

Fiscal Relevance of Transnational Environmental Crime

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Foreword

Environmental crime is the world's third most lucrative criminal business after drugs and counterfeit goods, ahead of human trafficking. Environmental crimes encompass a broad list of illicit activities, including illegal trade in wildlife; smuggling of ozone-depleting substances; illicit trade of hazardous waste; illegal, unregulated, and unreported fishing; illegal logging and trade in timber, illegal mining and trade in minerals, precious metals and so forth. Often perceived as 'victimless' and incidental crimes, environmental crimes rank relatively low on the law enforcement priority list, and are commonly punished with administrative sanctions, themselves often unclear and trifling compared to the profits made (UNICRI, 2012). Featuring low risks and high returns, environmental crimes are quite attractive to organized criminal groups. Yet, such criminal activities have a direct impact on climate change, harming the livelihoods of millions of people, eventually resulting in forced migrations and can trigger the spread of animal-to-human viruses, called zoonotic diseases (INTERPOL, 2020), such as COVID-19 (WTO, 2020)

The purpose of this paper is to, without any claim to completeness, bring together in a schematic manner some peculiar aspects of the fiscal relevance of transnational environmental crime. The goal is to pinpoint some key factors to pay attention to, since they could be indicators of unlawful behaviors. Moreover, the intention is to highlight the fiscal value of environmental crimes, assuming that such an approach is more likely to attract governments' attention. By focusing on the fiscal aspect, in fact, environmental crimes are traced back to a measurable harm against the State's treasury, therefore moving away from a "victimless crime" perspective that relies on the interpretation of complex, often hard to measure, impacts on the environmental, social and cultural heritage of the territories affected.

Fiscal crime, instead, is countable, certain and much easier to prove and prosecute in the court of law.

National Interest

With law n° 537 of 1993 the Italian legislator crystallized the assumption according to which profits deriving from, both civil, penal and administrative, illegal activities are to be included in the income categories of which at article 6 of the TUIR. In 2006, another legislative act reaffirmed that when profits cannot be classified in the above mentioned categories, they are to be accounted for as “different” income, therefore maintaining their fiscal relevance (legislative decree 223/2006). Even the supreme court has recently ruled that *“in the field of income taxation, illegal profits, also those deriving from fiscal fraud, are to be included in the ‘different income’ category”* (Cassazione civile, sez. trib., Oct. 19th 2018, n. 26440) (Montalti, 2021). In fact, in fiscal terms, any taxpayer’s increase in wealth is subject to fiscal imposition, therefore it is only logical that also profits deriving from illegal activities should be subject to such an obligation. This line of thought is based upon the assumption according to which the illegality of a certain activity does not exclude the taxability of the profits such activity may have yielded, since income is an economic, not a juridical, indicator. This is the reason why any increase in wealth produced by a subject, regardless of it being from legal or illegal activities must be declared for fiscal purposes and is subject to the relative taxation. In addition, the fiscal discipline asserts that *“costs and expenses directly involved in the perpetration of illegal activities are nondeductible”* (article 14, comma 4-bis of law n° 537 of 1993). To this extent it has also been reaffirmed that not only the costs and expenses for goods and services directly used in the perpetration of criminal activities, but also *“the quotas of passive components related to the company’s normal activity that were instrumental to the perpetration of the criminal activity, also if not exclusively used for such activities”* are to be considered nondeductible, such as, for example, amortization quotas, passive interests, reserve funds, passive contingencies, mortgage quotas and the likes. (Manzari, 2021)

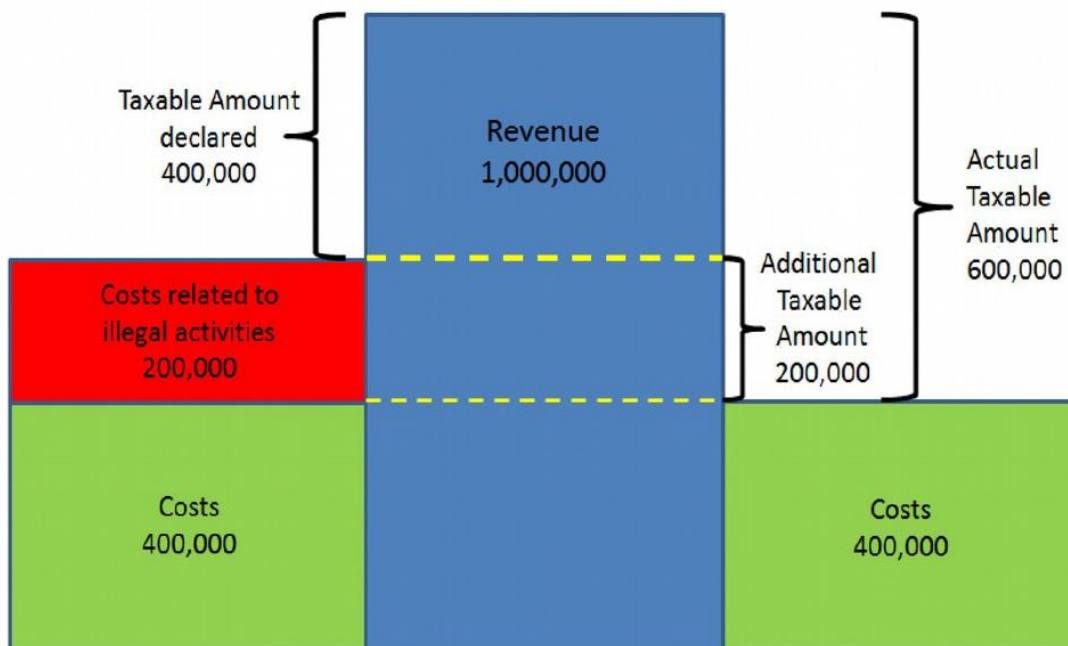


Fig. 1 – Actual tax base in presence of illegal activities

Figure 1 represents the activity of a company carrying out illegal activities alongside regularly authorized operations, hence using part of its productive factors, and thus of its operational costs, to carry out activities that can be classified as non-culpable crimes. The business accounting filed by the company for fiscal purposes is represented on the left. It is clear that the company tends to include all possible costs in such declaration as to reduce the taxable amount of revenue and thus also includes costs related to the perpetration of unlawful activities, disguising them as regular operational costs by means of fraudulent invoices and other falsified documents. The right side of figure1, instead, shows what the business accounting should actually look like, as revealed by the investigation (Judicial Police investigative function), since all costs and expenses directly linked to criminal activities are nondeductible by law.

According to article 55 of the Italian Criminal Procedure Code, also acting of its own initiative, using both typical and atypical techniques, the Judicial Police must receive crime reports that are transmitted without any delay to the Public Prosecutor's Office. Hence, the criminal activity is interrupted, and all those means necessary to prevent the crime from being carried to further consequences are put in place (Judicial Police repressive function). At this point the Judicial Police moves on to gathering sources of evidence through interrogations, inspections and evidentiary seizures. Sometime later, when the investigation is over, the Public Prosecutor carries out the penal action against the perpetrators. This is the condition sine qua non that legitimizes the intervention of the financial administration as of article 14, comma 4-bis of law n° 537/1993. At this point the financial administration examines the business's accounting in order to identify and quantify the costs that were instrumental to the perpetration of the criminal activity. These are then declared nondeductible and expunged from the accounting books. When calculating nondeductible costs, the financial administration shall, thence, refer to the evidence gathered by the Judicial Police and add up all relevant costs starting with the base elements of business accounting such as real estate and land owned and used; the gasoline and other sources of energy used for transporting, loading unloading, those used in the creation of illegal structures such as earthmoving, digging and filling and those used in the operation of machinery. For some of such expenses the company could have also filed a request for the reimbursement of the relative excise taxes collected by the Excise, Customs and Monopoly Agency and thus the full, non-reimbursed amount, should be calculated. It is worth highlighting that any reimbursement on excise taxes on energetic products instrumental to the perpetration of illegal activities represents a sort of "double crime" since, not only a cost is deducted, but the public administration is asked to reimburse such costs, *de facto* facilitating and in some way enabling the perpetration of the unlawful activity.

Take, for example, a legally authorized waste management company that, as a side business, also illegally handles waste streams it is not authorized to treat. In this case the costs directly linked to the perpetration of the unlawful activity, such as transportation and the relative reimbursements on excise taxes on gasoline the company may have enjoyed; the costs of treatment and disposal; the cost of labor; the amortization quotas for machinery; the mortgage quotas for real estate and all other costs that were instrumental to the perpetration of the illegal part of the company's operations shall be reclaimed by the fiscal administration. In addition to paying the tax on the nondeductible part of the company's revenue, the administrative sanction for unfaithful statement shall apply. According to law n° 471 of 18.12.1997, this amounts to a fine from 100% to 200% of the additional tax on the new part of taxable base discovered (see "additional taxable amount" in figure 1). Such nondeductible costs and expenses can also be relevant for the application of other criminal charges as of law n°74 of 2000 regarding the "*new discipline on crimes related to income and VAT taxation.*" Finally, the company that has committed environmental crimes can also be prosecuted for additional criminal charges according to articles 2 and 3 of the aforementioned law regarding "*fraudulent tax declarations by means of invoices and other documents attesting nonexistent operations*" and "*fraudulent declarations by other means*" respectively. Whereas if the company were to have use fraudulent Custom Declaration to prove nonexistent imports the criminal charges would be further aggravated by ideological falsity in public acts.

Transnational implications

Quoting former UN Secretary General Mr. Kofi A. Annan in the foreword to the Palermo Convention of 2000: "*If crime crosses borders, so must law enforcement. If the rule of law is undermined not only in one country, but in many, then those who defend it cannot limit themselves to purely national means*" (Annan, 2000). Environmental crimes, in particular, have revealed to be among the most profitable transnational criminal activities. According to United Nations Interregional Crime&Justice Research Institute "*The level of organization required to successfully perpetrate environmental crimes indicates a link with other serious offenses, including theft, fraud, corruption, drugs and human trafficking, counterfeiting, smuggling of firearms and money laundering, several of which have been substantiated by investigations. Therefore, environmental crimes represent today an emerging form of transnational organized crime requiring more in-depth analysis and better-coordinated responses at national, regional and international levels.*" (UNICRI, 2012).

Interpol has calculated that illegal profits deriving from transnational environmental crimes add up to somewhere in between 110 and 281 billion dollars per year (INTERPOL, 2018). Likewise the UNEP-INTERPOL report from 2016 highlighted how the exponential growth and proliferation of such criminal activities affects local governments and communities by draining valuable resources for an estimated 9 to 26 billion dollars per year in each country, and this data may vary significantly according to the country taken into consideration. Illegal management and trade of waste, deforestation and trafficking of endangered species and illegal mining represent the main types of environmental crimes. Not only do environmental crimes have negative effects on the quality of soil, air and water in a particular area, but pollutants can travel miles through air and water affecting other communities in other countries as well (Beare, 2012). Environmental crimes have thus been listed among the main driving factors of climate change, desertification, loss of biodiversity, forced migration and other phenomena that bear widespread social, political and economic implications, often increasing non-environmental related crime rates.

The Atlas of Illicit Flows published by INTERPOL in 2018 reveals that criminal organizations' profits from illegal logging alone add up to somewhere in between 51 and 152 billion dollars per year. Such crimes have negative effects on the properties of soil, animal and human habitats, reducing productivity and increasing erosion and desertification, thus threatening the very ability to survive of entire communities and species. The World Bank has calculated that governments lose between 6 and 9 billion dollars per year in fiscal revenues from illegal logging alone (World Bank, 2019). This example demonstrates just how tightly bound fiscal revenue and environmental crimes are, highlighting once more the fiscal relevance of transnational environmental crime. The wood illegally logged around the world is generally transported towards Eastern Asia, North America and Western Europe. Similarly to how illegal logging is concentrated in the areas of the world where large pluvial forests are, illegal mining operations are carried out where there is valuable ore to be extracted. The main countries affected by illegal mining are, in fact, in Africa and South America, Colombia in particular, where 87% of refugees leaving the country were forced to run away from areas where illegal mining takes place. The use of artisanal methods such as mercury amalgam for the extraction of precious metals has polluted the waterways, air and soil of large. It is calculated that illegal mining generates profits between 12 and 48 billion dollars per year. The most sought after minerals are gold, coltan and tin, materials that are essential for the production of technological products such as computers, smartphones, vehicles, solar panels and all other technological devices. In 2010 the Dodd-Frank Wall street reform and Consumer Protection Act was the first national attempt to regulate the import of minerals used in technological products. Since then, the bill has had little success and the Trump administration partially froze its application for a number of years. The UNEP Minamata Convention on Mercury, named after the terrible disease caused by mercury contamination, entered into force in 2017 and currently counts 143 parties, however, it is well known that international conventions signed at the UN level take time to be transformed into national law. For instance the UNODC Palermo Convention of 2000 was transformed into national law in Italy only in 2006 (article 216-bis of the Italian Criminal Code).

All transnational environmental crimes share a common denominator which is the physical movement of material through national borders. Taking a step back and looking at the big picture, resources appear to move from developing and least developed countries towards rich and developed countries, whereas waste streams, including toxic waste flows, appear to move from rich countries towards under developed and least developed countries. Unfortunately, political will and widespread consumerist culture of people in rich countries, where there are the resources and means as well as the power to change these dynamics, often appear to turn a blind eye to transnational environmental crimes. Nevertheless, as reported in the example of Italy previously described it is in all States' national interest to prevent, combat and thus curb environmental crimes. Most of the actions useful for detecting, deterring and preventing transnational crimes from occurring in the first place as well as prosecuting perpetrators can and shall initiate from Customs Authorities, since for transnational environmental crimes to occur, materials and money must cross borders.

Conclusions

EU regulation 444/2021 represents a step in the right direction, calling for a strengthened cooperation between member States' Customs Authorities. The European Union is first and foremost a Customs Union and therefore it is the perfect

laboratory where to experiment cutting edge investigative techniques and interstate coordination in the detection, prevention and prosecution of transnational crime in general, environmental crimes in particular. Lessons learned in the management and coordination of the different authorities in and throughout EU member States can thus be packaged into a toolbox that can be further elaborated with allies and partners near and far. Nevertheless, both political wills, entrepreneurs and citizens must be aware that curbing environmental crimes shall necessarily entail an increase in the price of products and this will require that the populous make different marginal choices in their consumption practices, eventually changing their behavior and lifestyle.

Although national Customs authorities are chronically understaffed, this is no excuse for lacking attention. A good overall policy could be to slightly widen the net's mesh, increasing the strength of the net in order to firmly catch the big fish without wasting valuable resources chasing after small fish, still bearing a relaxed and watchful eye on banks of small catch, whose movements could reveal valuable information on where the big ones roam. This approach, however calls for high-level field operators and officials, able to thrive in ambiguity and chaos (Brown, 2019), gathering intelligence rather than chasing after rats as to hunt from above with piercing, see-through eyes like an eagle and pounce on the juicy prey with strong clawed paws like a lion, ensuring the interests of the State treasury. Just as depicted in Ambrogio Lorenzetti's frescoes from 1338-1339 on the walls of the Public Palace of Siena, a rich and healthy State can provide for its citizens, investing in the future of its children, protecting its cultural heritage and natural beauties. But this wealth shall not come at the cost of others, exporting negative externalizations, therefore States are called to place as much attention on what is exported as to what is imported through their borders. Member states of the European Union shall hence eventually emanate fiscal aggravations for transnational environmental crimes to be prosecuted by the EPPO both within the EU and abroad in collaboration with other State authorities worldwide. A borderless world will remain utopia until it becomes an honest, respectful and responsible world based on integrity, love, tolerance, compassion and mutual understanding. We are one.

The following case study is based on recent successful investigations carried out by the Financial and Tax police of Italy. The case is especially interesting and relevant because it demonstrates the effectiveness of a fiscal approach in the prosecution of transnational environmental crimes.

Case Study: Operation “Silk Road”

On June 16th, 2021, the Guardia di Finanza in Pordenone, delegated by the District Antimafia Direction of the Public Prosecutor's Office, has recently carried out a complex investigation of a transnational criminal group that was perpetrating fiscal frauds in the management and trade of ferrous and non-ferrous metals such as copper, brass and aluminum belonging to the “non-hazardous metal waste” category as defined in legislative decrees n° 152/2006 and 21/2008. The investigation was initiated in 2018 following some odd financial movements that took place between a company in Czech Republic and a newly founded firm in the province of Pordenone, in Italy.

This is how the fraud was carried out: some firms were created *ad hoc* to optimize transactions, working as intermediaries between the companies producing/gathering metal scrap and the steel mills. These intermediaries' job was to file fictitious purchases of metal scrap from abroad, justified by apparently regular invoices for actually nonexistent sales made by companies in Czech Republic and Slovenia. In addition, these countries are Members of the European Union, therefore there is no border control in place and no Customs Declaration is required to pass shipments through national frontiers. Hence the criminal operation was facilitated because transactions could occur only on paper without having to prove an actual physical transit of goods across borders. Since steel mills are huge companies regulated by strict procedures and must undergo regular audits from the authorities, they are utterly refractory to purchasing material “in black” and without the required environmental documentation. This is where the intermediaries' came into play, providing apparently legitimate fiscal and environmental documents fraudulently generated for these actually nonexistent fictitious operations, which allowed the producing/gathering companies to sell their metal waste as metal scrap to the steel mills.

Similarly to what happens in matters regarding Transfer Pricing and the definition of Custom Value, lacking the conditions necessary to establish the connection between two legal persons as art. 10 of the TUIR, it is not possible to demonstrate that the different companies were in some way connected (Ferroni, 2014). Therefore, at a legal level, the different actors figure as “independent groups” that were put in contact with each other by the respective bosses. Although risky, it is plausible to wonder whether the Chief Executive Officers of these companies could possibly be part of an occult group, or at least share a common criminal design. The following investigations, carried out also with atypical methods, traced back to a diffuse and relevant illegal management and trade of metal wastes of diverse origins for an esteemed 150,000 metric tons, in the amount of about 7000 trailer trucks, for the operation of which the companies could also have requested the reimbursement of excise taxes on petrol. Using false invoices for nonexistent operations, allowed these companies to work around the environmental and traceability certification required to sell the scrap to the steel mills without paying taxes. Moreover, through the classic method used by companies to manipulate the price of goods in Custom Declarations within intercompany transactions, the end users of the fraudulent invoices were able to register costs hence reducing the relative taxable amount of their firm (Ferroni, 2014). The payment of the invoices were always wire transferred in order to make them appear legitimate. Investigations revealed that about 150,000,000 euro were transferred abroad towards missing trader companies in Czech Republic and Slovenia. The capitals were then immediately re-wired to banks in China, marked as purchases for not better specified “imports.” Since imports from China must be accompanied by Custom Declarations comprehensive of a description of the goods and the relative Customs Code, it is much easier to detect the fraud and demonstrate that the material figuring on the invoices had never crossed the border, hence that the money sent to China did not correspond to an actual transfer of material towards Europe. In this particular case, the manifest would have had to refer to Section XV of the TARIC under the voice “Base Metals and articles of base metal,” for which there are also particular conditions to import into the EU, requiring additional documents in accordance to EU regulation 1013/2006.

In practice, the metal scrap, presumably originating from Italy, stayed in Italy and was sold to Italian steel mills through companies created *ad hoc* in Italy, but invoiced through missing trader companies acting as paper mills that fictitiously declared such scrap originated from Eastern Europe. The money was then transferred to these companies and directly re-wired to China with all the documentation in order, proving the legitimate nature of the transactions. Finally, the money was paid back to the firms who had “purchased” the nonexistent supplies. To this goal the criminal organization relied on the Chinese community living in Italy who has massive amounts of cash, most of which coming from other illegal activities and tax evasion, that cannot be easily nor legally transferred to China as is, given the legal requirements banks have to accept deposits and the limit of 10,000 euro on carrying cash outside the EU.

This organization allowed all parties, although each independent and dedicated to their own illegal activities, to reach a point of convergence that allowed them to fulfill their goals: the money transferred East to China through the paper mills in Czech Republic and Slovenia, was returned in cash, thus untraceable, through hand to hand delivery in plastic bags in well-known Asian markets in Padova and Milano. It is natural to suspect whether or not the imports of Chinese products sold on these markets are all legitimate, correctly declared at Customs and have undergone inspections for lucrative contraband. On the “bright side,” the actual metal scrap was never moved, therefore, technically, this case cannot be properly defined as transnational waste trafficking and this may very well be a demonstration that stringent regulations on waste shipments have progressively made transnational waste trafficking a high risk, low return business. Nevertheless, the transnational aspect is still necessary in order for criminal organizations to “wash” and launder capitals. This can, to all effects, happen on paper only, taking advantage of the Customs Union and the loopholes in the fiscal administration and control system. Moreover, since 2013 three of the people arrested had moved their residence to Switzerland and, according to the investigators, there are concrete possibilities they may have “hidden” more illicit profits in Swiss banks. It is yet to be understood how they could have moved the cash through the alpine borders if by using the classic methods of mountain contraband or simply traveling regularly to Switzerland as *frontaliers* with less than 10,000 euros at a time. Among the people indicted there were residents from Brescia, Belluno, Padova, Treviso, Venezia, Verona, Parma, Torino and Vicenza some of which share borders with Switzerland and Eastern Europe.

On March 8th, 2022 the Military of the Guardia di Finanza in Torino revealed a similar mechanism adopted by companies based in Piedmont and Lombardy with contacts in Germany. Evidence, hence, highlights the need for tighter forms of

cooperation between the various authorities, including the Excise Customs and Monopoly Agency, that can bring its expertise and professionalism in its specific fields of interest, eventually revealing yet to be known aspects of transnational environmental crime.

The role of the European Public Prosecutor's Office

The European Public Prosecutor's Office (EPPO) is an independent body of the European Union responsible for investigating, prosecuting and bringing to judgment crimes against the financial interests of the EU, including: fraud, corruption, money laundering, cross-border VAT frauds. This institute is the first of its kind acting as a supra-national law enforcement prosecuting office in a nonfederal State Union such as the EU. EPPO works through dedicated offices in each member State able to prosecute criminal cases within the States' jurisdictions still responding to a central coordinator at the European level, therefore increasing flexibility and effectiveness in prosecuting transnational crime involving different member States.

This case in particular, however, presents an interesting case study to better understand the limits the EPPO office encounters in prosecuting transnational crime occurring in and between Member States. The main limitation encountered in the "Silk Road" case is that the crimes perpetrated carried little or no harm against the EU's financial interests. In fact the frauds were committed at the national level within the member States. The financial frauds committed in Italy were to be prosecuted by the State of Italy, whereas the crimes perpetrated in Czech Republic and Slovenia fell under the relative national jurisdictions.

Nevertheless, the way the crime ring was organized reveals another aspect that may be worthy of the European Union's interest, especially considering that similar crimes may very well be taking place in and within other of the 27 member States. In fact, the case at hand reveals a flow of capitals towards China that is not compensated by a corresponding flow of materials, i.e. metals, towards Europe. Actually the outflow of capital was criminally compensated by a recirculation of dirty euros within Italy itself. In practice capitals left Europe and the same amount was laundered without increasing material assets within Europe. In substance the monetary base was eroded by "doubling" the cash without a corresponding increase in material metallic base, which in a certain sense is a sort of manipulated inflation created by criminal business based in another, not necessarily friendly, State. In addition, the trade balance "on paper" appears to shift in favor of China, apparently increasing the dependence of Europe on trade with China for access to raw materials, at the same time increasing the amount of Euros in Chinese banks. Given that Chinese banks and enterprises are all, in some way, under the control and surveillance of the Chinese government and the Chinese Communist Party, which ultimately is the residual claimant of all economic activities in mainland China (Gabusi, 2009), it is somewhat hard to believe that the CCP is totally unaware such criminal activities are taking place and it is legitimate to wonder what could be the economic and political interests of the Chinese government with regard to this sort of criminal activities. Perhaps it is all about feeding a gambling addiction, placing yet another bet on the global "green table" of "casino capitalism" (Strange, 1986) eventually manufacturing yet another one of those "extraordinary popular delusions and the madness of crowds" (Mackay 1841).

Finally, a fictitiously altered trade balance in favor of China fostered by criminal groups of Chinese citizens who launder money, evade taxes and conduct all sorts of criminal activities also indirectly creating inflation in Europe, is certainly not much of a win-win situation. Having massive foreign capitals in foreign currency can be used as political leverage by China against Europe and its NATO allies, especially in this moment of rising tensions and progressive power transition to a multipolar world. This is part of the International Political Economy (Strange, 1970) game when goods are actually exchanged, but in this case, the capitals are flowing to China in exchange for fraudulent electronic invoices. Given that China wishes to assert its stance on the global stage as a "responsible stakeholder," it would be mutually beneficial to strengthen cooperation between European and Chinese customs and police authorities in order to investigate transnational flows of capital and materials, also in collaboration with EPPO, EUROPOL, EUROjust, INTERPOL, potentially using UN fora as a platform for open discussion aiming at combating transnational crime in all its forms. Enhanced cooperation and strengthening the fight against transnational crime, including, but not limited to,

environmental crimes are also key to the successful implementation of the Chinese belt and road initiative announced by President Xi Jinping during his speech held at the Nazarbayev University in Astana (now Nur-Sultan), Kazakhstan on September 7th, 2013 (PRC Embassy Belgium, 2013), of which the Memorandum of understanding was signed by Italian Prime Minister Giuseppe Conte on May 24th, 2019.

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