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CHAPTER

WTO rulebook and combating illicit trade in food and food fraud

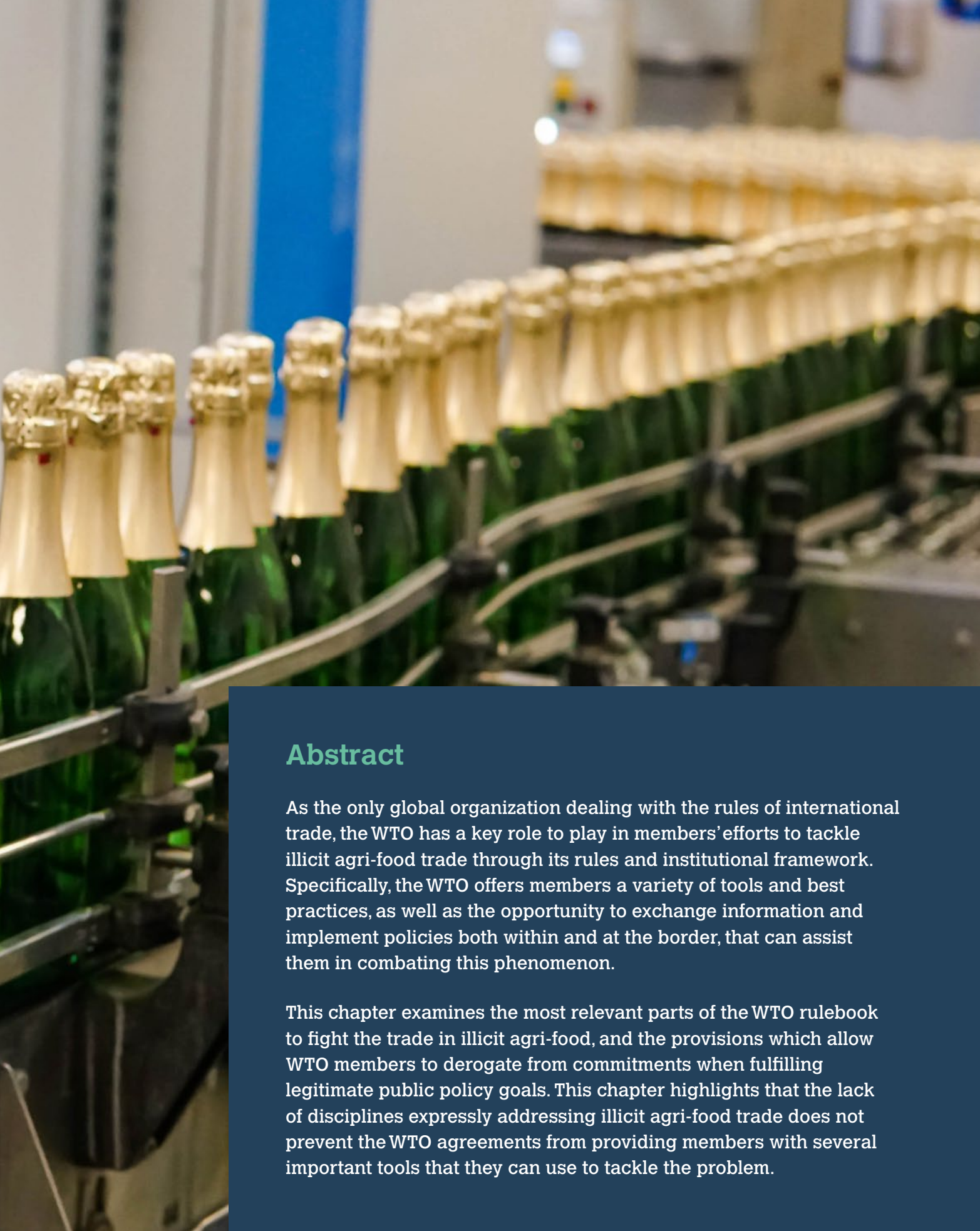
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Abstract

As the only global organization dealing with the rules of international trade, the WTO has a key role to play in members' efforts to tackle illicit agri-food trade through its rules and institutional framework. Specifically, the WTO offers members a variety of tools and best practices, as well as the opportunity to exchange information and implement policies both within and at the border, that can assist them in combating this phenomenon.

This chapter examines the most relevant parts of the WTO rulebook to fight the trade in illicit agri-food, and the provisions which allow WTO members to derogate from commitments when fulfilling legitimate public policy goals. This chapter highlights that the lack of disciplines expressly addressing illicit agri-food trade does not prevent the WTO agreements from providing members with several important tools that they can use to tackle the problem.

Introduction

Illicit agri-food trade is a serious concern for international food security and economic development, especially in developing countries and least-developed countries (LDCs). The WTO and its members are responsive to this.

Illicit trade in agri-food products is a multifaceted phenomenon that eludes a clear definition and attempting to confirm one is beyond the scope of this chapter.¹ Given its inherently clandestine nature, illicit trade is difficult to measure (WTO, 2022b: 7). In the same vein, the Panel in *Australia – Tobacco Plain Packaging* noted “the inherent difficulty and limits of measuring illicit trade, given the quasi-legal or illegal nature of the activities involved.”²

For the purpose of this chapter, illicit food trade includes food content that is not what it claims to be and other forms of food fraud, food that does not comply with health and other regulations (e.g. on quality), and food that is smuggled or otherwise produced or traded outside the legitimate market framework.

WTO rules do not define what distinguishes licit and illicit trade,³ and whether and how licit and illicit trade affect the “like” product and “like” services determinations in the context of the WTO non-discrimination obligations.⁴ Generally, trade liberalization through the lowering of tariffs reduces opportunities for arbitrariness and removes the incentive to engage in illicit trade in the form of smuggling.⁵ WTO disciplines on subsidies also help reduce price distortions, which often motivate the smuggling of agricultural products.⁶



By providing a toolbox for possible regulatory barriers to trade, customs valuation, trade facilitation and preshipment inspection, WTO rules further help members combat illicit trade.



By providing a toolbox for possible regulatory barriers to trade, customs valuation, trade facilitation and preshipment inspection, WTO rules further help members combat illicit trade in many of its forms. They also guide members in designing more effective processes at the border and in the use of international standards and certification procedures, particularly for sanitary and phytosanitary (SPS) measures – falling under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) – and other regulatory measures – falling under the WTO Agreement on Technical Barriers to Trade (TBT Agreement). The latter would include measures such as health and nutrition labelling, measures to prevent consumer deception and provide consumers with information, and measures to protect the environment (i.e. to regulate and promote organic products or to address animal welfare considerations). If applied consistently and in a complementary, mutually reinforcing fashion, these rules can be crucial to the design of national policies that actively contribute to weeding out illicit agri-food trade.

If WTO members wish to go beyond this toolbox and pursue even more ambitious targets to reduce illicit agri-food trade, they are provided with ample policy space and flexibilities – but they must avoid unjustified discrimination. Finally, the provisions on the enforcement of intellectual property rights (IPRs), in particular trademarks and geographical indications, are designed to prevent IPR-infringing forms of illicit trade, including illicitly traded food.

Given the limited scope of this chapter, the WTO rules that are discussed below are not meant to be exhaustive, but rather serve as examples of how the rulebook, as well as the policy space that they provide, can help members address the illicit trade in food.

WTO agreements in the fight against illicit agri-food trade

Agreement on Agriculture

The only WTO agreement that explicitly refers to illicit crops is the WTO Agreement on Agriculture, which – among other things – governs the use of agricultural subsidies by members. Article 6.2 provides developing country members with flexibility when transitioning away from the cultivation of illicit narcotic crops by exempting subsidies that encourage diversification from domestic support reduction commitments. Providing small farmers with alternative means of making a living is crucial in order to deter them from growing narcotics. Agricultural subsidies are thus a central pillar of several members' anti-drug policies.⁷ The Agreement on Agriculture recognizes this and provides the necessary policy space for it.

The smuggling of agriculture products is driven by a disparity between the price of a good at its origin and its destination, which can include price differentials deriving from government subsidies. The ongoing WTO agriculture negotiations, which aim to simplify tariff structures, to reduce excessively high tariffs and trade-distorting subsidies and to address import and export restrictions, could reduce the incentives for smuggling and illegal trade.

Agreement on Trade Facilitation

Indirectly related to illicit trade are the WTO agreements that regulate customs practices. They provide members with best practices that make customs enforcement more effective in the fight against illicit agri-food trade, as well as reduce the incentives for illicit contravention by lowering compliance costs.

The most detailed set of guidelines to harmonize and simplify customs procedures is set out in the WTO Agreement on Trade Facilitation (TFA). Its rules can serve as best-practice blueprints for members in designing their policies as well as reduce friction between different national systems. Section I of the TFA requires the

publishing of customs-related information (Article 1), as well as making some of that information available through the Internet (Article 2) and mandating the designation of national enquiry points (Article 3).

In doing so, the TFA reduces compliance costs, creates transparency and limits the uncertainty that allows illicit and corrupt practices to thrive (WTO, 2022a: 14). Turning to customs administration practices, Articles 3 and 7 contain provisions on issuing advance rulings, developing risk management systems and conducting release and clearance procedures. They provide members with a transparent, effective and risk-appropriate method for these processes, allowing them to use their resources efficiently and focus their attention on the prevention of illicit trade practices (WTO, 2022a: 16).

Furthermore, the TFA explicitly allows members to take measures for enhancing controls and inspections at the border with respect to foods, beverages or feedstuffs or for the protection of human, animal or plant life or health within their territory (Article 5). While the TFA phases out preshipment inspections for tariff purposes, it expressly recognizes them for SPS purposes (Article 10.5). To better share information, the TFA mandates increased internal cooperation between national agencies in Article 8.1 (agency cooperation and coordination) and Article 23.2 (setting up a National Committee on Trade Facilitation (NCTF)), as well as international coordination in Articles 8.2 and 12, thereby reducing the loopholes that those involved in illicit trade may exploit (WTO, 2022a: 17). NCTFs in particular serve as crucial fora to exchange information and share best practices, with the involvement of a broad spectrum of stakeholders (WTO, 2022b: 19).

Complementing NCTFs and bilateral exchanges, the TFA created the Trade Facilitation Committee, which is tasked, among other things, with capacity building (Article 21) and facilitating the sharing of information and best practices (Article 23.1.4). It provides an invaluable forum for continually improving the measures taken against illicit trade, in particular by developing country members and LDCs. In summary, the TFA contains several instruments to help members allocate their resources more efficiently in the fight against illicit agri-food trade, strengthen cooperation between them and decrease friction caused by divergent regulatory approaches.

Customs Valuation Agreement

Another relevant agreement that harmonizes certain practices at the border is the Customs Valuation Agreement (CVA)⁸, which provides standards for determining the value of imported goods and designing valuation procedures. It also includes guidelines on making customs valuation procedures uniform, non-discriminatory and expeditious, lowering compliance costs and therefore incentives for smuggling and other methods of circumvention (WTO, 2022a: 18).

The procedures of the CVA are a key instrument for determining the actual value of a product that has had its price artificially lowered through fraudulent means, either through outright mis-invoicing or illicit cost-cutting along the production chain. The CVA has built-in mechanisms for transparency and predictability, which WTO members can leverage to identify transactions that are most susceptible to mis-invoicing and build this into their risk profiles for illicit agri-food trade. The CVA is a fundamental tool in the fight against food fraud.

Agreement on Preshipment Inspection

An additional aspect of customs administration is regulated by the Agreement on Preshipment Inspection (PSI Agreement), which sets out standards for the inspection of goods in their country of origin. This is performed by private companies, making it attractive to developing country members with limited resources to spend on national customs enforcement. However, if inspections are implemented wrongly, it can cause delays and additional costs.⁹

The PSI Agreement addresses these issues. In prescribing minimum requirements and standard practices for preshipment inspections, the PSI Agreement lowers compliance costs and ensures that such inspections are carried out in a swift and efficient manner. If utilized effectively, it provides members with an important tool to fight illicit agri-food trade that might otherwise be carried out under the guise of unregulated PSI programmes.

Agreement on the Application of Sanitary and Phytosanitary Measures

In addition to the general administration of customs, WTO rules also recognize a member's right to regulate the safety of imported products – an issue vital to food trade. As one of the primary agreements dealing with this issue, the SPS Agreement contains specific disciplines that can be used to tackle certain forms of illicit agri-food trade.

One of the forms of food fraud is adulteration, which carries the risk of endangering the health of consumers. To prevent adulterated foods from illicitly entering the market, SPS measures may be used. The framework of the SPS Agreement balances a member's right to protect human, animal and plant life and health with the desire to avoid unnecessary barriers to trade, through the promotion of science-based measures in Article 2.2 and the reflection of the precautionary principle in Article 5.7.¹⁰

There is a thrust for harmonization (as a long-term goal) under Article 3 of the SPS Agreement which deems measures taken in conformity with international standards to be compliant with SPS rules. The SPS Agreement explicitly recognizes the food safety standards developed by the Codex Alimentarius Commission (established by the Food and Agriculture Organization of the United Nations and the World Health Organization), the animal health standards of the World Organisation for Animal Health and the plant health standards of the International Plant Protection Convention (IPPC). Members are thus asked to use international standards in their policy design, although they are free to choose higher levels of protection based on risk assessment.



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In this respect, the *Guidance on the Prevention and Control of Food Fraud*, currently being prepared by a working group of the Codex Alimentarius,¹¹ could be useful for WTO members. In the context of illicit food trade, the Organisation for Economic Co-operation and Development has recommended that countries create risk profiles for different products and implement policies at the border based on them.¹² This would allow low-risk imports to be cleared faster, freeing up capacity to focus on higher-risk products.

Article 2.3 of the SPS Agreement prevents members from applying SPS measures that discriminate between members where identical or similar conditions prevail, thus encouraging measures based on the risk profile of a member. Annex C of the SPS Agreement recognizes that members can prescribe control, inspection and approval procedures for imported products provided that these are reasonable and necessary. Such control measures, which also include sampling, testing and certification requirements, can help to identify unsafe or adulterated food before it reaches the market.

The current movement towards electronic SPS certificates, including for example the IPPC ePhyto solution for electronic phytosanitary certificates, helps combat falsified certificates, contributing to better enforcement of SPS requirements. A recent SPS Committee working group on approval procedures discussed how to minimize the trade-restricting effects of such measures while ensuring their efficacy, highlighting the importance of non-discriminatory, science-based and transparent approaches. The SPS Agreement thus offers both valuable tools and considerable flexibilities to members.

Agreement on Technical Barriers to Trade

Complementing the SPS Agreement, the TBT Agreement¹³ covers standards and technical regulations laying down specifications with respect to any type of product (both “industrial and agricultural”, Article 1.3) that members adopt for addressing a wide variety of policy objectives (such as the prevention of deceptive practices, and the protection of human health or safety, animal or plant life or health, or the environment).



Illicit traders exploit weaknesses in national regulatory systems to sell products that can be substandard or unsafe.

Importantly, it also covers conformity assessment procedures (CAPs) (Article 5); that is, the procedures put in place for certifying compliance with specifications. It is through these CAPs that members can employ methods such as sampling or testing (at the border or after the passage of goods) to verify the quality and other attributes of agri-food products.

As noted in a recent WTO study: “Illicit traders exploit weaknesses in national regulatory systems to sell ... products that can be substandard or unsafe”. It is therefore important that these CAPs are well designed and implemented.¹⁴

Also covered by the TBT Agreement are measures on food labelling, or marking requirements, which play a vital role in informing consumers about the ingredients and nutrients of a product, as well as its origins or other quality attributes. Proper labelling of agri-food products helps prevent deceptive and fraudulent practices.¹⁵ However, labels can be easy to tamper with. In the absence of a binding and uniform worldwide labelling system, it can be difficult for regulatory authorities at the border to determine the authenticity of a label. Here, the role of Article 2.4 of the TBT Agreement comes into place. This provision promotes regulatory harmonization across members by requiring¹⁶ the use of relevant international standards, unless such standards are ineffective and/or inappropriate for that member.

Unlike the SPS Agreement, the TBT Agreement does not list specific international standardizing bodies, nor has the TBT Committee adopted such a list. Existing international standards that may be relevant for food regulation in areas covered by the TBT Agreement include the Codex Alimentarius guidelines on nutrition labelling, which reduce divergences in domestic labelling requirements.¹⁷

Aligning standards and cooperating in their elaboration can also help members enforce laws and regulations across borders and work together to combat transnational illicit agri-food trade (WTO, 2022b: 20).

Marking requirements are also of interest to the discussion on food fraud, and these may include indications which certify that a particular standard has been complied with.¹⁸ Certification marks are expressly mentioned in Article 5.1.1 of the TBT Agreement.¹⁹

In addition, the WTO also provides tools to protect certification marks under its rules on intellectual property (WTO, 2022b: 15). These serve to prevent the unauthorized use of such marks and thus contribute to consumer trust and confidence. This is a good example of how the different WTO agreements complement and mutually reinforce each other.²⁰

Furthermore, the TBT Committee can be used to discuss CAP practices and attempt to achieve a degree of regulatory coherence for labelling and other relevant types of regulatory interventions in the area of food. Such recognition reduces the risk of adulteration and other instances of food fraud and makes it easier for manufacturers to conform with divergent labelling requirements.

Members using TBT and SPS measures should be cautious so as to not make them overly burdensome. Cumbersome CAPs are likely to make circumvention a more attractive option. The TBT and SPS Committees also serve as fora in which members can raise, among other things, specific trade concerns (STCs) relating to transparency or undue delays in approval procedures.²¹ The information made available through members' notifications makes compliance and cooperation easier.²²



The TRIPS Agreement sets minimum standards for the availability, protection and enforcement of intellectual property rights.

Agreement on Trade-Related Aspects of Intellectual Property Rights

In the realm of IPRs, the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) makes a toolbox available to members against instances of illicit agri-food trade that constitute IPR violations (Roberts *et al.*, 2022: 7, 26). It sets minimum standards for the availability, protection and enforcement of IPRs, balancing the interests of right holders and users of intellectual property. LDCs enjoy a transition period until 2033 to apply the substantive provisions of the TRIPS Agreement.

Examples of possible food-related IPR violations include:

- a supplier applying registered trademarks to products which are not manufactured by the owner and without consent;
- utilizing a counterfeit mark of certification;
- claiming that a particular product originates from a region when it in fact does not;²³
- illicit trade in IPR infringing seeds or violations of a plant breeder's rights (see Box 1).

This is significant, as the TRIPS Agreement obliges members to make available effective and balanced enforcement mechanisms to counter trade in products that violate IPRs. The enforcement procedures mandated by the TRIPS Agreement are designed to allow right holders to have direct involvement with enforcement agencies in identifying and addressing unauthorized use of their trademark for trade in agri-food products.

Most of the provisions contained in the TRIPS Agreement aim to enable the right holder to prevent IPR violations at their source. They require members to put in place enforcement procedures that protect IPRs in the country of origin (for instance, the member in which the production of counterfeits takes place). In particular, Article 41.1 requires that members put in place effective and balanced enforcement procedures that provide for administrative and judicial remedies to the right holder while protecting the rights of the users of intellectual property.

BOX 1

Plant variety protection and the TRIPS Agreement

With regard to plant variety protection, Article 27 of the TRIPS Agreement defines which inventions members are obliged to make eligible for patenting, and what they can exclude from patenting. While Article 27.3(b) permits the exclusion of certain products and processes from patenting (i.e. plants, animals and “essentially” biological processes), it specifically provides that plant varieties have to be eligible for protection either through patent protection, an “effective *sui generis* system” (i.e. created specifically for the purpose), or a combination of the two.

A number of members have implemented such a *sui generis* system in the form of plant breeder's rights in

national jurisdictions and many WTO members have joined recent versions of the International Convention for the Protection of New Varieties of Plants. However, the TRIPS Agreement does not reference any particular convention or minimum standard in this regard, and thus leaves policy space for members to implement a system that balances the interests of right holders and those of farmers. This is of particular relevance to developing country members that wish to take into account farming practices (“farmers’ rights” – reuse of seeds and across the fence exchanges of seeds) that they consider essential for maintaining the livelihoods of their smallholder farmers.



With regard to cross-border trade, section 4 of the enforcement chapter of the TRIPS Agreement requires members to provide border measures targeting the import of trademark counterfeit and copyright pirated products (see Box 2). This is optional for products infringing other IPRs, as well as for export and goods in transit.

Furthermore, members are obligated to provide for criminal sanctions in cases of wilful IPR violations on a commercial scale under Article 61, which can serve as powerful deterrents. Another point to note is the role of the TRIPS Council in collecting notifications, promoting transparency and encouraging discussions, all of which can strengthen cooperation in the fight against illicit agri-food trade.

In the spirit of cooperation, the TRIPS Agreement also encourages members (including their customs authorities) to work together on combating counterfeit trademark goods (Article 69), including for food products, and to provide technical and financial assistance to developing country and LDC members (Article 67). In sum, the TRIPS Agreement plays a crucial role in empowering public authorities to effectively combat illicit agri-food trade. Other WTO provisions leave policy space for more ambitious measures, as discussed below.

Ongoing discussions on the Agreement on Fisheries Subsidies

Finally, if the definition of illicit trade in agri-food were to extend to the illegal harvesting of natural resources, then the newly concluded WTO Agreement on Fisheries Subsidies²⁴ is also relevant.²⁵ Adopted by consensus at the WTO's 12th Ministerial Conference in June 2022, the Agreement sets new, binding, multilateral rules to curb harmful subsidies, which are a key factor in the widespread depletion of the world's fish stocks. For the Agreement to enter into force, two-thirds of WTO members must formally accept the Protocol of the Agreement on Fisheries Subsidies by depositing an "instrument of acceptance" with the WTO.

The Agreement prohibits support for illegal, unreported and unregulated fishing, subsidies for fishing overfished stocks, and subsidies for fishing on the unregulated

high seas. With over 3.3 billion people around the world obtaining at least 20 per cent of their daily animal protein intake from fish, the Agreement represents a milestone in the fight against illicit trade in this critical source of food and dietary protein. WTO members continue to negotiate on outstanding issues. In fact, negotiations continued at the WTO's 13th Ministerial Conference in Abu Dhabi, United Arab Emirates, in February 2024, on additional provisions that would further enhance the disciplines of the Agreement.

The policy space under GATT Article XX to combat illicit agri-food trade

The Appellate Body held in *Colombia – Textiles*²⁶ that the obligations of members under the General Agreement on Tariffs and Trade (GATT) apply irrespective of whether a member considers the trade in a certain good illicit or not. This means that there can be, in principle, no discrimination between "like" products, even if one of them stems from illicit trade. Nevertheless, members can combat illicit trade in goods by making use of the policy space afforded to them by GATT Article XX, which lists general exemptions.

In the context of illicit agri-food trade, paragraphs (a), (b) and (d) of GATT Article XX are relevant. These exceptions allow members to derogate from GATT obligations when necessary to protect public morals and order (paragraph (a)), to protect human, animal or plant life or health (paragraph (b)) and to secure compliance with laws and regulations designed, *inter alia*, to prevent fraudulent and deceptive practices (paragraph (d)).

Since illicit agri-food trade includes the intentional adulteration or dilution of food and the use of illicit substances (WTO, 2022a: 4), measures designed to tackle these practices would comfortably fall within these policy objectives. The Appellate Body has had the opportunity to discuss GATT Article XX(d) in the context of food in the *Korea – Various Measures on Beef*²⁷ dispute. Here, the Republic of Korea argued that domestic retailers and suppliers were engaging in fraudulent practices by which beef was being marked as

BOX 2

Counterfeit trademark goods and pirated copyright goods as defined in the TRIPS Agreement

Counterfeit trademark goods are “any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation”.

Pirated copyright goods are “any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation”.

Source: Footnote 14 to Article 51 of the TRIPS Agreement.



domestically produced (for a much higher cost and price) when it was in fact imported. The Government of the Republic of Korea addressed these practices with a policy that allowed the sale of imported beef only in specialized stores and not in regular supermarkets (dual retail system). The Appellate Body found that this measure was more trade restrictive than necessary to achieve the objective of preventing deceptive and fraudulent sales. Alternative, less trade-restrictive measures such as labelling, prosecution accompanied with fines and record keeping, among other things were available to the Republic of Korea. Accordingly, the Appellate Body found the dual retail system in the Republic of Korea unnecessarily trade distorting and not justified under GATT Article XX.

The *Korea – Various Measures on Beef* Appellate Body report suggests that the policy space of members is not unlimited because of the need to adopt less trade-restrictive alternatives if they are reasonably available (financially and technically). Nonetheless, the Appellate Body has held that members are allowed to choose high levels of protection so long as they deal coherently with any risk to human, animal and plant health.²⁸

Moreover, it is the complaining party that has to show the existence and availability of a less trade-restrictive measure and must ensure that such an alternative measure is equally feasible and effective as the responding member's existing measure in order to reach that member's chosen level of protection.²⁹ Governments can thus take steps to frame the gravity of the problems arising from illicit agri-food trade and use this as a basis for more controls at the border. Finally, measures taken under GATT Article XX cannot be arbitrary and discriminatory or operate as disguised restrictions on trade under the first *chapeau* paragraph of Article XX.



Members have significant policy space under GATT to take public measures against illicit agri-food trade, so long as they act in good faith and apply their measure coherently and even handedly.

In sum, members have significant policy space under GATT to take public measures against illicit agri-food trade, so long as they act in good faith and apply their measure coherently and even handedly. As the next section shows, they can also request the assistance of private actors.

The role of the private sector in combating illicit agri-food trade

Public authorities may want to tap into the expertise of private actors in the fight against illicit agri-food trade. One option to do this are the border measures foreseen by the TRIPS Agreement. They include provisional measures to ensure that infringing goods are not released into commercial circulation, subject to the procedural safeguards spelled out in the TRIPS Agreement. Notably, private right holders may initiate actions with competent border authorities to prevent pirated and counterfeit goods from entering the commercial market of the importing member.

Ex officio action by competent authorities is optional under the TRIPS Agreement, as is taking action against the import of small consignments. Collaboration of customs authorities and right holders, as well as encouraging private actors to be vigilant and make use of border enforcement mechanisms under Article 51 of the TRIPS Agreement can help weed out instances of illicit agri-food trade that also constitute an IPR infringement (WTO, 2022a: 12, 13). At the same time, the TRIPS Agreement provides safeguards to ensure that the legal and legitimate use of IPRs is not stifled (WTO, 2022a: 26).

The private sector can also play a role in making border controls more effective in other areas, by providing customs authorities with valuable expertise to correctly identify and classify a product and thereby apply the appropriate tariffs and restrictions. This leveraging of private capacities is a part of the sovereign right of members to pursue legitimate administrative objectives through the design of their customs procedures, as emphasized by the Panel in *Thailand – Cigarettes (Philippines)*.³⁰

However, given the inherent conflict of interests involved when private actors exercise control over their competitors, steps must be taken to ensure they act uniformly, impartially and reasonably pursuant to GATT Article X:3(a). Thus, they should only be given access to information strictly necessary to discharge their duties,³¹ and safeguards have to be in place to ensure this information is not mishandled. Keeping this in mind when designing policy allows members to benefit from private expertise while ensuring that private actors do not abuse their authority.

Conclusion

The WTO agreements equip members with a toolbox to combat illicit trade in food and food fraud, a pervasive challenge that undermines global food security, economic development and consumer trust by jeopardizing the safety, quality and integrity of the global food supply chain.

WTO disciplines promote transparency and reduce opportunities for illicit activity. Trade liberalization through tariff reduction lessens incentives for smuggling, and disciplines on subsidies help mitigate price distortions that can motivate illicit trade. Furthermore, WTO agreements

empower members to set appropriate protection levels, ensuring food safety and quality standards without resorting to disguised protectionism or unjustified discrimination. It is crucial to note, particularly within the SPS and TBT frameworks, that the freedom to choose protection levels is a fundamental right, not an exception. Agreements on regulatory barriers to trade, dealing with customs valuation, trade facilitation and preshipment inspection provide WTO members with the capacity to strengthen border controls. These measures can encompass health and nutrition labelling, consumer protection measures and environmental regulations. Consistent and complementary application of these rules is crucial for designing national policies that effectively combat illicit agri-food trade.

The WTO framework also allows flexibility for members to pursue more ambitious anti-counterfeiting measures, provided they avoid unjustified discrimination. The provisions on IPRs help prevent illicit trade involving trademarks and geographical indications in the food sector.

The WTO rulebook, along with the policy space it provides, offers a valuable framework for promoting a safer, fairer and more transparent global food system.

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Endnotes

1. In any event, what is more important than finding an abstract definition is that, when addressing an instance of illicit agri-food trade, the nature of the infringement, be it adulteration, smuggling, intellectual property right (IPR) violations or something else, is precisely pinpointed, so that the fitting policy instrument can be chosen to combat it (see also WTO, 2022a: 4).
2. See *Australia – Tobacco Plain Packaging (Indonesia)*, Panel Report DS467, para. 7.1010.
3. Although note the references in the First Recital of the Preamble and Article 41.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to “legitimate trade”, emphasizing that the TRIPS Agreement’s enforcement measures, which are designed to combat intellectual property right (IPR)-infringing illicit trade, should not become barriers to legitimate trade.
4. See https://www.wto.org/english/news_e/news22_e/ddgag_03mar22_e.htm.
5. The *Oxford English Dictionary* defines smuggling as the “*Clandestine importation of goods, etc.*” The *Dictionary of Trade Policy Terms* (WTO, 2020) defines it more specifically as “*taking goods illegally across borders. If the goods could be imported legally into the country after the payment of applicable customs duties, the main motivation may simply be the avoidance of these duties. If the import of the good is illegal in the first place, other motivations of course come into play.*” Finally, in *Colombia – Ports of Entry*, the Panel recognized that “*WTO Members have a legitimate right to apply measures aimed at combating under-invoicing, smuggling and money laundering*” (Panel Report DS366, para. 7.155).
6. See <https://www.tracit.org/agri-food-industry.html>.
7. Currently, four members, Colombia, Peru, Türkiye and Viet Nam, have notified the use of diversification subsidies (see <https://agims.wto.org>).
8. More commonly known as the Customs Valuation Agreement, its full title is the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994.
9. For background information, see Rome (1998).
10. See *EC – Hormones (US)*, Appellate Body Report DS26, para. 124.
11. See <https://www.fao.org/fao-who-codexalimentarius/committees/ewg/detail/en/c/1481114>. For a collection of other standards potentially relevant in this area, see *Collection of Available Tools and Resources in Relation to SPS Approval Procedures*, WTO document G/SPS/67, 27 March 2023.
12. *New Digital Technologies to Tackle Trade in Illegal Pesticides*, OECD Document COM/TAD/ENV/JWPTE(2020)8/FINAL, 20 May 2020, para. 86.
13. For a more detailed overview on the TBT Agreement, see WTO (2021).
14. See WTO (2022a: 12, 13, 17, 21). Box 3 of WTO (2022a) observes that: “The weaker a CAP, the higher the risk that more non-compliant products will enter the market. This, in turn, can open pathways for illicit trade in medical products that do not meet quality, health or safety standards. Conversely, well-designed and well-enforced CAPs are a crucial element of a country’s NQI [National Quality Infrastructure] and are instrumental in efforts to stem the flow of illicit trade in medical products.”
15. OECD document COM/TAD/ENV/JWPTE(2020)8/FINAL, para. 77.
16. However, a member is not required to use such international standards if they are “ineffective” of “inappropriate” for fulfilling the legitimate objective(s) pursued by its measure.
17. *Guidance on Nutrition Labelling*, Codex Alimentarius document CXG 2-1985, last revised in 2021. Another relevant standard in the context of traceability, published by the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC), is *Automatic Identification and Data Capture Techniques: Supply Chain Applications of RFID – Product Tagging, Product Packaging, Transport Units, Returnable Transport Units and Returnable Packaging Items*, ISO/IEC 17360:2023.
18. Such marks serve, for example, to certify the origin of a product, the qualification of the producer or the classification of the product. They can either be issued by a public authority, like the Conformité Européene (CE) mark, or by a private actor, such as the Fairtrade label. In the latter case, they are typically registered trademarks.
19. Referred to as the “mark of the system”, Article 5.1.1 concerns discrimination in terms of giving a supplier of an imported product less favourable access to the procedures for getting these marks as compared to that given to suppliers – who are in a “comparable situation” – of like products (of domestic origin or from other countries).

20. On this point, see also further examples on improving border controls and regulatory procedures in WTO (2022a: 14).
21. With respect to SPS Committee, see for example *Summary of the Meeting of 12-13 July 2018: Note by the Secretariat*, WTO document G/SPS/R/92/Rev.1, 15 October 2018. Technical regulations and CAPs affecting agri-food products are also frequently discussed in new STCs raised in the TBT Committee. For instance, the product categories most frequently targeted in TBT STCs raised in 2022 included (Harmonized System (HS) codes in parentheses): beverages (HS 22); fish and crustaceans (HS 03); meat and edible meat offal (HS 02); and coffee and tea (HS 09). See *Twenty-eighth Annual Review of the Implementation and Operation of the TBT Agreement: Note by the Secretariat*, WTO document G/TBT/50, 6 March 2023, pp. 36 and 37.
22. An especially valuable tool is the ePing SPS and TBT Platform, jointly developed by the International Trade Centre, the United Nations and the WTO, available at <https://eping.wto.org>.
23. Specific IPRs can take different forms, such as geographical indications, patents and trademarks, among others.
24. See https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_e.htm.
25. See Chapter 1 and the definitions discussed at the WTO Trade Dialogues on Food in March 2022, available at https://www.wto.org/english/res_e/reser_e/tradedialogonfood_e.htm.
26. See *Colombia – Textiles*, Appellate Body Report DS461, paras 5.35 and 5.36.
27. See *Korea – Various Measures on Beef*, Appellate Body Report DS161, paras 172, 178-180.
28. See *EC – Asbestos*, Appellate Body Report DS135, paras 167 and 168; see also *Korea – Various Measures on Beef*, Appellate Body Report DS161, para. 178.
29. See *Brazil – Retreaded Tyres*, Appellate Body Report DS332, para. 156.
30. See *Thailand – Cigarettes (Philippines)*, Panel Report DS371, paras 7.923-7.925.
31. See *Argentina – Hides and Leather*, Panel Report DS155, para. 11.91; see also *China – Raw Materials*, Panel Report DS394, para. 795.
32. See *Argentina – Hides and Leather*, Panel Report DS155, para. 11.101.