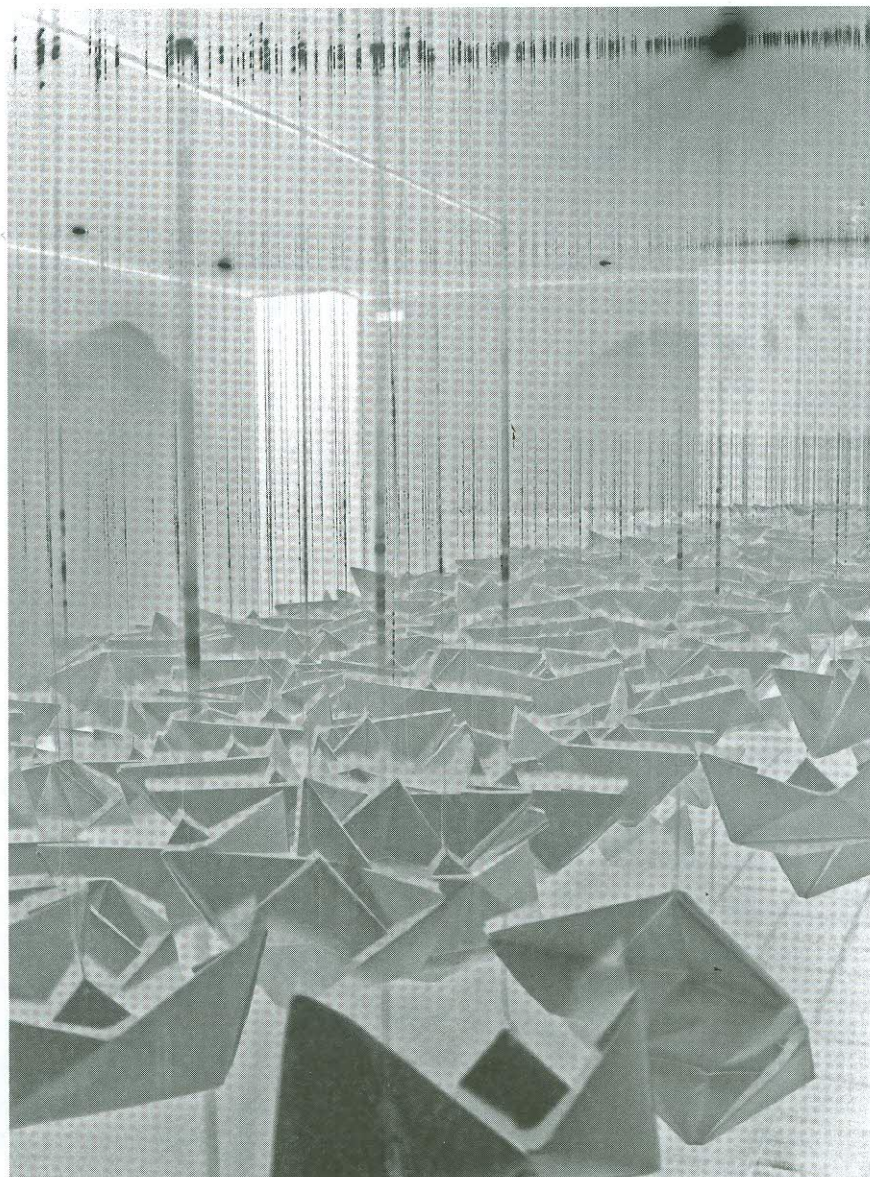


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**DRUG TRAFFICKING, MONEY LAUNDERING AND INTERNATIONAL TRADE RESTRICTIONS AFTER THE WTO PANEL REPORT IN COLOMBIA - PORTS OF ENTRY: HOW TO ALIGN WTO LAW WITH INTERNATIONAL LAW\***

*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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\* El presente artículo apareció publicado en el JOURNAL OF WORLD INVESTMENT AND TRADE. Volumen 45 (2011)

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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

Para citar este artículo: Álvarez J., Alberto (2011) "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" En: *Revista Académica e Institucional, Páginas de la UCP*, N° 90: p. 5-42.

Transnational crime is the dark side of globalization,<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> 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 Products<sup>5</sup> 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](http://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](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](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 Panama<sup>6</sup> that concluded in a

<sup>6</sup> 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](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”<sup>7</sup> [the Customs Protocol]. The scope of the agreement was broad and comprehensive<sup>8</sup> and led Colombia to remove the measures the day after the Protocol was reached.<sup>9</sup> Subsequently, once Panamanian authorities were not cooperating, in Colombia's view, as agreed to in the Customs Protocol,<sup>10</sup> Colombia enacted new measures similar to the original and with identical purpose.<sup>11</sup> 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).<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup> 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.<sup>16</sup> 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](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](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.<sup>17</sup> 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.<sup>18</sup>

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.<sup>19</sup>

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.<sup>20</sup> 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.<sup>21</sup> Finally, importers were obliged to pay a fee if they had to introduce corrections to the advance declaration.<sup>22</sup>

## 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.<sup>23</sup> 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,<sup>24</sup>

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.<sup>25</sup> 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).<sup>26</sup> 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 Violation<sup>27</sup>

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...”<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> 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,<sup>31</sup> 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.<sup>32</sup> Further, the panel held that such prices amounted to minimum prices banned by Article 7.2(f).<sup>33</sup>

Turning to the claims of violation of the GATT 1994, the panel started with Article III.2, first sentence,<sup>34</sup> and declared the existence of the transgression.<sup>35</sup> 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.<sup>36</sup>

The panel went on with Panama's claim that the port restrictions were contrary to GATT Article XI.<sup>37</sup> The panel declared that the term "restriction" had been broadly interpreted to cover measures that created limiting conditions and also limitations of action.<sup>38</sup> 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.<sup>39</sup> 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"<sup>40</sup> and violated GATT Article XI.1.<sup>41</sup>

As to whether the mandatory advance declaration violated the Most-Favoured Nation principle embodied in GATT Article I.1,<sup>42</sup> the panel began by ratifying that the term "advantage" had been interpreted broadly by the Appellate Body<sup>43</sup> 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,<sup>44</sup> was available to like goods arriving from WTO Member,<sup>45</sup> and was not immediately and unconditionally accorded to goods from Panama,<sup>46 47</sup> 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.<sup>48</sup>

### 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.<sup>49</sup>

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;<sup>50</sup>

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;<sup>51</sup> 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.<sup>52</sup>

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 20 1996. [hereinafter *US – Gasoline AB Report*], available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds2\\_e.htm](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](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](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](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](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.<sup>53</sup>

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.<sup>54</sup>

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.<sup>55</sup>

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.<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup>

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](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](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.

