



ILLICIT TRADE AND THE WORLD TRADE ORGANIZATION

Raising awareness, identifying limitations and building strategies

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List of Abbreviations

ACTA	Anti-Counterfeiting Trade Agreement
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CVA	Customs Valuation Agreement
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Communities
EU	European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade 1994
GSP	Generalized System of Preferences
G20	Group of Twenty
ICSFT	International Convention for the Suppression of the Financing of Terrorism
ICSID	International Center for Settlement of Investment Dispute
INTERPOL	International Criminal Police Organization
IP	Intellectual Property
IP Rights	Intellectual Property Rights

LDCs	Least Developed Countries
MFN	Most-Favoured-Nation Treatment
NT	National Treatment
OECD	Organization for Economic Co-operation and Development
QRs	Quantitative Restrictions
SSFFC Medicine	Substandard, spurious, falsely-labelled, falsified or counterfeit Medicine
TBT	Technical Barriers to Trade
TFA	Trade Facilitation Agreement
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNTOC Convention	United Nations Convention against Transnational Organized Crime
US	United States
WCO	World Customs Organization
WIPO	World Intellectual Property Organization
WHO	World Health Organization
WHO Protocol	WHO's Protocol to eliminate illicit trade in tobacco products
WTO	World Trade Organization

1. Illicit Trade: A worldwide phenomenon

“Illicit Trade” is a global problem. It abuses the international trade system and negates the foundations of the multilateral legal framework. “Illicit trade” destabilizes institutions, recognizes no frontiers and nullifies the collective objective of fair trade. And, yet, it is not on the WTO’s agenda.

The reality of today’s world shows that illicit trade is all around us: from the falsified medicines containing no active ingredients being brought to treat patients in North America, to illegally-captured fish products being acquired by consumers in Asia. This is, indeed, a serious matter.

Illicit trade practices often defeat the object and purpose of trade liberalization, which is to create development and wealth-sharing among States. Illicit trade does not contribute to the States’ economy the way licit trade does as it does not go through the ordinary (legal) channel.

The conundrum of “illicit trade” starts with its very definition. The notion of “illicit trade” encompasses a broad variety of issues, ranging from the cross-border sale of illicit products (such as narcotics) to the sale of licit goods for illicit purposes (such as money-laundering). To make things worse, no comprehensive definition thereof exists at the international level. Preliminarily, illicit trade has been defined as an exchange in the control / possession of a good or service that a lawmaker (national or international) deems illegal, because the object of the exchange is dangerous or morally repugnant.²

Nonetheless, if one uses only the above-referred preliminary definition, illicit trade would solely cover trading of prohibited weapons, endangered species, illicit timber, narcotics or conflict minerals. However, traditional illicit goods are not currently the sole issue at stake, albeit part of the considerable problem. It is often the case that fraudulent actors engage in sophisticated schemes

² OECD, 2016, Illicit Trade: Converging Criminal Network, OECD Reviews of Risk Management Policies, Paris, page 19

through which they trade or deal with licit products (such as electronics or footwear) for criminal or otherwise non-licit purposes (like money laundering).

It is estimated that illicit international trade amounts to roughly \$650 billion, taking into account – only – trade in goods. Illicit financial flows are on the order of \$1.3 trillion. Moreover, the “illicit economy” represents approximately 15% of the world’s GDP and 7% of the world’s circulating merchandise.³ It, thus, has the potential of impacting, in a negative way, both the major and the small economies of our planet alike. To illustrate why this is, truly, a worldwide phenomenon, below are a few examples that evidence the wide-spread extent of the problem.

Substandard, Spurious, Falsely-labelled, Falsified and/or Counterfeit Medicine (SSFFC Medicine)

Trade in SSFFC medicine is, truly, at a frightening level now.⁴ Some non-profit and non-governmental institutions⁵ have even noted that the practice of illicit trade of SSFFC medicine is worse than imagined, due to scarcity of reliable sources of data that can be used to assess the magnitude of the problem.⁶ For an example of the problem, in 2014, INTERPOL and local enforcement agencies seized 8.4 million doses of counterfeit and unlicensed medicine worth estimated GBP 18.6 million in the United Kingdom alone.⁷

³ World Economic Forum, 2013, *Out of the Shadows: Why Illicit Trade and Organized Crime matter to us all*, Switzerland, page 1.

⁴ Counterfeit medicines could be categorized into six levels: i) Products without active ingredients, ii) Products with incorrect quantities of active ingredients, iii) Products with wrong ingredients, iv) Products with fake packaging, v) Copies of original products, and vi) Products with high levels of impurities and contaminants; *see* OECD, 2016, *Illicit Trade: Converging Criminal Network*, OECD Reviews of Risk Management Policies, Paris, page 80

⁵ *Inter alia*, the Institute of Medicine (now known as National Academy of Medicine).

⁶ Institute of Medicine 2013, *Countering the problem of falsified and substandard drugs*, Washington D.C., National Academies Press, page 85

⁷ OECD, 2016, *Illicit Trade: Converging Criminal Network*, OECD Reviews of Risk Management Policies, Paris, page 89

Aside from its adverse economic impact, trade of those medicines also poses health risks to certain groups of people, especially (albeit not exclusively) in North America. This is due to the fact that SSFFC medicine does not – generally – contain active ingredients.⁸ The concern about trade in counterfeit medicine was recently raised at the WHO, reflecting the grave and imminent nature of the problem.⁹ However, despite those efforts, an effective international legal framework to deal with this kind of illicit trade is still needed.

Illegal, Unreported and Unregulated Fishing

Illegal, Unreported and Unregulated (IUU) Fishing is a major concern for coastal States. Transnational criminal organizations operate in the fishing and fisheries industries by means of, *inter alia*, illegally entering into a State's exclusive economic zone and overfishing their waters. It has been reported that trade in illegal fishing products (connected to criminal organizations' actions) amounts to somewhere in between 10 billion and 23.5 billion dollars per year.¹⁰ In Southeast Asia, canned fish-products are often traded internationally when fish were the product of non-licit capture. Although there may be regional arrangements dealing with this fraudulent conduct, this criminal practice requires a global framework.¹¹

IUU fishing practices by transnational criminal organizations have also been linked to human trafficking and modern slavery.¹² IUU fishing, as a major kind of illicit trade, calls for immediate global attention: it is not just a resource-

⁸ World Health Organization, 2012, Substandard / Spurious / Falsely-labelled / Falsified / Counterfeit medical products, Situation Report by the Secretariat, A/MSM/1/INF./1, para 10

⁹ World Health Organization, Seventieth World Health Assembly, Provisional agenda item 13.6, March 20th 2017, A70/23

¹⁰ Anastasia Telesetsky, Laundering Fish in the Global Undercurrents: Illegal, Unreported, and Unregulated Fishing and Transnational Organized Crime, *Ecology Law Quarterly*, Vol. 41, Issue 4, page 942.

¹¹ It is not covered under the framework of United Nations Convention on Transnational Organized Crime.

¹² International Organization for Migration, (2016), Report on Human Trafficking, Forced Labour and Fisheries Crime in the Indonesian Fishing Industry, Indonesia, page 20.

management problem, but also a matter connected to transnational organized crime. Overfishing by fraudulent actors not only disrupts the sustainability of ecosystems, but also undermines the means of subsistence of local fishers.

Trade in Endangered Species and Wildlife Trafficking

Trade in endangered species and wildlife trafficking has – for a long time – been one of the most lucrative illicit trade businesses in Africa. “Good quality” raw elephant tusk can be priced around 1,100 dollars (and above) per kilogram.¹³ Studies suggest this was the cause of the over 95% decline in the African elephant population over the last century.¹⁴

In order to reduce the numbers of wildlife trafficking, African States have put export quotas on certain wildlife products, such as ivory.¹⁵ Because the sale of ivory is not legally prohibited as such in certain States, transnational criminal organizations operating in Africa smuggle wildlife products elsewhere to avoid export quotas. In addition to the problems associated with this illicit trade practice, without adequate technology it is virtually impossible to monitor, secure and deter illicit trade and smuggling schemes in endangered species and wildlife trafficking.¹⁶ This matter too requires a global response.

Cultural Objects

The pillaging and subsequent commerce of cultural property conducted by terrorist organizations in the Persian Gulf, has been a matter of continued

¹³ Vigne, Lucy and Esmond Martin (2017), Decline in The Legal Ivory Trade in China: In Anticipation of A Ban, Kenya, page 66.

¹⁴ OECD, 2016, Illicit Trade: Converging Criminal Network, OECD Reviews of Risk Management Policies, Paris, page 59.

¹⁵ CITES, CITES National Export Quota, https://cites.org/eng/resources/quotas/export_quotas

¹⁶ Guatam Basu, Combating illicit trade and transnational smuggling: key challenges for customs and border control agencies, World Customs Journal, Vol.8, No.2, 2014, page 20.

international concern. Illicit trade of cultural property (including cultural heritage) has been condemned through various UN Security Council Resolutions.¹⁷ The most recent resolution has affirmed that illicit trade of cultural property is related to the financing of terrorism. Although the WCO has adopted resolutions on the subject-matter,¹⁸ additional collective measures at a global scale *vis-à-vis* the international trade regime are much needed to effectively address this issue from a “global trade” perspective.

Money Laundering

Although not the only way through which fraudulent actors engage in money laundering schemes, the under-invoicing of ordinary goods, such as electronic appliances, has proven to be used for money laundering purposes. Latin American States have been particularly (albeit not exclusively) affected by these fraudulent practices.

Commentators often use the same example to illustrate the complexity of the conducts, which can be summarized as follows. Think about a drug dealer selling illegal substances and making \$100,000. With this amount, the dealer then buys 1,000 electronic appliances at \$100 per unit. The dealer exports its 1,000 appliances at a declared price of \$10 per unit to a colluding importer, who pays \$10,000. The importer then sells the 1,000 appliances at \$100 per unit, and gets \$100,000 (or its equivalent in local currency) for the dealer. Customs duties were paid for the export price of \$10,000, when the real value of the exports was \$100,000. After completing his money laundering scheme, the dealer has \$100,000 (less any commission) at his disposal. What happens

¹⁷ Security Council Resolution 2199, Threats to international peace and security caused by terrorist acts, S/RES/2199; Security Council Resolution 2253, Threats to international peace and security caused by terrorist acts, S/RES/2253; Security Council Resolution 2347, Maintenance of international peace and security, S/RES/2347

¹⁸ WCO, 2015, Illicit Trade Report 2015, Brussels.

next? This dealer finances terrorism (without having to use the financial system) with the illegal proceeds of the trading of ordinary textiles.¹⁹

Other trade-based money laundering schemes, include the declared import of “machinery” with inaccurate invoice pricing (of over a million dollars), which in reality turns out to be only a “heap of a scrap metals”.²⁰

Evidently, not every fraudulent actor uses those specific schemes. Other examples include, *inter alia*, the multiple invoicing of financial services to a governmental agency or overstated weights or over-invoiced exports.²¹ The point to understand here is, that transnational criminal organizations now have the ability to use and abuse legal loopholes to sustain their activities or to gain non-licit benefits, abusing the current framework.

The concrete examples presented above serve to illustrate the seriousness and complex spread or extent of the global threat of illicit trade in today’s world. Fraudulent conducts were seen from North America to Southeast Asia; from Latin American to Europe; and from the Persian Gulf to Africa. This is a worldwide phenomenon and, as such, requires a worldwide response.

The purpose of this Memorandum

As anticipated in this Memorandum’s Introduction, not only has Illicit trade not been comprehensively defined at the international level, it has also been partially and deficiently regulated. International organizations and international fora have attempted to address only some of the conducts associated with

¹⁹ J.S. Zdanowics, (2009) *Trade-based money laundering and terrorist financing*, Review of Law and Economics, page 5.

²⁰ Cassara, John A., 2015, *Trade-Based Money Laundering: The Next Frontier in International Money Laundering Enforcement*, Wiley, page 44.

²¹ For an in-depth discussion of the typology of scenarios see, Financial Action Task Force, 2006, *Trade Based Money Laundering*, Paris, page 6.

illicit trade (combating specific forms thereof), hence, failing to establish a wide-ranging framework to tackle the issue.

As the first step in the direction of encouraging a worldwide response, this Memorandum intends to raise global awareness of the significant problem that illicit trade represents. To that end, it will refer to the international instruments currently available to fight against this collective threat, making the inevitable conclusion that international regulation has not only been fragmented, but also insufficient *vis-à-vis* this subject-matter. As a second specific objective, it will also present the available tools to tackle the issue, incorporating this subject matter into the WTO's framework. Intrinsicly intertwined with this goal is the suggestion of a broad definition of "illicit trade", which is specifically designed for its use at the WTO.²²

As an important clarification, it is crucial to understand that this Memorandum is not concerned with domestic measures, laws or regulations of any Member State (whether consistent or not with the WTO's legal framework). Similarly, it does not purport to examine bilateral or regional agreements (or arrangements) dealing with this subject matter. Rather, in accordance with the global perspective that the scrutiny of a global threat demands, it will only present multilateral treaties and other international instruments to which all States are eligible to become parties to or to join.

The Illicit Trade's Definitional Conundrum

The term "illicit trade" – and the use thereof by States – is not novel. It can be traced back to the enactment of "*The new Trade Barrier Regulation*" in the EU

²² This Memorandum in no way suggests that only one single definition of "illicit trade" should be adopted at the international level. Rather, in accordance with the relevant instructions, it intends to suggest a definition of "illicit trade" for its use at the WTO. Naturally, this is without prejudice to the adoption of other definitions at the international level aiming to carve out more concrete, or specific, fraudulent conducts.

in 1994.²³ However, the oldest definition of “illicit trade” incorporated in a document of an international intergovernmental body can be found in the EC Regulation *‘on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices’*, a regulation by the Council of the European Community adopted in 1984.

As relevant here, this document states that “illicit commercial practices shall be any international trade practices attributable to third countries which are incompatible with international law or with generally accepted rules”.²⁴

The above-referred definition serves as an illustrative example of the ambiguity that has surrounded not only the adoption of the earlier definitions of “illicit trade”, but also the determination of which conducts – in fact – constitute “illicit commercial practices”.

The lack of a comprehensive international definition of illicit trade may be, naturally, explained by a wide range of reasons. One of these reasons relates to perceptions of States having different interests at stake. Since – historically – States have experienced illicit trade in distinct ways (they have been affected by dissimilar non-licit abuses to trade), the adoption of a collective definition has not yet crystallized.

This perception needs to change. Of course, States are affected in different ways by illicit trade. The fundamental threat affecting one State may not be the major problem of another. For the EU and China, illicit traffic in waste and counterfeit goods may very well be the most important issue²⁵. For Latin American States, it is perhaps the fight against money laundering which represents the most problematic conduct.²⁶ For the US, illicit trade in

²³ WTO Trade Policy Review: European Union – July 1995, PRESS/TPRB/10, 18 July 1995, https://www.wto.org/english/tratop_e/tp_r_e/tp10_e.htm

²⁴ Council Regulation (EEC) No 2641/84 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices.

²⁵ European Commission Press release, Customs: EU and China sign landmark mutual recognition agreement and intensify their customs cooperation, Brussels 16 May 2014.

²⁶ Council for Trade in Goods, ‘Goods Council approves AGOA waiver, hears call for talks on illicit trade’, WTO Press Release, 10 November 2015, https://www.wto.org/english/news_e/news15_e/good_10nov15_e.htm

pharmaceutical products raises concerns about IPRs protection and the safety of the products.²⁷ Nonetheless, what needs to be understood is that there is a common interest behind the specific – albeit diverse – ways in which States are affected. The fight against the abuse of the international trade system by fraudulent actors equally concerns all States around the globe. It is, thus, not a struggle of one or very few States, but a collective problem of the international society as a whole.

This international approach to the common threat of illicit trade by no means ignores the different cultural contexts and legal frameworks that interact in this global fight. INTERPOL, for example, has acknowledged that what is considered as illicit trade “depends on the cultural context and legal framework established by individual states organization”.²⁸

Thus, the problem is not having different approaches or tools to combat this fight at the domestic level, but rather the lack of consciousness over the necessity of the adoption of broad definitions at the international level.

Efforts have been made by some international organizations and international fora to tackle some of the conducts associated with illicit trade. However, it is a truism to say that these attempts have been partial, fragmented and insufficient. This will be evidenced in Sections 1.2.1., 1.2.2. and 1.2.3. bellow.

The international society’s attempts to address the issue of illicit trade can be classified into two categories: (a) trade of illicit goods and (b) trade of licit goods for illicit – or otherwise non-licit – purposes. The next Sections will, hence, elucidate on the partial, fragmented and insufficient character of the international regulation of illicit trade bearing in mind this distinction.

²⁷ United Nations Interregional Crime and Justice Research Institute, *Counterfeit Medicine and Organized Crime*, Turin, 2012, page 29.

²⁸ INTERPOL, *Countering Illicit trade in Goods: A guide for Policy Makers.*, Lyon, France, page 5.

1.2.1. Trade of Illicit Goods and Services: A definitional approach

One of the ways in which the international society has dealt with illicit trade is by convening international instruments prohibiting or condemning the trade of specific goods.

The WTO, evidently, was not the first international organization to use the term “illicit trade” in its conventional law. The WHO, in its *Framework convention on tobacco control*²⁹ as well as in its *Protocol to Eliminate Illicit Trade in Tobacco Products* (WHO Protocol), employed the locution in line with the general goal of containing the spread of tobacco consumption. The WHO defines illicit trade of this product as:

“any practice or conduct prohibited by law and which relates to production, shipment, receipt, possession, distribution, sale or purchase, including any practice or conduct intended to facilitate such activity’ related to the tobacco products (emphasis added)”³⁰

The object and purpose of these WHO instruments aimed at reducing concealed manufacture and traffic of tobacco products by imposing an obligation to excise every tobacco product.³¹

Unlike these WHO instruments, other international instruments dealing with traffic of certain non-licit goods do not attempt to define the concept of illicit trade. By way of example, Article I of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES),³² does not define the

²⁹ WHO Framework Convention on Tobacco Control, United Nations, Treaty Series, vol. 2302, page 166.

³⁰ Article 1.6, WHO FCTC Protocol to Eliminate Illicit Trade in Tobacco Products, adopted during the fifth session of the Conference of the Parties to the WHO Framework Convention on Tobacco Control by Decision FCTC/COP5 (1) of 12 November 2012, (‘WHO Protocol’).

³¹ See Article 14, WHO Protocol.

³² Convention on International Trade in Endangered Species of Wild Fauna and Flora, United Nation Treaty Series, Vol 993, page 224.

scope of the term ‘trade’ as the goods themselves are non-tradable under this Convention.

The WHO Protocol deserves further mention. Although tobacco is generally harmful, it is still tradable (the States’ ability to monitor the spread of the goods imposing excise on the product allows for its trade). By contrast, CITES does not limit “trade” because the non-tradeable nature of the goods is clearly determined.³³ For example, trade of goods mentioned in Annex I of CITES is illegal irrespective of whether it was traded in a formal way or in the black market, and this irrespective of the purpose of the trade.

Similar to the WHO Protocol, the *Convention on Psychotropic Substances of 1971*³⁴ and the *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (UNTOC Firearms Protocol)*³⁵ attempt to incorporate relevant definitions. This Convention defines “illicit traffic” as the “manufacturing or trafficking of the substances” that are contrary to the provisions of this Convention.³⁶ Similarly, the UNTOC Firearms Protocol defines “illicit trafficking” as “the import, export, acquisition, sale, delivery, movement or transfer of firearms without authorization of the export target State Party”.³⁷

But perhaps the most advanced approach to trade of illicit items was taken in respect to intellectual property rights’ protection (IP Rights). The international framework of IPRs started with dispersed international instruments defining

³³ See and compare Annex I of the CITES (non-tradable) and Annexes II and III (still permitted in certain instances).

³⁴ Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol; Convention on Psychotropic Substances of 1971; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988

³⁵ Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (UNTOC Firearms Protocol), United Nations, Treaty Series, vol. 2326, page 208.

³⁶ The convention limits trade for only specific purposes, such as research; see, Article 2, Convention on Psychotropic Substances of 1971, United Nations Treaty Series , vol. 1019, page 175.

³⁷ Article 3, UNTOC Firearms Protocol.

numerous IPRs such as the *Berne Convention for the Protection of Literary and Artistic Works (1886)* (Berne Convention);³⁸ the *Convention of Paris for the protection of industrial property of March 20 1883* (Paris Convention);³⁹ the *Trademark Law Treaty (1994)*;⁴⁰ or the *UNESCO Universal Copyright Convention*⁴¹. The issue of enforcement of all those conventionally-recognized rights was then covered by a single agreement called the *Agreement on Trade-Related Aspects of Intellectual Property Rights*.⁴² However, the concept of illicit trade under this framework is merely limited to trade conducted in violation of the defined IP Rights, hence, far from exhaustive.

Illicit trade practices, of course, not only cover trade in goods but also trade in services. Although the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (UNTOC Human Trafficking Protocol) condemns the recruitment or transfer of a “trafficked person”, it is nonetheless hard to identify, in practice, illicit trade in services.⁴³ Trafficked persons may, at first sight, be assimilated to illegal migrants, as they both entered illegally into a State’s territory. However, illegal services offered by trafficked persons are not only differentiable from services offered by illegal migrants, but also a considerable problem. The International Labor

³⁸ Berne Convention for the Protection of Literary and Artistic Works 1886 and amendment thereto, United Nation Treaty Series vol. 828, page 22.

³⁹ Convention of Paris for the protection of industrial property of March 20 1883, and revision thereto, United Nation Treaty Series vol. 828, page 109.

⁴⁰ Trademark Law Treaty 1994, 2037 UNTS 35.

⁴¹ Universal Copyright Convention, with Appendix Declaration relating to Articles XVII and Resolution concerning Article XI 1952, UNESCO, Geneva, 6 September 1952.

⁴² Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Texts: The Results of The Uruguay Round of Multilateral Trade Negotiations 320 (1999), 1869 UNTS.

⁴³ Article 3, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (UNTOC Human Trafficking Protocol).

Organization estimated that there are 20.9 million people engaged in forced labor in which 4.5 million of those are sexually exploited.⁴⁴

Another vague definition is provided by the OECD Task Force – Countering Illicit Trade. In this document, it is argued that illicit trade could be defined as *“an exchange in the control / possession of a good or service that a legislature deems illegal, because the object of exchange is dangerous or morally repugnant”*.⁴⁵ The OECD’s definition, nonetheless, is perhaps too vague in the sense that every good that is illegal for a “legislature” is encompassed therein. Obviously, this definition is, at the same time, narrow because it only covers “illicit products”, but not licit products for illicit or otherwise non-licit purposes.

In order to facilitate the comprehension of the available treaties to fight against illicit goods and illicit services, the following Chart presents an illustrative summary thereof:

Goods	International Instruments
Weapons and Arms	Trade in Arms Treaty; Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime
Environmentally Sensitive Goods	Convention on International Trade in Endangered Species of Wild Fauna and Flora
Narcotics and Psychotropic	Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol; Convention on Psychotropic Substances of 1971; United Nations

⁴⁴ International Labour Organization 2012, ILO Global Estimate of Force Labour, Geneva, page 13.

⁴⁵ OECD, 2016, Illicit Trade: Converging Criminal Network, OECD Reviews of Risk Management Policies, Paris, page 19.

	Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988
Counterfeit products	Trade Related Aspect of Intellectual Properties Agreement; Paris Convention for the Protection of Industrial Property; Berne Convention for the Protection of Literary and Artistic Works
Excisable goods	WHO Framework Convention on Tobacco Control
Human Trafficking, Forced Labor	Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children; supplementing the United Nations Convention against Transnational Organized Crime

Up to this point this Section has presented the treaty-based mechanisms that provide for ways to address and fight against the trade of illicit goods and services. However, non-treaty-based mechanisms offer a yet broader scope. Within the WCO framework, for instance, some of the illicit goods covered are Counterfeit Products,⁴⁶ Cultural Objects,⁴⁷ Endangered Species,⁴⁸ and Psychotropic Drugs.⁴⁹

On measures relating to illicit trade of endangered species, for example, the WCO initially called for cooperation with and among Member States, as well

⁴⁶ Fourth Global Congress on Combating Counterfeiting and Piracy (Dubai Declaration), February 2008.

⁴⁷ WCO Resolution of the Customs Co-Operation Council on the Role of Customs in Preventing Illicit Trafficking of Cultural Objects, July 2016.

⁴⁸ WCO Resolution of the Customs Co-operation Council concerning the prevention of illicit traffic in endangered species of wild fauna and flora, June 1991; Declaration of the Customs Co-operation Council on the illegal wildlife trade, June 2014.

⁴⁹ Declaration of the Customs Co-operation Council on the illicit traffic in drugs (Brussels Declaration), June 2003.

as with the CITES Secretariat.⁵⁰ Subsequently the WCO members established a Committee to implement action plans designed or adopted by the international organization.⁵¹

Regarding cultural objects (which are also the core subject of the *UNESCO Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property*, 1970), a resolution of the WCO has endorsed cooperation between diverse stakeholders (States, academia, NGOs, and private sector) for the purposes of exchange of information.⁵²

On the issue of piracy (counterfeit products), the WCO has worked alongside with WIPO, INTERPOL – and even the privately-composed ICC – to make “appropriate recommendations”. The *Dubai Declaration on the Fourth Global Congress on Combating Counterfeiting and Piracy, 2008*, by way of example, encourages the adoption of legislation (and its enforcement), as well as capacity building and awareness raising initiatives.⁵³

As to the illicit trade of psychotropic drugs, the WCO has emphasized the need for more international scrutiny, especially, as they are often closely intertwined to trade activities related to international terrorism.⁵⁴ The WCO has also reiterated the importance of fostering more cooperation with other international organizations.

Aside from the non-treaty-based mechanisms mentioned above, it is also worth noting that the WCO publishes an annual report on illicit trade.⁵⁵

⁵⁰ WCO Resolution of the Customs Co-operation Council concerning the prevention of illicit traffic in endangered species of wild fauna and flora, June 1991.

⁵¹ Declaration of the Customs Co-operation Council on the illegal wildlife trade, June 2014, ¶4

⁵² WCO Resolution of the Customs Co-Operation Council on the Role of Customs in Preventing Illicit Trafficking of Cultural Objects, July 2016.

⁵³ Dubai Declaration on the Fourth Global Congress on Combating Counterfeiting and Piracy, 2008.

⁵⁴ Declaration of The Customs Co-Operation Council On The Illicit Traffic In Drugs (Brussels Declaration).

⁵⁵ See, WCO, 2015, *Illicit Trade Report 2015*, Brussels.

1.2.2. Trade of Licit Goods for Illicit (or otherwise Non-Licit) Purposes: A definitional approach

Unlike the international instruments referred to above (which directly prohibit or condemn specific goods), the international instruments referred to in this Section are to be read from a purpose-oriented approach, thus, covering a broader scope of goods.

The *United Nations Convention against Transnational Organized Crime* (UNTOC Convention)⁵⁶ although not addressing directly illicit trade, criminalized the conduct of money laundering, as a component of organized cross-border crime. Article 6 of the Convention, in particular, requires a State Party to criminalize the act of:

*“(a) (i) **The conversion** or transfer of property, knowing that such property is the proceeds of crime, **for the purpose of concealing or disguising the illicit origin of the property** or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;*

*(ii) **The concealment or disguise** of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that **such property is the proceeds of crime**; (emphasis added)”⁵⁷*

Because of the sophisticated mechanisms employed by fraudulent actors (such as transnational criminal organizations), benefits that are obtained through crime can often be converted and concealed with legitimate business transactions in the course of international trade.⁵⁸ This Convention is, thus,

⁵⁶ United Nations Convention against Transnational Organized Crime, adopted by General Assembly Resolution 55/25 of 15 November 2000, A/RES/55/25.

⁵⁷ Article 6 the UN Convention on Transnational Organized Crime.

⁵⁸ Through so-called “Hawala Transactions”, trade could be used to transfer wealth or profit from illicit activities across the border (i.e. through under-invoicing of goods schemes). See Financial Action Task Force, 2006, Trade Based Money Laundering, Paris, page 6.

closely intertwined with the fight against illicit trade and, particularly, against the trade of licit goods for the illicit purpose of money laundering.

This Convention has, however, limitations as to the scope of its application. It is only applicable to matters related to serious transnational offences by organized criminal groups.

Unlike the UNTOC Convention's approach to illicit trade, the *International Convention for the Suppression of the Financing of Terrorism* approach is more direct. Article 2 of the Convention condemns trade in any goods (irrespective to their legality), as soon as they are used for the financing of terrorism. This is reflected by the use of the following terms, which aim at the incorporation of an all-inclusive prohibition:

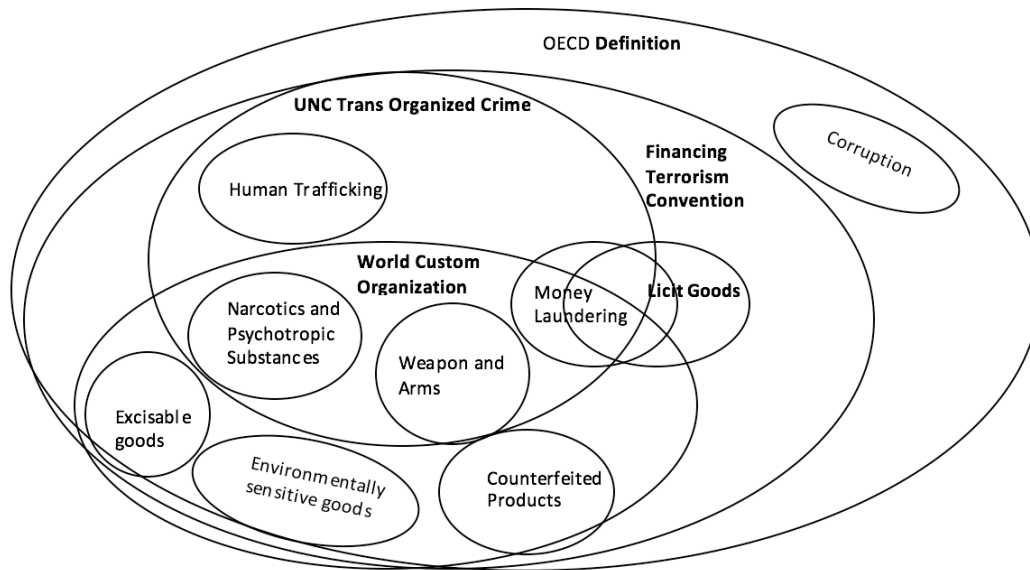
[...] *by any means, **directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they*** [will be used to conduct terrorism] (emphasis added)⁵⁹.

It further defines funds in a broad way that includes any kinds of assets, whether tangible or intangible, movable or immovable.⁶⁰

The preceding examples serve to elucidate how partial, fragmented and insufficient the regulations at the international level are with regard to illicit trade. The matter is far from being comprehensively or unambiguously addressed. Figure #1 below shows how fragmented the international instruments are. Naturally, the problem with insufficient regulation does not stop at the definition, but it is the definition – a truly comprehensive one – that best sets the path in the right direction.

⁵⁹ Article 5, International Convention for the Suppression of the Financing of Terrorism, United Nation Treaty Series Vol 2178, page 197. ('Financing of Terrorism Convention').

⁶⁰ Article 1, Financing of Terrorism Convention.



Weapon and Arms: UNTOC Firearms Protocol
 Excisable Goods: WHO Framework on Tobacco
 Narcotics: UN Convention on Narcotics
 Environmental Sensitives: CITES convention, Basel Convention on Transboundary Hazardous Waste
 Counterfeited Products: Berne and Paris Convention, TRIPS Agreement
 Human Trafficking: Human Trafficking Protocol to UN Trans Organized Crime
 Corruption: UN Convention against Corruption

Figure: Definitional overlap of the concept of Illicit Trade

This figure shows the following key points: first, the framework under the auspices of the WCO covers the issue of illicit trade on counterfeit products, arms and weapons, narcotics and psychotropic substance, excisable goods, environmentally sensitive goods and money laundering.⁶¹ Second, the UNTOC Convention only covers money laundering, weapons and arms, and drugs; with (possibly) the addition of illicit trade related to human trafficking.⁶² Third and on a broader level, the Financing of Terrorism Convention covers broadly all trade activities related to aiding terrorist activities. Lastly, the OECD's suggested definition shows the scope of illicit trade in a vague, but narrow manner: it would encompass any good that is condemned under the law ("illicit goods"), but not licit goods for non-licit purposes.

⁶¹ WCO, 2015, Illicit Trade Report 2015, Brussels, page 4.

⁶² see United Nations Convention Against Transnational Organized Crime and The Protocols Thereto, Adopted in GA Res 55/25 and GA Res 55/255.

Additional Problems: Enforcement and Dispute Settlement

Closely intertwined with the lack of comprehensive international definitions of illicit trade (which impacts the scope of the obligations of States) is the absence of effective enforcement and dispute settlement mechanisms. International law-making processes are often long and cannot keep-up with contemporary problems. The international society, therefore, increasingly uses non-treaty-based mechanisms to tackle some of the issues.

Most of the international instruments that deal with illicit trade of a criminal nature have enforcement mechanisms heavily dependent on the domestic system of each State. By way of example, Article 14 of WHO Protocol and Article 4 of the Financing of Terrorism Convention mutually oblige States Parties to criminalize illicit trade domestically whilst fostering cooperation at the international level (as reflected in Article 20 of the WHO Protocol and Article 18 of the Financing of Terrorism Convention).

Both the “identification”, as well as the “placing of measures” to tackle illicit trade at the border are, perhaps, the most effective ways to fight against this threat. As illicit actors across the globe become more organized and sophisticated in finding loopholes, cooperation among States is crucial. International fora that have resorted to non-treaty-based mechanisms are, among others, the WCO and the OECD.

The WCO, in particular, created an “Information & Intelligence Center” to collect and distribute open-source intelligence from each customs authority, encompassing more than the 98% of global trade.⁶³ Besides this international organization’s cooperation with INTERPOL (to deal with several aspects of illicit trade such as illegal logging, falsified medicines and illegal trade in

⁶³ OECD (2016), “*World Customs Organization (WCO)*”, in *International Regulatory Co-operation: The Role of International Organisations in Fostering Better Rules of Globalisation*, Paris.

cultural goods),⁶⁴ the WCO has also created a common space called the Customs Enforcement Network (CEN), where the customs authorities can report their enforcement measures (like seizures).⁶⁵ The INTERPOL also created the I-24/7 as a network for exchange of information between the police authorities around the world.

The OECD is another one of the leading international organizations attempting to fight illicit trade. With a comprehensive approach and aiming at the prevention of illicit financial flows, it has adopted several recommendations on current issues in illicit trade, such as money laundering, the financing of terrorism, and trade in illicit goods. To that end, it created a forum to enhance policy-oriented solutions on the subject matter: the OECD Task Force on Countering Illicit Trade.⁶⁶

One of the best examples that have been established by the OECD is the Information Sharing Platform to combat illicit trade of wildlife in Sub-Saharan Africa. The Task Force on Charting Illicit Trade created “a common space” where myriad stakeholders like government experts, non-governmental organizations, Industries and Academia, can participate in a near real-time crowd-based mobile reporting.⁶⁷ The initiative is not only managed to identify cooperative and uncooperative stakeholders or States, but also managed to gather geo-tagged data that has not been “historically available”.⁶⁸

However, despite the flexibility that non-treaty-based mechanisms pose to tackle contemporary problems in illicit trade, it is worth nothing that non-treaty

⁶⁴ WCO, WCO and INTERPOL reaffirm their commitment to work together against crime, 13 January 2016, <http://www.wcoomd.org/en/media/newsroom/2016/january/wco-and-interpol-reaffirm-their-commitment-to-work-together-against-crime.aspx>

⁶⁵ WCO, CEN Suite information, <http://www.wcoomd.org/en/topics/enforcement-and-compliance/instruments-and-tools/cen-suite.aspx>

⁶⁶ Charting Illicit Trade: Sharing Data and Information, available at: <http://www.oecd.org/gov/risk/chartingillicittradessharingdataandinformation.htm>

⁶⁷ OECD (2016), *Illicit Trade: Converging Criminal Networks*, Paris, page 72

⁶⁸ *Id.*

based mechanisms operate largely based on a voluntary commitment from States.

Because treaties create rights and obligations for States under international law, they are often equipped with dispute settlement provisions. Conventional law relating to illicit trade is no exception.

However, what is quite noteworthy – although perhaps not surprising – about these dispute settlements mechanisms on illicit trade is that none of them provides for a recourse within the “home” of international trade: the WTO. The ordinary dispute resolution mechanisms are rather negotiation, conciliation, good offices, or arbitration / submission of a case to the International Court of Justice.⁶⁹

⁶⁹ Article 24, Financing of Terrorism Convention; Article 35, UNTOC Convention; Article 19, Trade in Arms Treaty; Article 31, 1971 Psychotropic Substance Convention; Article 27, WHO FCTC.

Annex 3

Summary of the External (Non-WTO)

International Framework on Illicit trade

Treaty-based Mechanisms

- **Trade in Illicit Goods and Services:** WHO Protocol (Article 1.6: prohibits the production, distribution and sale of illicit products – unauthorized tobacco products –; lacks definition of illicit trade). CITES (Article I: prohibits any sale of the illicit products – merchandise incorporated in its Annex I –; lacks definition of illicit trade). UNTOC Firearms Protocol (Article 3: prohibits unauthorized transfer or trade of illicit products – firearms –; lacks definition of illicit trade). Convention on Psychotropic Substances, 1971 (Article 1: prohibits the manufacture and trafficking in illicit products – psychotropic substances –; lacks definition of illicit trade). UNTOC Human Trafficking Protocol (Article 3: prohibits recruitment, transport and receipt of illicit services – such as sexual services (prostitution) offered by trafficked persons –; lacks definition of illicit trade.) TRIPS Agreement (Article 41: obliges enforcement of intellectual property protection against illicit products – counterfeit goods –; lacks definition of illicit trade). All of the above-mentioned treaties require that the “condemned conducts” be penalized at the domestic level. Cooperation is encouraged at the international level, but “enforcement” is inexistent. Dispute-settlement mechanisms are not strong: negotiation, conciliation, arbitration or recourse to International Court of Justice (the latter being subject to additional requirements on recognition of jurisdiction).
- **Trade of Licit Goods for Illicit Purposes:** United Nations Convention against Transnational Organized Crime (Article 6: condemns any transfer

or concealment of property that is used or going to be used to aid a transnational organized crime). International Convention for the Suppression of the Financing of Terrorism (Article 2: prohibits any means that directly or indirectly collect funds to help the execution of a terrorist action). All of the above-mentioned treaties require that the “condemned conducts” be penalized at the domestic level. Cooperation is encouraged at the international level, but “enforcement” is inexistent. Dispute-settlement mechanisms are not strong: negotiation, conciliation, arbitration or recourse to International Court of Justice (the latter being subject to additional requirements on recognition of jurisdiction).

Non-Treaty-based Mechanisms

General Comments: Non-treaty-based mechanisms are founded on the principle of reciprocity: commitments are political and not legal, hence, solely resorting to a mutual will in cooperation. States are provided with guidelines; best practices, as well as capacity-building training, but there is no enforcement. The means for cooperation include: joint operations and information sharing.

Highlighted International Instruments:

- **INTERPOL’s *trafficking in Illicit Goods and Counterfeiting Program:*** initiative to dismantle transnational organized networks behind trafficking in illicit goods. Tools Employed: Capacity-building and training,²⁰⁹ raising awareness²¹⁰ and legal assistance²¹¹. Implementation: Coordinated operations. Some of them are: *Operation Meerkat* (with WCO), against illicit traffic of alcohol and tobacco; *Operation Pangea* (with WCO), targeting fake and substandard medicine.

²⁰⁹ Online training by the International IP Crime Investigators College.

²¹⁰ Publication of progress made.

²¹¹ In particular, legal assistance to adopt domestic regulations.

- WCO's initiatives on creating *Regional Intelligence Liaison Offices*: Initiatives that allow customs authorities to exchange information. It has evolved into the "Customs Enforcement Network", a program through which customs authorities can look for information on other Members' enforcement measures.
- *Declaration of the Customs Co-operation Council on the illicit traffic in drugs 2003*: The declaration emphasizes on the needs for more cooperation between authorities, as well as on further work with the UN Office on Drugs and Crime.
- *WCO Resolution of the Customs Co-Operation Council on the Role of Customs in Preventing Illicit Trafficking of Cultural Objects, July 2016*: This resolution was an affirmation of the need to address illicit trade in cultural objects, as has been condemned by the UN Security Council Resolutions 2199 and 2253, respectively.
- *Declaration of the Customs Co-operation Council on the illegal wildlife trade, June 2014*: This declaration pertains to illicit trade in wildlife. It invites for more participation from other international organizations to work with the WCO to reduce wildlife trafficking.
- *OECD Task Force – Countering Illicit Trade*: Initiative created by the Public Governance Committee of OECD to address the "Important Issue of Illicit trade". The Task-Force is a forum to raise awareness of illicit trade and for discussion between OECD members.