

February 5, 2016

VIA WORLD WIDE WEB

<http://www.regulations.gov>, Docket Number USTR-2015-0022

Christine Peterson
Director for Intellectual Property and Innovation
Office of the United States Trade Representative
600 17th Street NW
Washington, DC 20508

Re: 2016 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment. 81 Fed. Reg. 1277 - 78 (January 11, 2016)

Dear Ms. Peterson:

The attached written comments are submitted on behalf of the International AntiCounterfeiting Coalition, Inc. (“IACC”), in response to the request by the United States Trade Representative (“USTR”), published in the Federal Register on January 11, 2016, for written submissions from the public concerning the acts, policies, and practices of foreign countries that are relevant to USTR’s determination under Section 182 of the Omnibus Trade and Competitiveness Act of 1988, 19 USC § 2242 (“Special 301”) of countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection.

Comprised of approximately 250 corporations, trade associations, and professional firms, and founded over 35 years ago; the IACC is the world’s oldest and largest organization representing exclusively the interests of companies concerned with trademark counterfeiting and the related theft of intellectual property. The members of the IACC represent a broad cross-section of industries, and include many of the world’s best known brands in the apparel, automotive, consumer goods, entertainment, pharmaceutical, and other product sectors. The IACC is committed to working with government and industry partners in the United States and abroad to strengthen IP protection by encouraging improvements in the law and the allocation of greater political priority and resources, as well as by raising awareness regarding the enormous—and growing—harm caused by IP violations.

The IACC applauds the USTR and the inter-agency team for their ongoing work to improve the protection and enforcement of intellectual property rights by our trading partners. We look forward to assisting in those efforts to promote IP protection globally, and we are available at any time for clarification of any issues raised in the attached submission.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Travis D. Johnson', with a stylized, cursive script.

Travis D. Johnson
Vice President - Legislative Affairs, Senior Counsel
The International AntiCounterfeiting Coalition
1730 M Street NW, #1020
Washington, DC 20036

Submission of the

International AntiCounterfeiting Coalition

to the

United States Trade Representative

Special 301 Recommendations

February 5, 2016

TABLE OF CONTENTS

Introduction	1
--------------	---

ASIA-PACIFIC, SOUTH ASIA

China	5
Hong Kong	10
India	11
Indonesia	12
Japan	14
Malaysia	15
Philippines	16
Singapore	17
Thailand	18
Vietnam	20

EUROPE, MIDDLE EAST, AFRICA

Kenya	22
Kingdom of Saudi Arabia	23
Nigeria	24
Turkey	24
United Arab Emirates	26

RUSSIA, UKRAINE, CAUCASUS

Russia	29
Ukraine	31

SOUTH AMERICA

Bolivia	34
Brazil	35
Colombia	37
Paraguay	38

NORTH & CENTRAL AMERICA

Canada	40
Mexico	44

INTRODUCTION

The International AntiCounterfeiting Coalition, Inc. (“IACC”) submits the following recommendations to the Office of the United States Trade Representative (“USTR”), pursuant to a request for written submissions from the public concerning the acts, policies, and practices of foreign countries relevant to the determination by the USTR, in cooperation with its interagency partners in the Special 301 review (“Special 301”), under Section 182 of the Omnibus Trade and Competitiveness Act of 1988, 19 USC § 2242, of countries that deny adequate and effective protection of intellectual property rights (“IPR”) or deny fair and equitable market access to U.S. persons who rely on intellectual property protection.

The IACC is the world’s oldest and largest organization dedicated exclusively to combating trademark counterfeiting and copyright piracy. Founded in 1979, and based in Washington, D.C., the IACC represents approximately 250 corporations, trade associations, and professional firms, spanning a broad cross-section of industries. IACC rights-holders include many of the world’s best-known brands in the apparel, automotive, electronics, entertainment, luxury goods, pharmaceutical, software, and other consumer product sectors.

Central to the IACC’s mission is the education of both the general public and policy makers regarding the severity and scope of the harms caused by intellectual property crimes – not only to legitimate manufacturers and retailers, but also to consumers and governments worldwide. The IACC seeks to address these threats by promoting the adoption of legislative and regulatory regimes to effectively protect intellectual property rights, and encourages the application of resources sufficient to implement and enforce those regimes.

While quantifying the damage caused by counterfeiting is inherently difficult – due in large part to the illicit nature of the trade – those harms remained severe in 2015.¹ Whether measured in terms of lost sales to legitimate manufacturers, lost tax revenues and duties that go unpaid to governments, lost jobs, or lost investment in capital improvements and research and development; counterfeiting is a significant drain on the U.S. and global economy. Further, the manufacture and distribution of goods produced in an entirely unregulated supply chain, where the makers have every incentive to cut

¹ According to a 2011 study published by the International Chamber of Commerce, the total global economic and social costs of the trade in counterfeit and pirated goods – including lost tax revenue, and increased government spending on law enforcement and healthcare – were projected to be as high as \$1.77 Trillion in 2015. INT’L CHAMBER OF COMMERCE, ESTIMATING THE GLOBAL AND SOCIAL IMPACTS OF COUNTERFEITING AND PIRACY (2011). <http://www.iccwbo.org/Advocacy-Codes-and-Rules/BASCAP/BASCAP-Research/Economic-impact/Global-Impacts-Study/>.

corners by using cheap, substandard components, and no incentive to abide by accepted standards of consumer health and safety, presents a clear threat to the health and well-being of consumers, and to the integrity of our national security infrastructure.²

Each year, the IACC submits comments as part of the U.S. Government's Special 301 process, drawn from a variety of sources including surveys of member companies, interviews with local experts in the identified countries of concern, research of publicly-available sources, and data generated by the IACC through its own programs and direct engagement with foreign governments. However, it should be noted that the countries and issues discussed herein are not an exhaustive list of rights-holders' concerns, but merely a snapshot of current and ongoing issues faced by rights-holders around the world, to which the IACC wishes to draw special attention. It is expected that the majority of the countries and issues raised in this filing will come as no surprise to USTR and the interagency team, as many of those highlighted by IACC members have been long-standing concerns for rights-holders, and have been raised in previous years' filings.

As has been the case for well over a decade, the People's Republic of China – the primary source for the manufacture of counterfeit goods entering the U.S. market³ (and other consumer markets around the world⁴) - remained the country of greatest concern for IACC members in 2015. In addition to its status as the leading producer of counterfeit goods, China's growth as a hub for the online sale and distribution of counterfeit and pirated goods, and as a provider of essential IT and financial services for such sites, is an increasing concern for rights-holders. Despite some noted improvements in recent years, the country remains, far and away, the most problematic for most rights-holders. China is followed next in terms of rights-holders' overall concerns by the other BRIC members – Brazil, Russia, and India – each host to long-standing issues highlighted in prior submissions of the IACC. The IACC recommends each of these nations, as well as Indonesia, Thailand, and Ukraine be considered for inclusion on USTR's Priority Watch List in 2016.

² GOV'T ACCOUNTABILITY OFFICE, DOD SUPPLY CHAIN: SUSPECT COUNTERFEIT ELECTRONIC PARTS CAN BE FOUND ON INTERNET PURCHASING PLATFORMS (2012). GAO-12-375.
<http://www.gao.gov/assets/590/588736.pdf>.

³ U.S. CUSTOMS & BORDER PROT., INTELLECTUAL PROPERTY RIGHTS FISCAL YEAR 2014 (2015).
https://www.cbp.gov/sites/default/files/documents/IPR%20FY14%20Seizure%20Statistics%20Booklet_100515_spread_web.pdf.

⁴EUROPEAN COMM'N, REPORT ON EU CUSTOMS ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS – RESULTS AT THE EU BORDER 2014 (2015).
http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/statistics/2015_ipr_statistics.pdf.

The IACC continued to focus significant resources on engagement throughout Latin America in 2015, organizing events in Brazil, Mexico, Bolivia, Panama; we're currently planning an event for mid-2016 that will bring together high-level officials from throughout the region with an aim of cultivating stronger regional partnerships to combat counterfeiting and piracy. In addition to the previously mentioned PWL recommendation for Brazil, our submission includes comments on Bolivia, Colombia, Mexico, and Paraguay. Members have likewise cited concerns in Guatemala and Honduras, which we will continue to explore, and which we expect will be raised with USTR outside of this formal process. We also wish to note that the IACC continued its direct engagement with both Curacao and Jamaica in 2015, and that engagement remains positive and ongoing.

Elsewhere in the world, we've remained active, hosting or participating in training events in more than a dozen countries, and actively supporting international visitor programs of the U.S. Patent and Trademark Office's Global Intellectual Property Academy, as well as similar programs managed by the Department of State. The IACC also signed MOUs to expand cooperation with like-minded organizations in North America, the Middle East and Europe during the past year, and has committed to greater participation in capacity building programs in the coming year in each region.

As with last year's submission, this year's comments are organized by region rather than simply by country, bearing in mind that the trafficking of counterfeit goods is, inherently, a cross-border problem requiring regional collaboration and partnership. The policies, practices, and resources that countries apply to addressing the issues at and within their borders necessarily impact their neighbors in the region and further afield. The IACC welcomes this opportunity to highlight the efforts of those trading partners who have taken steps in advancing the protection and enforcement of legitimate manufacturers' IP rights, and to offer suggestions for where those efforts might be improved for the benefit of all.

IACC SPECIAL 301 RECOMMENDATIONS, 2006 – 2016*

	06	07	08	09	10	11	12	13	14	15	16
Belize	PWL	WL									
Bolivia											WL
Botswana									SM		
Brazil		PWL	WL	WL	WL	WL	WL	WL	WL	WL	PWL
Canada	PFC	PWL	WL	WL	PWL	PWL	PWL	PWL	WL/OCR	WL/OCR	WL
China	PFC/306	PFC/306	PFC/306	PFC	PWL	PWL	PWL	PWL	PWL	PWL	PWL
Colombia									SM	WL	WL
Costa Rica	PWL	PWL									
Czech Republic		WL	WL	WL							
Hong Kong											SM
India									SM	PWL	PWL
Indonesia									SM	PWL	PWL
Italy						WL	WL			SM	
Japan											SM
Kenya									SM	WL	WL
Korea			OO								
Malaysia	PWL	WL							SM	SM	WL
Mexico	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Mozambique									SM	WL	
Namibia									SM		
Nigeria									SM	WL	WL
Pakistan									SM		
Paraguay		PWL/306	306	306	306	306	306	306	WL/306	SM	SM
Philippines	PWL	WL	WL	WL	WL	PWL	WL	WL	WL	SM	SM
Russia	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL
Saudi Arabia							WL				SM
Singapore											SM
South Africa					WL				SM		
Spain					WL	WL	WL			SM	
Thailand										PWL	PWL
Turkey			OO	WL	WL	WL	WL	WL	WL	WL	WL
Ukraine										SM	PWL
UAE		SM	OO					WL	WL	WL	WL
Vietnam		PWL	WL	WL		WL	WL	WL		WL	WL

* Abbreviations: PFC: Priority Foreign Country; 306: Section 306 Monitoring; PWL: Priority Watch List; WL: Watch List; OO: Other Observations; SM: Special Mention; OCR: Out-of-Cycle Review.

ASIA-PACIFIC & SOUTH ASIA

CHINA

Recommendation: Priority Watch List

For well over a decade, IACC members have identified the People's Republic of China ("China" or "PRC") as their country of greatest concern with regard to intellectual property protection and enforcement. This fact should come as no surprise given the country's long-standing status as the world's largest manufacturer of counterfeit goods, servicing both China's domestic market – also the world's largest – and consumers around the globe. Customs seizure statistics in the United States⁵ and the European Union⁶ have consistently identified China as the primary source of counterfeit and pirated goods intercepted at their respective borders; and rarely, if ever, during the past two decades has that dubious ranking been closely contested. The IACC's engagement with foreign governments around the world frequently paints a similar picture; counterfeits sold in the local market – whether that market is in Asia, the Middle East, Europe, Africa, or Latin America – are largely attributed to Chinese imports. The same is true for the websites that have grown to become a significant distribution tool for the sale of counterfeits to consumers worldwide; the sites are frequently operated out of China, using Chinese banks and payment service providers to facilitate their sales, shipping disproportionately via China EMS. While the country has taken significant steps in developing its IP regime, China remains, undoubtedly, the global hub of counterfeiting. Accordingly, the IACC supports USTR's retention of the PRC on the Special 301 Priority Watch List in 2016.

As discussed in prior years' submissions, China has a well-developed and relatively robust legal and regulatory regime with regard to intellectual property. Rights-holders have reported consistent improvements in recent years as the PRC continues to review, amend, and modernize its relevant legislation. IACC members describe the recent Trademark Law revision as a move in the right direction, though impediments to effective protection and enforcement remain. One long-standing concern, for example, involves China's thresholds for criminal counterfeiting cases, which remain far too high in the view of trademark owners. Particularly in light of the sophistication of many counterfeiting operations who, fully aware of the existence of the thresholds (and in connection with

⁵ See Intellectual Property Rights Fiscal Year 2014, note 3 supra. China was the source country for 45% of shipments seized by U.S. Customs & Border Protection, and for 63% of total seizures in terms of manufacturers' suggested retail price.

⁶ See Report on EU Customs, note 4 supra. China accounted for over 80% of seizures in terms of the volume of seized articles, and over 66% of seizures by value.

standard approaches to calculating the value of goods), take great care to minimize inventory on-hand and to obfuscate evidence of their level of sales; the thresholds can serve as a complete bar to criminal sanctions. This, of course, leads directly to another of rights-holders long-time complaints – the Chinese government’s over-reliance on administrative enforcement.

As in past years, administrative enforcement remains the most frequent mode of enforcing intellectual property rights in China.⁷ And while members generally spoke positively regarding their interactions with administrative authorities, ultimately, administrative penalties are viewed as wholly insufficient as a means of deterring recidivism. Rights-holders reiterated statements described in last year’s submission regarding challenges that they continue face in some regions – particularly in Northeast China – resulting in greater difficulties in obtaining even administrative enforcement. Administrative enforcement personnel in some areas are described as overly conservative, sometimes justifying their inaction on the basis of maintaining social stability. Others report strong protectionism preventing any meaningful action from being taken against even well-known and notorious districts and markets throughout the country.

Despite the heavy reliance upon administrative enforcement, some members reported an overall increase in the number of criminal cases taken on by Chinese authorities in 2015, which is encouraging. Members likewise spoke positively regarding their working relationships with the Public Security Bureau (PSB) and the Ministry of Public Security (MPS). The former was cited for its support of rights-holders in conducting criminal raids of factories and distributors, some of which have been driven by closer cooperation from online platforms to build cases against large scale online counterfeiters’ brick and mortar networks (i.e., their production and storage facilities). The latter was cited for its efforts on a number of special campaigns against counterfeiting since 2013.

Rights-holders continue to raise concerns with what is viewed as an overly-formalistic approach often taken by the procuratorate and the judiciary however, which is seen as undermining much of the work undertaken by the criminal authorities and diminishing the level of penalties assessed in such cases.⁸ More specifically, a very conservative

⁷ According to the most recently available statistics, in 2014, China’s AICs dealt with 67,500 infringement and counterfeiting cases with a value of approximately RMB 998 million (US\$ 161 million). The number of cases was 15,600 fewer and the value was RMB 123 million (US\$ 19.8 million) less than the 2013 figures – a decrease of 18.77% and 10.97% respectively.
<http://sbj.saic.gov.cn/tjxx/201505/P020150506389157118243.pdf>.

⁸ In 2014, procuratorates approved arrests in 2,924 cases involving 4,859 individuals, most for counterfeiting registered trademarks. This is down from 3,272 cases involving 5,081 individuals in 2013.
<http://www.nipso.cn/onevs.asp?id=26177>.

approach is generally taken when assessing evidence of the extent of counterfeiters' crimes. Evidence of illegal business volume or sales volume may be disregarded in favor of more concrete proof such as the value of goods seized on-site. Likewise, prosecutors and judges may refuse to consider "unfinished" counterfeit goods, labels, and packaging as proof of the extent of the criminal activity. The end result can frustrate police and investigators who've spent significant effort to document the illicit activity.

Chinese manufacturing of counterfeit goods for export remains a primary concern of rights-holders around the world. As noted above, China remains the single-greatest source of production, globally, for the counterfeit goods found in retail markets – whether in the brick and mortar context, or online. As such, China Customs essentially serves as the first line of defense for the anti-counterfeiting efforts of every country in the world.⁹ Customs agencies worldwide have the unenviable task of finding the proverbial needle in a haystack, and counterfeiters rely on the overwhelming volume of trade to provide cover for their own illicit shipments. Chinese Customs officials' ability to reduce the size of that haystack, in turn, makes the jobs of other Customs agencies' screening of imports for contraband a more manageable task.¹⁰ As in many years past, rights-holders participating in this year's Special 301 consultations stressed the need for greater transparency with regard to the destruction of seized counterfeit goods and instrumentalities. While IP owners may bear the costs associated with the storage and destruction of seized goods, in many instances they are provided with no access or opportunity to witness the goods' destruction, and are provided with little, if any, documentation of Customs' disposal of the goods. In light of past instances of corruption, where goods have been found to re-enter the market, it is incumbent on Customs to ensure a transparent and verifiable process. Likewise, rights-holders encourage Customs to improve the efficiency of the process, as undue delays may result in significantly increased storage costs.

Rights-holders have reported some improvement in their interactions with China Customs during the past year, but have also expressed a desire for greater information exchange with Customs. Intelligence sharing is viewed as an essential tool for identifying high-level targets who drive the overall volume of the counterfeit trade. As borne out by U.S. Customs & Border Protection's annual seizure statistics, there has been a pronounced shift in the mode of transport for goods being exported from China into other consumer markets. While ocean-going cargo transport continues to account for the

⁹ In 2014, Customs seized 24,000 shipments for IP violations in 2014, totaling nearly 92 million items. Jacob Schindler, Chinese Customs Seizures Rocket As Most Affected Industries Are Revealed, 2015 World Trademark Rev., June 30, 2015

. <http://www.worldtrademarkreview.com/blog/detail.aspx?g=9f3362a6-5c0e-453a-a9a9-7b5d13e68cb3> .

¹⁰ *Id.* Nearly all of the goods seized by China Customs were intended for export.

greatest overall volume, we've seen a significant increase in express consignment and international mail shipments.¹¹ This has the unfortunate side-effect of greatly increasing the strain on Customs resources (both in China and in the destination country), while also minimizing the harm to counterfeiters when one of their shipments is intercepted; as they lose a single item, or at most a handful of items rather than a container-load. In this regard, China EMS has become the provider of choice for counterfeiters shipping to consumers internationally, as it generally allows counterfeiters to ship their products without an accurate description of the goods, and without a valid or verified return address. The former consideration may make detection by import inspectors more difficult, while the latter negatively impacts rights-holders' (or law enforcement's) ability to trace the goods back to their source when they have been discovered. Additional safeguards should be considered to prevent the exploitation of legitimate services by counterfeiters to facilitate their illegal activities.

The growing volume of express consignments and international mail shipments of counterfeit goods is widely viewed as correlating to the explosion in the trafficking of counterfeit goods online in recent years. The IACC has focused a great deal of attention on this growing online problem in recent years, both with regard to stand-alone websites and large scale trading platforms. In 2012, we launched our RogueBlock® program, developed in cooperation with the world's largest credit card and money transfer companies. This was followed by the launch of the IACC MarketSafe® initiative in 2014, in collaboration with the Alibaba Group, and intended to combat the sale of counterfeit goods on the Taobao and Tmall platforms – two of the largest consumer-facing online marketplaces in the world. From the time of its launch in January 2012, and through January 2016, the RogueBlock program has resulted in the termination of over 5,000 merchant accounts tied to the trafficking of counterfeits online. Even by conservative estimates, it's believed that these accounts were used to service networks totaling over 200,000 sites. Analysis of program data has shown that a disproportionate number of these sites, and the financial institutes providing their merchant capabilities, are based out of China. It should be noted that while these sites may be operated from China, they typically target American and European consumers.¹² As noted in previous years' submissions, greater regulation and oversight by Chinese authorities is essential to cutting off the flow of illicit funds to the operators of such sites, particularly in light of the frequent reluctance of Chinese banks to comply with U.S. court orders to freeze counterfeiters' assets and provide account records in such cases.¹³

¹¹ See Intellectual Property Rights Fiscal Year 2014, note 3 supra, at pages 16 – 19.

¹² The sites, for example, are English- or other Western European-language sites, with pricing in U.S. dollars, Euros, or British Pounds.

¹³ See e.g., *Tiffany (NJ) LLC v. Forbse*, 12-2317-cv(L) (2013).

The IACC MarketSafe program, which has now been in operation for nearly two years, focuses on another aspect of online trafficking, but has seen comparable success. As of February 1st of this year, it has resulted in the removal of over 155,000 listings for IP infringing goods offered for sale in violation of the participating online marketplaces' policies. Further, it has resulted in the permanent ban and closure of over 4,300 sellers' online stores on the platforms. We have enjoyed a strong partnership with Alibaba in the development and implementation of the program, and we continue working to expand and refine our efforts in this space.

While China has taken significant steps to improve its IPR regime in recent years, the scope and size of the counterfeiting and piracy problems there remains unacceptably large, and many long-standing concerns have, to date, not been sufficiently addressed. Notwithstanding the progress that China has demonstrated in some respects, it remains the country of greatest concern for IACC members in 2016; accordingly, we support its retention on the Priority Watch List. The IACC encourages continued reforms to China's IPR regime, and urges China to address significant concerns of rights-holders, including:

- Providing for greater cooperation between administrative and criminal enforcement authorities with the aim of increasing the volume of case transfers and the imposition of deterrent criminal penalties where appropriate;
- Taking steps to encourage greater information exchange and intelligence sharing between China Customs and industry partners to address the exploitation of mail and express delivery services for the exportation of counterfeit goods to consumers abroad;
- Developing best practices and, where necessary, adopting regulations to ensure the assistance of Chinese financial institutions and other intermediaries to deprive counterfeiters of their ill-gotten gains; and
- Providing leadership and oversight to ensure the consistent application of IP laws throughout the country.

HONG KONG

Recommendation: No Recommendation

Hong Kong consistently ranks second, behind China, in U.S. Customs & Border Protection's, and the European Union's, annual IPR-related seizure statistics in terms of the number of seizures, the volume of goods seized, and the value of goods seized.¹⁴ Hong Kong is not, however, widely thought of as a major manufacturing center for the counterfeit goods arriving in consumer markets around the globe. This apparent inconsistency is largely viewed as being the result of the massive volume of counterfeit goods manufactured in "mainland" China, that are transshipped through Hong Kong in an effort to decrease their likelihood of targeting for enforcement by customs personnel in their destination markets.

Chinese exporters frequently work with Hong Kong-based freight forwarders, who become the exporter of record, obfuscating the true source of the goods. Even where customs agencies do interdict those shipments at the border, the freight forwarders typically disclaim any liability or knowledge that the goods in question were counterfeit; they also frequently refuse to disclose any information about the true identity of the exporter, claiming that their client information is confidential. As a result, any efforts to investigate the ultimate source of the illicit goods hits a dead end.

Rights-holders generally speak very positively with regard to the assistance they receive from Hong Kong Customs and Excise (HKC&E), particularly with regard to their efforts outside of the traditional border control mission with which customs agencies are responsible for around the world.¹⁵ HKC&E is likewise applauded for their professional and consistent efforts to coordinate with international law enforcement agencies. However, IACC members have raised Hong Kong Customs' enforcement against in-transit shipments from the PRC as a significant concern during this year's consultations. Though we make no recommendation regarding Hong Kong's inclusion or exclusion from the Special 301 Watch List, we wish to highlight this issue, and to encourage discussion between the United States, China, and Hong Kong to address this ongoing concern.

¹⁴ See notes 3 and 4 *supra*. Hong Kong is identified as the source of 37% of overall IP-related seizures, accounting for 25% of seizures by value in the United States. In the EU, Hong Kong is identified as the provenance of just over 8% of seized goods, accounting for over 16% of seizures by value.

¹⁵ Unlike many customs agencies in other countries, Hong Kong Customs & Excise has authority to investigate and enforce against targets not only at the border, but also within Hong Kong. This includes the authority to make arrests and to seize counterfeit goods.

INDIA

Recommendation: Priority Watch List

The IACC supported India's retention on the Special 301 Priority Watch List last year, and continues to support its inclusion in 2016. Though rights-holders' comments were largely positive with regard to police and customs enforcement personnel in India, the legal regime itself is seen as creating substantial obstacles to the effective enforcement of IP rights in the country. One respondent during our consultations described India as one of the most challenging jurisdictions in the world in terms of enforcing his company's intellectual property, a result of resource constraints, over-burdened courts and enforcement bodies, and an overly-formalistic approach to enforcement.

With regard to that final complaint, rights-holders have pointed for several years to Section 115(4) of the Trade Marks Act of 1999¹⁶. That statutory provision requires that police seek an opinion from the Registrar of Trade Marks as a prerequisite to undertaking an anti-counterfeiting enforcement action. As also noted in prior years' submissions, this preliminary opinion often takes at least a month to obtain, and at best simply serves to delay enforcement and permit the counterfeiter's illegal conduct to continue. At worst, it precludes enforcement entirely, as targets may have long-since moved on when the opinion is finally in hand. The police should be trained sufficiently to make a determination of probable cause on their own or on the advice of prosecutors. Due process to the accused can be further ensured by the judiciary at a preliminary stage of prosecution. In a similar vein, it is a common practice among enforcement agencies to insist upon the production of a copyright registration as a precondition for conducting a raid, in spite of there being no such statutory requirement for such. We've also received reports that despite being a party to the Berne Convention, authorities are often reluctant to recognize foreign copyrights. As a practical consideration, rights-holders have found it necessary to seek Indian copyright registrations, resulting in additional costs and delays.

In spite of these structural impediments, rights-holders tended to speak positively with regard to law enforcement and customs personnel; there appears to be a desire on the part of enforcement authorities to do more. Likewise, we've received positive comments regarding the capability and expertise of the judiciary, noting the quality and consistency of their judgments. The consensus view however is that both enforcement personnel and their counterparts in the judiciary are under-resourced. Each of these factors decreases the efficiency and effectiveness of India's IP regime, and contributes greatly to the challenges faced by rights-holders.

¹⁶ The Trade Marks Act (1999), http://www.wipo.int/wipolex/en/text.jsp?file_id=128107.

One additional area of concern heard by rights-holders during this year's consultations involved the acquisition of trademark rights. The process is viewed as overly bureaucratic, with registration often taking considerably longer to obtain than in other countries. It was described by a respondent as one of the most difficult countries in the world to obtain trademark registrations. As a result, a rights-holder's ability to assert its established trademark rights in India may lag far behind its ability to do so in other jurisdictions.

Rights-holders have seen some reasons for optimism under the Modi administration. The new National IPR Strategy which was drafted by the Indian Ministry of Commerce and Industry, and for which industry was given an opportunity to provide input, is viewed as a step in the right direction. However, more substantial and more substantive reforms are necessary in order to ensure real improvement to the nation's IP regime. The volume of counterfeits in the market remains severe, and the obstacles to enforcement remain significant. In the coming year, we hope that the Indian government will take the following steps to ensure progress moving forward:

- Increase engagement with the private sector to develop a roadmap for reforms that will lead to practical improvements in the IP regime;
- Adopt necessary legislation and amendments to remove impediments to enforcement that currently exist;
- Ensure that law enforcement and customs personnel have the necessary resources to carry out their IP enforcement missions;
- Provide the Register of Trade Marks with the necessary resources, and implement necessary procedures to reduce the pendency of applications for registration; and
- Expand efforts in training and in providing clear guidance to law enforcement personnel to increase the uniform application of IP laws and consistency of enforcement throughout the country.

INDONESIA

Recommendation: Priority Watch List

IACC members' comments with regard to Indonesia during this year's Special 301 consultations largely mirrored those issues raised last year. Trademark counterfeiting and copyright piracy remain severe in a number of product sectors, and insufficient border controls including with regard to transshipment of infringing goods, were cited as major concerns, along with inadequate penalties, slow-moving and costly judicial processes, and official corruption. The IACC recommends Indonesia's retention on the Priority Watch List in 2016, due to these continuing concerns.

Though Indonesia has taken steps to modernize its legal regime in recent years, in practice, it remains extremely difficult for IP owners to enforce their rights. Rights-holders have noted significant problems with police corruption when attempting to execute raids, including the disclosure of planned enforcement actions to targets. One respondent indicated that corruption remains the single greatest obstacle to effective IP enforcement in the country. Where enforcement actions have been carried out, subsequent prosecution is hampered by a lack of coordination between the police and the Attorney General's Chambers; and where cases do proceed to trial, punishments remain low, and only come after costly and lengthy proceedings.

The Indonesian judiciary is said to typically only impose the minimum allowable sentence in IP-related cases, resulting in negligible deterrence. Rights-holders have been actively encouraged by police to forego pursuing criminal charges in favor of extra-judicial settlement with offenders, leaving the impression that even among law enforcement personnel who are truly interested in addressing the country's IP problems, there is growing frustration with the lack of follow-through on their efforts. Another respondent indicated that it had had no cases prosecuted in the past year, while commenting that it was their understanding that few do. Substantially greater efficiency and transparency – both with regard to the judicial process, and with regard to sentencing – are necessary to overcome this perceived disinterest in addressing the deficiencies in Indonesia's IPR regime.

In light of the reported lack of progress in Indonesia during the past year, the IACC supports Indonesia's retention on the Priority Watch List in 2016. We encourage the Indonesian government to:

- Increase the resources and training available to enforcement agencies, including Customs, as a means to decreasing the volume of counterfeit goods imported or transshipped through the country;
- Ensure that the judiciary is properly trained and resourced in order to efficiently handle IP-related cases, and to ensure that appropriate sentences are imposed and enforced; and
- Take steps to significantly improve coordination between the relevant bodies tasked with IP enforcement, from police and customs officials to prosecutors and judges.

JAPAN

Recommendation: No Recommendation

The IACC makes no recommendation for or against Japan’s inclusion on the Special 301 Watch List this year, but wishes to draw attention to three key concerns faced by rights-holders in the country. While Japan is widely viewed as having a strong IPR regime, these issues undermine that perception. We would welcome the opportunity to engage with the Japanese government in the coming year to discuss steps that could be taken to ensure that Japan remains a regional and global leader with regard to protecting intellectual property rights.

During this year’s consultations, rights-holders raised concerns regarding the “personal use exception” to the general prohibition under Japanese law on importing counterfeit goods. While other countries, including the United States, include a personal use exception¹⁷, those exceptions should apply in only limited circumstances and for very limited quantities of goods. Moreover, they should not serve as loopholes precluding the enforcement of a generally applicable law. As applied in Japan however, the personal use exception is viewed by many as one that swallows the rule. There is no clear delineation of the volume or value of goods which may be claimed for personal use, and neither is there a requirement (as in the U.S.) that the goods be imported personally, nor a limitation on the frequency with which the exception may be invoked.

A second concern raised by IACC members involves what many view as an overly formalistic approach by Customs with regard to the recordation of trademarks. On numerous occasions, Japanese Customs has refused to allow recordations for trademarks where those marks are affixed to small components or products because, in the view of Customs, the use of the marks was not prominent enough. In a similar vein, Customs has refused recordations, questioning whether a registered trademark actually qualifies as a trademark. Simply put, these questions are not properly within the purview of Customs, but of the Japan Patent Office, which has already determined the issue of the marks’ validity when it issued the registration. Denying the owner of a registered trademark the benefits accorded with registration – including Customs enforcement for the mark – is inappropriate.

A final concern raised by rights-holders involves the enforcement of IP rights on online marketplaces. Some IACC members report greater difficulty in enforcing their rights on Japanese platforms than is typically the case elsewhere around the world (including in China). Platforms often take a very formal approach, refusing to accept “good faith”

¹⁷ See 19 U.S.C. 1526(d), and 19 CFR 148.55.

takedown requests for products that are, on their face, counterfeit. They generally require that a test purchase accompany each request, which is both exceedingly costly and inefficient.

While none of these concerns may warrant Japan's inclusion on the Special 301 Watch List, we would welcome the assistance and attention of USTR to each of these issues in 2016.

MALAYSIA

Recommendation: Watch List

Malaysia has appeared sporadically in the IACC's Special 301 recommendations during the past decade with mentions in 2014 and 2015, as well as recommendations in 2006 and 2007 for the Priority Watch List and Watch List, respectively. For a number of years in the early- to mid- 2000s, Malaysia was a regular presence in the IACC's Special 301 comments, due to significant levels of pirate optical disc production, customs-related issues, and a number of other rights-holder concerns. Regrettably, rights-holders' problems in Malaysia have grown more pronounced during the past two years, and as a result, we recommend Malaysia's return to the Watch List in 2016.

During this year's consultations, IACC members identified a number of issues including: a lack of criminal enforcement, insufficient coordination between enforcement agencies, non-deterrent penalties, ineffective border control measures, official corruption, and an overall lack of political will to address these problems. While Malaysia's statutory regime is well-developed with regard to IP, including the Trade Descriptions Act of 2011, Copyright Act of 1987, the Patents Act of 1983, the Trademark Act, and other laws focused on geographical indications, integrated circuit designs, and industrial designs, enforcement of the legal rights provided by those statutes has generally proven difficult for IP owners.

While some domestic production and finishing takes place in Malaysia, the consensus view is that most of the problems experienced by rights-holders begin with the country's ineffective border controls. Malaysia lacks a trademark recordation system which both hinders local authorities' identification of infringing goods, and their ability to seek assistance from rights-holders in authenticating shipments. Customs official are supposed to contact the enforcement division of the Ministry of Domestic Trade Cooperative and Consumerism (MDTCC) when they detect a suspicious consignment of products being imported into the country, though in action, this rarely occurs.

Malaysian authorities demonstrate a strong preference for administrative enforcement, raising the same concerns detailed by rights-holders in other jurisdictions such as China and Vietnam, namely the lack of significant deterrence and frequent recidivism. While raids are not infrequent, rights-holders report little follow-through, and prosecutions are described as exceedingly rare. In either case, counterfeiters appear to be well aware that their crimes have a low risk of punishment, meaningful or otherwise; not surprisingly, members complained of a high number of repeat offenders. One respondent described conducting multiple enforcement actions against several shops under common ownership in 2015, each selling counterfeit goods. Subsequent to the raids however, no prosecution was initiated, and the stores continue to operate. In light of such reports, it was unsurprising that, when queried on their experience with Malaysian courts, another rights-holder responded that they had none to report, as their cases typically never reach the courts. Another reported significant delays causing the case to be drawn out for several years unnecessarily.

While the Malaysian government has steadily increased the staffing and resources available to the enforcement division of the MDTCC, many of the problems identified by rights-holders cannot be addressed simply by the addition of manpower or funding. Significantly greater political will and increased training for, and better coordination between, law enforcement and customs personnel are essential to improving the situation for rights-holders in Malaysia. For all of the reasons described herein, we recommend Malaysia's return to the Special 301 Watch List.

PHILIPPINES

Recommendation: No Recommendation

In 2014, USTR removed the Philippines from the Special 301 Watch List, following a decade at either the Watch List or Priority Watch List level. USTR cited significant improvements in the legislative and regulatory regimes in the country, as well as great strides that had been made with regard to civil and administrative enforcement, though noting that "significant challenges remain" for rights-holders in the country. Since its removal from the Watch List, the IACC has continued to monitor the situation; in 2015, IACC representatives also had the opportunity to meet with representatives from the IP Office of the Philippines (IPOP HL). While the IACC acknowledges the progress that has been made, and welcomes continued engagement with the government of the Philippines, we wish to highlight herein some of the ongoing problems raised by IACC members during this year's consultations.

First, it should be noted that rights-holders continue to speak positively both with regard to the National Bureau of Investigation and IPOPHL, and commend the efforts that have been made to increase enforcement. Border controls however remain a concern, with counterfeits still consistently reaching the local market, and fueling retail sales. While raids are an important component of enforcement, increased efforts at the border could pay further dividends and ease some of the burden currently shouldered by the internal enforcement agencies.

Rights-holders' primary concern in 2015 though remained with the judiciary system, which has for years been decried as exceedingly slow. Prosecutors and judges are described as inefficient in their handling of cases, and the system as a whole is viewed as lacking accountability; in some instances, even relatively simple cases may take years to resolve. Judges frequently push cases into mandatory mediation, but fail to sanction defendants for failing to appear or who needlessly, and repeatedly, delay cases. Rights-holders, meanwhile, are implicitly sanctioned for defendants' delays and the courts' poor case management, as IP owners continue to accrue storage fees unnecessarily. As enforcement increases, so too does the backlog of cases awaiting adjudication; and as a direct result of the judiciary system's inefficiency, at least one rights-holder has indicated that it has ceased all raid actions at present.

The IACC strongly encourages the Philippines to make addressing the judicial backlog a priority in 2016, and to provide necessary training, resources, and oversight to remedy these long-standing concerns.

SINGAPORE

Recommendation: No Recommendation

Though we make no recommendation with regard to Singapore's inclusion on the Special 301 Watch List this year, IACC members wish to highlight ongoing concerns in the country with regard to customs enforcement. In late 2014, the Intellectual Property Office of Singapore undertook a public consultation on enhancing border protection. In spite of significant feedback from the rights-holder community encouraging a more robust border enforcement regime, respondents report little or no progress in that area during the past year. Enforcement remains problematic due to both statutory constraints, insufficient coordination, and difficulties with the judiciary.

Rights-holders' primary concern in Singapore involves the transshipment of counterfeit

goods through the country. Under the Trade Marks Act though, customs enforcement is hampered by onerous requirements that make it impractical for IP owners to pursue most shipments. For example, the current law permits the detention of suspected infringing goods for no more than two days. This alone, as a practical matter, will preclude most action. But Singapore also requires a minimum security deposit of \$20,000 for each shipment that is detained, again significantly reducing rights-holders' ability to pursue smaller shipments. Finally, the lack of an efficient administrative process for the detention, seizure, and destruction of infringing goods necessitates that the rights-holder file a civil action against the importer / shipper in any case in which the seizure is objected to. These factors decrease the effectiveness of Singapore's border control regime, while increasing the costs to rights-holders associated with enforcement.

In addition to the above concerns, IACC members also report a lack of coordination between Customs and the Intellectual Property Rights Branch of the Police. As a result, Police rarely launch criminal investigations or enforcement actions, even in the case of large-scale seizures by Customs, and in spite of repeated requests from injured rights-holders. Enforcement in the Free Trade Zone is likewise hampered by an apparent lack of clarity among the judiciary with regard to the legal authority for enforcement in the FTZ. Lower court judges will often refuse to grant search warrants for suspected counterfeit shipments if they've been imported into the FTZ. That issue has arisen in a number of jurisdictions around the globe with regard to the operation of free trade zones, and a clear pronouncement by the government concerning the authority of enforcement agencies, and the applicability of Singaporean law within the FTZ would be helpful in this case.

We welcome the opportunity to work with USTR and the government of Singapore to address these issues in 2016.

THAILAND

Recommendation: Priority Watch List

In 2015, USTR retained Thailand on the Special 301 Priority Watch List, noting that although the government has indicated a willingness to improve its IPR regime, to date, its actions had not borne out that expressed interest. Regrettably, IACC members reported much the same in this year's consultations. Rights-holders continue to cite a wide variety of concerns in the country including insufficient border measures, official corruption, ineffective policing (including with regard to investigating offenses), as well

as high levels of retail trafficking and inefficient handling of applications for trademark registration that hamper efforts to protect companies' trademarks. Accordingly, the IACC recommends Thailand's retention on the Priority Watch List again in 2016.

For several years, IACC members have consistently reported a decline in support for IP enforcement in Thailand, even preceding the military coup in May of 2014; that trend continued in 2015. While Thailand's legal regime is generally viewed as strong in terms of IP, enforcement is hindered by a number of factors. Rights-holders first note that under Thai law, prosecutors have almost no discretion in whether to prosecute cases, provided there is "sufficient evidence" of a crime. As a result, they're unable to prioritize their efforts on more significant cases where tougher sentences might be imposed. In a sense, the problem is the reverse of that seen in other jurisdictions, e.g., Vietnam, where rights-holders report an over-reliance on administrative sanctions. This has led to the system becoming overloaded with lower-level counterfeiting cases. However, the laws also provide for a 50% reduction in sentence in the case of a guilty plea, and suspended sentences are common, so counterfeiters have little risk of significant jail time in practice, and deterrence remains minimal.

A second, related concern is raised specifically with the quality of police investigative work. Because prosecutors' discretion is limited, some have reported that police tend to view one case as equivalent to another – any arrest with sufficient evidence will be prosecuted, and higher arrest numbers provide better optics, regardless of the ultimate outcome of the case. As a result, investigation often goes only as far as is necessary to provide "sufficient evidence." There's little incentive to do more than a cursory investigation, and police rarely collect enough evidence to prove a more serious crime (e.g., by seizing and preserving business documents that might provide proof of past sales, or enable them to work back to identify other larger targets). The limited evidence collection and investigation though may also decrease the likelihood of a conviction when cases do go to trial.

Rights-holders view the deterioration with regard to enforcement in recent years as being due in part to corruption, particularly in the Economic Crimes Suppression Division of the Police, which is the de facto enforcement authority for IP-related crimes.

Border controls and customs enforcement also remain key concerns. Though Thailand is not generally viewed as a major manufacturing center for counterfeit goods, the widespread availability of counterfeits in the local market clearly point to deficiencies in this area.

As reported last year, trademark owners remain frustrated with the exceedingly slow trademark registration process in Thailand. One member company described its own

experience noting dozens of applications that have been pending with the office in excess of seven years with no progress reported.

Given the continued lack of progress on these issues and others, most of which have been the subject of comments by the IACC and others in past years' submissions, we encourage USTR's retention of Thailand at the Priority Watch List level in this year's report. In 2016, Thailand should take significant steps towards:

- Improving border control measures, including by working more closely with its counterparts in the region;
- Identifying and rooting out corruption within its enforcement agencies; and
- Providing increased training to law enforcement and encouraging deeper investigation to ensure that cases are fully-developed when presented to prosecutors.

VIETNAM

Recommendation: Watch List

Vietnam was retained on the Special 301 Watch List in 2015, with USTR citing, among other reasons, the continued widespread availability of counterfeit goods in physical markets, a growing online trade in counterfeit goods, and inadequate enforcement. IACC members continued to raise each of these issues during this year's consultations, and accordingly, we support Vietnam's retention on the Watch List in 2016.

While Vietnam has made significant progress over the past decade – IACC recommended the country's inclusion at the Priority Watch List in 2007 – IP protection remains challenging in the country. One typical complaint has focused on the country's over-reliance on administrative enforcement, which, though often more efficient in terms of time and cost, tends to diminish the deterrent effect on offenders. Penalties remain too low in Vietnam, and recidivism too frequent. As in past years, respondents encourage Vietnam to make greater use of criminal sanctions, which carry greater punitive effect, but are used relatively sparingly. Rights-holders have spoken highly of the judiciary in Vietnam, noting their imposition of strong penalties and understanding of the seriousness of IP offenses.

Brick and mortar retail sales of counterfeits persist in major cities such as Hanoi and Ho Chi Minh, as well as in tourist destinations. Rights-holders also continue to report increasing online sales – a concern that has been flagged by both the IACC and USTR in the past. Some members have commented positively with regard to their interactions with the Ministry of Science and Technology, noting that Ministry's responsiveness to IP

owners' complaints about online trafficking and its willingness to disable websites upon conclusive evidence of the sites' sales of counterfeit goods. Given the continued proliferation of such sites though, clearly greater efforts are needed to crack down on illicit online sales.

Customs enforcement likewise remains a priority for rights-holders, though we have received some positive reports of increased cooperation between Vietnamese and Chinese Customs personnel resulting in increased seizures at the border. The IACC has long advocated for greater collaboration between the two countries, and these reports are encouraging. The widespread availability of counterfeit goods in the Vietnamese market though – by most accounts, sourced primarily from China – is a clear indicator though that more can and should be done in this regard.

We have also received troubling reports during this year's process regarding a perceived increase in corruption within the Market Management Bureau and Economic Police which has compromised enforcement actions and resulted in a lack of prosecutions. The IACC will continue investigate and seek additional information with regard to these assertions.

While we applaud the progress that has been made in Vietnam in recent years, given the severity of challenges still faced by rights-holders in protecting and enforcing their rights in the country – and particularly in light of growing concerns related to online trafficking – we recommend Vietnam's retention on the Special 301 Watch List in 2016. In the coming year, we encourage the Vietnamese government to:

- Adopt policies to encourage the referral of administrative cases for criminal enforcement;
- Develop an action plan for more effectively dealing with online trafficking of counterfeit and pirated goods;
- Continue building upon the past year's cross-border cooperation with Chinese Customs officials; and
- Continue efforts related to capacity building and training with international partners.

EUROPE, MIDDLE EAST, AFRICA

KENYA

Recommendation: Watch List

IACC members again highlighted concerns in the key African markets of Kenya and Nigeria (see below) during this year's Special 301 process. As noted in our submissions in each of the past two years, rights-holders have applauded the efforts made by the Kenyan government in providing a strong legal regime to combat counterfeiting and piracy, but practical enforcement remains a challenge in the country. Retail level sales, ineffective border controls, and the failure to impose consistent and deterrent penalties remained a concern for trademark owners during the past year.

In past years, IACC members have commented positively with regard to Kenya's legislative regime, most notably in relation to the Anti-Counterfeit Act (2008), which provides for criminal measures and significant penalties. But while deterrent penalties are authorized under the law – up to 5 years imprisonment for a first offense, or 15 years for subsequent offenses, in addition to hefty fines – in practice, the penalties imposed by Kenyan courts rarely carry such deterrent weight. In fact, custodial sentences are infrequently applied; convicted offenders generally receive a nominal fine that fails to discourage subsequent violations.

Rights-holders remain largely positive in their comments about Kenya's Anti-Counterfeit Agency ("ACA"), police, and the Kenya Revenue Authority ("KRA"). Though some rights-holders have cited inconsistency in their dealings with the ACA during the past year, management has been open to, and responsive to, the concerns that have been raised.

With regard to border control issues, those concerns raised in the IACC's 2015 comments continued during the past year, particularly with regard to exports and in-transit enforcement. We again encourage the Kenyan government to empower enforcement personnel in that regard. We believe that Kenya could be a leader on IP in the region, and play an important role in cross-border, regional efforts with other key countries in Southwestern Africa, such as Tanzania and Mozambique, which in turn could allow for the more efficient application of resources by each country. In the coming year, the IACC encourages the government of Kenya to take concrete steps to:

- Ensure the imposition of deterrent penalties;
- Provide opportunities for judicial training in IPR; and
- Ensure that Customs officials are provided with the necessary authority to address cross-border trafficking of counterfeit goods.

KINGDOM OF SAUDI ARABIA

Recommendation: No Recommendation

The Kingdom of Saudi Arabia (“KSA” or “Saudi Arabia”) returns to the IACC’s Special 301 submission for the first time in a number of years, due to increased rights-holder concerns with regard to border controls, assistance from law enforcement personnel (including reports of a lack of transparency), non-deterrent sentencing, and insufficient coordination between agencies tasked with IPR enforcement. While we make no recommendation for or against the inclusion of the KSA on USTR’s Special 301 list, the IACC will continue to monitor these issues throughout 2016.

The Kingdom of Saudi Arabia is one of the largest consumer markets in the region, and despite the financial crisis caused by the drop in oil prices, average retail sales purportedly increased by more than 10% in 2015. Regrettably, rights-holders indicate that the domestic market is rife with counterfeit consumer products, and the country’s existing customs and enforcement regimes are doing little to reduce the volume of illicit goods available to consumers.

Though counterfeit goods may enter the KSA directly via the ports of Jeddah and Dammam, the primary source for counterfeit goods appears to be the United Arab Emirates (“UAE”). Goods are said to move mainly overland after arriving at the Jebel Ali port, with the trade in counterfeits facilitated by liberal trade agreements between the two countries offering relatively unfettered access to the KSA market for goods arriving from the UAE. Rights-holders report that KSA Customs are often reluctant to inspect or seize products in-bound from the UAE or other Gulf Cooperation Council member states, and further, that Customs has been seen to take a formalistic approach to seizures when they do take place. For example, one respondent noted that where “unfinished” goods were found alongside counterfeit packaging and security labels in a single shipment, the labels and packaging were seized, but the unbranded goods were not.

Rights-holders have noted that the KSA has neither a centralized process for the enforcement of IP-related offenses; nor has it developed an efficient model for coordinating between its various agencies.

However, the IACC has seen some apparent acknowledgement of the need for improvement and the desire to do so during the past year – e.g., the IACC has been contacted regarding potential interest for IP-related training in the KSA – leading to some optimism that progress can be made on these issues. We will continue to work with IACC members in the coming year to monitor for any progress on these rights-holder concerns.

NIGERIA

Recommendation: Watch List

Rights-holders from a number of product sectors, continued to report extensive problems with regard to the protection and enforcement of intellectual property rights in Nigeria during the past year. In contrast to Kenya, however, rights-holders typically took a less optimistic view of the legal regime in Nigeria. The laws currently in place – particularly with regard to the authorized penalties for IP offenses – are viewed as inadequate to effectively deter the trafficking of counterfeit and pirated goods. A slow judicial process, widespread corruption, and a lack of coordination among responsible agencies were likewise highlighted in rights-holders’ comments during this year’s process.

Rights-holders indicate that IP enforcement actions are rare, in view of the acknowledged pervasiveness of counterfeit goods in the domestic market; though one member has also noted an apparent increase in criminal cases during the past year, providing some optimism that the government may be growing more serious about addressing the problems. Court cases continue to proceed slowly though, and absent a significant change in the courts’ typical imposition of penalties, major improvements are unlikely to materialize.

We urge USTR to continue closely monitoring the situation in Nigeria, offering support where appropriate, to improve both the legal framework and its implementation. In 2016, the IACC encourages the government of Nigeria to:

- Explore opportunities for addressing long-standing concerns of official corruption and increasing accountability by auditing enforcement agencies;
- Adopt policies to increase the availability of deterrent-level penalties; and
- Provide greater opportunities for judicial training to improve the efficiency with which IP cases are handled.

TURKEY

Recommendation: Watch List

The IACC has filed comments with regard to rights-holders’ concerns in Turkey in each year since 2008; this year marks the eighth year in a row that we have recommended Turkey’s inclusion on the Special 301 Watch List. As the gateway between Europe and Asia, the country’s strategic importance as a trade hub has long been recognized; regrettably though, IACC members continue to report a wide range of concerns related to

the trafficking of illicit goods through the key nation, along with increasing problems with the domestic protection and enforcement of their IP rights.

Turkey perennially ranks as one of the leading sources of counterfeit goods entering the European Union. In the most recently published EU Customs statistics¹⁸, Turkey ranked 4th in terms of the total number of items seized, and 4th with regard to the total value of goods seized. Rights-holders have bemoaned the insufficiency of Turkish Customs' efforts for a number of years, and noted little or no improvement in this area during the past year. Retail sales and wholesale distribution likewise remain key concerns, attributed in part to the lack of effective enforcement. Rights-holders have reported significant difficulty in bringing criminal actions due to a number of procedural hurdles; the following example is representative of such complaints.

In order to arrange for an enforcement raid at a location, a search warrant is a legal requirement. Search warrants can only be obtained from a judge, and must be supported with evidence of the alleged activity, typically in the form of a test purchase of infringing goods. Judges have taken an exceedingly formalistic approach to this prerequisite though, insisting upon receipts detailing the name and address of the retailer, and a fully itemized description of the purchased items. Sellers of counterfeit goods have become aware of these standards, and frequently refuse to provide the required documentation, which in turn often results in judges refusing to issue the necessary warrant. These preliminary requirements are viewed as being even more onerous in the context of distribution and manufacturing facilities where test purchases are impractical.

These concerns mesh with rights-holders' descriptions of the judiciary, particularly lower court judges, as having insufficient training with regard to intellectual property. Many are said not to take IP cases as seriously as other actions before them, and – perhaps as a result of the low levels of enforcement, and the relatively few IP cases brought to trial – judges do not have the opportunity to develop expertise in these types of cases.

As noted above, Turkey again appears near the top of the European Commission's most-recently reported statistics, ranking behind only China, Hong Kong, and Panama in terms of seizures by value.¹⁹ Turkey appears as one of the three most prominent sources of counterfeit goods seized at the EU border in a number of categories, including: "other beverages" (25.33% of seized articles), perfumes and cosmetics (15.26%), clothing (9.91%), clothing accessories (5.2%), sport shoes (7.92%), other shoes (3.28%), bags (including wallets, purses, etc.) (1.02%), and packaging materials (14.79%). The last category is perhaps the most troubling, as it tends to underscore long-standing concerns

¹⁸ See note 4 *supra*.

¹⁹ *Id.*

related to the increase of manufacturing and finishing of counterfeits in the country. The IACC has noted Turkey's prominence in the EU seizure statistics for several years, highlighting the need for fundamental improvements in the country's IPR and border enforcement regimes. Lack of resourcing and high staff turnover within Turkish Customs are viewed as contributing to these difficulties, but more concrete steps must be taken to enhance Turkey's border control measures.

In light of the continued concerns related to the enforcement of IP rights both within and at Turkey's borders, the IACC recommends its retention on the Watch List in 2016. In the coming year, we encourage the Turkish government to take the following steps towards combating the trafficking of counterfeit goods:

- Provide Customs authorities with the necessary resources and training to significantly increase their ability to carry out their IPR enforcement mission;
- Increase opportunities for training to build greater expertise among the judiciary;
- Review the existing statutory and regulatory regimes to identify structural impediments to IP enforcement efforts; and
- Leverage high-profile enforcement actions as a means of educating the public about the importance of IP protection.

UNITED ARAB EMIRATES

Recommendation: Watch List

The IACC recommended the United Arab Emirates for inclusion on the Special 301 Watch List in each of the past three years. Regrettably, rights-holders continue to experience significant, and apparently increasing, concerns with regard to the state of IP protection and enforcement in the UAE. As noted in previous years' submissions, rights-holders' concerns in the Emirates are largely focused on border control and customs enforcement issues, a result of the UAE's vital importance as a trade hub in the region, and globally.

While members continue to report positive interactions with the Ministry of Development and police forces in key emirates – both have been described as motivated and responsive – they are also under-resourced, and the nominal penalties imposed on offenders do little to discourage recidivism.

As also noted in prior years however, rights-holders' experiences with Customs in the UAE have diverged greatly from those seen with the police. According to one respondent, Customs officials at Jebel Ali Port have not conducted or reported any formal seizures of

their brands goods in over two years. Other members describe Customs officials as largely unresponsive, and generally disinterested in IP enforcement. A number of rights-holders report receiving few, if any, notifications of seizures or detentions.

In some cases, rights-holders have also questioned the sufficiency of procedures adopted by Customs officials when counterfeit goods are detected. Following an interdiction of consignments suspected of containing counterfeit goods, officers first notify the shipper – at which point the counterfeiters may simply abandon the goods, leaving the authorities or the brand-owner with the expense of disposal. Counterfeiters may also seek to convince officials to release the goods through bribery or other means. Involving the shipper at that stage serves no legitimate purpose in any case, as the shipper generally has no means of demonstrating that the goods in question are, in fact, legitimate. At best, they may be able to offer documentation to demonstrate the provenance of the goods; but as such documentation can easily be forged, these procedures serve simply to delay direct authentication by the party most qualified to do so – the trademark owner.

Rights-holders also report that in some instances, Customs will seek authentication of suspect shipments from the Authentication Laboratories run by the police or other government agencies, though rights-holders have also pointed to deficiencies in this process. Oftentimes, the labs will request that the brand owner provide an authentic sample identical to the counterfeit version presented for examination. As counterfeiters often use well-known marks on products that have no authentic counterpart though, providing a specimen for comparison is an impossibility.

In addition, rights-holders continue to express concerns related to the transparent disposition of goods and the practice of re-exporting counterfeit goods to the country of origin, both of which may be done in a non-transparent fashion, and with little information provided to rights-holders which might facilitate subsequent investigation or enforcement at the original point of export.

Improved communication and coordination between enforcement agencies in the Emirates would likely pay significant dividends in addressing the issues raised herein. The IACC looks forward to working with partners in the UAE to address these concerns in 2016, and encourages further engagement from the U.S. government to enhance collaboration between enforcement agencies and the private sector throughout the UAE. In the coming year, the IACC requests that the government of the UAE:

- Continue its work on legislative reforms related to intellectual property in a transparent manner, allowing for input from relevant stakeholders;
- Undertake capacity-building efforts to ensure the increasing sophistication of investigative and enforcement efforts at and within UAE borders; and

- Make efforts to increase the deterrence of penalties imposed for intellectual property offenses.

RUSSIA, UKRAINE, CAUCASUS

RUSSIA

Recommendation: Priority Watch List

The IACC has recommended Russia's inclusion at the Priority Watch List level in its annual Special 301 submissions for more than a decade. And although some rights-holders continue to note modest improvements and occasional bright spots with regard to the protection and enforcement of their rights, on balance, the situation remains severe. Counterfeits remain widely available in the Russian consumer market, Customs enforcement remains largely ineffectual, and perennial concerns such as protectionism and corruption continue to be viewed as hindrances to effective enforcement. Political unrest in the region, and the strained relationship between the United States and Russia is also seen as negatively impacting Russia's attention from issues such as IPR. Accordingly, we recommend that USTR continue to include Russia on the Priority Watch List in 2015.

Rights-holders continued to highlight a variety of long-standing problems during this year's consultations. And while Russia has made significant changes to its legislative regime over the course of the past decade, beginning with its adoption of Part IV of the Civil Code prior to its accession to the WTO, rights-holders' issues have typically been less focused on the sufficiency of the country's laws, than on the willingness of Russian authorities to enforce those laws. Enforcement – both at and within in Russia's borders – remained the single greatest concern raised by IACC members during the past year.

Russian border enforcement has been described as generally ineffective, with goods passing freely into the country – a problem exacerbated by Russia's proximity to the large-scale manufacturing of counterfeits in China. The entry of illicit goods into Russia from China is likewise facilitated by the ineffective, under-trained, and under-resourced border control personnel manning the borders of Russia's partners in the Customs Union. As noted in last year's submission, some IACC members have seen an up-tick in counterfeit manufacturing operations in the remote west of China, accompanied by greater traffic along new distribution routes through Kazakhstan.

Rights-holders report that they rarely receive seizure notifications or requests for assistance from Customs personnel (e.g., for support in authenticating suspect goods presented for entry), both of which are concerning for a nation the size of Russia, particularly considering the volume of counterfeit products that appears in the retail market. At best, these factors point to Russian Customs needing to better communicate

with rights-holders when they are taking effective action to interdict counterfeits at the border; at worst, they're an indicator that significantly greater efforts and resources are necessary to prevent the influx of counterfeit goods into the domestic market.

As we've seen in the United States, rights-holders also report a significant increase in the volume of international postal shipments of counterfeit goods, likely tied to the growth in online trafficking of counterfeit goods shipped directly to consumers. Some IACC members have been told that Customs is not able (or is perhaps not willing) to seize these small consignments, and in some cases simply returns the goods to the senders. Where rights-holders become aware of such shipments, they may have an opportunity to intervene and file a civil action to seize the items, but given the volume, and often small size of the shipments, doing so is likely impractical or not viable from a financial standpoint. Customs should have clear administrative authority to seize and dispose of those consignments, and work with their police counterparts to make appropriate use of the available shipper and recipient information for follow-up investigations.²⁰

While criminal enforcement of IP rights also reportedly remains difficult to obtain in Russia, rights-holders do report some success in filing civil cases. Members have spoken positively with regard to the judiciary's well-reasoned opinions, and their willingness to impose meaningful penalties. In the online context however, rights-holders continue to note issues with regard to cyber-squatting and abusive domain name registrations. The lack of an effective counterpart to the Uniform Domain Name Dispute Resolution Procedure ("UDRP") for .ru domains is viewed as a significant obstacle to enforcement, with civil actions in that realm being both more expensive and time-consuming. Russia has taken steps elsewhere in the online realm, with the enactment of new Anti-Piracy legislation that came into force last year. The new law is intended to require ISPs to respond to takedown notices within 24 hours, or else risk losing their protection under the current intermediary safe-harbor regime. Historically, Russian ISPs were seen to largely ignore those notices, however, we have received some reports of increased responsiveness under the new rules. We will continue to monitor these developments during the coming year. Copyright owners also continue to report wide-spread infringements and wholesale piracy on Russia-based websites, as widely commented on by the IACC and others in previous years.

As in past years, the range of industries affected by counterfeiting and piracy in Russia remains fairly comprehensive, including everything from apparel to spirits, information

²⁰ Russia has recently adopted more strict rules regarding express consignment deliveries from abroad, though it is unclear what effect these new rules are having, if any, in stemming the flow of counterfeits imported via mail or express delivery services. See, e.g., <http://www.ft.com/cms/s/0/77949d5e-8501-11e3-8968-00144feab7de.html#axzz3yvrlsSXY>.

technology and consumer electronics, to pharmaceuticals, all manner of copyrighted works, industrial chemicals, tobacco, and others.

Protectionism and official corruption, likewise, remain a concern for rights-holders of all kinds. Rights-holders reported during this year's consultations that some very high-profile brick-and-mortar retail locations have been described as "untouchable." Owners of some stores reportedly have agreements in place with the police to preclude any enforcement actions that might otherwise be taken against them. Russian authorities could remedy this long-standing perception by increasing the transparency with which they make decisions about enforcement, and with regard to the disposition of cases (including the destruction of seized goods).

Given the significant challenges that rights-holders continue to face in Russia, we recommend Russia's retention on the Priority Watch List in 2016. We encourage the Russian government to take the following actions in the coming year:

- Significantly increase the level of border enforcement, and increase recently reported collaboration with China Customs to decrease the volume of counterfeit goods entering the market from China;
- Increase engagement with private-sector stakeholders to develop focused, effective action plans to address long-standing concerns related to online trafficking of counterfeit and pirated goods;
- Provide law enforcement and Customs personnel with the resources necessary to more actively protect intellectual property rights; and
- Publicize enforcement actions and prosecutions, as a means to increase public awareness and demonstrate political priority for protecting intellectual property rights.

UKRAINE

Recommendation: Priority Watch List

Ukraine was designated a Priority Foreign Country in the U.S. Trade Representative's 2013 Special 301 Report, largely the result of acts, policies, and processes related to copyright and related rights. Due in part to the political crisis that unfolded soon thereafter, no punitive sanctions were taken against the country; in 2015, the IACC acknowledged continuing concerns with the country's IP regime, but made no formal recommendation for placement on the 301 Watch Lists. In its own final report, USTR

noted that while the issues leading to Ukraine's PFC designation remained, the country's government had taken some positive steps; and Ukraine was returned to the Priority Watch List.

While IACC members' experience appears to bear out the USTR's analysis of the situation in Ukraine – specifically, that of the government's legitimate efforts and interest in making progress with their IPR regime; rights-holders too noted the continuing existence of severe impediments to protecting and enforcing their rights in the Ukraine. As a result, and for the reasons discussed herein, the IACC recommends that Ukraine be retained on the Priority Watch List in 2016.

Like those in the copyright sectors, online trafficking is a major concern for trademark owners. And, as noted with regard to our comments on Russia, rights-holders have bemoaned the lack of a UDRP equivalent to address cyber-squatting and bad faith domain name registrations in Ukraine. The lack of an efficient, effective procedure for dealing with those issues requires rights-holders to rely upon costly and slowly moving civil actions. Comparatively, such actions are seen to proceed much more quickly in Russia, and with greater certainty of outcomes. As noted in previous reports, a number of large, well-known sites dealing exclusively in pirated and counterfeit products are hosted in Ukraine, and Ukrainian ISPs and registrars have been described as unhelpful and unresponsive to rights-holders' complaints and take-down requests.

The government has reportedly expressed interest and willingness to reform its existing legal regime, which would be greatly welcomed by IP owners. While the illegal use of trademarks and the illegal reproduction or distribution of copyrighted works is prohibited by, and punishable under, the Ukraine Criminal Code, those laws have in practice been interpreted very narrowly. For example, the mere possession or transportation of goods is often viewed as insufficient to level criminal charges. As a result, retail-level counterfeiters typically attempt to game the system by keeping minimal inventory on-site, and replenishing their stocks from nearby storage locations. Rights-holders have been told that those goods held in storage will not be considered in determining charges, even where the offender's intent to sell those goods is clear from the circumstances.

While the police are described as generally willing to help rights-holders in taking action against infringers, they suffer from insufficient resources, and may be discouraged from doing so given the above-mentioned formalism in interpreting the law. Significant restructuring of internal Ministries also appears to have resulted in widespread personnel changes, and in turn, many of those tasked with IP enforcement remain relatively inexperienced in the field. Customs enforcement also remains problematic, with minimal stops, and very few notifications to rights-holders of seizures.

Given the range and severity of the problems that rights-holders continue to face, we recommend that Ukraine be retained on the Priority Watch List in the coming year. We would welcome the opportunity to work with the U.S. Government to assist the Ukrainian government in addressing any of these long-standing issues in 2016.

SOUTH AMERICA

BOLIVIA

Recommendation: Watch List

In 2015, USTR retained Bolivia on the Special 301 Watch List, noting that while the country's IPR Agency, Servicio Nacional de Propiedad Intelectual (SENAPI), had made progress with regard to raising public awareness; "... adequate enforcement has been a consistent problem ... Video, music, and software piracy rates are among the highest in Latin America, and rampant counterfeiting persists." Based on discussions with IACC member companies active in Bolivia, USTR's description of the situation in-country remains accurate a year later. Rights-holders continue to point to an overall lack of enforcement in the country, and the need for holistic improvements in the way that the Bolivian government handles the problems faced by trademark and copyright owners.

While members generally believe the relevant legislation – trademark law No. 1294 – sufficient to protect their rights, that protection, in practice – whether by SENAPI or Bolivian Customs remains lacking. Though some rights-holders successfully concluded seizures with the authorities, and obtained orders for the destruction of the goods in question; obtaining that assistance remains difficult by and large. Some members have also reported that Bolivia appears to be increasing in popularity as a route for the distribution of counterfeit goods throughout the region, likely due in-part to the existing sea-access treaty between Bolivia and Chile which allows for the free passage of goods into the country from ports such as Arica and Iquique – both free zone ports, and well-known regional transit hubs for counterfeit goods. Rights-holders have expressed concerns that Bolivia's Customs and Police are not yet prepared to deal with the expected increase in counterfeit traffic.

The IACC conducted its first training in Bolivia during 2015, and looks forward to working with the country's authorities to improve the relevant enforcement agencies' expertise, and to help raise public awareness of the threats posed by counterfeiting and piracy.

BRAZIL

Recommendation: Priority Watch List

The IACC has recommended Brazil's inclusion on the Special 301 Priority Watch List in 2007, and on the Watch List in every year since. Following consultations with rights-holders during this year's 301 process, we again recommend Brazil's return to the Priority Watch List. This decision is primarily the result of intensifying concerns among rights-holders from multiple industry sectors that have been highlighted in previous years' reports, and an apparent continuing deterioration of the Brazilian government's political will to address those concerns. Retail sales of counterfeit goods in the Brazilian market – both brick and mortar and online – remain rampant. Rights-holders also continue to point to non-deterrent penalties, insufficient border measures, and an overall lack of enforcement throughout the country. The conditions in Sao Paulo which were highlighted in last year's comments continued largely unabated, and the problems experienced by rights-holders appear to be most pronounced in that region. In light of these continuing, and worsening, problems, the IACC recommends Brazil's elevation to the Priority Watch List in 2016.

The Brazilian retail market – the largest in South America – has long been viewed by legitimate manufacturers as a significant growth opportunity. That growth potential has been hampered though by the pervasiveness of counterfeits in the marketplace, and the failure of the Brazilian government to take steps necessary to curtail the illicit trafficking. On the contrary, rights-holders have regularly reported that policies and priorities established at both the federal and local levels have had the effect of exacerbating the issues. The government's failure to impose truly deterrent penalties for IP violations remains a primary concern of IACC members. While enforcement remains problematic as a general matter throughout the country, IACC members commented positively with regard to the efforts of the Specialized IP Unit of the Rio de Janeiro Police Department, which is described as a model for the rest of the country.

For years, rights-holders have bemoaned the government's failure to enact Bill number 333/1999, which would increase the authorized terms of imprisonment for crimes related to counterfeiting, bringing them in line with those available for copyright offenses. Current law provides sentences for importing, exporting or selling counterfeits that generally range from one to three months, or require only the payment of a nominal fine. In practice, sentences are often more lenient, requiring the convicted individual to perform community service only. The proposed legislation would also provide for the seizure of instrumentalities, which would both increase the level of deterrence, and make recidivism more difficult after offenders have completed their sentences. Regrettably, the legislation continues to sit dormant, as it has for years.

Rights-holders were similarly disappointed by the Senate's rejection of bill 2729/03 last December. That legislation included provisions related to inter-agency cooperation, the admission of external expert reports based on samples analysis, increased penalties, and the expeditious destruction of counterfeit goods. The bill would have helped to streamline criminal prosecutions and decreased expenses related to the storage of seized goods, both of which would have been welcomed by rights-holders.

As noted above, Sao Paulo, remains ground zero for the distribution of counterfeit goods in Brazil. Home to the notorious Shopping 25 de Marco mall, and other well-known retail centers, the sale of counterfeit goods of all kinds continued largely unimpeded in 2015, as it has since the election in 2012 of Mayor Haddad, and his decision to "deprioritize" the enforcement of IP rights. Rights-holders have noted significant problems with corruption in the city, and described enforcement raids as a practical impossibility; where they do take place, a criminal or civil injunction is required in advance, greatly increasing the cost.

Customs enforcement likewise remains a major concern. Officials are reported to lack essential resources to police Brazil's busy ports and extensive borders. Brazilian Customs still has not implemented a customs recordation system for IP owners, diminishing the effectiveness of Customs as an enforcement arm. In practice, customs enforcement often relies heavily on the reputation of the brand, or the rights-holders' own proactive efforts. Further, while Brazilian law allows for the ex officio seizure of counterfeit goods, the lack of a recordation system makes ex officio seizure more difficult and less frequent. Rights-holders also noted the inability of the federal government employees' unions to negotiate a wage increase in the past year, contributing to low morale, which in turn may contribute negatively to IP enforcement efforts.

Complaints regarding the inefficiency of the judicial system remain common; one member estimated that its civil cases take an average of more than four years from the time of filing to final adjudication; and over three years in the case of criminal prosecution. When considered in light of the previously discussed non-deterrent penalties, many rights-holders feel that they have little practical recourse.

Despite notable efforts in recent years on the part of The National Council Against Piracy and Intellectual Property Crimes ("CNCP") and The National Association for the Guarantee of Intellectual Property ("ANGARDI"), public awareness of the harms of counterfeiting and piracy remains low; there is a widespread public perception that the only difference between authentic and counterfeit goods is the price. The IACC has likewise received reports that the CNCP has become largely ineffective, no longer meeting regularly and without the political authority to bring its proposals to fruition.

As a result of the foregoing, the IACC recommends Brazil's elevation to the Priority Watch

List in 2016. The IACC encourages the Brazilian Government to take the following actions in the coming year:

- Enact and fully implement necessary legislation to achieve the objectives identified herein and in previous years' submissions, including increasing the minimum term of imprisonment for trademark offenses and minimizing financial and procedural burdens on both rights-holders and enforcement personnel;
- Devote significantly greater resources to Customs authorities and law enforcement, and increase specialized IP enforcement units throughout the country;
- Take focused and consistent action to clean up well-known retail markets with large numbers of vendors trafficking in counterfeit goods; and
- Continue efforts to raise consumer awareness regarding the threats posed by counterfeiting and piracy.

COLOMBIA

Recommendation: Watch List

IACC members continue to voice concerns with regard to Colombia, similar to those documented in prior years' submissions. IP enforcement is said to be a low priority for the country's government, and in many instances is hampered by insufficient resourcing, including the diversion of specialized units to work on other higher priority crimes. The prosecution of offenses also continues to be described as cumbersome, with a slow-moving judicial system and penalties insufficient to deter recidivism. Accordingly, we recommend that Colombia be placed on the Special 301 Watch List in 2016.

IACC members cited a wide range of issues in Colombia, including the need for stronger border controls and concerns related to transshipment. The country is viewed by many as both a source and as a weigh-station for illicit goods produced elsewhere, destined for sale throughout the Caribbean. Some members noted problems with the trafficking of labels and packaging – an indicator that domestic production and finishing of counterfeit goods has become more commonplace. Official corruption was also cited as an increased concern in the country last year. Perhaps most troubling of the comments received by the IACC this year with regard to Colombia involves the government's sanctioning of the Criminal Investigation Section, or SINJIN, in Bogota, during the second half of 2015. That action was purportedly taken as a result of the discovery that the unit's Captain was

involved with merchants from an apparel market in the area, and in turn led to several high-ranking officials being relocated, and the dissolution of the unit. The IACC is currently seeking additional information regarding this matter.

IACC members commented positively again this year on Colombia's prosecutors, who are described as professional, well-trained, and sufficiently resourced. Regrettably, the efforts of those prosecutors are often hampered by the inefficiencies of the judicial system, and the inadequate penalties imposed on offenders. Increased resources and training for the judiciary may be helpful in remedying some of these concerns.

While the legal framework in Colombia is viewed as adequate, more must be done to ensure that the laws are effectively implemented and enforced. Some members are optimistic that the continued implementation of the US-Colombia will have a positive impact on their experiences in the region, and the IACC looks forward to increased engagement with Colombia in 2016. In the coming year, the IACC encourages the government of Colombia to:

- Ensure necessary resources and funding are available to police agencies to allow specialized units to focus on their intended areas of expertise;
- Increase the efficiency of the judiciary to minimize delays; and
- Take steps to increase public awareness of the harms caused by the trafficking of counterfeit goods, and to publicize the government's efforts to fight IP crimes.

PARAGUAY

Recommendation: No Recommendation

Paraguay has been under Section 306 monitoring by USTR since the signing of a Memorandum of Understanding in 1998; following an Out-of-Cycle Review and the signature of a new MOU in June of last year, Paraguay was removed from the Special 301 Watch List. While rights-holders continue to report a number of concerns in the country, they likewise acknowledge commendable progress in some areas. As such, we provide the comments herein, but make no specific recommendation for its placement on the Special 301 Watch List.

For many years, rights-holders have cited a range of concerns with regard to IP protection and enforcement in Paraguay, including: trademark infringement and counterfeiting, manufacturing and finishing of counterfeit goods, all manner of border control issues, non-deterrent penalties for infringers, retail sales of counterfeits, an overall lack of

transparency and a need for better engagement with IP owners, as well as official corruption. While rights-holders continue to experience significant problems in Paraguay, during this year's 301 consultations, IACC members have noted increased seizures both by the police in the domestic market, and some also pointing to greater seizures by Paraguayan Customs. Rights-holders also spoke positively with regard to the efforts of DINAPI – the National Directorate for Intellectual Property – and its work to increase inter-agency cooperation and public engagement.

As in past years, Ciudad del Este remains a major hot-spot for the trafficking of counterfeits, whether destined for the domestic market, or bound for neighboring Brazil or Argentina. Rights-holders reported an overall decrease in the level of enforcement and seizures in Ciudad del Este during the past year, including at the Guarani International Airport. Elsewhere, we have received conflicting reports with some noting progress, and others increased difficulties, in obtaining enforcement at Aeropuerto Silvio Petirossi (Asuncion).

During the past year, perhaps the most frequently-heard concerns from rights-holders with regard to Paraguay involved inefficiencies in the judicial system, corruption, and the arduous nature of customs enforcement. One respondent noted that the local press has helped to highlight the issue of corruption, resulting in the removal of several public servants, but noting that there remains a perception that many counterfeiters remain protected either directly by officials within the government, or indirectly by the cumbersome procedures and formalities required to obtain enforcement – particularly in Ciudad del Este. Members report positive experiences with specialized prosecutors and judges, while also noting that they remain under-resourced and over-worked, resulting in delays and backlogs in cases. Non-deterrent penalties, and a lack of transparency with regard to the disposition of seized goods also remains a common complaint.

Paraguay remains a key entry and distribution point for counterfeit goods in Latin America, and the government must continue to build upon the progress that it has made in recent years to address rights-holders' concerns. In 2016, the IACC encourages Paraguay to take the following steps towards improving its IPR regime:

- Improve coordination among law enforcement and customs officials in Paraguay, and among regional trading partners such as Brazil and Argentina;
- Continue efforts to root out corruption within the system; and
- Provide greater resourcing and training for judges and prosecutors to increase the efficiency with which cases are handled, reduce delays, and minimize existing backlogs.

NORTH AMERICA, CENTRAL AMERICA, CARIBBEAN

CANADA

Recommendation: Watch List

Canada has remained a perennial concern for rights-holders due to a number of deficiencies in its statutory and enforcement regimes, which have typically lagged behind those of the United States and other large, developed economies. Though one of our largest trading partners, with a stable economy, robust consumer market, and itself a significant producer of intellectual property – both in the copyright and hard goods sectors – the Canadian government has often failed to make IP protection a priority. The IACC has reported on a range of issues in Canada over the course of the past decade, from the lack of criminal penalties for trademark counterfeiting, to insufficient enforcement authority for Customs personnel, and insufficient coordination among enforcement agencies. And while Canada has taken some positive steps in recent years with regard to modernizing its IP regime, most notably with the enactment of legislation²¹ in 2014 intended to address the above-mentioned concerns and others; IP owners continue to face a number of difficulties in the Canadian market. As a result, we recommend Canada’s placement at the Watch List level again in 2016.

Customs enforcement has, historically, topped the list of rights-holders’ concerns in Canada; this remained the case in 2015. Prior to the enactment of Bill C-8, the Canada Border Services Agency (“CBSA”) was handicapped by a lack of statutory authority to enforce IP rights at the border, *ex officio*. Absent a clear health and safety risk which would have triggered alternative authority for their action, CBSA could not seize even clearly counterfeit goods at the border without a court order. *Ex officio* authority is viewed broadly by rights-holders, not as “best practice” for Customs agencies around the world, but as a minimum standard for the effective enforcement of IP rights. Particularly given the volume of global trade, and the strain that processing and clearing such traffic places on Customs agencies who are tasked not only with trade enforcement, but also (and in most cases, primarily) with trade facilitation; Customs personnel often simply do not have the luxury of waiting for a court order to determine whether goods should be seized or released into commerce. Likewise, rights-holders typically do not have advanced

²¹ *Combating Counterfeit Products Act*, Bill C-8, 41st Parliament, 2nd Session (2013), <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6370314&File=24#1>.

knowledge of when and at which ports shipments of counterfeit goods are expected to arrive, so obtaining such an order in advance isn't feasible.

With the enactment of Bill C-8, Canada took the positive step of granting CBSA ex officio authority to detain suspected counterfeits ex officio; in practice though, the process remains overly complicated, as C-8 failed to grant CBSA administrative authority to deal with those goods. As implemented, the new system works in conjunction with the rights-holders' "Request for Assistance," – roughly comparable to a rights-holders' recordation of their marks with CBP in the United States. But while in the U.S., CBP retains explicit authority not only to detain the goods, but also to make an administrative determination that the goods are counterfeit (and therefore subject to seizure), seize the goods, and order their destruction as contraband; upon notice of detention by CBSA, rights-holders must file a petition with the relevant court requesting that the goods be seized and destroyed. The process of course comes with additional costs to the rights-holders in terms of attorneys' fees and court costs; rights-holders are likewise expected to cover the costs of storage and disposal.

To the IACC's knowledge, approximately 115 brands have filed the "Request for Assistance" with CBSA, though to date, most report no detained shipments under the new procedures. In fact, the IACC is aware of only six shipments that have been stopped by CBSA under the new procedures. Those who have reported experience with the procedures have expressed concern with regard to the costs associated with the new system. In at least two test cases, brands have been contacted about shipments consisting of only a handful of items – one involving a package containing four items, another involving nine pieces. In such instances, the costs associated with filing a court action to seize the goods may far outweigh the value of the goods themselves. It is worth nothing that this practical application represents a significant departure from earlier statements by the Canadian government indicating that CBSA would focus on large shipments so as to ensure its cost-effectiveness to brands.²² Rights-holders' willingness to make use of the Request for Assistance is further complicated by the uncertainty of storage and destruction costs for the goods at issue. Absent significant changes in its implementation though, we believe it's unlikely that many rights-holders will avail themselves of the Request for Assistance process – a direct result of the costs associated with doing so, and the relatively minor benefit provided by any single small package seizure. Regrettably,

²² This position was, in itself, troubling to rights-holders, given the noted trend toward small parcel consignments via express delivery, and away from large-scale container shipments seen in the trafficking of counterfeit goods in recent years. The government's position was likewise viewed as problematic because, due to the relatively small number of large-scale seizures that take place in a given year, most rights-holders would be unlikely to see any benefit from the Request for Assistance process. Given the Canadian government's insistence that the new authority be implemented in a revenue neutral fashion however, an enforcement policy focused on large shipments is perhaps the only one feasible.

this is also likely to discourage front-line CBSA officers from taking a greater interest in IP enforcement.

A more efficient administrative system is widely viewed as a preferable alternative to the current procedures, as would be shifting the cost burden to the importer or shipper who should bear responsibility for storage and destruction of any seized items as the importer of the contraband items. In addition, CBSA should have clear authority to share available information with rights-holders regarding these shipments to ensure that rights-holders have a reasonable opportunity to further investigate, and pursue other remedies where appropriate.

IP owners also continue to report the widespread availability of counterfeit and pirated goods in the retail market – both in brick and mortar locations and online. The IACC’s RogueBlock program has received numerous reports of purported Canadian pharmacies attempting to sell counterfeit and unauthorized prescription pharmaceuticals to American consumers. While many of these sites are clearly based in countries other than Canada, some do in fact appear to be operating from locations in Canada, hosted in Canada, or using .ca domains. In the same vein, numerous Canadian websites trafficking in circumvention devices continue to target U.S. consumers. Rights-holders’ efforts at enforcement against these sites have been frustrated at times by the refusal of CIRA – the Canadian Internet Registry Authority – to accept foreign court orders against such sites operating illegally from Canada.

As has been noted for many years, rights-holders strongly encourage Canada to adopt meaningful provisions to prevent the transshipment of counterfeit goods through the country en route to the United States (or elsewhere). No such provisions were included in Bill C-8, and then-Industry Minister James Moore stated in response to calls for in-transit enforcement that, “The idea Canada would act as a customs agent for the United States is, frankly, not something that’s on the table ... The scope of this is protecting Canadians and the Canadian domestic market.”²³ The IACC was hopeful that with Canada’s joining as a party to the Trans-Pacific Partnership (TPP), the government may be willing to revisit that position. The text of the TPP does, in fact, include a provision requiring enforcement against goods in transit.²⁴ Unfortunately, that provision allows as an alternative that, “a Party shall instead endeavour to provide, if appropriate and with a view to eliminating international trade in counterfeit trademark goods or pirated

²³ Stephanie Levitz, *It Isn’t Canada’s Job to Stop Fake Goods From Going to the U.S., Industry Minister Says*, Canadian Press (2014), <http://news.nationalpost.com/2014/11/27/it-isnt-canadas-job-to-stop-fake-goods-from-going-to-the-u-s-industry-minister-says/>.

²⁴ Trans-Pacific Partnership – Final Text. Article 18.76.5(b), stating, “Each Party shall provide that its competent authorities may initiate border measures ex officio with respect to goods under customs control that are: (a) imported; (b) destined for export; or (c) in transit.

copyright goods, available information to another Party in respect of goods that it has examined without a local consignee and that are transhipped [sic] through its territory and destined for the territory of the other Party, to inform that other Party's efforts to identify suspect goods upon arrival in its territory." Negotiations between the U.S. Government and Canadian Government, as embodied in the countries' Side Letter with respect to Intellectual Property indicate that Canada will take this latter route. Although it is a step in the right direction, it is viewed by rights-holders as a very small step. The U.S. government should closely monitor Canada's compliance with its obligations to ensure that this provision is fully enforced, and that rights-holders receive the benefit intended.

While rights-holders have commented positively on their relationships with enforcement personnel, particularly with regard to local law enforcement agencies, overall enforcement remains difficult at times. This has largely been the case since a restructuring within the Royal Canadian Mounted Police several years ago; RCMP had previously taken a much more active role in IP enforcement issues. Authorities have typically been willing to engage with rights-holders, and the IACC participated in a training late in 2015 in collaboration with the Canadian Anti-Counterfeiting Network, which is also planning similar events in early- to mid-2016. Regrettably, CBSA has reportedly been less willing to participate in such training events than their counterparts at other agencies. Several rights-holder organizations have offered training opportunities to CBSA, but have been turned down with CBSA citing budget limitations. The IACC has also received reports that CBSA has refused invitations to speak at major conferences in Canada regarding the new laws and procedures.

Some rights-holders report an apparent disinterest by law enforcement agencies in pursuing criminal IP charges, a fact that may be attributable to the historic difficulties in bringing cases prior to the enactment of the new legislation. At least one member reports having been encouraged by enforcement personnel to simply pursue civil remedies; however, rights-holders have in many cases been discouraged from doing so in light of the lack of statutory or treble damages, which creates uncertainty as to whether any civil recovery will cover the costs of bringing the action.

The IACC continues to encourage greater levels of cross-agency collaboration to provide more efficient use of resources; we remain hopeful that the new criminal provisions in Bill C-8 will lead to a greater priority on enforcement at all levels, and that the increased communication and cooperation between CBSA and CBP contemplated under the TPP side letter will lead to greater efficiency and effectiveness in combating IP offense at our northern border. To date however, we have received no reports of significance with regard to criminal cases brought under the new statutes, or any increase in enforcement.

Moving forward, the IACC encourages the Canadian government to continue working with the private sector to identify and address statutory and policy gaps in its protection and enforcement regimes. In 2016, the IACC requests that the Canadian government:

- Increase the resources available to Customs, police, and prosecutors, particularly at key points of entry and large metropolitan areas such as Vancouver, Toronto, and Montreal;
- Take further steps to ensure compliance with the obligations undertaken in the TPP side letter with regard to in-transit enforcement;
- Provide CBSA with the administrative authority to expeditiously seize counterfeits that they've detained ex officio without first requiring rights-holders to seek a court order; and
- Encourage meaningful collaboration between law enforcement agencies within Canada and in the U.S. on anti-counterfeiting operations.

MEXICO

Recommendation: Watch List

2016 marks the tenth consecutive year in which the IACC recommends Mexico's inclusion on the Special 301 Watch List. Perennial concerns related to large-scale retail sales of counterfeiting, including sales in a number of well-known informal markets, an overly formalistic approach to enforcement, insufficient penalties, and inadequate resourcing and authority for Customs officials continued largely unabated in Mexico during the past year. These issues have been discussed at length in prior submissions by the IACC; and given the continued lack of progress, we recommend Mexico's retention on the Special 301 Watch List in 2016.

IACC members from nearly every product sector report problems with retail-level distribution in Mexico. It has been asserted that the Mexican government is reluctant to crack down on many well-established and smaller informal markets which, although outside of the formal economy, provide employment and an outlet for inexpensive goods that would otherwise be out of reach for many consumers in the domestic market. Increased enforcement against such outlets, it is thought, could in turn contribute to increased civil unrest.

The scope of issues seen in Mexico also remains largely unchanged from previous years, with domestic manufacturing and finishing of counterfeit goods, large volumes of imports, as well as transshipment through Mexico to other markets in North and Central America, remaining problematic.

IP protection in Mexico has traditionally been hampered by an overly-formalistic approach to enforcement, where authority is segmented between the relevant agencies. Customs officials, for example, have lacked *ex officio* authority to take action against shipments of counterfeit goods; such action first requires an order from either a federal court, the Trademark Office (IMPI), or the Attorney General's Office (PGR), making the detention and seizure process more time-consuming than necessary, and adding to the expense. In some cases, by the time an order can be obtained, Customs officials have already been forced to allow the shipment to proceed.

Similar concerns have been raised for several years with regard to Customs' authority to take action against counterfeit goods in-transit through Mexico. Though Mexican Customs previously had the authority to undertake enforcement against goods in-transit, in 2011 the Attorney General's Office published a legal opinion that precluded that authority.²⁵ Counterfeiters are well aware of this determination, and need only document their shipments as being bound for a final destination beyond Mexico's jurisdiction to avoid enforcement. Undoubtedly, some of these supposed transshipments never exit the country; and Mexican authorities will have missed a clear opportunity to remove the illicit products from the domestic distribution chain. Likewise, those same goods may enter the United States. Though we are aware that a working group is currently revisiting this topic and others that have been raised in the past with regard to Mexico's enforcement regime, to date, we are unaware of any progress in remedying the situation. We would encourage the Mexican authorities to work closely with their colleagues in the United States to address these concerns more concretely.

Customs enforcement is similarly hindered by the lack of clear legal requirements in other areas as well. As is often seen in the U.S., counterfeiters frequently hide behind freight forwarding companies and customs brokers when bringing counterfeit goods into the country. However, there appears to be no clear legal requirement that these companies disclose the identity and contact information of their clients, even where a seizure of counterfeit goods has been effected. If such information was available, it could provide vital intelligence to both rights-holders and law enforcement to be used in civil or criminal actions, or for targeting subsequent shipments of counterfeits into the country.

²⁵ In 2011, the PGR issued an opinion stating that Customs' mandate under the criminal statutes was limited to those goods being imported, and that because transshipments were not intended for sale in Mexico, no legal basis for their seizure existed.

In spite of these challenges though, the IACC can also report some positive engagement with the Mexican government during the course of the past year. With the assistance of the U.S. Government's IPR attaché and Embassy staff based in Mexico City, the IACC worked to host a seminar and workshop that was well-attended by Mexican government officials including law enforcement and customs personnel. While much progress remains to be made, the robust participation by Mexican officials underscored a growing understanding of the importance of IPR, and a growing commitment to protecting the investments of rights-holders in the country.

In light of all of these factors, the IACC recommends that Mexico be retained on the Special 301 Watch List in 2016. The IACC encourages the government to take the following actions during the coming year:

- Empower Customs personnel to take ex officio action against shipments of counterfeit goods at the border;
- Rescind the 2011 Attorney General's Office opinion that prevents enforcement against goods in-transit; and
- Increase the level of penalties in counterfeiting cases to ensure the deterrent effect of existing laws.