

Revisiting the Regimes of Public International Law and the WTO Law on Countering Narcotic Drug Trafficking

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The recent fentanyl dispute between China and the US adds the academic value to the efforts to examine the respective legal regime of public international law and the WTO law on narcotics trafficking. On the one hand, public international law offers a comprehensive framework to address narcotics trafficking but as demonstrated by Chinese proofs, its function is undermined by weak enforcement. On the other hand, there exist some useful mechanisms in the WTO law to combat narcotics trafficking but their weaknesses can also be easily spotted. More importantly, the alarm of the global threat of illicit trade is ringing, which requires our raising awareness to it. Recently, the UNCTAD and the OECD have already taken the initiative to discuss the collective actions, by means of conferences or reports, to deal with illicit trade. In the long run, it will be indispensable to establish an operational governance framework on the international level to effectively curb illicit trade.

Keywords: Fentanyl, Narcotics Trafficking, Illicit Trade, Public International Law, WTO Law

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1. Introduction

Recently, the trade war between China and the US has been escalating since President Donald Trump announced to impose additional 15 percent tariffs on USD 300 billion worth of Chinese imports.¹ According to the claims of the US, *inter alia*, one reason for this round of fresh tariffs is that China has failed to do more to stem the illicit flow of fentanyl into the US.² Under such circumstances, countering narcotic drug trafficking has been put under the spotlight in the international community. Pursuant to the Schedule I of the Single Convention on Narcotic Drugs of 1961 (hereinafter 1961 Convention), all listed narcotic drugs are subject to all measures of control applicable to drugs under the 1961 Convention.³ Moreover, pursuant to Article 1, Provision (n) of the United Nations Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances of 1988 (hereinafter 1988 Convention), “Narcotics Drugs” means any of the substances, natural or synthetic, in the Schedule I and II of the 1961 Convention.⁴ Furthermore, pursuant to Article 3, Provision 1 of the 1988 Convention, each signatory State, including China, ought to adopt such measures as may be necessary to establish the illicit trafficking of narcotic drugs that are defined by Article 1, Provision (n) of the 1988 Convention as criminal offences under its domestic law.⁵ Obviously, public international law has been long concerned with narcotic drug trafficking. Besides, it is figured out that to some extent, the WTO law is also armed to tackle narcotic drug trafficking. Unfortunately, few research has thus far examined public international law and the WTO law, through the perspective of countering narcotic drug trafficking, to find out their own flaws. This research attempts to fill out this research gap.

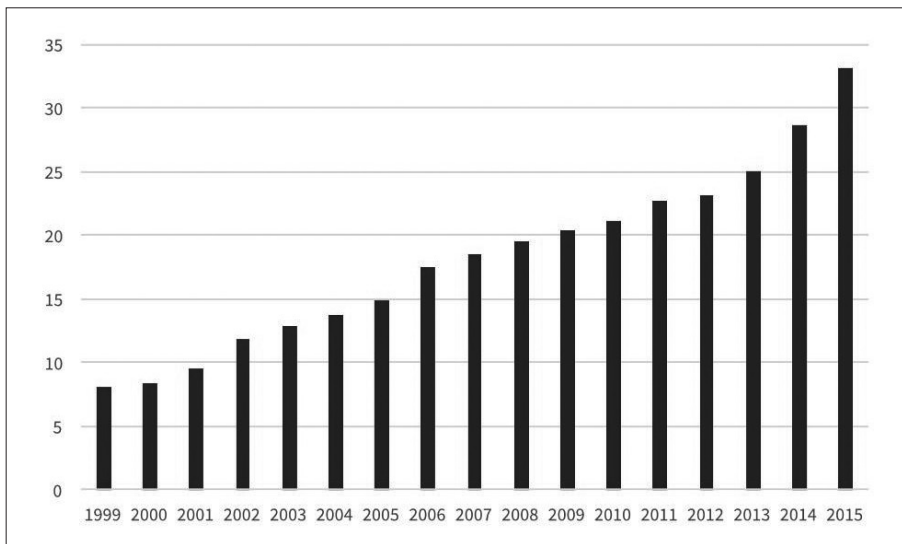
This article consists of six parts. Following an Introduction, Part two will briefly describe the opioid crisis in the US and further show that narcotic drug trafficking has become a global problem nowadays. Part three will examine the regime of public international law against narcotic drug trafficking. This effort tries to demonstrate that the regime of public international law heavily relies on the domestic laws of States. Part four will focus on the related mechanisms of the WTO that may facilitate the efforts to Member States to counter illicit trade and finds out their respective weaknesses. Part five will look further to the global threat of illicit trade and preliminarily discuss the distinct ways to raise awareness

towards illicit trade in public international law and the WTO law. The last part is concluding remarks.

2. The Ongoing Opioid Crisis in the US

In October, 2017, President Trump declared the opioid crisis a public health emergency in the US.⁶ His declaration was based on the fact that the number of the opioid-involved overdose deaths was escalating from 1999 to 2016 in the US. Figure 1 clearly shows this ascending trend from 1999 to 2015.⁷ According to other relevant statistics, the annual death number of opioid overdoses further increased to more than 42,000 in 2016.⁸

Figure 1: Opioid-involved Overdose Death, 1999-2015



Note: Thousands of Deaths

Source: CDS Wonder Database, Multiple Cause of Death Files

Besides the fatality costs, the non-fatality costs of the opioid crisis was shocking as well in the US. In 2015 alone, for example, the opioid crisis caused the fatality losses of USD 431.7 billion while at the same time the non-fatality costs were

USD 72.3 billion.⁹

More seriously, the opioid crisis is not just a serious problem for the US, but it has been a devastating epidemic in the globe. In terms of the statistics from the World Health Organization (“WHO”), roughly 450,000 people died as a result of drug use in 2015.¹⁰ Of those deaths, about 118,000 were directly associated with opioid use disorders.¹¹

The opioid epidemic in the US as well as in other parts of the world has been caused by multiple factors, such as the health-care system, regulatory regime, culture and socio-economic trends.¹² Since 2018, President Trump has applied an all-of-Government approach to tackle this deadly crisis.¹³ Structurally, the all-of-Government approach refers to the joint activities performed by diverse ministries, public administrations and public agencies in order to provide a common solution to the opioid crisis. This approach consists of two modules: reducing demand and cutting down on illicit domestic and international supply.¹⁴ In the aspect of eliminating illicit international inflow of opioid, such as fentanyl, President Trump has adopted the aforementioned tariff measure to press for China to efficiently curb its illicit fentanyl smuggling to the US. To a large degree, the ongoing opioid crisis in the US plus the above statistics of the WHO demonstrates that narcotic drug trafficking has already become a global threat.

3. The Regime of Public International Law against Narcotic Drug Trafficking: Evidence from China

A. Evolution of the Regime of Public International Law against Narcotic Drug Trafficking

In public international law, the anti-narcotics-regime has shifted from “a liberalized model to an administrative model and further to an expansively prohibitionist model” over the past two centuries.¹⁵ In the 19th century, the UK was the leading supplier of narcotics through international trade.¹⁶ Through selling narcotics, such as opium, to other countries, the British Empire harvested a tremendous number of revenues.¹⁷ At that time, the opium market was so lucrative to the UK that it even launched a war against China in 1840 when the

Qing government prohibited the imports of opium and cracked down on British opium smugglers.¹⁸ The UK undoubtedly favored the minimization of import restrictions on narcotics then to maintain its own remarkable monopoly profits from selling opium.¹⁹ At the turn of the 20th century, besides those colonized or quasi-colonized countries such as China, “both opium and cocaine were widely used by consumers in the developed world in a variety of over-the-counter food and medicine products.”²⁰

Beginning with the 20th century, the mainstream attitude of the West towards narcotics fundamentally changed. The International Opium Convention of 1912 (hereinafter 1912 Hague Convention) required signatory States to “confine to medical and legitimate purposes the manufacture, sale and use of opium, heroin, morphine and cocaine.”²¹ Similarly, the International Opium Convention of 1925 (hereinafter 1925 Geneva Convention) requested member States to demonstrate their narcotics imports and exports for medical and legitimate purposes with statistics.²² Further, the Convention for limiting the Manufacture and regulating the Distribution of Narcotic Drugs of 1931 (hereinafter 1931 Geneva Convention) obliged member States to apply their narcotics control schemes to all the other states besides other members.²³ Finally, the Protocol Bringing under International Control Drugs Outside the Scope of the Convention of 13 July 1931 for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs (hereinafter 1948 Paris Protocol) required member States to report in a timely manner about any “medical and scientific” drugs not covered by the 1931 Convention that could have harmful effect or lead to abuse.²⁴ The 1948 Paris Protocol also stipulated that the 1931 Convention applied to any drug that was deemed harmful by the WHO.²⁵ To conclude, these early treaties in the first half of the 20th century display that the attitude of the West towards narcotics production and trade shifted from the “liberalized approach” - the lessening of government regulations and restriction on narcotics - to the “administrative approach” that restricts narcotics with “medical and legitimate” concerns.

The second half of the 20th century saw the origin and evolution of the narcotics regime of the UN that has shifted from the previous administrative approach towards an increasingly prohibitionist one that criminalize the illicit narcotics activities. The 1961 Convention initialized this shift. On the one hand, it maintained the administrative approach while constraining member States to

limit their ability to produce and trade narcotics for medical purposes.²⁶ The 1961 Convention further required member States to criminalize the illicit production and trade of narcotics²⁷ as well as to establish conspiracy as crime.²⁸ However, Article 38 of the 1961 Convention provided for an exception to the criminalization provisions, i.e., where illicit narcotics production or trade was conducted by “abusers of drugs,” a member State was able to adopt measures of “treatment, education, after-care, rehabilitation and social reintegration” as an alternative response.²⁹

Comparing with the 1961 Convention, the 1988 Convention substantially narrowed down the scope of the aforementioned “drug abuser” exception to the production only “for personal consumption” or otherwise to “cases of a minor nature.”³⁰ Furthermore, it greatly increased the number of criminal offenses by including knowing acquisition, possession, use, conversion or transfer of property.³¹ The 1988 Convention transformed the anti-narcotics approach from the administrative model to the prohibitionist one against illicit narcotics production and trade.

The latest Convention on Transnational Organized Crime of 2000 (hereinafter 2000 Convention) expands the range of criminal offenses even further.³² In addition to the offenses covered by the 1961 and 1988 Conventions, the 2000 Convention criminalizes “participation in an organized criminal group” and “laundering of the proceeds of crime.”³³ It also punishes both the promise, offer, or gift of reward to, and the solicitation or acceptance of reward by, a public official to facilitate criminal activity.³⁴

As the administrative and prohibitionist models are actually lack of their own enforcement mechanisms and heavily rely on the domestic laws of signatory States, their regulations were not implemented efficiently. Chinese cases prove this position very well as follows.

B. The Lasting War against Narcotic Drug Trafficking in China: Efforts and Difficulties

At present, China has two domestic laws to fulfill its international obligation to crack down on narcotics trafficking: one is the Regulation on the Administration of Narcotic Drugs and Psychotropic Drugs (“RANP”)³⁵ and the other is the Criminal Law Code (“CLC”).³⁶ Pursuant to Article 5 of the RANP, the main

administrative organ to regulate the lawful production and trade of narcotics is the National Medical Products Administration (“NMPA”) with its local branches, while the narcotics trafficking is clamped down by the Ministry of Public Security and its local branches.³⁷

Simply speaking, the NMPA first sets the annual production volume of narcotics nationwide on a yearly basis.³⁸ Next, it determines how many relevant raw materials are permitted to produce to satisfy the annual production volume each year.³⁹ Then, it selects qualified suppliers, producers and distributors who are respectively responsible for offering raw materials, producing narcotics, and distributing the narcotic products to qualified institutions for medical or scientific purposes.⁴⁰

The NMPA adopted the inspectors of good manufacturing practices (hereinafter GMP inspectors) as the main mechanism to monitor the entire chain of narcotics production and trade.⁴¹ The GMP inspectors consist of two groups, respectively including the one directly affiliated to the NMPA and the other within the provincial branches of the Administration.⁴² The GMP inspectors affiliated to the NMPA are responsible for checking a small and randomly-selected subset of material suppliers, manufacturers or distributors in the process of narcotics production and trade on a yearly basis.⁴³ Similarly, the provincial GMP inspectors are in charge of checking a small and randomly-selected subset of material suppliers, manufacturers or distributors in the process of narcotics production and trade that are located in their own provinces each year.⁴⁴

However, the mechanism of GMP inspectors in China is not very efficient in practice due to the following two reasons. First, the number of full-time GMP inspectors on both the national and provincial levels is remarkably small in comparison with the huge amount of qualified material suppliers, manufacturers and distributors for narcotics. Statistics show that although there were more than 5000 qualified narcotics manufacturers, 12,000 wholesalers and 400,000 retailers in China in 2016, while there were less than 500 full-time GMP inspectors on the national level.⁴⁵ The situation is similar on the provincial level. For example, Hubei Province whose pharmaceutical industry is very developed just possessed less than 60 full-time GMP inspectors on the provincial level in early 2019.⁴⁶ The shortage of full-time GMP inspectors is mainly ascribed to the rigid personnel quota system for governments in China. Under this inflexible and outdated system,

the headcount of each governmental agency is fixed and cannot be easily changed. Consequently, the NMPA and its provincial branches are not able to recruit sufficient full-time GMP inspectors. Due to the insufficiency of full-time GMP inspectors, the vast majority of material suppliers, manufacturers and distributors for narcotics in China are just under the very lax and porous surveillance of the domestic regulators.⁴⁷

Second, the professional capability and ethics of part-time GMP inspectors are relatively low in China. To alleviate the shortage of full-time GMP inspectors, the NMPA and its provincial branches have employed part-time GMP inspectors to conduct inspections independently to the aforementioned parties involved in the entire chain of narcotics production and trade in China.⁴⁸ However, the NMPA has yet to make a well-devised system for thoroughly training part-time GMP inspectors, which have caused their professional capabilities and ethics still low.

Further, the low professional capabilities and ethics of part-time GMP inspectors have inevitably caused negligence or even corruption in the process of inspection. In 2015, for example, when two and half tons of methamphetamine was seized in Guangdong Province, China - one of the biggest seizures in Asia at the time - a senior UN drug official stated: "To operate a lab like this, you need a lot of chemicals, which are legitimate, regulated chemicals from the pharmaceutical industry (in Mainland China). There is some kind of corruption in the chemical/pharmaceutical industry (in Mainland China) taking place allowing this to happen."⁴⁹

To a large degree, the defects of the mechanism of GMP inspectors have bred the illicit manufacture and trade of narcotic products in China, such as fentanyl concerned by the US. As mentioned above, pursuant to Article 5 of the RANP, the administrative organ to clamp down on narcotics trafficking is the Ministry of Public Security and its local branches.⁵⁰ Within the Ministry of Public Security and its local branches, a special troop of police has been established to deal with all kinds of drug crimes. However, seriously constrained by the rigid personnel quota system, this special troop only possessed about 16,000 members nationwide by the end of 2014, while at the same time there were around 660 branches of the Ministry of Public Security on the municipal level.⁵¹ In other words, in each city of China, on average there were less than 30 policemen who were responsible for cracking down on drug crimes in 2014, which were far from being sufficient. This

situation partially explains the rampant drug trafficking in China such as fentanyl, despite the CLC provides for heavy punishments including death penalty against drug-related criminals.

To conclude, China's practice on cracking down of narcotics trafficking clearly shows that without its own enforcement mechanism, the regime of public international law against illicit narcotics trade primarily depends on the domestic laws of signatory States. Under such circumstances, when its relevant domestic laws and in particular their enforcements are not efficient, no signatory State can thoroughly perform its treaty obligation against narcotics trafficking. However, it is not really liable to public international law.

4. Narcotics Trafficking and the WTO Law: Mechanisms and Limitations

It is evident that the global increase in narcotics trafficking parallels the growth in international free trade that is pursued and promoted by the WTO.⁵² The current legal regime of the WTO offers some mechanisms that facilitate the efforts of member States to counter narcotics trafficking. However, it is also undeniable that there are some weaknesses in them. The pros and cons of these relevant mechanisms of the WTO law concerning tackling narcotics trafficking are elaborated on below.

A. Article XX of the GATT

Article XX of the GATT entitles member States of the WTO to take trade-restrictive measures if they fall into one of the categories listed therein. According to the relevant cases that were adjudicated by the Appellate Body of the WTO, a member State must pass the necessity test if it wants to successfully invoke Article XX of the GATT. In regard to the necessity test, it was comprehensively stated by the Appellate Body in its report for *Brazil-Retreaded Tyres* (DS332). The Appellate Body stated:

In order to determine whether a measure is 'necessary' within the meaning of art XX(b) of the GATT 1994, a panel must assess all the relevant factors, particularly the extent of

the contribution to the achievement of a measure's objective and its trade restrictiveness, in the light of the importance of the interests or values at stake. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued. It rests upon the complaining Member to identify possible alternatives to the measure at issue that the responding Member could have taken. ... [I]n order to qualify as an alternative, a measure proposed by the complaining Member must be not only less trade restrictive than the measure at issue, but should also 'preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued'. ... If the responding Member demonstrates that the measure proposed by the complaining Member is not a genuine alternative or is not 'reasonably available', taking into account the interests or values being pursued and the responding Member's desired level of protection, it follows that the measure at issue is necessary.⁵³

In accordance with the Appellate Body, the necessity test subsumes the following two key steps confirming that: (1) the measure at issue that the responding Member takes falls into one of the objectives listed in Article XX of the GATT; and (2) no alternative measure can achieve the same level of protection on the objective pursued while being less trade-restrictive.

A WTO member State is entitled to invoke Article XX of the GATT to justify a trade-restrictive measure adopted by it against narcotics trafficking and auxiliary activities. But the measure has to go through the necessity test if it is challenged by a complaining member State. Considering scientific proofs and related cases, it is almost predictable that the Appellate Body will confirm at the first step that the challenged measure falls into the objective to "protect public morals" or "protect human, animal or plant life or health" that is listed in Article XX of the GATT.

First, current research has demonstrated the negative influence of narcotics trafficking on the life and health of human beings. Briefly speaking, once narcotics trafficking is rampant in a certain country, the level of domestic drug consumptions will increase accordingly, which in turn negatively influences the life and health of citizens of this affected country. A report conducted by the International Labor Organization ("ILO") shows that "substance abusers have 2-4 times more accidents at work than other employees and are absent 2-3 times more often" in Egypt, Mexico, Namibia, Poland and Sri Lanka.⁵⁴ Moreover, drug abuse is closely related to the group of youngsters. The World Bank once pointed

out that “users typically fall within the age group of 15-44, although most are in their mid-twenties.”⁵⁵ Thus, drug abuse substantially harms the life and health of citizens of a country that suffers from narcotics trafficking. In addition, narcotics trafficking may cause serious environmental pollution, in particular water pollution. While the main sources for water pollution are industrial and household sewage in the global scope, the entire water suppliers may turn toxic by drug-processing chemicals in the clustering regions of drug production and trafficking.⁵⁶ Undoubtedly, toxic water is a serious threat to the life and health of residents there.

Second, related cases have indicated that the Appellate Body confirms the negative impact of auxiliary activities for narcotics trafficking on public morals. In *Colombia-Textiles* (DS461), for example, the Appellate Body ruled that the compound tariff that was adopted by Colombia to tackle money laundering, which is closely related to drug trafficking groups, fell into the objective to protect public morals that is specified by Article XX of the GATT.⁵⁷

Compared with the first step, the second step of the necessity test has become a substantial barrier for a responding Member to justify its trade-restrictive measure against narcotics trafficking and auxiliary activities. In *Colombia-Textiles*, the Appellate Body concluded that the compound tariff adopted by Colombia did not satisfy the key aspects of the necessity analysis, particularly regarding the degree of contribution of the measure at issue to the objective of combating money laundering and the degree of trade-restrictiveness of the measure.⁵⁸ Thus, it rules that the compound tariff was not a measure necessary to protect public morals within the meaning of Article XX of the GATT. In most of other cases concerning Article XX of GATT, the responding Members failed to pass the second step of the necessity test carried out by the Appellate Body. Some international lawyers sharply pointed out that the second step of the necessity test “enables the AB to keep maximum adjudicatory flexibility; but it leaves Members uncertain of the legality of their measures or, to put it more graphically, leaves Members and (judicious) judges wandering in deserts of uncharted discretion.”⁵⁹

B. GSP

Other than Article XX of the GATT, another mechanism of the WTO may facilitate the endeavors of member States to counter narcotics trafficking, which is the Generalized Scheme of Preferences (“GSP”). Under the Enabling Clause

that was adopted in the GATT in 1979, developed Member States are granted the right to offer differential and more favorable treatment to developing Members under their GSP schemes.⁶⁰ It is the discretion of the preference-giving State to independently choose the products and Members to be covered in its GSP scheme. It is obvious that the GSP is a potentially effective mechanism for States to fight the global threat of narcotics trafficking. Beneficiary States have been included in the GSP on a conditional basis. According to the EC GSP scheme, GSP privileges may be suspended if a beneficiary State fails to combat drug production and trafficking.⁶¹ Thus, GSP represents a powerful economic incentive for developing countries to fight narcotics trafficking. In *EC-Tariff Preferences (DS246)*, the Appellate Body concluded with the Enabling Clause that:

[i]n granting differential tariff treatment, preference-granting countries are required, by virtue of the term “non-discriminatory,” to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the same “development, financial and trade needs” to which the treatment in question is intended to respond.⁶²

Thus, based on this statement, the Appellate Body confirms that GSP privileges can be conditional on the performance of beneficiary developing countries to counter drug trafficking as long as identical treatment is available to all similarly-situated GSP beneficiaries.⁶³

The GSP is weak in that developing Members of the WTO are not entitled to launch their own GSP schemes to developed Members and other developing Members. But a developing Member can also become the victim of narcotics smuggling from developed Members and other developing Members. For example, a recent research found that a great number of synthetic drugs have been smuggled into the other jurisdictions of the world each year.⁶⁴ Likewise, China has long suffered from the drug smuggling from Myanmar.⁶⁵

To sum up, although it is committed to promote free trade among Member States, the WTO is equipped with Article XX and GSP of the GATT that take effects on countering narcotics trafficking. As analyzed above, however, both of the mechanisms also possess their own loopholes that may discount the endeavors of Member States to tackle the global threat of narcotics trafficking to some degree.

5. Looking Further to Raise Vigilance against Illicit Trade in the Globe

The above two sections respectively sketch out the strengths and weaknesses of public international law and the WTO law on countering narcotics trafficking. However, the mission of this research is not only to arouse awareness on the harm of narcotics trafficking, but also raise vigilance against the aggravated threat of illicit trade in the international community. The Transnational Alliance to Combat Illicit Trade (“TRACIT”) addresses:

There are notable ‘macro’ impacts where illicit trade cuts deeply across many of the Sustainable Development Goals, undermining achievement of the economic goals for poverty reduction, decent jobs and economic growth, and robbing governments of taxable income that can be invested in public services. When it generates revenue for organized criminal and terrorist groups, illicit trade undermines goals for peace and stability. Most forms of illicit trade plunder natural resources, abuse supply chains and ultimately expose consumers to fake and potentially harmful products. In all cases, illicit trade pushes achievement of the goals further away.⁶⁶

Under public international law system, raising vigilance against illicit trade requires that the UN, other international organizations, sovereign States, business and other stakeholder sought to cooperate with each other to promote the enforcement of anti-illicit-trade measures specified by public international law in sovereign States.⁶⁷ Recently, an increasing trend has been seen towards this direction. For example, the United Nations Conference on Trade and Development (“UNCTAD”) and TRACIT took the lead in convening the first-ever Illicit Trade Forum on February 3-4, 2020 in Geneva to generate a roadmap for collective action by government, business and other stakeholders to combat illicit trade.⁶⁸ In addition, the Organization for Economic Co-operation and Development (“OECD”) released a report entitled “Governance Frameworks to Counter Illicit Trade” on March 1, 2018 that provided a general overview of enforcement challenges faced by governments to counter illicit trade.⁶⁹

Under the WTO law, meanwhile, raising vigilance against illicit trade rests on that Member States must reach a consensus to re-define the function of the WTO. Pursuant to Article 1 of the Marrakesh Agreement Establishing the

World Trade Organization (hereinafter Marrakesh Agreement), the WTO is an intergovernmental organization to promote free trade among Member States, without taking the responsibility to counter illicit trade. Thus, it is a prerequisite that the overwhelming majority of Member States must firstly recognize that the WTO ought to address the problem of illicit trade seriously before it can adopt comprehensive and substantial measures to combat illicit trade. But it will inevitably entail a long time for Member States to re-define the WTO by embracing the task of countering illicit trade.

6. Conclusion

The recent dispute between China and the US has put the issue of narcotics trafficking under the limelight. To counter narcotics trafficking, public international law has established a comprehensive legal regime. However, as the Chinese proofs demonstrate, this legal regime is plagued with the problem of weak enforcement. As to the WTO law, it is also equipped with some mechanisms that may facilitate the efforts of Member States to combat narcotics trafficking. Even so, these related mechanisms also have their own weaknesses to be redressed. Narcotics trafficking is just part of the canvas of the global threat of illicit trade. There has already been an ideological convergence towards collective actions taken by the international community to combat illicit trade in the realm of public international law, while the same thing entails a long time for Member States to re-define the WTO. It is expected that more research will be carried out to discuss the ways to reinforce the legal regime of public international law and the WTO law in the future.

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