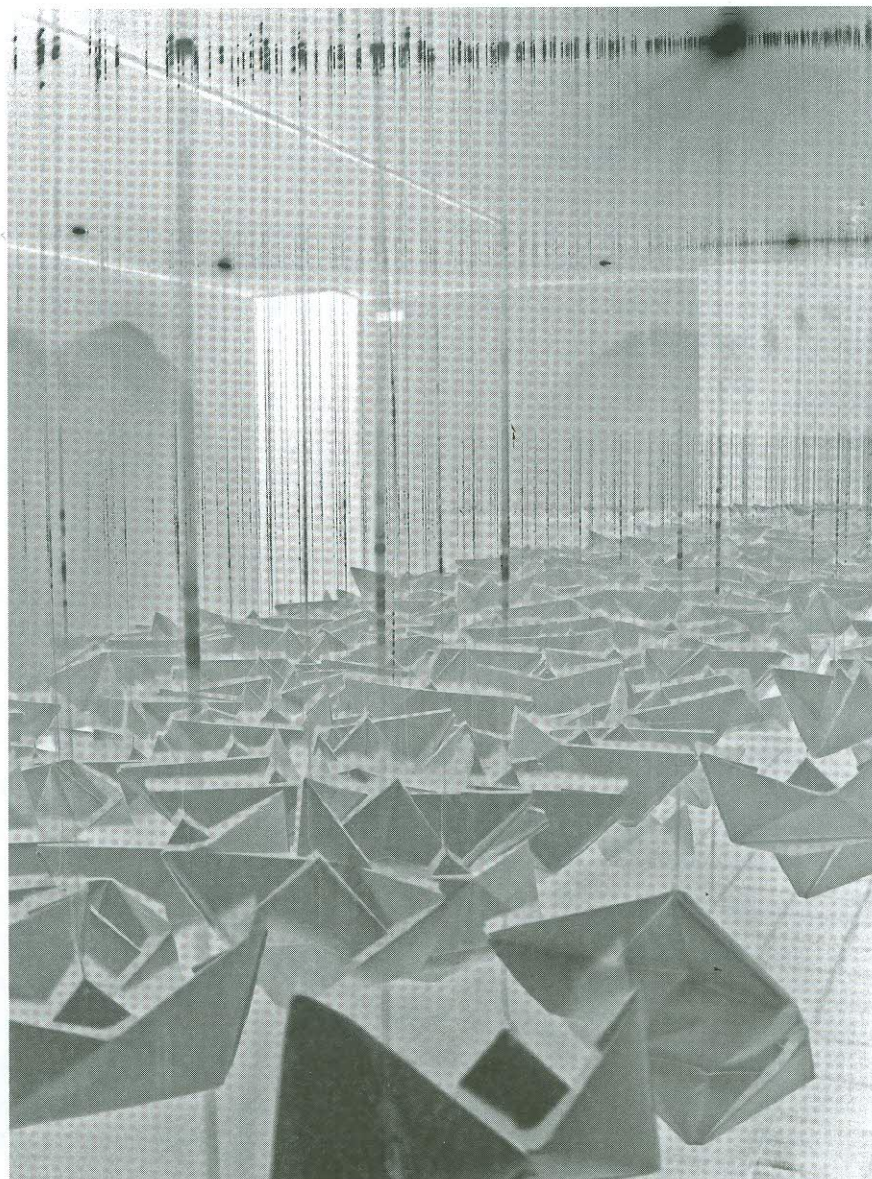


AUTOR INVITADO



DRUG TRAFFICKING, MONEY LAUNDERING AND INTERNATIONAL TRADE RESTRICTIONS AFTER THE WTO PANEL REPORT IN COLOMBIA - PORTS OF ENTRY: HOW TO ALIGN WTO LAW WITH INTERNATIONAL LAW*

Tráfico de drogas, lavado de dinero y restricciones al comercio internacional a la luz del informe del grupo especial de la organización mundial de comercio en el caso Colombia – puertos de entrada: cómo alinear el derecho de la OMC y el derecho internacional

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ABSTRACT

The collective work of teachers and students is the result of the pedagogical culture of the University, which renews the curriculum dimension around the integration and the problem teaching knowledge. Through the experience that this pedagogical practice raises, a relationship of teaching-learning is based progressively, through formulation, implementation and shared evaluation of the formation process in all its dimensions and development.

In this document a reflection is made on the pedagogical horizon and the curricular foundations of the collective work; it is argued about its relationship with the professional teaching practice, the educational research and the university research system. Also some guidelines and commitments are defined for the collective work at the institutional level.

DESCRIPTORS:

Customs restrictions, World Trade Organization, International Trade, Fight against Drugs, Money Laundering, WTO law.

SÍNTESIS:

El crimen transnacional es el lado oscuro de la globalización y los Estados han dado pasos concretos para enfrentarlo a través de la adopción de importantes convenciones multilaterales durante las últimas décadas. La Organización Mundial de Comercio (OMC) no puede permanecer al margen en esta cruzada: la promoción del comercio y la lucha contra el narcotráfico no pueden contraponerse entre sí. Una de las formas por medio de las cuales la OMC puede hacer una contribución es a través de la interpretación de los acuerdos abarcados de la Organización. Aun cuando disputas comerciales internacionales relacionadas con el crimen internacional no son frecuentes, una reciente, Colombia—Precios Indicativos y Restricciones a los Puertos de Entrada posee esta dimensión. El informe del Grupo Especial que resolvió esta controversia ofrece una guía muy importante y constituye un punto de partida a fin de asegurar que las normas de la OMC se armonicen con el Derecho Internacional en esta área. El propósito de este artículo es mejorar el proceso interpretativo de la excepción contemplada en el Artículo XX(d) del Acuerdo GATT de 1994, cuando es invocada para justificar la adopción de medidas comerciales contrarias a la normatividad de la OMC que, además de perseguir el cumplimiento de las normas aduaneras, son parte de una estrategia contra el tráfico de drogas y el lavado de dinero.

DESCRIPTORES:

Restricciones aduaneras, Organización Mundial de Comercio, Comercio Internacional, Lucha contra las Drogas, Lavado de Dinero, Derecho de la OMC.

DRUG TRAFFICKING, MONEY LAUNDERING AND INTERNATIONAL TRADE RESTRICTIONS AFTER THE WTO PANEL REPORT IN COLOMBIA—PORTS OF ENTRY: HOW TO ALIGN WTO LAW WITH INTERNATIONAL LAW

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Transnational crime is the dark side of globalization,¹ and States have been taking concrete steps to cope with it through the adoption of important multilateral conventions over the last decades. The World Trade Organization (WTO) cannot be a bystander in this crusade: trade and the fight against drug trafficking and money laundering should not collide. There are many reasons for the involvement of the WTO. To begin with, the WTO is one of the international institutions that more clearly reflects such globalization and constitutes one of its more prominent driving forces. Second, the world trading system is one of the instruments increasingly used by money launderers, in particular, to carry out their transnational crimes.² And finally, the WTO should join other institutions such as the United Nations, the International Monetary Fund, and the World Bank, which have taken concrete steps to deal with the said transnational crimes.³

Perhaps one of the most relevant means the WTO has at its disposal to make a contribution is through the interpretation of the WTO-covered agreements. Although trade disputes related to transnational crimes are not common, a recent one, Colombia—Indicative Prices and Restrictions on Ports of Entry, had this dimension.⁴ The panel report on this case provided valuable guidance and constitutes a starting point on which to draw on to ensure that WTO law aligns with general international law in the fight against transnational crime.

So far, the WTO and, in particular, its dispute settlement system have been able to adjust WTO law to new realities and to cope with values other than those that are directly related to trade. For instance, the Appellate Body in its report in United States—Import Prohibition of Certain Shrimp and Shrimp Products⁵ put WTO law in tune with concerns for the environment

1 Melvin Levitsky, *The Dark Side of Globalization*, 5 INTL STUD REV. 253, 253 – 54 (2003). As quoted by Tomer Broude & Doron Teuchman, *Outsourcing and Insourcing Crime: The Political Economy of Globalized Criminal Activity*, 62 VANDERBILT LAW REVIEW 796, 798 (2009).

2 As the Financial Action Task Force (FAFT) stated:

"The international trade system is clearly subject to a wide range of risk and vulnerabilities that can be exploited by criminal organizations and terrorist financiers." ... As the standards applied to other money laundering techniques become increasingly effective, the use of trade-based money laundering can be expected to become increasingly attractive.

Financial Action Task Force, *Trade Based Money Laundering*, June 23, 2006, available at www.fatf-gafi.org (last visited April 15, 2010). The FAFT is an inter-governmental body that establishes standards and creates policies against money laundering.

For a complete analysis of drug trafficking from an original contemporary sociological perspective, see ELIANA HERRERA-VEGA, *TRAFFIC DE DROGUES ET CAPITALISM. UNE PARADOXE CONTEMPORAIN* 2006.

3 See Joras Ferwerda, *The Economics of Crime and Money Laundering: Does Anti-Money Laundering Policy Reduce Crime*, 5 REVIEW OF LAW AND ECONOMICS 903, 921–22 (2009).

4 WTO Panel Report, *Colombia—Indicative Prices and Restrictions on Ports of Entry*, WTO Doc. WT/DS366/R, 27 April 2009. [hereinafter *Colombia—Ports of Entry Panel Report*], available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds366_e.htm (last visited March 11, 2010).

5 See WTO Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R, 12 October 1998. [hereinafter *US—Shrimp AB Report*], available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm (last visited March 29, 2010).

embodied in international law. A close look at this decision explains this striking success: the influence of international law over the interpretation of the GATT exception of Article XX(g) was expansive and covered each of the stages of interpretation of this provision. The US – Shrimp approach should be replicated in the interpretation of GATT exceptions in trade and transnational crime disputes.

The purpose of this article is to improve the legal analysis of the GATT Article XX(d) exception when invoked to justify inconsistent measures that, in addition to seeking the enforcement of customs laws, are mainly enacted as part of a strategy to fight drug trafficking and money laundering. To this end, the article suggests three main improvements to the report in Colombia – Ports of Entry. The first is to place the interpretation of GATT Article XX(d) under these circumstances in the context of public international law and, in particular, of the multilateral conventions addressing transnational crimes, among them drug trafficking and money laundering. The second improvement recommended is that of aligning the current interpretation of the two-tier test of Article XX(d) with international law in disputes of this character. The third suggestion is that of making co-operation between litigants—a widely recognized, suitable instrument in international law to address transnational offences—an attractive solution as part of the settlement of the case when the exception of GATT Article XX(d) is invoked.

To develop these arguments, this article is divided into eight parts. The first describes the measures at issue in Colombia – Ports of Entry. The second part presents the main arguments and conclusions of the panel in this case. The third

part illustrates the international law dimension of trade measures aimed at combating drug trafficking and money laundering by highlighting the pertinent provisions of multilateral conventions dealing with transnational crimes. The fourth part presents the Appellate Body's approach to the interpretation of GATT exceptions in light of international law, developed in US – Shrimp. The fifth part draws on the report in Colombia – Ports of Entry to suggest ways in which GATT Article XX(d) can be interpreted in light of international law to better reflect the respondent's intention to fight drug trafficking and money laundering—and sometimes to preserve public order—through the adoption of the measures at issue. The sixth part puts forward ways in which elusive co-operation between parties can be introduced as part of the settlement of anti-drug trafficking and money laundering-related trade disputes. The seventh part summarizes how GATT Article XX(d) can be interpreted in light of international law in this kind of controversy. Finally, the eighth part concludes.

I. The Measures at Issue in Colombia – Ports of Entry

Before describing the measures at issue in Colombia – Ports of Entry, it is worth highlighting that this dispute had some particularities that will be relevant in subsequent parts of this paper. Prior to the enactment of the measures in this dispute, Colombia introduced regulations imposing indicative prices on imports and ports of entry restrictions aimed at preventing money laundering, smuggling, and the violation of Colombian customs norms by certain products originating in or coming from Panama. These measures prompted consultations with Panama⁶ that concluded in a

⁶ See *Colombia—Customs Measures on Importation of Certain Goods from Panama*, Dispute DS348. The consultations were requested on 20 July 2006. See *Summary of the dispute to date*, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds348_e.htm (last visited February 10, 2010).

mutually agreed solution that the parties labelled “Protocol of Procedure for Cooperation and Exchange of Customs Information between Customs Authorities of the Republic of Panama and the Republic of Colombia”⁷ [the Customs Protocol]. The scope of the agreement was broad and comprehensive⁸ and led Colombia to remove the measures the day after the Protocol was reached.⁹ Subsequently, once Panamanian authorities were not cooperating, in Colombia's view, as agreed to in the Customs Protocol,¹⁰ Colombia enacted new measures similar to the original and with identical purpose.¹¹ The new measures led again to consultations and finally to the panel report in Colombia – Ports of Entry.

The measures at issue in this dispute, which will be labeled in general “ports of entry measures or restrictions,” set forth indicative prices for textiles, footwear and apparel arriving from all countries save those with which Colombia had free trade agreements. They also set port restrictions on and required advance import declaration for these products coming from Panama and the Colon Free Zone (CFZ).¹² Colombia had identified a growing problem of under-invoicing for and smuggling of these products imported from Panama and its CFZ and had linked them to money laundering on the basis, among others, of assessments carried out by the United Nations and the International Monetary Fund.¹³ According to Colombia, there was a significant discrepancy between Panama's

data on the value of exports to Colombia in 2005 and 2006, US\$1,055 and US\$1,241 million, and Colombia's information, which had the data at US\$381 and US\$414 million, respectively.¹⁴

The link between under-invoicing, drug trafficking and money laundering can in general be explained through the following example. A drug dealer sells illegal drugs and makes US\$100,000. He/she buys 1,000 blouses at US\$100 per unit. Then he/she exports the 1,000 blouses at a declared price of US\$10 per unit to a colluding importer, who pays US\$10,000. The importer then sells the 1,000 blouses at US\$100 per unit, and gets US\$100,000 or its equivalent in local currency for the drug trafficker or money launderer. At the end, customs duties are paid for the export price of US\$10,000, when the real value of the exports is US\$100,000.¹⁵ In addition, after the trade-based money laundering, the drug dealer has US\$100,000, less any commission, at his/her disposal to do whatever he/she wants, such as financing terrorism, as Colombia's history has sadly well illustrated over the last three decades.

According to Colombia, indicative prices functioned as reference prices and were calculated on the basis of the average production costs of the goods, if these data were available, or on the basis of the lowest price negotiated or offered for importation of the goods into the said country.¹⁶ Indicative prices

7 Panama notified the Dispute Settlement Body (DSB) of the agreement on 1 December 2006. See *Summary of the dispute to date*, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds348_e.htm (last visited 10 February 2010). The content of the Protocol seems not to have been disclosed to the Dispute Settlement Body (DSB), for such content is not included in the WTO website under the link “Find all documents from this case.”

8 See Award of the Arbitrator, *Colombia—Indicative Prices and Restrictions on Ports of Entry*, Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Doc. WT/DS366/13, 2 October 2009, ¶ 22. [hereinafter *Colombia – Ports of Entry Award*], available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds366_e.htm (last visited March 15 2010).

9 See *id.* ¶ 51.

10 According to Colombia, Panama failed to respond to requests for assistance, and when it did, its answers had multiple inconsistencies. See *Colombia – Ports of Entry Panel Report*, *supra* note 4, ¶ 4.85.

11 See *Colombia – Ports of Entry Award*, *supra* note 8, ¶ 22 n.54. For a detailed description of the measures, see *Colombia – Ports of Entry Panel Report*, *supra* note 4, ¶¶ 2.6–2.19.

12 See *id.* ¶ 2.4.

13 See *id.* ¶ 2.5.

14 See *id.* ¶ 2.5 n.12.

15 See John S. Zdanowicz, *Trade-Based Money Laundering and Terrorist Financing*, 5 REVIEW OF LAW AND ECONOMICS 855, 856–58 (2009).

16 See *Colombia – Ports of Entry Panel Report*, *supra* note 4, ¶ 2.7.

operated in the following fashion: when the declared free on board (f.o.b) value of the imported goods was lower than the given indicative prices, the goods would not be released, save if the importer corrected the declaration following the indicative prices and paid custom duties and sales taxes according to these prices. Importers were given five days to make the correction or to adduce evidence that the declared value was the real transaction value of the goods; otherwise, they would have to be reshipped or be declared legally abandoned by Colombian authorities. When the declaration was corrected and the goods were released, a new customs procedure started, called subsequent assessment (control posterior), in which the Colombian custom authorities verified the customs value initially declared by the importer. If this were the true value of the transaction, then the importer could ask for a refund of the customs duties paid in excess as a result of the use of indicative prices; there was no specific timetable for this refund.¹⁷ If the declared prices were not the true value, then the said authorities would issue a final determination of the customs value, which the importer could challenge before administrative authorities.¹⁸

As to port restrictions, Colombian customs law established the possibility of their adoption whenever the authorities determined that they were not in a position to exert their powers of control and verification. On this basis, Colombia enacted restrictions of this nature on imports of textiles, footwear, and apparel originating from or coming through Panama and the CFZ; these goods could enter Colombia only through Bogota

Airport or the Barranquilla seaport, subject to some exceptions. Non-compliance with these restrictions would lead to seizure and forfeiture.¹⁹

In addition, importers of the above-mentioned products coming from Panama had to present an advance import declaration not more than 15 days before the arrival of the goods and had to pay customs duties and taxes in advance, a requirement that did not exist for the same products coming from other WTO members.²⁰ If the importer did not do so, it had to reship the goods or pay a fee for rescuing them, in addition to any customs duties, in order to prevent the goods from being declared legally abandoned.²¹ Finally, importers were obliged to pay a fee if they had to introduce corrections to the advance declaration.²²

II. The Panel's Decision in Colombia – Port of Entry

Panama claimed that the use of indicative prices was inconsistent with Articles 1, 2, 3, 5, 6, and 7.2(b) of the Customs Valuation Agreement; Article II.2, first sentence; or Article III.4 of the GATT 1994. Likewise, Panama claimed that the port restrictions were contrary to Articles XI.1 and Article XIII.1 of the GATT 1994 or, alternatively, with Article I.1 of the same agreement. According to Panama, the requirement of advance import declaration for imports of textile, footwear, and apparel originating in Panama violated Article I.1 of the GATT 1994.²³ Colombia, for its part, rejected all these claims by arguing that indicative prices were not a customs valuation method, but a customs control and verification instrument,²⁴

17 Evidence before the panel showed that the refund could take more than two years to be received by the importer. *See id.* ¶7.125.

18 *See id.* ¶¶ 2.8–2.11.

19 *See id.* ¶¶ 2.13–2.14.

20 *See id.* ¶¶ 2.16–2.17.

21 *See id.* ¶ 2.18.

22 *See id.* ¶ 2.19.

23 *See id.* ¶ 3.1.

24 *See id.* ¶ 4.49.

and that they operated as a guarantee mechanism.²⁵ Colombia also adduced that, even if there were a violation of the GATT 1994, this was justified under the exception of GATT Article XX(d).²⁶ The report can then be divided for the purpose of its description into two main parts: first, the panel's assessment of Panama's claims of violation; and second, the panel's evaluation of Colombia's defence of GATT Article XX(d).

A. The Panel's Assessment of Panama's Claims of Violation²⁷

The panel started its analysis by determining the meaning of the term “custom valuation” in the Customs Valuation Agreement, and concluded that it was “the process of determining the monetary worth or price of imported goods for the purpose of levying customs duties...”²⁸ The panel also identified the two key elements of discovering whether a customs procedure was a customs valuation: first, the value of the goods; and second, the use of the value to levy ad valorem customs duties.²⁹ The panel was then of the view that customs valuation took place when Colombia made use of indicative prices in order to collect customs duties and that the payment was not made as a guarantee.³⁰ Having said this, the panel went on to examine Panama's claim of violation of the Customs Valuation Agreement.

Article 1 of the Agreement sets forth that, in general, absent certain circumstances, the customs value of imported goods is the transaction value, and Articles 2 to 7 contemplate the customs valuation methods that must be deployed when the transaction value of the imported goods does not apply. The panel was of the view that the Customs Valuation Agreement set forth the primacy of the use of the transaction value as the customs valuation method, with the others having to be applied sequentially,³¹ and concluded that Colombia's indicative prices were not the result of the application of any of the methods of the Customs Valuation Agreement and therefore violated it, given that the former were established as fixed prices for a large category of products without taking into account the particular circumstances of the transactions.³² Further, the panel held that such prices amounted to minimum prices banned by Article 7.2(f).³³

Turning to the claims of violation of the GATT 1994, the panel started with Article III.2, first sentence,³⁴ and declared the existence of the transgression.³⁵ The panel reached this conclusion since, in those events in which the declared value was lower than the indicative price and the transaction price of the like domestic product was lower than the indicative

25 See *id.* ¶ 4.52.

26 See *id.* ¶¶ 3.2–3.3. For the text of this provision, see *infra* text accompanying note 48.

27 This paper is focused on the panel's interpretation and application of GATT Article XX(d) and only illustrates, without further comment, the panel's conclusions concerning violations of WTO law.

28 *Colombia—Ports of Entry Panel Report, supra* note 4, ¶ 7.82.

29 See *id.* ¶ 7.84.

30 See *id.* ¶¶ 7.100, 7.106, 7.111, 7.115, 7.118–119, & 7.129–7.130.

31 See *id.* ¶ 7.137.

32 See *id.* ¶¶ 7.142 & 7.144.

33 See *id.* ¶ 7.150.

34 This provision sets forth:

The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. ...

World Trade Organization, THE LEGAL TEXTS. THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 428 (1999). [hereinafter WTO LEGAL TEXTS].

35 See *Colombia—Ports of Entry, supra* note 4, ¶ 7.201.

price and higher than the market price, the imported product was taxed at a tax base that was higher than that of the like domestic product.³⁶

The panel went on with Panama's claim that the port restrictions were contrary to GATT Article XI.³⁷ The panel declared that the term "restriction" had been broadly interpreted to cover measures that created limiting conditions and also limitations of action.³⁸ For the panel, measures that had clearly negative consequences on the importation of goods, such as market access restrictions, increased transactions costs, and uncertainties affecting investment plans, qualified as restrictions on importations under Article XI.1.³⁹ The panel concluded that the ports restrictions, by limiting access only through Bogota and Barranquilla, had the effect of reducing "the number of opportunities for importers to deliver goods into Colombia"⁴⁰ and violated GATT Article XI.1.⁴¹

As to whether the mandatory advance declaration violated the Most-Favoured Nation principle embodied in GATT Article I.1,⁴² the panel began by ratifying that the term "advantage" had been interpreted broadly by the Appellate Body⁴³ and determined that the flexibility to present import declarations at the time of the arrival of the goods or after constituted an advantage under GATT Article I.1,⁴⁴ was available to like goods arriving from WTO Member,⁴⁵ and was not immediately and unconditionally accorded to goods from Panama,^{46 47} thereby contravening Article I.1.

B. The Panel's Assessment of Colombia's Defence Under the GATT Article XX(d) Exception

Colombia argued that, even if the ports of entry restrictions were considered to violate the WTO-covered agreements, any violation would be justified by the GATT Article XX(d) exception, according to which:

36 See *id.* ¶ 7.193. The panel did not deem that the potential reimbursement of any tax paid in excess over the subsequent assessment process (control posterior) prevented the existence of the violation, since this process was not automatic and still imposed a financial burden on importers between the time of payment of sales tax and the reimbursement. See *id.* ¶ 7.196.

37 This provision reads as follows:

General Elimination of Quantitative Restrictions

1. 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." ...

WTO LEGAL TEXTS, *supra* note 34, at 437.

38 See *Colombia—Ports of Entry Panel Report*, *supra* note 4, ¶¶ 7.233–7.240.

39 See *id.* ¶¶ 7.243 & 7.271.

40 *Id.* ¶ 7.272.

41 See *id.* ¶ 7.275. The panel exerted judicial economy regarding the claim of violation of GATT Article XIII.1. See *id.* ¶¶ 7.291–92.

42 The provision reads:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

WTO LEGAL TEXTS, *supra* note 34, at 424.

43 See *Colombia—Ports of Entry Panel Report*, *supra* note 4, ¶ 7.340.

44 See *id.* ¶¶ 7.351–7.352.

45 See *id.* ¶ 7.355.

46 See *id.* ¶¶ 7.363–7.365, & 7.367.

47 In addition, the panel determined that the restrictions to the freedom of transit to textiles, footwear, and apparel arriving from Panama was contrary to GATT Article V.2. See *id.* ¶¶ 7.416, 7.417, 7.420, 7.423 & 7.430. The panel also concluded that the port restrictions violated GATT Article V.6, since imports of textiles, apparel, and footwear originating in or arriving from Panama or the CFZ had to arrive only at two ports of entry and clear customs there, which was not the case of imports of these goods that had not entered Panama, which could arrive at 11 ports. See *id.* ¶ 7.480.

Subject to the requirement that such measures are not 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 this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ...

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.⁴⁸

General Considerations Regarding the Interpretation of GATT Exceptions

In interpreting GATT Article XX, the Appellate Body has established that it contains a two-tier test. The first tier assesses whether the measure at issue falls under any of the exceptions, namely, that the regulation in question is necessary to achieve any of the objectives specified in the particular exception invoked. Once the measure

is found to be covered by a given exception, the second part of the test determines whether the regulation is applied in a way that satisfies the requirements of the chapeau of Article XX.⁴⁹

Specifically, an inconsistent measure has to meet four requirements to pass the first tier of the necessity test of Article XX:

There is a risk to the interest or value that needs to be protected;⁵⁰

The inconsistent measure must pursue the objective defined by the exception invoked;

The measure in question makes a material contribution to the pursuit of the particular goal or interest. As to the proof of the contribution of the measure to the pursuit of the goal of protecting health, the Appellate Body expressed in *Brazil – Retreaded Tyres* that such contribution can be demonstrated in qualitative and quantitative terms. The Appellate Body rooted this conclusion in two grounds: (i) Article XX(b) does not clearly impose only a quantitative analysis, so panels have discretion to conduct either a qualitative or quantitative analysis;⁵¹ and (ii) there are measures whose impact may only be gauged after a long period of time, which forces panels to rely on qualitative assessments regarding the necessity of such measures.⁵²

48 WTO LEGAL TEXTS, *supra* note 34, at 455.

49 See Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, at 22, WT/DS2/AB/R, adopted 20 May 2019. [hereinafter *US—Gasoline AB Report*], available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds2_e.htm. (last visited May 2, 2010).

50 The European Communities, Korea and China satisfied this requirement in *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* (Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 12 March 2001, ¶ 166. [hereinafter *EC – Asbestos AB Report*], available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds135_e.htm (last visited May 18, 2010)), *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc. WT/DS161/AB/R, 11 December 2001, ¶ 158. [hereinafter *Korea – Various Measures on Beef AB Report*], available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/169abr.doc> (last visited April 17, 2010)), and *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc. WT/DS363/R 12 August 2009, ¶ 7.763. [hereinafter *China – Publications and Audiovisual Products Panel Report*], available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm (last visited April 9, 2010), respectively. On the other hand, the United States failed to do so in *United States—Measures Relating to Shrimp from Thailand, United States—Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties* and its defense based on Article XX(d) was dismissed. See WTO Appellate Body Report, *United States—Measures Relating to Shrimp from Thailand, United States—Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WTO Doc. WT/DS343/AB/R, WT/DS345/AB/R, 16 July 2008, ¶ 317 & 319. [hereinafter *US—Customs Bond Directive AB Report*], available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds345_e.htm (last visited May 17, 2010).

51 See Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/AB/R, 3 December 2007, ¶ 146. [hereinafter *Brazil—Retreaded Tyres AB Report*], available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm (last visited April 7, 2010).

52 See *id.* ¶ 151.

There is no reasonable alternative available to achieve the goal other than the WTO-inconsistent measure in question.⁵³

It is important to mention that the Appellate Body stated in *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef* that a necessary measure did not have to be indispensable to achieving the particular goal in question. However, the measure must be located closer to the pole of “indispensable” than to the opposite pole of simply “making a contribution to” the pursuit of the given goal.⁵⁴

While the above-mentioned elements must be present for the successful invocation of the exception, the first tier of the necessity test must be carried out in several stages and comprises a process that the Appellate Body has labelled “weighing and balancing,” in which the contribution, the value at issue, and the trade restriction are weighed and balanced. The current state of the law regarding the several steps of the first tier of the test of any GATT/GATS necessity exception was so expressed by the Appellate Body in *China — Publications and Audiovisual Products*:

In *Brazil – Retreaded Tyres* the Appellate Body described the process in the context of an analysis of “necessity” under Article XX(b) of

the GATT 1994. The Appellate Body observed that a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution made by the measure to the achievement of the relevant objective, and the measure's trade restrictiveness. The Appellate Body stated that, if such an analysis “yields a preliminary conclusion” that a measure is necessary, then the necessity of the measure must be “confirmed” by comparing the measure with possible alternatives, in the light of the importance of the interests or values at stake.⁵⁵

This means that, as was the case with the panel in *China — Publications and Audiovisual Products* recently did, the weighing and balancing is an intermediate step that leads to a preliminary conclusion.⁵⁶ If the inconsistent measure seems to be provisionally necessary, then panels must proceed to assess whether a less trade-restrictive measure is reasonably available to the respondent Member.⁵⁷ It is important to mention that this final step can also be performed in light of the importance of the interest at stake, as the panel did in the above-mentioned case, which was not reversed by the Appellate Body.⁵⁸

This first tier of the test is carried out on the basis of criteria that the Appellate Body has

53 Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/AB/R, 7 April 2005, ¶ 308, [footnotes omitted]. [hereinafter *U.S. – Gambling AB Report*], available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm (last visited March 30, 2010). (“[A] ‘reasonably available’ alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued under paragraph (a) of Article XIV.”).

54 See *Korea – Various Measures on Beef AB Report*, *supra* note 50, ¶ 161.

55 WTO Appellate Body, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc. WT/DS363/AB/R, 21 December 2009, ¶ 241. [footnotes omitted]. [hereinafter *China — Publications and Audiovisual Products AB Report*], available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm (last visited March 20, 2010). For a critical approach to the weighing and balancing process, which virtually led the Appellate Body to introduce some changes to it that are reflected in the current state of the law, see Donald H. Regan, *The meaning of ‘necessary’ in GATT Article XX and GATS Article XIV: the myth of cost-benefit balancing*, 6 *WORLD TRADE REVIEW* 347, 347 (2007).

56 There is a situation in which a panel or the Appellate Body can reach a final conclusion that the measure at issue is not necessary, without even carrying out the weighing and balancing process. This is so, as the Appellate Body did in *US – Customs Bond Directive*, when no risk to the value sought to be protected by the invoked exception is found, in which case there is no need to restrain trade to preserve the value, and panels' assessments of contributions and of the level of trade restriction are superfluous. See *US – Customs Bond Directive*, *supra* note 50, ¶¶ 317–19.

57 See *China — Publications and Audiovisual Products AB Report*, *supra* note 55, ¶¶ 245–46. This approach was upheld by the Appellate Body. See *id.* ¶ 249.

58 See *id.* ¶¶ 246 & 249.

proffered. First, “The greater the contribution, the more easily a measure might be considered to be 'necessary' ... A measure with a relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects.”⁵⁹ The other criterion that panels and the AB have to take into account is the importance of the value in question: the greater the importance of the objective, the easier it will be for the measure to be considered necessary.⁶⁰

The Colombia – Ports of Entry Panel's Analysis of the First Tier of the Test of GATT Article XX(d)

Colombia argued that its ports of entry regulations sought to indirectly prevent trade operations that were associated with criminal activities related to money laundering, drug trafficking, and alterations of the public order and that the objective of the measures went beyond revenue protection.⁶¹ Although Colombia did not identify with precision the regulations whose enforcement it was seeking with the adoption of the ports of entry restrictions, the panel used the ability, recognized by previous panels, to determine such regulations on the basis of Colombia's submissions.⁶² Consequently, the panel identified some Colombian norms (Decree No 2685 and Resolution No 4240) as regulations aimed at ensuring “the security of goods and ability of customs authority to exercise control.”⁶³ This meant for Colombia that the defence was

evaluated from the very narrow perspective of collection of revenue and not from the main one: the need to prevent or attenuate drug trafficking, money laundering, and smuggling.⁶⁴ Colombia nonetheless adduced evidence linking smuggling and contraband with money laundering and drug trafficking. The panel stated:

Colombia views the link between customs fraud and smuggling and other criminal activities, including money laundering and drug trafficking, has been clearly established, and, in particular, in relation to the CFZ. As Colombia notes, a Memorandum of Understanding between the World Customs Organization and the International Criminal Police Organization linked customs fraud with other criminal activities, including money-laundering and terrorism. Colombia additionally notes publications by the United Nations and the International Monetary Fund, which also refer to problems with smuggling in the CFZ. Colombia's own UIAF has referred to a close relationship between contraband and money-laundering.⁶⁵

The panel began by recognizing that the fact that Colombia and Panama had reached the Customs Protocol under the previous dispute involving similar port of entry restrictions evidenced that there were indeed customs fraud-related problems,⁶⁶ which proved the risk to the enforcement of customs regulations. Subsequently, the panel found that the ports of

59 *Korea—Various Measures on Beef AB Report*, *supra* note 50, ¶ 163.

60 *See id.* ¶ 162 and Appellate Body Report, *Dominican Republic—Measures Affecting the Importation and Internal Sales of Cigarettes*, WTO Doc. WT/DS302/AB/R, 25 April 2005, ¶ 68. available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds302_e.htm (last visited May 17, 2010).

61 *See Colombia—Ports of Entry Panel Report*, *supra* note 4, ¶ 7.516 n.841.

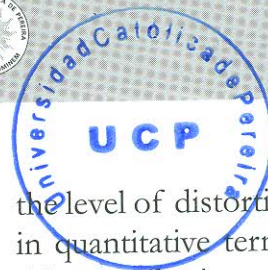
62 *See id.* ¶ 7.521 n.849.

63 *Id.* ¶ 7.523.

64 Colombia did not adduce evidence demonstrating that the ports of entry restriction sought to combat money laundering and drug trafficking. *See id.* ¶ 7.576. This issue will be assessed in more detail below in Part V.A.1.

65 *See id.* ¶ 7.553. [footnotes omitted].

66 *See id.* ¶¶ 7.542 – 7.543. Colombia adduced evidence that 89 firms incorporated in the Colon Free Zone were regularly purchasing goods with contraband US dollars. *See id.* ¶ 7.542 n.873. Panama did not contest this evidence. Moreover, Colombia started 106 criminal investigations involving apparel, footwear, and textiles between 2005-2007 on the basis of information submitted by both Colombia, and Panamanian customs authorities. *See id.* ¶ 7.559.



entry restrictions were designed to secure compliance with the above-mentioned Colombian regulations.⁶⁷ Then the panel proceeded to determine whether the ports of entry restrictions were necessary to ensure compliance with Colombia's customs enforcement regulations.⁶⁸

The panel began by recognizing that the Colombian regulations sought objectives, such as curbing tax evasion,⁶⁹ that were important and specifically stated that “combating under-invoicing and money-laundering associated with drug trafficking is a relatively more important reality for Colombia than for many other countries.”⁷⁰ Having said this, the panel proceeded to examine whether the ports of entry restrictions made a contribution to preventing smuggling, contraband and under-invoicing. The task of the panel was particularly challenging due to important inconsistencies and lack of uniformity in Colombia's data, which proved to be fatal to its defence.⁷¹

Colombia submitted two kinds of arguments—quantitative and qualitative—to the panel to demonstrate that the measures made a contribution to the achievement of the goal, following the approach set forth by the Appellate Body in its report in *Brazil – Retreaded Tyres*.

Colombia argued that the evolution of three indicators, namely, implicit prices, seizures, and

the level of distortions, proved the contribution in quantitative terms. According to Colombia, this contribution existed because, first, implicit prices of the imports of textiles, footwear, and apparel, defined as the price per unit, had increased since the adoption of the ports of entry measures, which illustrated that they were effective in combatting under-invoicing.⁷² Second, it existed because seizures related to contraband in relation to textiles had grown in 2007 compared with 2006. And third, it existed because the level of distortion, understood as the difference in the exports to Colombia of the covered products reported by Panama and the imports of the said goods as reported by Colombia,⁷³ had been reduced.⁷⁴ However, despite these factors, Colombia itself declared that the data did not always clearly prove the impact of the measure on the achievement of the goal and that the improvements could be the result of other relevant factors that should be considered.⁷⁵

As to the evolution of implicit prices, the panel divided the periods of application of the restrictions in the following way: (i) from January 2004–June 2005 (when there was no restriction in place); (ii) from July 2005–October 2006 (when the first set of ports of entry restrictions was adopted); (iii) from November 2006–June 2007 (when there was no restriction due to the operation of the Customs Protocol); and from July 2007 until panel proceedings under the second ports of entry restrictions.⁷⁶

67 See *id.* ¶7.543.

68 A full assessment of the GATT/GATS necessity exceptions has already been carried out and will not be duplicated here. See in this regard, Alberto Alvarez-Jiménez, *New Approaches to the State of Necessity in Customary International Law: Insights from WTO Law and Foreign Investment Law*, 19 AMERICAN REVIEW OF INTERNATIONAL ARBITRATION 463 (2008).

69 See *Colombia—Ports of Entry Panel Report*, *supra* note 4, ¶7.562.

70 See *id.* ¶7.566.

71 See *id.* ¶¶7.577 n.945, 7.578 n.950, 7.583 & 7.584 n.964.

72 See *id.* ¶7.577.

73 See *id.* ¶7.555.

74 See *id.* ¶7.568.

75 See *id.* ¶7.569.

76 See *id.* ¶7.578 n.950.

The panel did not consider that implicit prices were a good parameter to assess the material contribution in quantitative terms, since the said prices could increase due to changes in consumer demand and tastes.⁷⁷ Nonetheless, the evidence was uneven regarding implicit prices for apparel, textiles, and footwear. For textiles, the implicit price of products arriving from Panama between December 2006 and July 2007 was not higher than that of those arriving from other countries until a period when the measures were not applied. For apparel, implicit prices did increase during the existence of the measures, although in July 2006, when the measures were first implemented, the price dramatically plummeted from US\$2.77 to US\$0.39. As to footwear, implicit prices also increased, but the increase took place during a time in which the ports of entry restrictions were not in place. Implicit prices also grew for footwear coming from the rest of the world, but the magnitude was less significant.⁷⁸ On this basis, the panel concluded that the evidence submitted by Colombia regarding implicit prices was “inconclusive”⁷⁹ and, therefore, that Colombia had not proven that the restrictions were effective in combating under-invoicing.⁸⁰

The panel proceeded with the assessment of whether the actual contribution could be found on the basis of the second criterion argued by Colombia: increase of contraband-related seizures. Colombia argued that these seizures of textiles had almost doubled from 2006 to 2007. However, the data provided by Colombia was

annual, not monthly, which prevented the panel from finding proved that the increase took place as a result of the restrictions. In addition, the panel found that trade in textile goods increased during this year, which led the panel to assume that the increase in seizures could be the result of the said increase in trade.⁸¹ As to footwear products, the increase in seizures was less than that of textiles seizures. Finally, Colombia did not adduce any evidence regarding seizure of apparel. Consequently, the panel concluded that Colombia had not proven that the value of seizure of textiles, apparel, and footwear originating or arriving from Panama had increased since the adoption of the ports of entry restriction.⁸²

The panel reached an identical conclusion regarding trade distortions; since Colombia submitted evidence on an annual not a monthly basis, there was no way for the panel to determine if the reduction in such distortions took place as a result of the adoption of the measures over the periods July 2005–October 2006 and July 2007 until the time of panel proceedings. Third, the panel was of the view that any reduction could be attributed not to the ports of entry measures, but to the indicative prices.⁸³

As a result, the panel concluded that Colombia had not demonstrated in quantitative terms that the ports of entry restrictions had made a contribution to reducing contraband and smuggling.⁸⁴

77 For instance, the panel mentioned that footwear was a category that comprised goods whose prices ranged from US\$1.40 to US\$63.40. An increase in the volume of the latter would increase the average price for the whole category, a result that would not be brought about by the ports of entry restrictions. *See id.* ¶ 7.579 n.953.

Moreover, the panel found certain anomalies in the evolution of implicit prices. In the case of textiles, these prices remained low in some months during which the ports of entry restrictions were in place: US\$0.12 in December 2005 during the first application of restrictions and US\$0.61 in May 2008, during the existence of the second restrictions. However, for apparel, implicit prices did increase from US\$1.98 in July 2007 to US\$4.15 in September 2007, when the second restrictions were introduced. *See id.* ¶ 7.577 n.945.

78 *See id.* ¶ 7.581 n.955

79 *See id.* ¶ 7.581

80 *See id.*

81 *See id.* ¶ 7.583.

82 *See id.*

83 *See id.* ¶ 7.584.

84 *See id.* ¶ 7.585.



The panel turned to Colombia's argument that the material contribution could be determined in qualitative terms, on the basis of the thrust and architecture of the measures.⁸⁵ The panel concluded that Colombia had not adduced evidence demonstrating increasing compliance arising as a result of the restrictions and that Colombia had only speculated about this consequence.⁸⁶ Consequently, the panel found that Colombia had failed to demonstrate that the measures had contributed to reducing customs fraud and contraband in Colombia.⁸⁷

The panel then proceeded to determine the trade-restrictive impact of the Colombian measures in question and found that it was unable to quantify it. The panel did not reach any definitive conclusion regarding the suppression of trade brought about by the measures when it compared growth in terms of value of the imports of the subjected products arriving from Panama with that of those arriving from the rest of the world, since both types of imports had similar fluctuations.⁸⁸ The panel, however, did find that the restrictions had had a significant impact on Panamanian exporters' choice of ports, since they were using ports other than the two contemplated by the regulation to a significant degree.⁸⁹ However, despite this, the panel found "it difficult to gauge the restrictive impact of the ports of entry measure."⁹⁰

Having assessed the first three elements of the necessity test at the first tier of the test of GATT

Article XX(d), the panel went on to carry out the weighing and balancing process of the said elements. The panel started with the important admission that "smuggling and contraband are practices commonly affiliated with money-laundering and drug trafficking,"⁹¹ and ratified its previous finding that there were problems with under-invoicing and contraband in Panama.⁹² Although the trade restrictive impact of the measure could not be determined, the fact that Colombia had not proven that the measure could contribute to reducing under-invoicing and smuggling was a more important factor.⁹³ Additionally, and still within the balancing test, the panel said, concerning the effectiveness of the regulations, that Colombia had greater distortions related to smuggling and contraband with other WTO members, such as United States (US\$2,902 million), Europe (US\$1,837 million), and ALADI countries (US\$2,500 million) than with Panama.⁹⁴

Given that Panama did not adduce evidence regarding the existence of a less trade-restrictive alternative,⁹⁵ there was no need to go further, and consequently, the panel concluded that Colombia had failed to meet the requirements of the first tier of the test of GATT Article XX(d) and that the inconsistent regulations were not justified under the said provision.⁹⁶

Does this decision mean that there is a conflict between trade and the fight against transnational crime? No. Colombia did not meet its burden of

85 *See id.* ¶ 4.170.

86 *See id.* ¶ 7.586.

87 *See id.* ¶ 7.588.

88 *See id.*

89 *See id.* ¶¶ 7.600–7.604.

90 *See id.* ¶ 7.608.

91 *See id.* ¶ 7.612.

92 *See id.*

93 *See id.* ¶ 7.614.

94 *See id.* ¶ 7.617.

95 *See id.* ¶ 7.611 Although Panama initially argued that a formal agreement between the parties similar to the previous Customs Cooperation Protocol was an alternative, Panama subsequently withdrew this argument. *See id.* ¶ 7.610.

96 *See id.* ¶ 7.620.

proof regarding key elements of the GATT Article XX(d) defence, which determined in large measure its fate. This is, however, not to say that the panel's analysis captured all of the dimensions of the dispute, because it did not.⁹⁷

The international law dimension was totally missing and, given its importance, should be incorporated by future WTO panels and the Appellate Body adjudicating similar controversies. I will devote the rest of this article to showing a way in which this can be done.

III. The International Law Dimension of Anti-Drug Trafficking and Money Laundering-Related Trade Disputes

The invocation of GATT Article XX(d) to justify violations of GATT provisions when the inconsistent measure seeks to ensure compliance with customs regulations and fight drug trafficking and money laundering transcends WTO law. This is so, for there are several treaties dealing with the above-mentioned activities that should not be ignored. WTO law cannot be interpreted in clinical isolation, as the Appellate Body has repeatedly stated, and this is a situation in which this mantra is fully pertinent.⁹⁸

The cornerstones of international law in this domain are the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances⁹⁹ and the 2000 United Nations Convention Against Transnational Organized Crime. Despite their relevance and significance, these conventions did not play any role in Colombia – Ports of Entry. Neither did Colombia argue them nor did the panel even use them to interpret the exception of Article XX(d).

To begin with, the preamble of the 1988 Convention Against Illicit Traffic in Narcotic Drugs cannot be more eloquent regarding the need to combat drug trafficking:

The Parties to this Convention,
Deeply concerned by the magnitude of and rising trend in the illicit production of, demand for and traffic in narcotic drugs and psychotropic substances, which pose a serious threat to the health and welfare of human beings and adversely affect the economic, cultural and political foundations of society,
Deeply concerned also by the steadily increasing inroads into various social groups made by illicit traffic in narcotic drugs and psychotropic substances, ...

Determined to improve international co-operation in the suppression of illicit traffic by sea,

Recognizing that eradication of illicit traffic is a collective responsibility of all States and that, to that end, co-ordinated action within the framework of international co-operation is necessary, ...

Recognizing also the importance of strengthening and enhancing effective legal means for international co-operation in criminal matters for suppressing the international criminal activities of illicit traffic,

Article 1 of the Convention sets forth that its purpose is to promote cooperation among States to address drug trafficking and Article 7 establishes mutual legal assistance of the widest measure and the procedure to make it effective. Article 9, for its part, provides for cooperation regarding enforcement of legislation combatting drug trafficking offences.

⁹⁷ When assessing the quality of the panel's reasoning and of Colombia's lawyering, it is important to take into account that *Colombia – Ports of Entry* was pretty much a case of "first impression"—a novel case—in many regards.

⁹⁸ See *US – Gasoline AB Report*, *supra* note 49, at 17.

⁹⁹ United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. available at http://www.unodc.org/pdf/convention_1988_en.pdf (last visited February 10, 2010).

As for the 2000 UN Convention Against Transnational Organized Crime, its Article 1 establishes that the goal of the Convention “is to promote cooperation to prevent and combat transnational organized crime more effectively.”¹⁰⁰ For its part, Article 7 sets forth specific provisions against money laundering in the following terms:

1. Each State Party:

(a) Shall institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, ...

(b) Shall, without prejudice to articles 18 and 27 of this Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering.

2. States Parties shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of

information and without impeding in any way the movement of legitimate capital. ...

4. States Parties shall endeavour to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.

In addition, Article 18 of the Convention consecrates mutual legal assistance as a tool to combat transnational crime and establishes that such assistance must be afforded “to the fullest extent possible.” Mutual legal assistance comprises, according to this provision, the execution of searches, seizures and freezing, examining sites and objects, the provision of evidentiary items and information, and the identification or tracking of proceeds of crime or property. Article 18.15 sets forth the request requirements for mutual legal assistance, and Article 18.21, the reasons for denying the assistance, such as the requested Party's view that the execution of the given request may prejudice its security, sovereignty, or public order or other essential interest, or impose limitations in its domestic law, among others. Further, the Convention establishes in Article 18.24 the requested State Party's obligation to execute the request of mutual legal assistance as soon as possible. Finally, Article 28 also prescribes cooperation regarding law enforcement to combat transnational crime.

In addition to UN Conventions, soft international law instruments have also been put in place to combat money laundering. Paramount among them are the 40

100 United Nations Convention against Transnational Organized Crime. available at <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> (last visited February 9, 2010).

101 See Financial Action Task Force, *FATF 40. Recommendations 20 June 2003 incorporating the amendments of 22 October 2004*. Recommendations No 36 to 39. [hereinafter *FATF Recommendations*]. available at <http://www.fatf-gafi.org/dataoecd/7/40/34849567.PDF> (last visited April 8, 2010). It is worth emphasizing that the recommendations have recently acquired a more significant status, since they have been applied by the International Monetary Fund and the World Bank. See Ferwerda, *supra* note 3, at 911.

Recommendations of the Financial Action Task Force, which once again highlight the importance of mutual assistance¹⁰¹ and other forms of co-operation. The FAF'T points out:

Countries should ensure that their competent provide the widest possible range of international co-operation to their foreign counterparts. ... Exchanges should be permitted without unduly restrictive conditions. ...¹⁰²

Furthermore, it is worth mentioning that drug trafficking and money laundering may sometimes, not always, have an additional dimension: the protection of security interests.¹⁰³ In effect, drug barons have carried out violent actions against civil populations, journalists, judges, government officials, and legislators in some States over long periods of time.¹⁰⁴ Legitimate institutions may have clearly been affected as a result of such actions, a connection that has explicitly been recognized by international law, for the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs provides in its Preamble:

Recognizing the links between illicit traffic and other related organized criminal activities

which ... threaten the stability, security and sovereignty of States,...

Also in its Preamble, the Convention Against Transnational Organized Crime states: Noting with deep concern the growing links between transnational organized crimes and terrorist crimes, taking into account the Charter of the United Nations and the relevant resolutions of the General Assembly ...

As can be seen, the said UN Conventions and soft law establish the importance of fighting drug trafficking and money laundering; recognize in the most clear terms possible the adverse impact that these activities may have on States and societies in the form of terrorism and loss of human resources, among others; and contemplate inter-State co-operation as one of the most important means to fight them.¹⁰⁵

Thus, any drug trafficking and money laundering-related WTO trade dispute has a significant international law dimension,¹⁰⁶ and panels and the Appellate Body should offer an interpretation of the covered agreements, and in particular of the GATT/GATS exceptions, that

102 See Recommendation No 40. See *EATF Recommendations*, *supra* note 101. The implementation of the recommendations was encouraged by the UN Security Council in its Resolution 1617 (2005).

103 This dimension was mentioned, but not fully developed, by Colombia in *Colombia—Ports of Entry*. See *Colombia—Ports of Entry Panel Report*, *supra* note 4, ¶ 7.516 n.841.

104 Colombia's experience in this regard is sadly vast. Drug trafficking has fueled right-wing paramilitary groups and left-wing guerrillas during the last 30 years, with devastating human, social, political, and economic consequences that have been widely documented. Besides scholarly research, such experience has been illustrated by reports, such as *NOTICIA DE UN SECUESTRO* (1996) by the Colombian Nobel Prize winner, Gabriel García Márquez, and novels such as *LA VIRGEN DE LOS SICARIOS* (1994), by Fernando Vallejo; *ROSARIO TIJERAS* (1999), by Jorge Franco; movies with real-life actors directed by the Colombian film-maker Victor Gaviria, such as *Rodrigo D: No Futuro* and *La Vendedora de Rosas*. Alonso Salazar in *NO NACIMOS PA SEMILLA* (1990), showed the roots and motivations of the young murderers that served and still serve drug barons. Perhaps among those who anticipated the immense costs that drug trafficking would impose over Colombia's society and institutions was Carlos Jiménez Gómez, as illustrated by his most recent book *CAMINO DE LA TRAGEDIA NACIONAL* (2010).

105 The importance of co-operation to fight trade-based money laundering has recently been shown by the results that Brazil and the United States achieved with a co-operative investigation that identified US\$200 million in import duty fraud owed to imports to Brazil at undervalued prices and income tax evasion in the United States. As a result of the investigation, 128 arrest warrants were executed and 79 people were arrested in what Brazil considered to be the largest trade-based money laundering scheme in its history. See Zdanowicz, *supra* note 15, at 856.

106 In addition to the relevance of the UN Conventions to the interpretation of GATT/GATS exceptions, it is important to mention that the Conventions can be relevant from another angle, not explored in this article. A WTO Member party to them can seek to justify an inconsistent measure on the need to ensure the enforcement of domestic legislation incorporating the Conventions, as the Appellate Body authorized in *Mexico—Tax Measures on Soft Drinks and Other Beverages*. See WTO Appellate Body, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WTO Doc. WT/DS308/AB/R, 6 March 2006, ¶ 79. [*Mexico—Taxes on Soft Drinks AB Report*], available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds308_e.htm (last visited February 18, 2010). For an assessment of this report, see Alberto Alvarez-Jiménez, *The Appellate Body Report on Mexico—Tax Measures on Soft Drinks and Other Beverages and the Limits of the WTO Dispute Settlement System*, 33 *LEGAL ISSUES OF ECONOMIC INTEGRATION* 319 (2006).

fully takes into account such dimension.¹⁰⁷ The Appellate Body report in *US – Shrimp* provides useful guidance to achieve this goal.

IV. The US – Shrimp Model for the Interpretation of GATT Exceptions in Light of International Law

US – Shrimp has been considered as one of the most important decisions ever rendered by the Appellate Body.¹⁰⁸ As with all judicial landmarks, the report has multiple facets, but I will concentrate on the one relevant for the purpose of this article: how to interpret GATT/GATS exceptions in light of international law in a way that aligns the latter with WTO law.

As was seen, the Appellate Body has established that the interpretation of GATT Article XX contains a two-tier test. At the first tier, the panel assesses whether the measure falls under the scope of the invoked exceptions. Once this is so, the panel or the Appellate Body examines whether the application of the measure complies with the Chapeau. One of the fundamental features of *US – Shrimp* was the expansive use of international law to interpret, in this case, GATT Article XX(g). The first tier of the test was interpreted in light of international environmental law in order to determine the scope of the term “exhaustive natural resources.”¹⁰⁹ And so was the second tier of the test, when the Appellate Body relied on international law to introduce co-operation as an element that had to be taken into account when

assessing whether the measure had been applied as an unjustified discrimination against the complainants.¹¹⁰

By interpreting GATT Article XX(d) in this way, not only did the Appellate Body set WTO law in tune with international environmental law, but it also was able to introduce an important tool provided therein, co-operation, as a key part of the settlement of the case. Given the existence of an international law dimension in drug trafficking and money laundering-related trade disputes and the importance that international law assigns to co-operation as an important instrument to fight transnational crimes, the connection between the interpretation of GATT Article XX(d) when invoked in controversies of the said nature and the *US – Shrimp* model becomes evident: international law should play an expansive role in the interpretation of the stages and sub-phases of the two tiers of the said provision in drug trafficking and money laundering-related trade disputes.

V. How to Align WTO Law and International Law in the Interpretation of GATT Article XX(d) in Drug Trafficking and Money Laundering Trade-Related Disputes

Before starting, it is important to make clear that providing full consideration to international law and to the drug trafficking and money laundering dimension of the dispute within the interpretation of GATT Article XX(d) should not mean a loose interpretation and application

107 However, this is not say that the Conventions can be applied in a WTO dispute in the sense that a panel has jurisdiction to examine whether a WTO Member is complying with them, a situation that the Appellate Body barred in general and for good reasons in *Mexico—Tax Measures on Soft Drinks and Other Beverages*. See *Mexico—Taxes on Soft Drinks AB Report*, *supra* note 106, ¶ 75.

108 See John H. Jackson, *Justice Feliciano and the WTO environmental cases: laying the foundations of a 'constitutional jurisprudence' with implications for developing countries*, in 29 *LAW IN THE SERVICE OF HUMAN DIGNITY. ESSAYS IN HONOUR OF FLORENTINO FELICIANO*, 40–1 (Steve Charnovitz, Debra P. Steger & Peter Van den Bossche eds., 2005).

109 The international law norms used were the 1982 United Nations Convention on the Law of the Sea, the Convention on Biological Diversity, the Resolution on Assistance to Developing Countries, adopted in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals. See *US – Shrimp AB Report*, *supra* note 5, ¶ 130.

110 To introduce co-operation, the Appellate Body relied on the following international environmental law norms: the Convention on the Conservation of Migratory Species of Wild Animals, the Convention on Biological Diversity and the Rio Declaration on Environment and Development and Agenda. See *id.* ¶ 168–69.



of this provision to the point that it becomes a readily available instrument to justify inconsistent, trade-restrictive measures. The issue is another: to offer WTO panels and the Appellate Body instruments that allow them, regardless of the final decision as to the success of the defence of Article XX(d), to fully take into account both the UN Conventions and the transnational crime dimension of the dispute at the time of its adjudication.¹¹¹ Thus, in this part, I will present, first, the arguments and evidence that the Member invoking Article XX(d) has to argue and provide to make it possible for the panel to take the drug trafficking and money laundering feature of the dispute into account. Then I will proceed with the illustration of how panels can, on this basis, interpret Article XX(d) in light of the UN Conventions, thereby aligning WTO law and international law.

A. Respondents' Arguments and Proofs to Incorporate the Drug Trafficking and Money Laundering Dimension of Trade Disputes

The panel in *Colombia – Ports of Entry* was aware of the connection in the case between smuggling and contraband and money laundering and drug trafficking¹¹² and of the fact that Colombia has been a country particularly affected by these international crimes.¹¹³ However, the panel did not reflect such connections in its assessment of the Article XX(d) defence, because although Colombia mentioned them, it did not develop these connections further. Thus, in *Colombia – Ports of Entry* the value claimed to be protected by the exception was only the collection of taxes, and

this was the value the panel dealt with.¹¹⁴ The first question to answer is then how respondents can ensure that the drug trafficking and money-laundering dimension receives full consideration by a panel or the Appellate Body.

Although panels and the Appellate Body enjoy wide freedom of argumentation,¹¹⁵ such freedom cannot relieve parties, and in particular, the one invoking Article XX(d), from exploring all of the legal facets of the case in order to allow WTO adjudicators to reflect them in their reports. Panels and the Appellate Body simply cannot make the case for the respondent and would likely fail to make an objective assessment of the matter, as required by Article 11 of the WTO Dispute Settlement Understanding, if they did so.

1. Precise Identification of Anti-Money Laundering and Drug Trafficking Legislation Sought to Be Enforced and of the Risk to Its Enforcement

The money laundering and drug trafficking dimension of trade-restrictive measures sought to be justified under Article XX(d) needs to be highlighted right from the beginning by respondents for a panel or the Appellate Body to incorporate this dimension into its analysis. The starting point for a respondent is then to claim that the measures, although seeking to enforce customs law, also pursue the enforcement of specific and fully identified domestic legislation enacted to fight drug trafficking and money laundering. A similar approach could be taken whenever a Member is seeking to see the security dimension incorporated as part of its defence of

111 This is not to suggest that the two-tier test of Article XX(d) must be changed. In fact, the overall structure of the test, as designed by the Appellate Body, is perfectly suitable to incorporate the drug trafficking and money laundering dimension of the dispute. What is required is simply to identify the adjustments required.

112 See *Colombia—Ports of Entry Panel Report*, *supra* note 4, ¶7.612.

113 See *id.* ¶7.566.

114 For instance, see *id.* ¶7.543.

115 See WTO Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/AB/R, 16 January 1998, ¶156. available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm (last visited April 21, 2010).

Article XX(d), when this is the case. The respondent has, then, to adduce that the measure seeks as well the enforcement of specific domestic constitutional provisions or legislation mandating the protection of public order and the rights of inhabitants, among others.¹¹⁶

But this would not be in itself enough. As was mentioned, one of the requirements of any GATT exception is the existence of a risk for the given interest sought to be protected. In consequence, the respondent should also have to adduce proofs that drug trafficking and money laundering have a connection with the particular acts that constitute an evasion of customs legislation for a panel to be able to take the money laundering and drug trafficking dimension into account as part of the interpretation of this provision. The proofs could be of a general character, on the basis of statements by international organizations linking them, as Colombia did in *Colombia – Ports of Entry*,¹¹⁷ or they could also be domestic decisions in which the evasion of customs duties has also led to charges and sentences for money laundering and/or drug trafficking crimes. This proof is required, because otherwise the dispute lacks a transnational crime dimension as a matter of reality, even if the respondent has argued that its measures seek to combat the said offences.

In addition, when this connection has been established, and security concerns are also part of the objectives of the measure, the respondent

needs to prove the risk to public order that drug trafficking and money laundering have posed in the past. If there is no such risk, the dispute lacks a security dimension as a matter of fact, and there is no need to incorporate it as part of the interpretation and application of Article XX(d).

The issue of security must be fully proved and not merely argued, even if the facts are in the public domain.¹¹⁸ Respondents must be forthcoming in providing panels with information regarding the impact that drug trafficking and money laundering have had over their security interests. They must recognize that panels and the Appellate Body are bound to make an objective assessment of the matter before them, and to do so, they must decide on all of the aspects of the necessity exception on the basis of proved facts. As the Appellate Body stated in *China – Publications and Audiovisual Products*:

We recall that, in *US – Gambling*, the Appellate Body stated that a panel must independently and objectively assess the "necessity" of the measure before it, based on the evidence in the record. The Appellate Body also affirmed that it is for the responding party to make a *prima facie* case that its measure is "necessary" by putting forward evidence and arguments that enable the panel to assess the challenged measure in the light of the relevant factors to be "weighed and balanced".¹¹⁹

116 A respondent's intention to seek consideration of its security interest under the two-tier of the test of Article XX(d) is different from invoking the security exception under GATT Article XXI. The first strategy is important for respondents because it allows them to provide the full factual situation in support of their defence of Article XX(d). On the contrary, the factual situation will be fragmented if, instead, respondents invoke as exceptions both Article XX(d) and Article XXI, since each exception, and its supporting facts, will be independently assessed. When this is the strategy, security issues will not make up part of the evaluation of the defence of Article XX(d).

A detailed discussion of GATT Article XXI can be found in GATT ANALYTICAL INDEX. GUIDE TO GATT LAW AND PRACTICE. Vol 1. (1995) 600–608.

117 See *supra* text accompanying note 65.

118 Information in the public domain has several shortcomings, which make its use difficult for even well-established international adjudicators such as the International Court of Justice. See for instance, International Court of Justice, *Case Concerning Military and Paramilitary Activities In And Against Nicaragua. (Nicaragua v. United States of America)*, Judgment of 27 June 1986, ¶ 63. available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3>. (last visited March 22, 2010).

119 *China – Publications and Audiovisual Products AB Report, supra* note 55, ¶ 288. [footnotes omitted].

In addition, when the measure at issue targets a particular WTO Member, as in *Colombia – Ports of Entry*, the level of proof needs to be higher for a panel to incorporate the security dimension of the controversy. It should require proof of some kind of connection between the targeted Member and drug dealers and money launderers who have committed actions in the past against the security interest or public order of the respondent Member invoking the defence. Such connections could be, for instance, the demonstration of an illegal past operation of the said actors in the targeted Member State, the use of its financial system in the past for illegal purposes related to the said crimes, the planning of violent acts that were made within the complainant's territory, or any other connection that may be established.

It is important, though, to mention that the level of proof should not go as far as to exclusively require evidence of specific present actions by non-State actors operating from the complainant Member State, aimed at affecting the security interest of the respondent. Nor would the level of proof be that of a demonstration of attribution to the targeted State of the acts committed by non-State actors, such as drug barons, that have affected the security interests of the respondent, since the exception invoked is not that of Article XXI, and what is at issue is not whether the acts related to the transnational crimes are attributed to the complainant.¹²⁰ It must be recalled that the issue is much narrower: how to include, within the interpretation of Article XX(d), the security concerns of a respondent Member as part of the assessment of measures aimed at enforcing customs regulations and legislation combatting drug trafficking and money laundering

The final point is whether, in order for a panel or the Appellate Body to take into account, on one hand, the drug trafficking and money laundering dimension and, on the other, the security dimension, complainants must prove not only the risk but also the contribution of the measure to the enforcement of the invoked legislation in these fields. Although such evidence could be useful, it is important to recall that the measure in question is seeking to detect and prevent money laundering through customs evasion. Thus, the measure simultaneously pursues several objectives that are intertwined: protecting public revenue, fighting transnational crimes, and sometimes, even preserving public order and security interests. Consequently, a contribution to the enforcement of customs regulation brings about another against drug trafficking and money laundering and, depending on the past history of the respondent, an additional one to the defence of security.

Having said this, the article proceeds to illustrate—on occasion, on the basis of the report in *Colombia Ports of Entry*—concrete ways in which the drug trafficking and money laundering dimension and the international law perspective that it brings about can be taken into account by panels and the Appellate Body in the interpretation and application of the two tiers of the test of GATT Article XX(d).

B. Interpretation of the First Tier of the Test of Article XX(d) in Light of International Law

1. Assessment of the Contribution of Trade-Based Anti-Drug Trafficking and Money Laundering Measures under Article XX(d)

¹²⁰ The relevant provisions of customary international law in this regard are Articles 4 and 8 of the International Law Commission's Articles on State Responsibility. A recent interpretation of these provisions was provided by the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Serbia and Montenegro)*. See International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ¶¶ 392 – 93 & 400, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=f4&case=91&code=bhy&p3=4> (last visited May 17, 2010).

a. Recognition of Corruption as Part of the Assessment of the Contribution in Quantitative Terms

As was mentioned, the panel in *Colombia – Ports of Entry* regarded that the increasing number of seizures did not demonstrate the contribution of the measure to the achievement of the goal, because such increase could also be associated with increasing trade.¹²¹ The panel did not look closely at a critical reality of criminal activities associated with drug trafficking and money laundering: the fabulous capacity drug traffickers have to corrupt authorities, and among them customs agents, owing to the immense profits that drug trafficking makes. If one takes into account this reality, the result is that any increase in demonstrated seizures could be seen as a good proof of impact and also interpreted as a conservative expression of it, since it would not include those events, certain in real life even though their magnitude always remains unknown, in which the measure operated but seizure was not possible due to bribery of customs authorities, thereby giving the impression that the measure was ineffective, when this might not have been the case.¹²²

Can panels legally ignore the corruption associated with drug trafficking when performing the two-tier test of GATT Article XX(d)? They should not, since international norms have already established the intimate connection between both practices. In effect, the Preamble of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances states

Aware that illicit traffic generates large financial profits and wealth enabling transnational criminal organizations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business, and society at all its levels,¹²³

Thus, future WTO panels dealing with trade restrictions aimed at combatting drug trafficking and associated crimes such as smuggling and money laundering should interpret the requirement of contribution at the first tier of the GATT Article XX(d) test in light of the close link that international law has recognized as existing between drug trafficking and corruption. Specifically, panels should take into consideration the impact that corruption may have over data illustrating the actual contribution that the restrictions at issue are making to the pursuit of the goal of combatting the said transnational illegal activities. Or, from a more general angle, acknowledging corruption means that panels should be careful in declaring that a measure is unable to make an actual contribution, since corruption may be preventing data from displaying such contribution.¹²⁴

A final point is whether respondents should adduce proofs of corruption associated with drug trafficking and money laundering in the enforcement of customs regulation in order for the panel to introduce this international law element as part of the assessment of the contribution at the first tier. The answer is affirmative, since what the foregoing UN

121 See *supra* text accompanying note 81.

122 The need to bribe means that the measure has increased the costs of eluding the given customs regulations for drug traffickers and money launderers. Such increase should be seen as a contribution.

123 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. available at http://www.unodc.org/pdf/convention_1988_en.pdf (last visited February 10, 2010).

124 This is certainly not to say that incorporating corruption as part of the assessment of the actual contribution prevents a panel from declaring the absence of such contribution. What is suggested is that panels should be *careful* in reaching this conclusion, given the existence of corruption.

Convention established in its Preamble is a connection, not a legal presumption, between corruption and drug trafficking. However, the level of proof should not be so high as to require proof of a specific connection between corruption and drug trafficking and money laundering regarding the measures at issue in the dispute. Proofs related to prosecutions in the past—related or unrelated to the targeted Member—could be adduced, and it would be up to panels to decide whether they are convincing enough to demonstrate the connection in the particular dispute, thereby allowing them to incorporate it as part of the assessment of the contribution in light of international law.

b. Recognition of Sophistication of Drug Traffickers and Money Launderers when Assessing the Contribution of the Measure in Quantitative Terms

When assessing the contribution in quantitative terms, panels should consider that, as the Financial Action Task Force has stated, “[M]oney laundering methods and techniques change in response to developing counter-measures. In recent years, the Financial Action Task Force ... has noted increasingly sophisticated combinations of techniques ...”¹²⁵

Switching to another criminal activity or performing the same but related to products not covered by the measure in question would reveal that the measure has been effective, while quantitative indicators, such as an increase in seizures for instance, may not be able to reflect the change.¹²⁶ Although proof of its existence as to the measure in question is very difficult to obtain, the statement of the Financial Action Task Force on its own should lead panels and the

Appellate Body to be careful when declaring that a measure has not made an actual contribution to the achievement of the goal of enforcing customs regulations or other norms combatting drug trafficking and money laundering. In sum, the statement should be kept in mind as part of the overall background of the case and, in particular, to show panels that the proof of the contribution may tend to be mainly qualitative, not quantitative, in nature in this kind of dispute.

c. Increased Costs to Evade Legislation should be Regarded as a Contribution in Qualitative Terms

When assessing a contribution in qualitative terms, panels should also declare its existence when it has been demonstrated that the measure enacted to ensure compliance with customs regulation has had the likely effect of increasing the costs of its evasion. The costs can be defined as the value of the sanction multiplied by the probability of detection.¹²⁷ So, if a measure increases the probability of detection of the violation of customs legislation, then it could be said that the measure is apt to make a contribution to the achievement of the goal, since it may reduce the incentives to carry out the violation of the customs regulations. The contribution is even greater if the measures also increase the probability of conviction.¹²⁸ Indeed, empirical studies have demonstrated that there is a negative correlation between crime and the probability of detection and severity of punishment; this correlation has been found even in research using different methodologies.¹²⁹

Consequently, a panel assessing the existence of a contribution in qualitative terms of a measure

¹²⁵ FATF 40 Recommendations, *supra* note 101.

¹²⁶ Broude and Teuchman mentions switching as a possible outcome of anti-transnational crime measures. *See* Broude & Teuchman, *supra* note 1, at 809.

¹²⁷ *See id.* at 807.

¹²⁸ Broude & Teuchman mentioned the concept of probability of conviction, although not in the context used here. *See id.* at 837.

¹²⁹ *See* Ferwerda, *supra* note 4, at 906.

taken to enforce customs legislation and anti-money laundering and drug trafficking provisions could declare such existence when the respondent is able to demonstrate that the structure of the measure and its application have increased the probability of detection of actions aimed at eluding the enforcement of norms of this character and have, therefore, raised the costs of such behaviour.

The final point concerns the evidence that needs to be adduced to prove the likely increase of detection. While the design of the measure must be used as part of the arguments, it certainly does not prove the likelihood as a fact. Something different should be required, such as proofs of an increase in human resources or the acquisition and dissemination of new know-how, to mention but a few. Or in other words, only proven facts may make it possible for a panel to infer the existence of an increase in the likelihood of detection.¹³⁰

In general, in this kind of dispute, the fact that a panel does not find proven the actual contribution in qualitative terms should not give the panel the impression that the measure cannot make a contribution in qualitative terms, for this is the most likely contribution in this kind of controversy. Finally, the existence of the contribution in qualitative terms should also receive careful and detailed discussion and analysis by panels, something that the panel in *Colombia—Ports of Entry* did not do.^{131 132}

d. Distinctions Between Products and/or WTO Members Should Not Be Seen as Limiting the Contribution of the

Measure to the Achievement of the Goal under Article XX(d)

The panel in *Colombia—Ports of Entry* was of the view that the ports of entry restriction could not be effective, since it was introduced only regarding textile, footwear, and apparel originating in or arriving from Panama, while there were more significant problems of under-invoicing and smuggling stemming from other regions. For instance, while trade distortions with Panama amounted in 2006 to US\$906 million, those with the United States were US\$2.902; with ALADI, US\$2500 million; and with Europe, US\$1837 for the same year.¹³³

Three objections could be made to this finding. First, what is being assessed at this stage of the first tier of the test is the contribution of the measure, taken in isolation, to the achievement of the goal and not whether the *whole* policy of tax enforcement against smuggling and money laundering makes a contribution to increasing enforcement in this area. Second, the rationale of the said panel's finding is questionable in the sense that the fact that Colombia did not put ports of entry restrictions in place against the United States, European Communities, and ALADI Members did not necessarily mean that it was not addressing the trade distortions that existed with these Members and regions. Colombia could have well been deploying other instruments to achieve the enforcement of its tax regulations in the fight against money laundering and drug trafficking. And third, the assessment of the targeting of specific members would have a more proper place when the panel was either evaluating alternatives, still under the first tier (to

¹³⁰ This conclusion can be based on the Appellate Body report in *Brazil—Retreated Tyres*. See *Brazil—Retreated Tyres*, *supra* note 51, ¶¶ 149 & 153.

¹³¹ This is not to say that the panel failed to make an objective assessment of this particular point. My criticism goes mainly to the lack of in-depth justification of this conclusion.

¹³² The panel reached its conclusion that the measure did not make a likely contribution to the goal in only one paragraph, after having made an extensive assessment of the actual contribution and finding that it did not exist. (See *Colombia—Ports of Entry Panel Report*, *supra* note 4, ¶ 7.586). To avoid such situation, respondents should prove first that the measure makes a contribution in qualitative terms and, second, present the analysis of the contribution in quantitative terms.

¹³³ See *id.*, ¶ 7.587.

assess the availability of the means deployed regarding non-targeted Members), or when it assessed whether the measure constituted unjustified or arbitrary discrimination between Members at the second tier of the test.

Another related point raised by Panama was that Colombia did not put ports of entry restrictions in place regarding goods coming from Panama, for which smuggling and under-invoicing problems also existed and were greater than those subject to the measures.¹³⁴ Although the panel did not delve into this issue, it stated that it had taken note of it,¹³⁵ which implies that the panel attached a certain value to this argument.

As to the panel's note, it can be said that, in effect, if the goal of the measure is to collect revenue and combat drug trafficking, smuggling, and money laundering, it is expected that the respondent must address the issue of those products for which distortions are higher, regardless of the industry they belong to. This is, however, not to say that the respondent has to cope with them with the same measures or means. This explains why the Appellate Body stated in *Korea – Various Measures on Beef* that the discussion relating to why a similar phenomenon was sometimes addressed through trade restrictive measures, while in others, through other means, had to be made within the assessment of alternatives at the first tier of the test of necessity.¹³⁶ In my view, this distinction between products is also relevant when determining, under the Chapeau, whether the measure constitutes or not a disguised restriction on international trade.¹³⁷

In sum, the fact that a WTO Member does not impose trade-related anti-drug trafficking and money laundering measures aimed at enforcing customs laws on all Members and goods with higher distortions is relevant at subsequent phases of the test of Article XX(d), and it should not be part of the assessment of the contribution of the measure to the achievement of the goal.

2. Weighing and Balancing Test in Drug Trafficking and Money Laundering-Related Trade Disputes

As was illustrated, the first tier of the test comprises several stages: it starts with the identification of the contribution of the measure to the achievement of the value protected by the invoked GATT exception and continues with the determination of the restrictive impact of the measure. The third stage is the weighing and balancing process in which the two elements are assessed in light of the value in question, in order to determine whether the measure is provisionally necessary.

Before proceeding with the particularities of the weighing and balancing process in drug trafficking and money laundering-related trade disputes, it is important to present a topic having a bearing on the said process that may play a role in these controversies. Recent case-law is showing that absence or lack of certitude regarding the existence or magnitude of one or several of the elements of the weighing and balancing process does not prevent panels from carrying it out. As was seen, the panel in *Colombia*

134 In response to this argument, Colombia expressed, without providing evidence, that it had put in place “contraband agreements” with the private sector to address these specific products. *See id.* ¶ 7.588 n.970.

135 *See id.* ¶ 7.588 n.970.

136 *See Korea – Various Measures on Beef AB Report, supra* note 50, ¶¶ 170 & 172.

137 More on this below in Part V.C.2. I am aware of the fact that issues related to the design of the measure are usually addressed under the requirements of the first tier of the necessity test and not at the second tier. But this has not always been the case. More on this *infra* in text accompanying note 156.

—*Ports of Entry* performed, rightly in my view, the process even though it did not find proven the contribution and could not determine the extent of the trade restriction. The panel still assessed these two issues and even took into account the risk, an element not explicitly included as part of the process, to conclude that, on balance, the absence of contribution was the dominant factor in arriving at the conclusion that the measure was not necessary.¹³⁸ Subsequently, the panel in *China — Publications and Audiovisual Products* did the same when it faced a similar situation.¹³⁹

a. Inclusion of the Risk to Enforcement as Part of the Weighing and Balancing Process

Panels should include, as part of the weighing and balancing process, the risk to the value protected by Article XX(d) and the risk that the given activities have also posed in the past over the respondent's security interests, if this risk has been proven. The panel in *Colombia — Ports of Entry* included, in passing, the risk that money laundering and drug trafficking were posing for customs revenues as part of the weighing and balancing process.¹⁴⁰ This inclusion is certainly to be commended. However, a more explicit formulation of this inclusion as part of the weighing and balancing process is required as a result of the particularities of these disputes, as

an expression of the international law dimension recognizing the adverse impact that money laundering, drug trafficking, and terrorism may have over the particular respondent that is invoking Article XX(d).¹⁴¹

The inclusion of the risk would be particularly useful in offering panels and the Appellate Body additional and relevant factual elements when performing the weighing and balancing process in situations of uncertainty regarding the extent of the contribution and/or of the trade restriction. In addition, such inclusion would serve a very important purpose in those cases in which the measure is not considered to be necessary at this stage of the first tier of the test. No party could claim that the determination has been made without taking into account the most important dimensions of the case.

b. Assessment of the Contribution Should Sometimes Not Receive a Hard Look Within the Weighing and Balancing Process but in Subsequent Stages of the Two-Tier Process

The fact that the contribution to the achievement of the objective is not close to the pole of indispensable but closer to the pole of making a contribution should not be fatal when panels carry out the weighing and balance process regarding measures aimed at combating

138 See *Colombia — Ports of Entry Panel Report*, *supra* note 4, ¶¶ 7.612–7.614.

139 The panel in *China — Publications and Audiovisual Products* dealt with some provisions by virtue of which a Chinese institution had discretion to designate those entities that could engage in the business of importing newspapers and periodicals. The regulation was declared by the panel to be in violation of paragraph 1.2. of the Accession Protocol. (See *China — Publications and Audiovisual Products Panel Report*, *supra* note 50, ¶ 7.837). When assessing the requirements of the necessity exception under GATT Article XX(a), the panel declared that the measure did not make a contribution to the preservation of public morals (See *China — Publications and Audiovisual Products Panel Report*, *supra* note 50, ¶ 7.842). Then the panel went on to assess the trade-restrictive impact and declared that, on the basis of the record, the discretion to designate entities could coexist with an increase in the imports of titles, since this had been the case over the period between 2002 and 2006. However, it could not be said that the fact that the designation would result in a reduced number of importers and, therefore, in a reduced number of business partners for foreign producers would not have a trade-restrictive impact. In its analysis, the panel found that it was unable to estimate the trade-restrictive impact of the measure, but that the measure prevented Chinese joint ventures and foreign-owned Chinese companies from becoming publication importing entities. (See *China — Publications and Audiovisual Products AB Report*, *supra* note 55, ¶ 255). Despite the absence of the contribution and the uncertainty regarding the magnitude of the trade restriction, the panel carried out the weighing and balancing process and concluded that the measure was not necessary to protect China's public morals. See *China — Publications and Audiovisual Products Panel Report*, *supra* note 50, ¶ 7.848. See also *id.* ¶¶ 7.860–63.

140 See *supra* note text accompanying note 92.

141 The risk does not need to be quantified and can also be demonstrated in quantitative terms, as the Appellate Body expressed in *European Communities — Measures Affecting Asbestos and Asbestos Containing Products*. See *EC — Asbestos AB Report*, *supra* note 50, ¶ 167.

A qualitative risk could also be part of the weighing and balancing process in anti-drug trafficking and money laundering trade-related disputes.

drug trafficking and money laundering. Panels could declare under such circumstance, after the weighing and balancing process, that the measure was provisionally necessary on the basis of the importance of the international law objective of combatting these practices and of the proven risk they posed over the enforcement of customs regulations and on the respondent's public order, if this was the case.

Such approach at this stage of the two-tier process would not open the door for abuse of the necessity exception,¹⁴² since a measure that was not indispensable to the achievement of the goal would not easily pass the next step of the test at the first tier, when compared with possibly less trade-restrictive alternatives.

However, if for any reason, the complainant had not identified any other less trade-restrictive alternatives that the respondent could reasonably deploy, as was the case in *Colombia – Ports of Entry*,¹⁴³ and therefore, there was no need for a panel or the Appellate to conduct the second step of the first tier, a hard look at the contribution could be made at the second tier of the test, and the measure would likely not pass it. In effect, a measure that makes only a modest contribution may usually be applied as a disguised restriction on international trade at the second tier of the test.¹⁴⁴ This is, however, not to transplant the assessment of the impact from the first tier to the second, but simply to take the impact fully into account *as part* of the assessment of whether the measure was being applied as a disguised restriction on international trade or constituting an unjustified

discrimination between Members with the same conditions.

It could be said that, given that the contribution is finally fully assessed, it is irrelevant at what stage of the two-tier test such evaluation is carried out. It is not. The values at issue and the interests seeking protection in this kind of dispute have been recognized as being important by international law through the negotiation and adoption of several conventions. A decision that rejects the defence later in the test, for instance, on the basis of the existence of reasonably available alternatives or as a result of the carrying out of the full two-tier test could hardly be regarded as not having sufficiently addressed the respondent's values, interests, and risks.

1. The Second Step in the First Tier: Assessment of Alternatives in Drug – Trafficking and Money Laundering – Related Trade Disputes

Panels and the Appellate Body should take into consideration four issues when they interpret the second and final stage of the first tier of the test of Article XX(d) in light of international law in this kind of controversy. The first, as was mentioned, is to take a hard look at the contribution at this stage of the first tier of the test, in which the measure is compared with other identified, less trade-restrictive alternatives that the respondent may reasonably have at its disposal,¹⁴⁵ which reach the same level of protection as that of the inconsistent measure. To evaluate alternatives, panels should do what the panel in *China – Publications and Audiovisual*

142 The Appellate Body has established as an objective of the interpretation of GATT/GATS exceptions the prevention of their abuse. *US – Gasoline AB Report*, *supra* note 49, at 22. The Appellate Body ratified this function of the Chapeau in *Brazil – Retreaded Tyres AB Report*, *supra* note 51, ¶ 224.

143 See *Colombia – Ports of Entry Panel Report*, *supra* note 4, ¶ 7.611.

144 This is not to suggest that the measure is a disguised restriction because it makes a modest contribution to the achievement of the sought goal. The point is that a modest contribution may be an indicator that the measure is applied as a disguised restriction on international trade.

145 It is worth mentioning that the Appellate Body clarified in *China – Publications and Audiovisual Products*, the level of proof that complainants must meet regarding the existence of reasonably available alternatives. They do not have to prove such existence but only to identify alternatives. Once complainants do so, it is for respondents to prove that the alternatives are not reasonably available. See *China – Publications and Audiovisual Products AB Report*, *supra* note 55, ¶ 319.

Products did. There, the panel assessed the contribution that the alternative made to the achievement of the goal,¹⁴⁶ then proceeded to address the extent of the trade restriction brought about by the alternative,¹⁴⁷ and concluded with the evaluation of the reasonable availability.¹⁴⁸

As a matter of fact, it is likely that for a measure that does not make a significant contribution there is a less trade-restrictive alternative available for the Member invoking the necessity exception. A panel that carries out an assessment of alternatives with the degree of depth of that of *China — Publications and Audiovisual Products* is certainly in a clear position to better justify the existence of an alternative that makes a measure that does not make a significant contribution to the achievement of the goal unnecessary. It can hardly be stated that the panel or the Appellate Body, by providing a fully reasoned conclusion in this sense, has not taken into account all of the dimensions of the dispute.

a. Assessment of Co-operation as an Alternative Identified by the Complainant

As was seen, several provisions in multilateral conventions call for co-operation as one of the most suitable means to fight drug trafficking and money laundering. The point to address is that of how these provisions could work in the interpretation of the first tier of the test of Article XX(d).

To begin with, it is important to recall that panels perform an assessment of the measure in light of possible alternatives once the alternatives have been identified by the complainant. Consequently, the latter would have to identify co-operation as a reasonably available alternative. However, it cannot be co-operation in abstract terms, since there are many ways to co-operate that may lead to diverse levels of protection, similar to or lower than that ensured by the inconsistent measure. Consequently, the complainant would have to design—taking into account the level of protection sought by the respondent—a concrete proposal of co-operation, with identification of the types of co-operation included, the steps to follow to request it, and the means that both parties would deploy to carry it out.¹⁴⁹ Once the complainant has identified and specified the form of co-operation that is ready to offer as an alternative,¹⁵⁰ it would be for the respondent to demonstrate why the proposal would not be reasonably available in order to succeed in its defence of Article XX(d).

Panels should be receptive to this kind of offer when is sufficiently detailed, even more if it is based on the instruments provided for in the international conventions¹⁵¹ and aimed at addressing the respondent's goals, as part of an interpretation of Article XX(d) in light of the international law norms mentioned above in Part III. As an expression of this receptivity, panels should require of respondents a high

146 See *China — Publications and Audiovisual Products Panel Report*, *supra* note 50, ¶ 7.888.

147 See *id.*, ¶¶ 7.888, 7.891–92.

148 See *id.*, ¶¶ 7.904–05.

149 Co-operation in abstract terms would equal a proposal for negotiation, which is certainly insufficient as a reasonably available alternative, since negotiations on their own cannot ensure that the result will ensure the respondent the level of protection of the value that it seeks with the inconsistent measure, as the Appellate Body stated in *US — Gambling*. See *US — Gambling AB Report*, *supra* note 53, ¶ 317.

150 This would mean that for co-operation to play a role in drug trafficking and money laundering-related trade disputes, complainants must go beyond the mere identification of co-operation, which is the level of proof of alternatives that the Appellate Body usually requires, as was seen.

151 This is, however, not to say that just because the co-operation offer is based on international law, it would qualify as a reasonably available alternative, for all depends on the level of protection of the goal that the offer achieves. However, when the offer is rooted in international conventions, certain arguments, such as excessive costs and administrative difficulties, that respondents may raise to claim that the offer is not reasonably available should be assessed with particular rigour by panels and the Appellate Body.

standard of proof to demonstrate that the co-operation proposal offered by the complainant is not reasonably available.¹⁵²

b. Devotion of Increasing Resources to Improve Enforcement of Domestic Legislation as an Alternative under GATT Article XX(d)

In a scenario in which no offer of co-operation is given by the complainant, a point that is important to address is to what extent the respondent's possibility of increasing resources devoted to enforcement of customs regulation and anti-drug trafficking and money laundering legislation could be considered as a reasonably available alternative that would prevent an Article XX(d) defence from succeeding. Increasing resources for the enforcement of the relevant legislation was recognized by the Appellate Body as a reasonably available alternative in *Korea Various Measures on Beef*,¹⁵³ and a slightly similar approach was adopted by the panel in *China — Publications and Audiovisual Products*.¹⁵⁴

The increasing of resources to be only borne by the respondent may not be enough to combat a transnational crime, for which international cooperation has been repeatedly declared to be the most effective instrument. Or differently put, as an expression of the interpretation of the first tier of the test of Article XX(d) in light of the international law provisions favouring co-operation, namely, shared costs to achieve goals against drug trafficking and money laundering, panels should be very cautious in accepting increasing costs of enforcement by the respondent as a reasonably available alternative

that prevents the defence of Article XX(d) from succeeding.

c. Inclusion of the Risk as Part of the Comparison Between the Measure and Less Trade-Restrictive Alternatives at the First Tier of Article XX(d)

When proven by the respondent, the risks to the enforcement of anti-drug trafficking and money laundering legislation and to public order should also be taken into account, along with the values sought, when the comparison between the measure and alternatives is carried out by panels and the Appellate Body. Such inclusion would be an expression of the relevance that international law attaches to the fight against the said transnational crimes and to the recognition of the threats to security that they pose. In general, such risks should make up part of any stage in the application of the first tier of the test that may result in a panel declaring, as a final conclusion, that the measure at issue is not necessary.

However, what would the impact of including the risk at this final step of the first tier of the test of GATT Article XX(d) be? The incorporation favours an interpretation of the final stage that has a more complete view of the facts of the case at a point at which the conclusion may be the failure of the invoked defence, if a panel or the Appellate Body finds that there are reasonably available alternatives.

But in addition, such inclusion could be valuable when panels and the Appellate Body conducted this final step of the first tier in situation of uncertainty. For instance, take the case of a

152 For instance, if in *Colombia — Ports of Entry*, Panama had offered full compliance with the Bilateral Customs Agreement as an alternative, it would have been difficult for Colombia to demonstrate that the co-operation envisaged in the Agreement was not a reasonably available alternative, despite the previous difficulties.

153 The Appellate Body upheld the panel by stating that the devotion of increasing resources to enforcement, along with selective and well-targeted controls over potential violators, could well ensure the same level of enforcement that Korea sought with its measure. See *Korea — Various Measures on Beef* AB Report, *supra* note 50, ¶ 180.

154 See *China — Publications and Audiovisual Products Panel Report*, *supra* note 50, ¶¶ 7.908 & 7.911.

measure provisionally declared necessary at the first step of the first tier: it makes a substantial contribution but its trade-restrictive impact is uncertain, and it is compared with an alternative under a similar situation in terms of contribution and uncertainty of its trade-restrictive impact. In the face of a demonstrated risk to the enforcement of anti-drug trafficking legislation or to security posed by drug traffickers and money launderers, a panel should be careful in determining that an alternative with these characteristics is available to the respondent, thereby making unnecessary the measure. Given the general international law dimension of the controversy, the risks and values at stake, such final conclusion should have more solid grounds if it were the result of a full application of the two-tier test, in which the measure is assessed also under the Chapeau. But in addition, if this is the conclusion the given panel reaches, its decision would be much better reasoned if it included the said risk as part of the assessment of alternatives.

The inclusion of the risk would also be relevant, and with identical consequences, in another situation of relative uncertainty: comparing measures in a situation in which both make a contribution in qualitative terms and have either comparable trade-restrictive effects or effects that are undetermined.

C. Second Tier of the Test of Article XX(d) in Drug Trafficking and Money Laundering-Related Trade Disputes

As the Appellate Body has stated, the second tier of the test of any GATT exception is the

instrument to control potential abuse of the exceptions by WTO Members. Undoubtedly, the interpretation of the Chapeau has to play exactly the same role in drug trafficking and money laundering-related trade disputes in which the defence of Article XX(d) is invoked, which means that a panel or the Appellate Body be not be deferential to a respondent who is addressing concerns of this character when carrying out the second tier of the test. In addition, it is important to highlight that, as was the case with the first tier, international law can and should play a role in the interpretation and application of the Chapeau by panels and the Appellate Body in these controversies.

1. Assessment of the Requirement that the Measure Not Be Applied as an Unjustified or Arbitrary Discrimination in Light of International Law

As was mentioned, the panel pointed out that Colombia had greater distortions related to smuggling and contraband with other WTO members, such as the United States (US\$2,902 million), Europe (US\$1,837 million), and ALADI countries (US\$2,500 million) than with Panama.¹⁵⁵ Would this fact mean that the measure constituted arbitrary discrimination at the second tier of the test?¹⁵⁶ Using what criteria could WTO Members make distinctions between them that would meet the requirement of the Chapeau?¹⁵⁷

Given that international law regards cooperation as an important means in the fight

¹⁵⁵ See *Colombia—Ports of Entry Panel Report*, *supra* note 4, ¶7.617.

¹⁵⁶ I am mindful that the Appellate Body has stated that issues related to the design of measures are addressed at the first tier of the test and that what is assessed under the Chapeau is the application of the measure in question. See *US—Shrimp AB Report*, *supra* note 5, ¶¶ 115–16. However, this general rule, which has clear support on the test of the Chapeau, has not prevented the Appellate Body from assessing issues related to design at the second tier of the test of GATT exceptions. Such situation took place in *Brazil—Retreaded Tyres*, in which the Appellate Body evaluated an exception to an import ban that benefitted some WTO Members that are parties to MERCOSUR that was set forth in a regulation at both the first tier and the second tier of the test, in this case, of GATT Article XX(b). See *Brazil—Retreaded Tyres AB Report*, *supra* note 51, ¶¶ 226–28 & 239.

¹⁵⁷ The issue of whether there is justification within the design of the anti-drug trafficking and money laundering measure for discrimination between Members is not addressed under any other part of the necessity test and should be part of the analysis under the Chapeau, even if it is a design-related topic.

against drug trafficking and money laundering, one way to introduce it as part of the analysis of the Chapeau is by considering co-operation as one of the criteria that could serve to make distinctions between WTO Members. So, a respondent invoking Article XX(d) with the ultimate goal of fighting drug trafficking and money laundering could justify discrimination between Members on the basis of the lack of co-operation that the complainant has shown and the existence of co-operation by other Members not targeted by the measure.

Such lack of co-operation could exist either whenever the complainant Member has not engaged in serious negotiations aimed at putting in place co-operative instruments or when, after a form of co-operation has been agreed upon, the complainant has failed to act in accordance with it, as was apparently the case with Panama under the Customs Protocol, according to Colombia.¹⁵⁸

It also must be recalled that a distinction between Members based on co-operation to justify restrictions targeting non-co-operative Members meets the requirement that the discrimination have a connection with the goal sought or does not go against it, which the Appellate Body established in *Brazil – Retreaded Tyres*.¹⁵⁹ The said discrimination against non-co-operative WTO Members in the enforcement of customs regulations against drug trafficking and money laundering is required to achieve the goal, since the targeted Members refuse to make use of the other instrument available to reach the objective: co-operation with the respondent Member.

The other side of this conclusion is that trade-restrictive measures fighting drug trafficking and money laundering targeting a specific WTO Member would be regarded as arbitrary discrimination under the Chapeau if the respondent Member had not sought negotiations with the complainant aimed at putting co-operation in place, but it did so with other WTO members.¹⁶⁰

2. Assessment of the Requirement that the Measure Not Be Applied as a Disguised Restrictions on International Trade

As was seen, Colombia's restrictions affected textiles, apparel, and footwear exclusively originating in or coming from Panama. However, the question that any respondent like Colombia would have had to answer at the second tier regarding the requirement of the measures not being applied as a disguised restriction on international trade is why the subjected products and not others that could also have been prone to be used for the purpose of money laundering through the violation of customs regulations were covered by the inconsistent, trade-restrictive measures.

One way for a Member to do so is to demonstrate that its concerns regarding other products have been addressed through other means that were not available for the subjected products. Some arguments that Colombia raised in *Colombia – Ports of Entry* at the first tier of the test could be relevant here. There, Colombia argued that it had entered into private agreements with the limited number of Panamanian producers or exporters of some of these products, such as cigarettes and electrical appliances, agreements that were not available

158 See *Colombia – Ports of Entry Panel Report*, *supra* note 4, ¶ 4.85.

159 See *Brazil – Retreaded Tyres AB Report*, *supra* note 51, ¶ 227.

160 This is not to suggest that co-operation should be the only criterion to make a distinction between WTO Members. Depending on the measure and the factual situation of the case, it could be possible to add other criteria to justify discrimination.



for the targeted products owing to the large number of traders and importers.¹⁶¹ Although Colombia did not adduce any evidence to support the existence of such private agreements,¹⁶² such an argument, duly proved, along with other proofs and arguments, would serve to demonstrate that the measure was not a disguised trade-restrictive regulation to favour domestic industries of like products.¹⁶³

There could certainly be some overlap between segments of this analysis and that of alternatives at the first tier of the test. However, such overlap would not be total; that is, this part of the second tier would not be a duplication of the said aspect of the first. To begin with, assessment of alternatives may not take place at the first tier if the complainant does not identify them as reasonably available to the respondent, as in *Colombia – Ports of Entry*. When this is the case, any discussion regarding why the respondent is targeting certain products and not others at similar risk will take place only and wholly at the second tier. Finally, at this stage of the second tier, what is being assessed is that the measure is not a disguised restriction on international trade, and to prove it, other evidence or arguments unrelated to possible alternatives, such as how the measure is in fact being applied, may be submitted by the respondent and assessed by the panel or the Appellate Body.

VI. How to Introduce the International Law Instrument of Co-operation against Drug Trafficking and Money Laundering as Part of the Settlement of WTO Disputes

As has been repeatedly mentioned, co-operation between States is a key instrument in international law to fight drug trafficking and

money laundering, given their transnational nature. The final point is how to introduce it as part of the adjudication of disputes.

It is important to mention that research has shown evidence that increasing co-operation reduces the level of money laundered and the crime level. As Ferwerda point out:

[T]he significant and robust result found in these estimation models is that more intense international cooperation to fight money laundering indeed is ... associated with a lower crime level. ... So the efforts of the international organizations (like UN, FATF, IMF and the World Bank) have to be seen positively and might be an important instrument to decrease not only the amount of money laundering worldwide, but also the crime level.¹⁶⁴

The reasons for introducing co-operation are several and important: first, co-operation is a less trade-restrictive instrument. Second, co-operation allows the parties to share the costs of the enforcement of their regulations. Third, co-operation is an appropriate means to cope with transnational crimes. And fourth, the introduction of co-operation opens the door for aligning WTO law and international law in the fight against drug trafficking and money laundering.

Before proceeding, it is important to recall that a closely related concept, negotiations, was already introduced by the Appellate Body in *US – Shrimp* as part of a settlement of a dispute¹⁶⁵ in which international law regarded co-operation as a key means to achieving the goal relevant in the

161 See *Colombia – Ports of Entry Panel Report*, *supra* note 4, ¶4.86.

162 See *id.* ¶7.587 n.970.

163 Colombia stated in the text of one of the ports of entry measures that the restrictions were related to important domestic industries. (See *Colombia – Ports of Entry Panel Report*, *supra* note 4, ¶2.14). I leave open the question of whether such importance could serve as a criteria to make a distinction between products.

164 Ferwerda, *supra* note 3, at 921–22.

165 The Appellate Body explicitly declared bilateral agreements as the best alternative to address the environmental concerns of the United States. See *US – Shrimp*, *supra* note 5, ¶171.

dispute. However, it is important not to lose sight of the fact that the Appellate Body was able to align WTO law and international environmental law regarding co-operation because the complainants had been excluded from this formula by the respondent and were keen on it.

Having said this, it is important to emphasize that interest in co-operation may come either from the complainant or from the respondent. In the former case, a specific form of co-operation can be introduced by regarding it as a reasonably available alternative that makes unnecessary, at the first tier of the test of Article XX(d), the trade-based, anti-drug trafficking and money laundering, inconsistent measure.¹⁶⁶ As a result of such declaration, the inconsistent measure has to be brought into conformity with the covered agreements, and one way to do so would be with the removal of the measure by the respondent and the adoption of the co-operation instrument with the complainant.

However, willingness to co-operate may not always be present on the part of the complainant, as was the case with Panama in *Colombia – Ports of Entry*, and again the issue is that of how to introduce co-operation under this circumstance. While this is not always possible,¹⁶⁷ there is a potential scenario in which it would be: the complainant's reluctance to co-operate in the face of the successful invocation of the defence of Article XX(d).

The instrument to introduce co-operation under such circumstances would be the

conditional declaration of justification of the trade-based anti-drug trafficking and money laundering measure. This means that the decision is the following: the inconsistent measure is justified and remains in place but must be removed if the complainant accepts the co-operation that assures the respondent of a similar level of protection for its objectives.

Finally, the conditional justification of the measure also allows parties to get a better settlement, because the one that the unconditional declaration would achieve may not be satisfactory for both parties. This would be so for the complainant, because the trade-restrictive measures affecting it would remain in place, and for the respondent, because it would have to bear of all the costs of seeking the enforcement of its customs regulations aimed at fighting drug trafficking and money laundering.

Some of the facts in *Colombia – Ports of Entry* could show how the conditional declaration could be deployed. As was mentioned, there was in reality an available alternative, the Customs Protocol, which was, though, not relevant because Panama refused to consider it as such.¹⁶⁸ The text of the Customs Protocol ensured the level of enforcement of the tax regulation and the pursuit of the goals against money laundering and drug trafficking that the Colombian second ports-of-entry restrictions sought,¹⁶⁹ since the first restrictions were removed a day after the Protocol entered into force.¹⁷⁰

Assuming that the ports-of-entry restrictions had been declared as justified by Article XX(d),

¹⁶⁶ To recall, co-operation is available because the complainant has identified it as an alternative and is willing to use it in relation to the respondent.

¹⁶⁷ For instance, the complainant is reluctant to co-operate and the defence of Article XX(d) is not successful because of the existence of a reasonably available alternative other than co-operation. The measure has to be brought into conformity, and co-operation will not take part in the implementation of the adopted reports of the case.

¹⁶⁸ See *Colombia – Ports of Entry Panel Report*, *supra* note 4, ¶ 7.610.

¹⁶⁹ Colombia's swift removal of its first port of entry restrictions after the entering into force of the Customs Protocol could indicate that the Protocol addressed Colombia's concerns and that this Member could have been interested in its full application.

¹⁷⁰ See *Colombia – Ports of Entry Award*, *supra* note 8, ¶ 51.

the panel could have introduced the Customs Protocol as part of the settlement of the dispute by stating that the measure would be justified by Article XX(d) unless Panama decided to comply with the Protocol. In general, the withdrawal of the measure could be an incentive that could lead complainants to change their mind regarding co-operation.

The possibility of introducing co-operation would not be limited only to those exceptional cases in which there was an explicit previous agreement addressing the respondent's concerns. Panels and the Appellate Body could set the basis for such inclusion during their proceedings. For instance, given that the main elements of co-operation in the fight against drug trafficking and money laundering have already been determined in general terms in international conventions, a panel or the Appellate Body could ask the respondent in the hearing what type of co-operative instrument would allow it to reach the level of protection of the interest regarding the complainant and whether there would be any impediment to applying such instrument in relation with this Member.¹⁷¹ Subsequently, the panel or the Appellate Body could make the conditional

declaration of justification, stating that the measure would have to be removed if the complainant accepted the terms of the co-operation suggested by the respondent.^{172 173}

The main concern for the conditional declaration of inconsistency could be that it apparently does not promptly settle the dispute, as mandated by Article 3.3 of the DSU. However, this is not true. The measure is justified, and there is no need to bring it into conformity with the applicable covered agreements.¹⁷⁴ A different issue is that the condition opens up the door for the complainant to act in a co-operative way to address the respondent's concerns regarding enforcement of customs law and the fight against drug trafficking and money laundering and to obtain the removal of the justified measure. However, it is entirely up to the complainant to act in such a way.¹⁷⁵

Nor could it be said that a panel would be making applicable the international conventions, since the panel is not declaring a violation of non-WTO law. Nor is the panel making recommendations and rulings requiring the respondent to bring its measure into conformity

171 Such a question during the hearing could not be seen as creating a bias in favour of the success of the defence of Article XX(d), since nothing has been decided at this stage of panel or appeal proceedings. Nor could it be understood to transform the role of the panel or the Appellate Body from adjudicators to mediators. They would be only identifying an alternative that may be available but that has not been identified by the complainant and would leave the decision to put it in place or not in the parties' hands. In any case, the panel and the Appellate Body render decisions that will be final, if the complainant decides not to implement the co-operative alternative.

172 Removal of the measure is not the only way in which an inconsistent measure can be brought into conformity with the covered agreements; such removal would likely need to be ordered as part of the acceptance of co-operation by the complainant.

173 Although I am well aware of the fact that such conditional declaration is an oddity in WTO dispute settlement, such declaration could well be explored and taken seriously, since it may lead to the best settlement possible under international law: the use of co-operation to cope with drug trafficking and money laundering concerns. But in addition, it may be possible to point out that the status of the co-operation instrument once it has been accepted by the complainant is, on the whole, not too distant from the notion of "a mutually agreed solution" (MAS) under Article 3.7 of the DSU. The fact that the agreement has been reached with the intervention of a panel or of the Appellate Body does not prevent the co-operation agreement from being considered a MAS. This would be so because MAS, in general, can be reached after dispute settlement proceedings, as the Appellate Body explicitly held in its Second Compliance report in *EC – Bananas III*, on the basis of the text of Article 22.8 of the DSU. See *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Second Recourse to Article 21.5 of the DSU by Ecuador*, WTO Doc. WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA, 26 November 2008, ¶ 215, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm (last visited March 8, 2010). I do not further develop this connection between the conditional declaration of justification and the co-operation agreement as a MAS. But the connection, which in my view, does exist could somehow illustrate that, in the end, the conditional justification would be another way to reach a MAS. It is the use of old concepts with some new clothes.

174 This is also why the conditional justification of the measure could not be seen as falling under the scope of Article 19.1 of the DSU, since this provision deals with the suggestion to implement the recommendations of the panel or the Appellate Body to bring the measure into conformity with the covered agreements. Under the conditional justification, there is no obligation to bring the measure into conformity, since it is justified by Article XX(d).

175 Certainly, an additional point is, what comes next, if any of the parties fail to comply with the co-operation agreement. This point, although pertinent, does not need to be addressed here. It suffices to highlight the issue that there may be a way to introduce the best available alternative in terms of trade and international law as part of the resolution of drug trafficking and money laundering-related trade disputes.

with non-WTO law. What the panel would be doing is creating some incentives to align the application of WTO law with international law, without ordering such alignment.¹⁷⁶

VII. Model for the Aligning WTO and International Law in Anti-Drug Trafficking and Money Laundering Trade-Related Disputes: A Summary

The interpretation of GATT Article XX(d) in light of international law—particularly the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the 2000 United Nations Convention Against Transnational Organized Crime—in drug trafficking and money laundering—related trade disputes can be possible:

(i) if the respondent Member clearly states that its inconsistent measure seeks, in addition to the enforcement of customs regulation, that of anti-drug trafficking and money laundering norms and, sometimes, the enforcement of public order norms combatting acts against security interests; (ii) if the Member demonstrates, in addition, that there is a connection between, on one hand, drug trafficking and money laundering and, on the other, the type of acts that constitute evasion of the customs regulations that the measure seeks to address; (iii) if public order objectives can be incorporated if the respondent Member proves that drug traffickers and money launderers have carried out acts against such value in the past. When these elements are incorporated as part of the defence, panels and the Appellate Body could follow the *US – Shrimp* model to interpret

each of the two tiers of the test of Article XX(d) in light of international law in the following way:

First Tier of the Test:

- a. Contribution. When assessing the contribution, panels and the Appellate Body should (i) take into account the connection recognized in international law between corruption and drug trafficking, once the respondent has adduced proofs of it pertinent to the dispute. As a result, WTO adjudicators should be cautious before concluding that a measure is not making a contribution in quantitative terms. (ii) Panels and the Appellate Body should also take into account that money launderers switch to other activities in response to legislation, giving the impression that the measure is not being effective, when the reaction may well show otherwise. Such reality would call for a similar caution as in (i). (iii) Increasing costs of evasion in the form of a growth in the possibility of detection and/or punishment, proved on the basis of facts, could serve as a contribution in qualitative terms. (iv) Distinctions between products or WTO Members in the sense that the trade-restrictive measures target only certain goods and/or Members and do not apply to others should not be regarded as evidence of the lack of contribution to the achievement of the goal of enforcing customs legislation and anti-drug trafficking and money laundering norms. Such distinctions would indeed be relevant but at other stages of the two-tier test.
- b. Weighing and Balancing Process. (i) Panels should include, as an additional element of

¹⁷⁶ Finally, it is important to highlight that allowing the Appellate Body to fully align WTO law and international law would require modest levels of judicial economy by the given panel. This was not the case in *Colombia – Ports of Entry*. Had Colombia decided to appeal the report and succeeded in reversing the conclusion that its measure did not meet the requirements of the first tier of the test, the Appellate Body would have likely not had enough undisputed facts in the record to complete the analysis when assessing whether the measure met the requirements at the second tier. Future panels adjudicating anti-drug trafficking and money laundering—related trade controversies should avoid such a risk.



the process, the risk that drug trafficking and money laundering have posed over the enforcement of anti-drug trafficking and money laundering legislation and over public order and security, when proven. (ii) The fact that the contribution of the measure to the achievement of the objective is not close to the pole of indispensable but closer to the pole of making a contribution should not be fatal at this stage, on the basis of the importance of the stakes at issue and of the international law dimension of the dispute.

- c. Assessment of Alternatives: (i) Panels should take a hard look at the contribution of the measure at this stage of the first tier of the test, when deciding whether a reasonable alternative is available to the respondent. (ii) They should give particular attention to complainants' offers of co-operation, the main instrument in international law to fight drug trafficking and money laundering, as a reasonably available alternative. (iii) Due to said relevance that co-operation has in international law, panels and the Appellate Body should be particularly careful in considering increasing resources for enforcement of customs regulations as a reasonably available alternative. (iv) Finally, when proved by the respondent, the risks over the enforcement of anti-drug trafficking and money laundering legislation and over public order should also be taken into account at the time panels and the Appellate Body compare the measure with available alternatives. The implication of such inclusion would be particularly relevant in situations of uncertainty, such as when panels or the Appellate Body compare measures and alternatives that make substantial contributions in quantitative terms or similar contributions in qualitative terms but whose trade-restrictive impact cannot be fully

determined. WTO adjudicators should be careful in determining that an alternative of this nature is available to the respondent, which would consequently make the measure unnecessary. A final conclusion under these circumstances should be reached as a result of the application of the full two-tier test of necessity.

Second Tier of the Test of Article XX(d) in Light of International Law

- (i) Criterion to Determine Unjustified Discrimination between Members. Given its international law status, co-operation could be one of the factors that could serve to make distinctions between WTO Members. Thus, targeted measures against non-cooperative Members would not qualify as unjustified discrimination.
- (ii) Criterion to Determine the Existence of a Disguised Restriction on Trade. To satisfy the requirement under the Chapeau that the measure not be a disguised restriction on trade, the respondent making distinctions between products of a same origin for the purpose of designing measures aimed at enforcing customs regulations and anti-drug trafficking and money laundering norms would have to demonstrate why the measure was targeting some products and not others that faced the same risk to the enforcement of the designated legislation.

How to Introduce the International Law Means of Co-operation within the Settlement of WTO Disputes

- (i) Panels should recognize concrete offers of co-operation with the respondent made by the complainant as a potentially less trade-restrictive alternative at the first tier of the

test, which would make the measure unnecessary. (ii) If the complainant is reluctant to co-operate and the defence of Article XX(d) succeeds, panels and the Appellate Body could declare the conditional justification of the inconsistent measure, unless the complainant accepted a form of co-operation that addressed the respondent's concerns over the enforcement of its customs regulation or anti-drug trafficking and money laundering legislation.

VIII. Conclusion

This article has illustrated three main improvements to the interpretation offered by the panel in *Colombia – Ports of Entry* of GATT Article XX(d) in trade disputes related to the fight against money laundering and drug trafficking. The first improvement is to offer the important international law perspective that

these controversies have, as evidenced by the existence of the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the Convention Against Transnational Organized Crime. The second improvement is the offering of specific ways in which this international law dimension can influence the interpretation and application by panels and the Appellate Body at each of the two tiers of the test of Article XX(d). Finally, the third suggestion this article has put forward is that of identifying some ways in which the international law means of co-operation can be introduced as part of the settlement of these disputes in situations in which complainants and respondents may be reluctant to make use of it. The improvements, which should not be understood to be the only ones, would contribute to aligning WTO law and international law in the fight against transnational crime.