if not “in letter” to the chapeau of Article XX. It is therefore possible that the developing jurisprudence of Article X and specifically Article X:3 (a) may be used to interpret application of Article XX measures or to somehow guide the interpretation of the chapeau of Article XX.

## VI. Conclusion

The broad language of Article X requires the WTO to review domestic administrative legal regimes based on interpretations of the term: “uniform,” “impartial,” and “reasonable.” Applying those terms to administrative acts and practices of states, particularly in the context of a claim against an administrative system as a whole, goes beyond what many Members may find acceptable interference in the area of domestic

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86 (2007). As Professor Steger writes:

The mandate and purpose of the WTO is no longer clear. The mandate of the GATT system was continuing the process of trade liberalization...the preamble to the GATT 1947 reflected these goals. The preamble of the WTO Agreement is broader – it includes the goals of environmental sustainability and development...but they have not become part of the accepted theology or culture of the WTO as perceived by its members. So, there is a difference between what the preamble of the WTO says the purpose of the organization is and what its members perceive it to be.

governance. Luckily, the multilateral trading system is very adept at making change incrementally. To date, the Appellate Body and Panels have been, in most cases, reluctant to find a measure inconsistent with the obligations of Article X:3 (a) but have continued to build the jurisprudence of Article X:3 (a) through interpretations of its provisions and applauding the values it enshrines without actually applying it in cases that may be controversial.<sup>113</sup>

The WTO is no longer a system simply based on consensus, reciprocity, and balancing of concessions, but a system based on rules that reflect the reality of the administrative state. The goal of the multilateral trading system is no longer “free trade” but rather trade that is regulated in a WTO consistent manner. As a result, the “good governance” provisions of the WTO, i.e., those addressing transparency and due process are increasingly central to WTO disputes. Article X is the oldest good governance provision of the WTO and a close study of its history and evolving jurisprudence contributes to our understanding of the emerging role of the WTO as a supra-national regulatory body.<sup>114</sup> The jurisprudence of Article X is also an example of the increasing relevance of the emerging discipline of global administrative law to the workings of the multilateral trading system.

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<sup>113</sup> Another example of incremental change has been to Article XX of the GATT where the Appellate Body discussed at great length the need to justify environmental measures under Article XX and elaborated on how Article XX should be read and applied years before they actually found a measure justified under Article XX. In 1999, in the aftermath, of *United States - Shrimp*, I wrote: “the Appellate Body’s analysis of Article XX generally and subparagraph (g) in particular...indicates that although supporters of Article XX interests [environmentalists] may have lost the battle, the prospects look good for winning the war”. See, 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, 1170-71 (1998).

<sup>114</sup> The work of the TPRM and the Committees in the area of good governance as expressed in Article X must also be studied to get a fuller picture of the good governance mandate of the WTO. Such work is necessary to assist the DSM in its application of Article X.



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