

The World Trade Organization and Law Enforcement

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The increased threats from transborder criminal activity is leading to stronger governmental and intergovernmental responses in the military, judicial, and regulatory arenas. These efforts, particularly the non-military ones, raise a "new" issue in international economic law-that is, the intersection between trade and law enforcement. By new, I do not mean that no previous discussion of this phenomenon exists. Indeed, many of the points discussed herein have been written about.(1) Rather, the perception is relatively new that there is a bundle of important issues in how the trading system interacts with efforts to combat illegal activity. The purpose of this paper is to introduce the subject as a whole, particularly with respect to the World Trade Organization (WTO).

"Trade and law enforcement" is a trade-linkage amenable to the modes of analysis used for other linkage issues, such as "trade and environment," "trade and labor," and "trade and human rights."(2) For any WTO linkage issue, three main issues arise: First, how much commerce is being impeded intentionally or unintentionally by a norm extrinsic to the WTO system?(3) Second, do WTO rules interfere with national efforts to combat a social harm? Third, can the WTO be enlisted to help intergovernmental efforts promote a non-trade value? These policy tensions and synergies are equally relevant for the issue of "trade and law enforcement," and will be examined in this paper. This paper does not attempt to answer the first question by sizing up how much trade is affected. In recent months, however, the author has noted an increase in articles about the impact of new law enforcement programs on trade flows.(4)

Connections between trade and efforts to combat criminal activity (such as smuggling) probably originated in antiquity, and the linkage appears in United States treaties going back over two centuries. For example in 1778, the Treaty of Amity and Commerce between the United States and France contained a provision for most-favoured-nation treatment as well as a commitment by France to employ its good offices in North Africa to provide for the safety of American subjects and vessels against all violence from entities of Barbary.(5) Another provision states that either party may inspect the merchant ships of the other party upon suspicion of contraband when the vessel has traveled to the port of an enemy of the first party.(6)

The paper proceeds in five parts as follows: Part I provides an overview of the "trade and law enforcement" linkage in four areas: security, health, human rights, and environmental protection. Part II presents a taxonomy of how trade measures are usable for law enforcement. Part III offers a synopsis of the WTO provisions relevant to law enforcement and national security. Part IV examines the ways that law enforcement efforts might infringe WTO rules. Part V considers new approaches for the WTO to promote law enforcement objectives.

I. An Overview of Global Issues at the Intersection of Trade and Law Enforcement

Part I of the paper surveys some of the key topics in the "trade and law enforcement" debate. These are issues where the law enforcement response may adversely affect trade or where the control of trade is a central part of the response. This survey will be divided into four sections: (A) Security, (B) Health, (C) Human Rights, and (D) Environmental Protection. Note that some of the examples below can fit into more than one section.

A. Security

Among the top security concerns are terrorism, money laundering, and traffic in arms.

International instruments addressing terrorism focus on both the financial underpinnings as well as access to weapons. For example, the International Convention for the Suppression of the Financing for Terrorism calls on parties to consider feasible measures to monitor the physical cross-border transportation of cash and bearer negotiable instruments, but "without impeding in any way the freedom of capital movements."⁽⁷⁾ The United Nations Security Council, in the landmark legislative Resolution 1373, decided that all states shall prohibit their nationals and persons within their territories from making any economic/financial resources or related services available for the benefit of persons who commit or attempt to commit terrorist acts.⁽⁸⁾

Money laundering is in itself a criminal activity that is instrumental in supporting other criminal activities, both violent and non-violent. The key institution addressing money laundering is the transgovernmental Financial Action Task Force on Money Laundering. Although export controls and anti-money laundering efforts are both designed to combat illegal activity, the imprecision of such efforts has the potential for spilling over and affecting legitimate business activity.

Traffic in arms is the subject of a new U.N. Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, supplementing the U.N. Convention against Transnational Organized Crime.⁽⁹⁾ The Protocol calls on signatories to control "illegal trafficking" which is defined as transborder trade among parties when one of the parties has not authorized the trade.⁽¹⁰⁾ Furthermore, the Protocol calls for increased effectiveness of import, export, and transit controls.⁽¹¹⁾ Another international agreement with a linkage to trade is the Convention on the Marking of Plastic Explosives for the Purpose of Identification.⁽¹²⁾ The Convention calls on parties to generally prohibit the transborder movement of unmarked explosives.⁽¹³⁾

Security is also pursued through national export control regimes loosely coordinated in the

"Wassenaar Arrangement," which now includes 33 countries.(14) The significant economic impact of export controls comes from their coverage of dual-use technologies, such as fast computers. Such trade is not inherently problematic, but may be, depending on the identity of the buyers. Sometimes analysts characterize export controls as sanctions. Yet the primary intent of such controls is to prevent the transfer of a particular good or service, not to induce behavioral change.

The problem of the movement of nuclear material is being addressed by the International Atomic Energy Agency, which has recently enhanced its anti-trafficking efforts, and the World Customs Organization (WCO), which has pointed out the need for better border controls against lethal shipments. For example in 1997, the WCO approved a Recommendation Concerning Action Against Illicit Cross-Border Movement of Nuclear and Hazardous Material.(15) The Recommendation urges governments to have appropriate regulations to deal with all aspects of illicit trafficking in nuclear and hazardous material.

B. Health

Treaties to control illegal liquor and drug trade began in the late 19th century, and the use of trade controls has always been part of the narcotics regime. In addition to narcotics, some other health-related issues of illegal trade are tobacco and generic drugs.

The World Health Organization (WHO) Draft Framework Convention on Tobacco Control includes trade provisions.(16) The Convention calls on parties to enact or strengthen legislation against illicit trade in tobacco products, and defines "illicit trade" as a practice prohibited by law.(17) In addition, the Convention directs parties to consider measures to restrict importation by travelers of tax and duty-free tobacco products.(18)

Another important issue is the evolving policy in the WTO on trade in compulsorily-licensed medicines. In December 2002, the WTO came close to agreeing on a decision to waive the requirement in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) that production under compulsory license be predominantly for the supply of the domestic market.(19) The unadopted WTO decision would have established a new system of trade controls on drugs produced for export under a compulsory license, including provisions for labeling and notice.(20) In addition, the decision would have required importing country governments to take reasonable measures to prevent trade diversion through re-exportation. The WTO is seeking to thwart diversion in order to enable producers to discriminate, or price discriminate, in exports. The United States government has recently stepped up its action against the diversion of drugs exported by U.S. producers to the price-controlled Canadian market because such drugs are being sold back into the United States.(21)

C. Human Rights

Human rights concerns have arisen with respect to trade with particular countries (e.g., China) and with respect to trade based on odious production practices, such as

goods produced by forced labor. The newest issue is conflict diamonds, which are diamonds originating in Sierra Leone, Liberia, or the Congo and sold by rebels in order to generate funds. This issue is distinguishable from many other human rights issues in that it affects more than one country yet only one product, and because what is at issue is not the production process, but rather the identity of the individuals profiting from the trade. In addition, the conflict diamond presents a security problem as well as a human rights problem because wars have raged over the control of diamond-producing regions.(22)

The stakeholders in diamond trade have worked to develop a way to distinguish the salutary from the odious trade, and the result is the Kimberley Process Certification Scheme.(23) The Scheme defines "conflict diamonds" as rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining illegitimate governments as described or recognized in various U.N. Security Council and General Assembly Resolutions.(24) The participant governments in the Scheme agreed to strict trade controls. Among participants, diamonds are to be accompanied by a validated certificate attesting that the diamond has been handled according to the origin and traceability expectations in the Scheme. Participants are also obligated to ban all trade in rough diamonds with non-participant countries.

D. Environmental Protection

International trade is generally recognized as a key factor in stimulating some serious environmental problems including:

- release of ozone-depleting substances,(25)
- taking of endangered species,
- illegal logging,
- transborder movement of hazardous wastes, and
- illegal, unregulated, and unreported (IUU) fishing.

Trade controls are used to address all of these challenges.

The International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing was adopted in 2001 under the aegis of the U.N. Food and Agriculture Organization.(26) Illegal fishing is defined broadly to include activity that is in violation of national laws or international obligations.(27) Under the Plan of Action, participating states agree to prevent fish from being traded or imported when caught by vessels identified as having been engaged in IUU fishing.(28) In a bow to other international norms, this provision further declares that such trade-related measures should be adopted in accordance with international law including the principles, rights, and obligations established in WTO agreements.

Summary

The purpose of this overview was to take note of some key global problems where the governmental response entails defining certain activities as illegal and where trade plays a role in addressing the problem. Part II of the paper moves from description to analysis by presenting a map of the issues.

II. A Taxonomy of the Trade Linkage

To solidify "trade and law enforcement" as a coherent topic, one has to begin the difficult analytical task of delineating and classifying the assorted pieces. With the caveat that any first attempt will need further refinement, this paper proposes the following four-part classification:

- A. Measures Against Illegal International Trade
- B. Measures Against Legal Trade Supporting Criminal Activity
- C. Sanctions Against Governments To Address Non-Compliance Within A Treaty System
- D. Sanctions Against Governments To Elicit Law Enforcement Cooperation

Each use of trade measures in this taxonomy is discussed and illustrated below.

A. Measures Against Illegal International Trade

In general, any international trade transaction that is illegal has to violate the legal regime of some country.⁽²⁹⁾ Nevertheless, a useful distinction does exist between (1) Illegality that arises out of *international* law (and then is implemented by national law) and (2) Illegality that arises out of *national* law.

Illegality can arise out of international law when a treaty obligates party governments to outlaw a specific transborder transaction. An example is the U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. This Convention requires each party to adopt such measures as may be necessary to establish as criminal offences under its domestic law (when committed intentionally) the production, manufacture, sale, transport, importation or exportation of any narcotic drug contrary to the provisions of the Single Convention on Narcotic Drugs (1961) or the Convention on Psychotropic Substances (1971).⁽³⁰⁾ Both of these earlier treaties contain rules regarding trade with parties and non-parties. Illegality can arise out of national law when such law makes importation or exportation unlawful. This might occur in at least three situations: First, a government might ban the trade because the product itself can be harmful. An example of this *harmful trade* category is the U.S. regulation banning the importation of certain semiautomatic assault rifles.⁽³¹⁾ Second, a government might ban trade because the product (or its production process) diverges from a national norm. An example of this *malum prohibitum* category is the U.S. law banning interstate or foreign commerce in human organs.⁽³²⁾ Third, a government might ban an import because the exporting country bans the export (or vice versa). An example of this *comity* category is the U.S. law banning the importation of a pre-Columbian sculpture or mural unless the country of origin certifies that such exportation was not in violation of its law.⁽³³⁾ Another example is the provision in the U.S. Lacey Act that bans interstate or foreign commerce in any fish or wildlife taken or sold in violation of any foreign law.⁽³⁴⁾

B. Measures Against Legal Trade Supporting Criminal Activity

A second unit of classification is nominally legal trade that becomes problematic only when it supports or induces illegal activity. Some examples are trade in stolen artwork and trade in conflict diamonds. In 2001, the U.N. Security Council directed states to prevent the importation of all rough diamonds from Liberia.⁽³⁵⁾ Thus, the Security Council made that trade illegal. By contrast, the Kimberly Process Scheme does not make trade in rough diamonds illegal. Rather, it seeks to permit diamond trade generally, but stop the trade that supports rebels.

C. Sanctions Against Governments To Address Non-Compliance In A Treaty System

The third and fourth units of classification are economic sanctions against a government to induce a change in that government's behavior. In Section C, the paper considers sanctions against non-compliance with a norm ostensibly shared by both the sender and the target countries, because such norm has been agreed to by a treaty or is customary international law. The distinction between Sections A and C is that while both address illegal activity, the illegal activity in A is trade, and the illegal activity in C is not trade. In Section D, the paper considers sanctions against behavior that diverges from what is expected by the sender government. There may

be some shared normative ground between the countries, but the sanction is not premised on consent to the norm by the target country. Thus, the activities in Section D are not necessarily illegal in the jurisdiction where performed, and if they involve trade, the trade is not illegal.

The trade sanctions to address non-compliance can be further subdivided into multilaterally-approved responses and unilateral responses. The two multilateral organizations that use trade sanctions as a retort to treaty non-compliance are the U.N. Security Council and the WTO. For example, the WTO recently authorized Brazil to impose a \$248 million trade sanction against Canada because Canada had failed to comply with a WTO judgment.(36) In the Security Council, the practice of economic sanctions has evolved over the years to the use of less blunt, more targeted, so-called "smart" sanctions.(37)

Unilateral responses are efforts undertaken outside of a multilateral treaty or other entity in order to promote treaty compliance even though the treaty or "autonomous institutional arrangement" does not provide for such action. The United States is the leading user of such measures, and U.S. law contains several of them. For example, trade sanctions are required or authorized against a foreign country that

- has used chemical or biological weapons in violation of international law and has not agreed to stop such use and to allow inspections;(38)
- has nationals who engage in large-scale driftnet fishing beyond the exclusive economic zone of any nation (given the U.S. policy to implement U.N. General Assembly Resolution 46-215 which called for a global moratorium of such fishing);(39) or
- is not complying with its obligations under an international fishery agreement with regard to the treatment of U.S. fishing vessels.(40)

D. Sanctions Against Governments To Elicit Law Enforcement Cooperation

Section D considers sanctions against behavior that diverges from what is expected by the sender government with respect to law enforcement. Such sanctions can be carried out multilaterally or unilaterally. Note that U.N. sanctions against states are included in Section C because such sanctions arise out of mutual obligations under the U.N. Charter.

While no relevant multilateral trade sanctions have come to my attention, there is an important transgovernmental process that should be noted. That is the Financial Action Task Force on Money Laundering (FATF) which was set up in 1989 and now includes 31 governments.(41) The FATF has designated ten non-member countries as "Non-Cooperative Countries and Territories," and has imposed the countermeasure of asking financial institutions to give "special attention" to business relations and transactions with persons from those countries, and to make certain findings available to law enforcement agencies. The largest target countries are Egypt, Indonesia, Myanmar, the Philippines, and the Ukraine. FATF may also recommend additional countermeasures, one of which is to warn businesses that transactions with companies in the listed country might run the risk of money laundering.

Unilateral trade responses are undertaken to change the attitude of a target government. The United States is the leading user of such measures, and U.S. law contains several of them.(42) For example, trade sanctions are required or authorized against a foreign country that

- has used chemical or biological weapons against its own nationals, and has not agreed to stop such use and to allow inspections;(43)

- is a major producer or transit country for narcotics, unless the President certifies that the country meets certain conditions, based on satisfying goals in a bilateral agreement or applicable multilateral agreement;(44)
- has nationals who engage in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species;(45) or
- supports terrorism or terrorist organizations or harbors terrorists or terrorist organizations.(46)

None of these laws are premised on an acceptance of the norm by the target country.

In contrast to these stick-based approaches, governments also use trade carrots to elicit cooperation from target countries. This has been done for many years in the Generalized System of Preferences (GSP) which provides duty-free access on some products to qualifying developing countries. For example, in the European Community GSP program, benefits may be temporarily suspended from a country that fails to conform to international conventions on money laundering.(47) In the United States GPS program, the President must withdraw GSP benefits from any country that aids or abets any individual or group which has committed an act of international terrorism.(48) In the U.S. preferential trade program for sub-Saharan Africa, there are several requirements for country eligibility including that the country "does not engage in activities that undermine United States national security or foreign policy interests" and that the country "cooperates in *international* efforts to eliminate human rights violations and terrorist activities."(49) These determinations are made unilaterally by the U.S. President. Recently, U.S. Senator Pat Roberts proposed that all preferential trade benefits be linked to whether the country is cooperating with the United States on national security issues.(50)

Summary

The purpose of the taxonomy in Part II is to set out the various ways that trade and financial measures are employed to regulate commerce and to sanction governments. Having such a classification will aid future analysis of why such measures are used and whether this use is in accord with WTO law. In Parts III and IV, the paper turns to WTO law. Part III examines the provisions in the WTO that reflect the goals of security and law enforcement. Part IV offers an introduction to the issue of whether trade measures (such as those in Part II) are consistent with WTO rules.

III. A Synopsis of Security and Law Enforcement Provisions in WTO Rules

Although the WTO commenced operations in 1995, the international trade regime is much older, and so the story of trade and law enforcement has to begin with the pre-WTO era. In 1927, when governments drafted a comprehensive convention to prohibit trade bans, they recognized the need to provide an exception for "prohibitions or restrictions relating to public security."(51) This exception was in addition to one for restrictions on traffic in arms, munitions or implements of war. In 1946-48, the Charter for the International Trade Organization (ITO) was drafted in parallel with the drafting of the General Agreement on Tariffs and Trade (GATT) of 1947. The ITO Charter was much broader than the GATT and contained several provisions to promote cooperation for economic development and reconstruction. Among the topics embraced were labor standards, skills, technology, investment, and natural resource development-issues that today fit under the rubric of sustainable development and good governance. Although the Charter did not contain provisions to promote cooperation against transborder threats to security, the Commercial Chapter of the Charter did provide a general exception to permit national measures "necessary to the enforcement of laws and regulations relating to

public safety."(52) This public safety exception was not placed in the GATT in 1947 or added to it later.

Compared to the ITO Charter, the GATT is a much narrower agreement aimed at overcoming national measures that deny market access, distort trade, discriminate, or impede freedom of transit. Because some GATT rules might interfere with national law enforcement and security activities, the drafters provided several important exceptions in GATT Article XX, such as paragraph (a) for measures necessary to protect public morals and paragraph (b) for measures necessary to protect human, animal, or plant life or health. Furthermore, in Article XX(d), there is an exception for measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this [GATT] Agreement, including those relating to *customs enforcement*, the enforcement of monopolies . . . the protection of patents, trademarks and copyrights, and the prevention of deceptive practices."(53) In GATT Article XXI, there is a set of National Security exceptions to make clear that the GATT does not:

(a) require information disclosure which a party considers contrary to its essential security interests; or

(b) prevent a party from taking an action that it considers necessary relating to (i) fissionable materials, (ii) traffic in arms and other traffic for supplying a military establishment, or (iii) taken in time of war or other emergency in international relations; or

(c) prevent a party from taking any action in pursuance of its obligations under the U.N. Charter for the maintenance of international peace and security.

Because the WTO is a much newer instrument, several of the WTO agreements are more attentive than the GATT to the dual problems of trade that promotes illegal activity and trade that is illegal. For example, the General Agreement on Trade in Services (GATS) contains two relevant General Exceptions: Article XIV(a) for measures "necessary to protect public morals *or to maintain public order*" and XIV(c) for measures "necessary to secure compliance" with laws or regulations which are inconsistent with GATS including those relating to "safety."(54) Thus, GATS reaches back to the "safety" exception lost from the ITO Charter. The GATS also has Security Exceptions in Article XIV bis that mirror those in GATT Article XXI.

In addition, the GATS Annex on the Movement of Natural Persons Supplying Services Under the Agreement contains a provision stating that the GATS

shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.(55)

Although this provision seems to impose a discipline, its impact is tempered by the need to read it in conjunction with the overall GATS Security Exceptions.

In contrast to the GATS, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) imposes some harmonization on law enforcement. The key provisions are:

- TRIPS Articles 46 and 59 require member governments to provide for judicial authority to order the disposal or destruction of domestic or imported goods infringing intellectual property rights; and
- TRIPS Article 61 requires member governments to impose criminal penalties in cases of willful trademark counterfeiting or copyright "piracy" on a commercial scale.

In addition, TRIPS promotes cooperation and comity in several ways:

- TRIPS Article 69 requires member governments to cooperate with a view to eliminating international trade in goods infringing intellectual property rights;
- TRIPS Article 40.3 requires Government A to enter into consultations with Government B when B believes that an economic actor in Country A is violating B's laws regarding anticompetitive practices in contractual licenses; and
- TRIPS Article 4(a) contains an exception from the most-favored nation requirement for international agreements on judicial assistance or law enforcement of a general nature. This exception avoids any WTO problem in having an agreement with one country but not others.

In summary, TRIPS effects a change in the substantive national law on intellectual property, and then includes specific disciplines to promote enforcement at the national level.

IV. The Compatibility of "Trade and Law Enforcement" Measures with WTO Rules

Although it is beyond the scope of this paper to do an analysis of the WTO-compatibility of a genre of trade measures, Part IV of this paper will introduce the legal issues. The tension between trade rules and law enforcement measures has been discussed by other commentators,(56) but no comprehensive analysis has been undertaken.

The domain of the WTO is transborder economic activity, and yet WTO rules are eclectic. The rules for trade in goods do not apply to the payment side of the exchange, but rather only to the transfer of the good. The rules for trade in services can apply to payments, but governments retain discretion on accepting this discipline and retain a generous exception for balance of payments difficulties.(57)

Furthermore, WTO rules in general do not seek to regulate the content of trade. Instead, the rules seek to supervise government *restrictions* on trade.(58) Within that narrow domain, WTO rules apply broadly to trade in goods (including goods embodying intellectual property rights) and services. The category of services is wider than many casual observers of the WTO imagine because GATS covers the movement of natural persons across borders to supply services.

While such a fundamental point may be obvious, it is nevertheless worth stating that the illegality of an importation under the law of the importing country is not a justification under WTO rules to block the importation. Were it otherwise, a government could vitiate any WTO rule by making the contested trade illegal. That result would be manifestly absurd, and would contradict a basic principle of international law that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."(59) The interaction of domestic and WTO law was an issue in the *Antidumping Act of 1916* case, where several governments lodged a WTO complaint about a U.S. statute that outlawed certain pricing practices on goods destined for the internal market. The panel held that the WTO Antidumping Agreement did not permit WTO member governments to have such a competition law.(60)

In general, trade-related law enforcement measures can run afoul of two WTO rules. First, both the GATT and the GATS prohibit certain quantitative restrictions that impede market access.(61) This rule is violated by many of the measures discussed in Part II because they apply a quantitative restriction in the form of a trade ban. Second, both the GATT and the GATS contain a most-favoured-nation (MFN) requirement that makes it difficult to discriminate against particular foreign

countries.(62) Despite this rule, many of the measures discussed in Part II are targeted against particular countries.

The WTO also has some special sectoral rules that might be infringed with anti-crime efforts. For example, the GATS Understanding on Commitments in Financial Services states that governments shall not take measures to prevent transfers of information when such transfers are necessary for the conduct of the ordinary business of a financial service supplier.(63)

When an inconsistency with a trade law obligation occurs, a government may avoid a WTO violation if a disputed measure is excused by an exception in a WTO covered agreement. As discussed in Part III, the key exceptions are in GATT Articles XX and XXI, and GATS Article XIV and XIV *bis*. By way of illustration, it might be possible to use these exceptions to justify some of the measures discussed in Parts I and II. For example, GATT Article XX(b) might justify the ban on conflict diamonds from non-participants to the Kimberley Scheme.(64) GATT Article XXI(b)(iii) might justify a ban on trade from countries using chemical or biological weapons. GATS Article XIV bis 1(c) might justify discriminatory actions to implement Security Council Resolution 1373.

In applying the GATT Article XX exceptions, recent WTO jurisprudence suggests that panels will consider, among other factors, the extent to which the behavior being responded to is recognized as a problem by the international community, and the importance of the interest pursued.(65) Because such consideration necessitates a balancing of objectives, legal outcomes will not be easy to predict because they will turn on the facts of the case, with panels being on the lookout for protectionism disguised as legitimate law enforcement. In his article on trade and drugs, Kal Raustiala warned of the danger of "narco-protectionism."(66)

In GATT Article XX, there is a little-used exception in paragraph (d) for measures necessary to *secure compliance* with laws or regulations (which are not inconsistent with the GATT), including those relating to customs enforcement, monopolies, intellectual property, and deceptive practices. The WTO Appellate Body has stated that under this provision, it is not open to doubt that governments "have the right to determine for themselves the level of enforcement of their WTO-consistent laws and regulations."(67) Thus, Article XX(d) could serve as a justification of customs enforcement at the border against trade implicated in an illegal practice, for example, the *comity* category discussed in Part II.A above. The potential role of this paragraph (d) exception is uncharted; as far as I know, no defense in a GATT or WTO case has been premised specifically on a customs enforcement purpose. In one relevant recent case, *Argentina Hides and Leather*, the panel agreed with Argentina that its measure was provisionally justified under Article XX(d) as necessary to avoid overt illegal actions under tax laws.(68)

With regard to the Security Exceptions in GATT Article XXI, the GATT did not develop a practice of rigorously reviewing defenses offered under this Article.(69) The leading case is Nicaragua's complaint against the United States over the trade embargo in 1985. After Nicaragua lodged a complaint in the GATT, the United States refused to agree to a panel except under terms of reference that precluded the panel from considering the "validity of or motivation for" the Article XXI:(b)(iii) war/emergency defense which the United States had invoked.(70) Given that delimitation, the panel had little to do, but it did make a pertinent observation that the GATT "could not achieve its basic aims unless each contracting party, whenever it made use of its rights under Article XXI, carefully weighed its security needs against the need to maintain stable trade relations."(71) The panel report was not adopted however. If a similar case were lodged in the WTO today, the defendant government would not be able to restrict the panel's terms of reference, but it seems likely that a panel would

reach the same result by refusing to second-guess a government as to the objective existence of an "emergency in international relations." (72)

Notwithstanding the available exceptions in GATT Articles XX and XXI, (73) the WTO recently moved to grant a four-year waiver for the trade controls against non-participants in the Kimberley Process Scheme. In November 2002, the Interlaken Declaration on the Scheme had stated the commitment to ensure that the measures taken will be consistent with international trade rules. (74) Ensuring that status is being accomplished by a waiver of the GATT rules requiring most-favoured nation treatment and forbidding quantitative restrictions and related discrimination. (75)

In addition to explicit WTO exceptions, national trade measures may perhaps avoid being ruled a WTO violation when there is a specific trade obligation dictated in another treaty. Many analysts have speculated about how the WTO might fit into a hierarchy of international norms, should a treaty conflict occur. But so far, there is no applicable caselaw in the WTO or other international tribunal.

Finally, let me note a topic of WTO law that has received little attention: the status of trade measures against individuals. For example, the measures against IUU fishing discussed in Part I.D are aimed at fishing vessels. While WTO law is well-defined about restrictions against specific products or against countries, the topic of restrictions against individuals has not arisen. Another undefined legal issue is export controls contingent on the identity of the recipient in the importing country and what it will do with the item. If Country A prohibits the export of a technology to a specific person in Country B because that person may transfer the technology to a terrorist in Country C, then Countries B and C could have a cause of action in the WTO. So far, no case like that has been filed.

In summary, although many trade-related law enforcement measures would violate WTO non-discrimination rules, broad defenses are available for governments to invoke in any case brought to the WTO. So long as the WTO continues the GATT practice of deference to governmental volitions regarding national security, WTO law seems unlikely to impede such efforts. Part V of this paper will discuss the other side of the coin, that is, whether the WTO can facilitate law enforcement.

V. Can the WTO Promote the Enforcement of Non-Trade Law?

Social actors have proposed more WTO involvement in supervising trade, but WTO governments have resisted most of these ideas. The telos of the WTO is to combat official *restrictions* on trade, not to impose restrictions. That said, all of the stakeholders in the WTO system recognize the role of TRIPS and GATS in beginning to transform the WTO into an institution of positive cooperation and integration.

Four possibilities exist for how the WTO could help control illegal activity. They are:

- A. Achieving More Trade Liberalization,
- B. Demanding Conformity to Specified Non-Trade Law,
- C. Promoting Cooperation Among Members, and
- D. Improving Cooperation with other International Organizations.

Each of these is discussed and illustrated below.

A. Achieving More Trade Liberalization

The WTO can help other causes by being more successful in its own mission of trade liberalization. This assumes that trade liberalization and the ensuing growth is complementary to better law enforcement—a reasonable proposition, but one without supporting evidence. One example of a positive trade effect would be agricultural trade liberalization that enables new markets and gives narcotics growers an alternative productive use of land. (76) The U.N. General Assembly saw this connection in 1992 when it passed a resolution regarding narcotics which, among other points, encouraged the pursuit of trade liberalization to enhance trading opportunities of countries affected by illicit production of narcotic drugs. (77)

B. Demanding Conformity to Specified Non-Trade Law

In requiring member governments to "comply" with specified provisions of listed treaties on intellectual property, the WTO shows its potential for imposing harmonization.(78) Thus, it would certainly be possible for the WTO to designate adherence to other treaties as a requirement for WTO membership. Any such decision in the WTO would have to be reached by consensus.

The Kimberley Scheme presents a good example of what more the WTO could do. At present, the only action being taken by the WTO is to grant a limited waiver. In effect, the WTO is smoothing its interface with the Kimberley Scheme by staying out of the way as Kimberley participants implement their obligations. If the WTO wanted to do more, it could seek to *require* member governments to participate in the trade controls of the Kimberley Scheme. One way to do this would be to clarify that the Kimberley rules are an "international standard" under the WTO Agreement on Technical Barriers to Trade, which would then trigger an obligation that each government use the standard as a basis of its own technical regulation.(79)

Governments failing to do so could be brought before a WTO dispute panel. Another possible initiative is stronger Transparency in Government Procurement, which is now being discussed at the WTO.(80) It would be possible for the WTO to require adherence to international anti-bribery conventions and to require reporting of all payments made to governments (with protection of business confidential information). It is interesting to note that one of the conditions for country participation in U.S. preferential trade benefits to sub-Saharan Africa is whether the country has a system to combat corruption and bribery, such as signing and implementing the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Thus, a precedent exists for linking trade to anti-corruption efforts.

C. Promoting Cooperation Among WTO Members

In the pre-WTO era, there were only a few attempts to promote positive cooperation among governments, and such efforts have not been significantly stepped up at the WTO.(82) As noted in Part III, TRIPS has a provision requiring member governments to cooperate with a view to eliminating international trade in goods infringing intellectual property rights. As far as I know, no collective action has been taken to implement this provision.

It would be possible for the WTO to undertake broader anti-crime cooperation using bilateral agreements as a model. Consider the following examples: The Europe Association Agreement with Lithuania-which is broader than a trade agreement-contains an Article on Money Laundering that calls for cooperation against laundering of proceeds from criminal activities.(83) In addition, the Agreement calls for Cooperation in the Prevention of Illegal Activities, such as illegal trafficking in drugs and illegal transactions involving industrial waste and counterfeit products.(84) The Free Trade Agreement between Canada and Costa Rica commits the parties to developing a technical cooperation customs program including the prevention and detection of contraband and illegal activities.(85) Another example is the new draft Free Trade Agreement between the United States and Singapore.(86) This Agreement contains provisions to enhance cooperation and information-sharing regarding import or exports that are in violation of one of the party's laws.(87) The Agreement also commits the governments to employ customs enforcement techniques that focus on high-risk goods.(88)

One potential area for cooperation is the transborder movement of natural persons. Although the ongoing GATS negotiations will attempt to liberalize restrictions, the feelings of insecurity afflicting many countries, including the United States, will probably put a damper on the depth of commitments made to ease visa requirements. These negotiations could perhaps be aided if the WTO facilitated the development of best practices in "temporary immigration" policy, rather than leave

every country the full responsibility to design an effective policy for keeping out undesirable individuals.

D. Improving Cooperation with other International Organizations

Although the WTO has general authority to cooperate with international organizations that have responsibilities related to those of the WTO, the WTO has not in fact undertaken much cooperation.⁽⁸⁹⁾ Whether the WTO should engage in more active cooperation depends on changes in the WTO's mandate. For example, the current WTO negotiations regarding the environment, including the issue of fishery subsidies, might lead to a need for the WTO to cooperate with the U.N. Food and Agriculture Organization and perhaps the U.N. Environment Programme. At present, the WTO lacks any policy on transborder terrorism or other criminal activity (other than intellectual property). Should that change in the future, with the adoption of either rules or soft law, there would then be a good reason for the WTO to agree to cooperation with the relevant international organizations and entities responsible for anti-crime programs.

If more cooperation ensues as discussed in Sections C and D, there may be a need to make sure that governments do not have to disclose sensitive information regarding law enforcement or a security interest. The GATT contains provisions clarifying that such disclosure is not required, and several WTO agreements contain similar provisions.⁽⁹⁰⁾

*Wilmer, Cutler & Pickering. The opinions expressed are those of the author only.
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1. For example, see Raj Bhala, *Fighting Bad Guys with International Trade Law*, 31 UNIVERSITY OF CALIFORNIA AT DAVIS LAW REVIEW 1 (1997). Notwithstanding the title of this article, the content is mainly about the use of *U.S. law* to fight bad guys. The "trade-and" research most focused on the WTO and law enforcement was a study by Kal Raustiala that sought to "highlight the need for greater political attention and more sustained research into the interactions between drug control and international economic liberalization" Kal Raustiala, *Law, Liberalization & International Narcotics Trafficking*, 32 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLITICS 89, 144 (1999).
2. See generally *Symposium: The Boundaries of the WTO*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 1 (José Alvarez ed., 2002).
3. Trade can be impeded unintentionally because of the difficulty of distinguishing between legal and illegal trade.
4. For example, see Peter Menyasz, *Newfoundland Expresses Trade Concerns about Proposed U.S. Bioterrorism Regulations*, BNA DAILY REPORT FOR EXECUTIVES, Apr. 7, 2003, at A-13.
5. Treaty of Amity between the United States and France, Feb. 6, 1778, 7 Bevans 763, arts. 2, 8 (not in force).
6. *Id.* art. 14.
7. International Convention for the Suppression of the Financing for Terrorism, Dec. 9, 1999, U.N. General Assembly Res. 54/109, art. 18.2.
8. U.N. Security Council, Res. 1373, para. 1(d) (Sept. 28, 2001).
9. Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the U.N. Convention against Transnational Organized Crime, U.N. General Assembly Resolution 55/222 (May 8, 2001).
10. Protocol, art. 3(e).
11. *Id.* art. 11.
12. Convention on the Marking of Plastic Explosives for the Purpose of Identification, March 1, 1991, 30 ILM 721.

13. *Id.* art. 3.
14. See <http://www.wassenaar.org/docs/docindex.html>.
15. Recommendation of the Customs Co-operation Council Concerning Action Against Illicit Cross-Border Movement of Nuclear and Hazardous Material (including their wastes), June 19, 1997, available at <http://www.wcoomd.org/ie/En/Recommendations/recommendations.html>.
16. Draft WHO Framework Convention on Tobacco Control, A/FCTC/INB6/5 (March 3, 2003). See David P. Fidler, *World Health Organization's Framework Convention for Tobacco Control*, ASIL INSIGHTS (March 28, 2003).
17. Draft WHO Framework Convention, arts. 1(a), 15.4(b).
18. *Id.* art. 6.2.
19. See Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), art. 31(f).
20. WTO Council for TRIPS, Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, Note from the Chairman (Dec. 16, 2002).
21. Thomas M. Burton, *The FDA Begins Cracking Down on Cheaper Drugs from Canada*, WALL STREET JOURNAL, March 12, 2003, at A1.
22. U.S. Senator Chuck Grassley, the chair of the Senate Finance Committee, stated that the conflict diamond "is a trade issue, a consumer issue, and most of all, a human rights issue." Gary G. Yerkey, *President Set to Sign Bill to End Trade in "Conflict" Diamonds Following House OK*, BNA DAILY REPORT FOR EXECUTIVES, Apr. 14, 2003, at A-14 (discussing passage of the Clean Diamond Trade Act).
23. Tracey Michelle Price, *The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate*, 12 MINNESOTA JOURNAL OF GLOBAL TRADE 1 (2003).
24. Kimberley Process Certification Scheme, § I, available at <http://www.kimberleyprocess.com>.
25. See, e.g., Spencer Tripp & Brittany Whiting, *The Illegal Trade in Chemicals that Destroy Ozone*, TRIO: NEWSLETTER OF THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION, Spring 2003, at 1 (noting that the United States is the largest black market destination for ozone depleting chemicals, many coming through Mexico).
26. International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, March 2, 2001, available at <http://www.fao.org/DOCREP/003/y1224e/y1224e00.HTM>.
27. *Id.* para. 3.1.3.
28. *Id.* para. 66. The identification is to be done by the relevant regional fisheries management organization.
29. If there is any treaty or customary international law that would be directly applied against an individual trader, that has not come to my attention.
30. U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, art. 3.1(a), available at <http://www.drugtext.org/library/legal/treat/psy88.htm>.
31. Roberto Suro, *President Making Gun Import Ban Permanent*, WASHINGTON POST, Apr. 6, 1998, at A6. The domestic sale of such rifles apparently remains legal.
32. 42 U.S.C. § 274e. Such trade is presumably not harmful to the donor and would be very helpful to the recipient. So it is not *malum in se*.
33. 19 U.S.C. § 2092(a).
34. 16 U.S.C. § 3372(a)(2)(A).
35. U.N. Security Council, Res. No. 1343, para. 6 (Mar. 7, 2001).
36. WTO Press Release, WTO Allows Brazil Sanctions Against Canada in Aircraft Dispute, March 19, 2003.

37. See MAKING TARGETED SANCTIONS EFFECTIVE. GUIDELINES FOR THE IMPLEMENTATION OF UN POLICY OPTIONS (Peter Wallensteen et al. eds., 2003).
38. 22 U.S.C. § 5605(b)(2)(D).
39. 16 U.S.C. § 1826a(b).
40. 16 U.S.C. § 1825.
41. See http://www.fatf-gafi.org/Sitemap_en.htm.
42. Richard N. Haass, *Sanctioning Madness*, 76(6) FOREIGN AFFAIRS 74 (1997).
43. 22 U.S.C. § 5605(b)(2)(D).
44. 19 U.S.C. § 2492.
45. 22 U.S.C. § 1978(a).
46. 22 U.S.C. § 2349aa-9(a).
47. Council Regulation (EC) No. 2501/2001, art. 26. This condition is not dependent on whether the beneficiary country is a party to the conventions.
48. 19 U.S.C. § 2462. The President may continue such benefits if he finds that doing so is in the national economic interest.
49. Africa Growth and Opportunity Act, 19 U.S.C. § 3704(a) (emphasis added).
50. Gary G. Yerkey, *Sen. Roberts Favors Linking Trade Benefits To Cooperation on National Security Issues*, BNA DAILY REPORT FOR EXECUTIVES, March 28, 2003, at A-18.
51. International Convention for the Abolition of Import and Export Prohibitions and Restrictions, Nov. 8, 1927, 97 LNTS 391, art. 4.2.
52. Charter for an International Trade Organization, Mar. 24, 1948, art. 45.1(a)(ii), available at <http://www.worldtradelaw.net/misc/havana.pdf>.
53. General Agreement on Tariffs and Trade (GATT) Art. XX(d) (emphasis added). This exception was also present in the ITO Charter.
54. General Agreement on Trade in Services (GATS) Art. XIV (emphasis added).
55. GATS Annex, para. 4 (footnote omitted).
56. For example, see Alyssa Woo, *Health Versus Trade: The Future of the WHO's Framework Convention on Tobacco Control*, 35 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 1731, 1763-64 (2002).
57. GATS arts. XI, XII. GATS Article XI refers to "payments and transfers for current transactions," and thus does not specifically include transfers of profits. Note that some free trade agreements can contain disciplines to permit the transfer of profits. For example, the North American Free Trade Agreement (art. 1109.1) requires parties to permit the transfer of profits, but another provision (art. 1109.4) allows governments to prevent a transfer relating to criminal or penal offenses. North American Free Trade Agreement, December 17, 1993, 32 ILM 296.
58. The main exception is TRIPS which does seek to disallow certain trades between consenting economic actors.
59. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331, art. 27.
60. United States - Anti-dumping Act of 1916, Report of the Appellate Body, WT/DS136/AB/R (Aug. 28, 2000).
61. GATT art. XI (with some sectoral exclusions); GATS art. XVI (in sectors where commitments are undertaken).
62. GATT art. I; GATS art. II. In addition, several of the specialized agreements on trade in goods contain MFN provisions. The specific requirement in the GATT is not to treat a product from another country more favorably than a like product from a WTO member country.
63. GATS Understanding on Commitments in Financial Services, para. 8.
64. Whether Article XX(b) is a good defense to safeguard life outside the jurisdiction of the importing country would be contestable.

65. For example, see United States - Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R, paras. 168, 170-71 (Oct. 12, 1998); European Communities - Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Appellate Body, WT/DS135/AB/R, para. 172 (March 12, 2001).
66. Raustiala, *supra* note 1, at 129.
67. Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef, Report of the Appellate Body, WT/DS161/AB/R, para. 176 (Dec. 11, 2000).
68. Argentina - Measures Affecting the Export of Bovine Hides and the Import of Finished Leather, Report of the Panel, WT/DS155/R, paras. 11.292-11.295 (Dec. 19, 2000). Nevertheless, the panel found that the contested measure was unjustifiable discrimination in violation of the Article XX chapeau.
69. JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT 748-52* (1969); Raj Bhala, *National Security and International Trade Law: What the GATT Says, and What the United States Does*, 19 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL ECONOMIC LAW 263 (1998).
70. United States - Trade Measures Affecting Nicaragua, L/6053 (Oct. 13, 1986) (unadopted), available at worldtradelaw.net.
71. *Id.* para. 5.16.
72. For a study of the possibilities of justiciability, see Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 VIRGINIA JOURNAL OF INTERNATIONAL LAW 365 (2003). The meaning of "international emergency" is explored in Sarah H. Cleveland, *Human Rights Sanctions and International Trade: A Theory of Compatibility*, 5 JOURNAL OF INTERNATIONAL ECONOMIC LAW 133, 183-86 (2002).
73. For a discussion of why the Scheme is not a violation of WTO rules, see Joost Pauwelyn, *What to Make of the WTO Waiver for "Conflict Diamonds": WTO Compassion or Superiority Complex?*, 24 MICHIGAN JOURNAL OF INTERNATIONAL LAW (forthcoming 2003).
74. Interlaken Declaration of 6 November 2002 on the Kimberley Process Certification Scheme for Rough Diamonds, para. 3, available at <http://www.kimberleyprocess.com>.
75. WTO Council for Trade in Goods, Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds, Draft Decision, G/C/W/432/Rev. 1 (Feb. 24, 2003). The waiver states that the WTO action does not prejudice the consistency of measures to implement the Kimberley Scheme, but is being given for reasons of legal certainty. The waiver, which applies only to governments seeking it, does not extend to a potential violation of the Agreement on Technical Barriers to Trade.
76. Raustiala, *supra* note 1, at 126, 130.
77. U.N. General Assembly, Examination of the Status of International Cooperation against the Illicit Production, Sale, Demand, Traffic and Distribution of Narcotic Drugs and Psychotropic Substances, A/RES/47/99, para. 1(e) (Dec. 16, 1992).
78. TRIPS arts. 1, 9. These requirements only extend to the treatment of aliens, not to domestic economic actors.
79. See Agreement on Technical Barriers to Trade (TBT), art. 2.4, which requires a showing that the international standard would not be ineffective or inappropriate for the fulfillment of a legitimate objective in the importing country. In the only case so far under this provision, the WTO held that the European Community had violated Article 2.4 for failing to follow a standard of the Codex Alimentarius Commission regarding sardine labeling.
80. See Kimberly Ann Elliott, *Corruption as an International Policy Problem: Overview and Recommendations*, in CORRUPTION AND THE GLOBAL ECONOMY 175-233 (Kimberly Ann Elliott ed., 1997).

81. 19 U.S.C. § 3704(a)(1)(E). On the Convention, see Padideh Ala'i, *The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade Against Corruption*, 33 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 877 (2000).

82. For example, in 1979, the GATT parties considered, but did not adopt, an Agreement on Measures to Discourage the Importation of Counterfeit Goods. The draft Agreement required governments to deal with imported counterfeit goods in a manner that deprives the persons involved of the economic benefits of the transaction. Counterfeit goods were defined as goods with a false representation of a trademark that is entitled to protection under the law of the country of importation. In addition, the parties agreed to consult with each other with a view to strengthening intellectual property rights. Agreement on Measures to Discourage the Importation of Counterfeit Goods, L/4817 (July 31, 1979).

83. Europe Agreement Establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Lithuania, of the other part, June 12, 1995, art. 90, available at http://www.eudel.lt/en/eu_and_country/political_documents.htm.

84. *Id.* art. 102.

85. Free Trade Agreement between Canada and Costa Rica, Apr. 23, 2001, art. IX.3, para. 2(c), available at <http://www.sice.oas.org/Trade/cancr/English/cancr20e.asp#p4c10arX.1>.

86. U.S.-Singapore Free Trade Agreement, available at <http://www.ustr.gov/new/fta/Singapore/consolidatedtexts/toc%20and%20cover.pdf>.

87. *Id.* art. 4.5.

88. *Id.* art. 4.9.

89. See Agreement Establishing the World Trade Organization, art. V:1.

90. GATT arts. X:1, XXI(a); GATS art. III bis; TRIPS art. 63.4; Agreement on Trade-Related Investment Measures, art. 6.3; Agreement on Safeguards, art. 12.11; and Agreement on Import Licensing Procedures, art. 1.11.