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1730 M Street NW • Suite 1020 • Washington, DC 20036 • USA • +1(202)223-6667 • [iacc@iacc.org](mailto:iacc@iacc.org) • [www.iacc.org](http://www.iacc.org)

February 9, 2017

VIA WORLD WIDE WEB

<http://www.regulations.gov>, Docket Number USTR-2016-0026

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

**Re: 2017 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment. 81 Fed. Reg. 95722 - 24 (December 28, 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 December 28, 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 continuing 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, sweeping flourish at the end.

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**

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**February 9, 2017**

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## TABLE OF CONTENTS

Introduction	1
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### **Priority Watch List Recommendations**

China	5
India	9
Indonesia	10
Thailand	11
Russia	12
Ukraine	13
Argentina	14
Brazil	15

### **Watch List Recommendations**

Malaysia	18
Vietnam	19
Bulgaria	21
Greece	22
Kenya	22
Kingdom of Saudi Arabia	24
Nigeria	25
Romania	25
Turkey	26
United Arab Emirates	27
Bolivia	29
Colombia	30
Ecuador	31
Peru	32
Canada	32
Mexico	34

### **Other Observations / No Recommendation**

Cambodia	37
Hong Kong	37
Japan	38
Philippines	39
Singapore	40
The Balkans	41
Kazakhstan	42
Paraguay	42
Dominican Republic	43
Guatemala	44
Honduras	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.

To that end, the IACC devoted significant energy throughout 2016 to engage directly with both foreign government officials and private industry abroad to encourage concrete actions intended to address gaps in legal and enforcement regimes. As the USTR is no doubt aware, the IACC has played a leading role in the development of voluntary collaborative programs to take on practical impediments to the enforcement of intellectual property rights, particularly with regard to emerging concerns in the online market. While programs such as RogueBlock and IACC MarketSafe rely upon cooperation among responsible actors within the marketplace, the role of governments in encouraging such initiatives must also be recognized. As we respond to challenges created from the evolving manufacturing and distribution chains for counterfeit goods, USTR is well-positioned to support these efforts; and we welcome the opportunity to work with you to ensure the safety of consumers and legitimate manufacturers and retailers around the world.

Whether measured in terms of lost sales to legitimate manufacturers, tax revenues and duties that go unpaid to governments, decreased employment, or diminished investment in capital improvements and research and development; counterfeiting is a significant drain on the U.S. and global economy. Further, the production and distribution of goods produced in an entirely unregulated supply chain, where the makers have every incentive to cut 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.

As in past years, the comments submitted by the IACC are 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 are long-standing concerns for rights-holders, and have been raised in previous years' filings.

Our comments this year cover more than 30 countries, spanning five continents, underscoring the truly global scope of the problems faced by rights-holders. Eight countries are recommended for inclusion at the Priority Watch List Level, and an additional 15 for the Watch List. We also provide comments on several countries in which members have raised concerns, but for which we make no recommendation with regard to placement. The People's Republic of China continued to be IACC members' country of greatest concern over the past year, and it remains the single-largest manufacturer and exporter of counterfeit goods to both the United States and consumer markets around the world. The IACC has significantly increased its direct engagement in the PRC, and during the past year has hosted delegations from China's AQSIQ and its National Leading Group on IPR; and senior staff have traveled to China to meet with a number of stakeholders from the public and private sectors. In both the former and latter cases, our engagements have been viewed as positive and productive.

As noted in last year's comments, the Latin American region, as well as the Middle East and Africa, have been the focus of rising concerns from rights-holders. Countries in those regions account for approximately 50% of those included in this year's comments. As a result of this increased attention, the IACC hosted its first ever Latin America Regional Brand Protection Summit last June, in Miami; bringing together approximately 200 rights-holders with representatives from over a dozen countries from across the region. The IACC similarly partnered on training events in both the United Arab Emirates and

the Kingdom of Saudi Arabia, each of which were included in last year's and this year's Special 301 comments.

During 2016, we've conducted or participated in training events around the world, hosted international delegations in Washington, and actively supported programs of the U.S. Patent and Trademark Office's Global Intellectual Property Academy, as well as similar programs for foreign government officials managed by the Departments of State and Commerce.

We thank you for the opportunity to share our experiences.

**IACC SPECIAL 301 RECOMMENDATIONS, 2007 – 2017**

	07	08	09	10	11	12	13	14	15	16	17
Argentina											PWL
Belize	WL										
Bolivia										WL	WL
Botswana								SM			
Brazil	PWL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL
Bulgaria											WL
Cambodia											OO
Canada	PWL	WL	WL	PWL	PWL	PWL	PWL	WL/OCR	WL/OCR	WL	WL
China	PFC/306	PFC/306	PFC	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL
Colombia								SM	WL	WL	WL
Costa Rica	PWL										
Czech Repub.	WL	WL	WL								
Dom. Repub.											OO
Greece											WL
Guatemala											OO
Honduras											OO
Hong Kong										SM	OO
India								SM	PWL	PWL	PWL
Indonesia								SM	PWL	PWL	PWL
Italy					WL	WL			SM		
Japan										SM	OO
Kazakhstan											OO
Kenya								SM	WL	WL	WL
Korea		OO									
Malaysia	WL							SM	SM	WL	WL
Mexico	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Mozambique								SM	WL		
Namibia								SM			
Nigeria								SM	WL	WL	WL
Pakistan								SM			
Paraguay	PWL/306	306	306	306	306	306	306	WL/306	SM	SM	OO
Peru											WL
Philippines	WL	WL	WL	WL	PWL	WL	WL	WL	SM	SM	OO
Romania											WL
Russia	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL
Saudi Arabia						WL				SM	WL
Singapore										SM	OO
South Africa				WL				SM			
Spain				WL	WL	WL			SM		
Thailand									PWL	PWL	PWL
Turkey		OO	WL	WL	WL	WL	WL	WL	WL	WL	WL
Ukraine									SM	PWL	PWL
UAE	SM	OO					WL	WL	WL	WL	WL
Vietnam	PWL	WL	WL		WL	WL	WL		WL	WL	WL



## **PRIORITY WATCH LIST RECOMMENDATIONS**

### **ASIA-PACIFIC & SOUTH ASIA**

#### **CHINA**

The People's Republic of China ("China" or "PRC") has held its position as the country of highest priority in our annual Special 301 comments to the USTR for well over a decade, a fact attributable to its long-time status as the world's largest manufacturer and exporter of counterfeit goods. Despite progress over that time in the development of its legal and enforcement regimes, the sale of counterfeit goods across all product sectors in China's domestic market remains widespread, copyright piracy persists at high levels, illicit goods produced in the PRC are sourced by counterfeiters around the world to fill local demand, and China-based websites, marketplaces, and service providers, including banks and payment processors, service a significant portion of global online sales and distribution of counterfeit goods and pirated content. IACC members continued to report a broad range of concerns in the Chinese market during this year's consultations, and while the PRC government has undoubtedly made positive steps in recent years, and engagement remains high, the IACC strongly supports China's retention on the Priority Watch List in 2017.

China's legal and regulatory regime has undergone tremendous change since its accession to the World Trade Organization in 2001, and continues to do so, thanks in no small part to the pressure and encouragement provided by the U.S. Government's consistent bilateral engagement efforts including the Joint Commission on Commerce and Trade (JCCT), and the Strategic and Economic Dialogue (S&ED), and its willingness to pursue dispute resolution at the WTO, when necessary. The IACC and its members, and numerous other stakeholders, have likewise regularly sought direct engagement with both the Chinese government and with partners in China's private sector. As a result of this multi-pronged effort, and China's own commitments to improving, we've seen China's IPR regime become well-developed and relatively robust over the years. Despite the progress that has been made however, a number of long-standing concerns remain unaddressed; and the evolving landscape for IP protection and enforcement has resulted in new challenges, requiring a similarly evolving approach.

As noted in last year's comments, member companies have described China's most recent revision to its Trademark Law as "a move in the right direction." Significant concerns remain though with regard to the threshold for criminal enforcement – an issue that has been raised in our 301 comments and through other avenues for years. As discussed further below, there is a stark difference between the criminal and administrative penalties available for counterfeiting offenses, and the thresholds embodied in the present law unfortunately lead to many cases being dealt with administratively, where criminal action is justified. The availability and level of penalties was a common concern of respondents, with one noting the disparity of the upper limits of statutory damages in cases involving trademark infringement

versus those involving copyrights. Another noted what they view as unreasonably low penalties for offenses involving the manufacturing or exporting of counterfeit goods. Revised statutory provisions or improved guidance to ensure a reasonably deterrent baseline for sentencing would be welcome. Similarly, we would support the reduction of existing criminal thresholds, and clear standards for the commencement of criminal investigations and for the referral of cases from administrative to criminal authorities.

In 2014 and 2016, respectively, the PRC committed to strengthening online enforcement against counterfeiting and piracy, and to promote e-commerce legislation (including the enhancement of its online enforcement efforts). A draft of the proposed e-commerce law is currently circulating, and IACC members are closely monitoring its development. Some rights-holders are raising concerns with regard to the counter-notice procedures included in the draft, arguing that they do not appropriately balance the relative burdens between rights-holders and alleged offenders. Given China's massive internet user-base, and the role of China-based producers, sellers, and service providers in the global online counterfeiting and piracy markets, the PRC should ensure that online platforms are obliged to take appropriate measures to protect consumers and legitimate business from illicit online sales.

While rights-holders' point to a variety of areas for possible improvement to China's legal and regulatory regime, its enforcement of IPR has, for many years, been highlighted as their greatest priority. This should come as little surprise given the gradual, but consistent improvement seen with regard to China's laws themselves, and the failure of that legal reform to alter the country's status as the world's largest producer and exporter of counterfeit goods. Many IP owners stress the PRC's approach to enforcement, particularly its over-reliance upon administrative remedies as the most significant contributing factor to this state of affairs.

As described in previous years, administrative enforcement remains the most frequent mode for enforcing intellectual property rights in China. And while rights-holders typically report positive working relationships with administrative enforcement bodies, and some have noted an improvements in the willingness of the AICs and other administrative enforcement agencies to act against counterfeiters, those improvements are not uniform throughout the country. Government restructuring has brought enforcement to a virtual standstill in some areas. The lack of necessary resources continues to be a problem in some parts of the country as well, with authorities refusing to act on consistent basis. Local protectionism remains problematic in some areas, with members highlighting examples during the past year in Guangdong, Zhejiang, Fujian, and Shenzhen. The greatest point of contention with regard to administrative enforcement however remains the failure of those actions to provide any true deterrence against recidivism. Administrative penalties are typically limited to nominal fines and the seizure of infringing products, but in some cases involve no more than a written warning. Given the inconsistency of enforcement actions, and the ultimate lack of any significant consequences, there's little incentive for offenders to alter their conduct. And while the administrative authorities can refer serious cases for criminal investigation and prosecution, in practice this does not happen frequently enough.

The lack of criminal referrals is generally tied to three factors. First, as noted above, the statutory thresholds for criminal prosecution remain unnecessarily high. Next, and perhaps more importantly, counterfeiters have become extremely adept at gaming the system. Counterfeiters are well-aware of the thresholds, and actively seek to minimize the likelihood of their prosecution by keeping minimal inventory on-hand at any single location, failing to maintain accurate records concerning their volume of sales, or otherwise taking steps to hide the duration or level of their illicit activity. Those practices are only successful however because of the third factor – the administrative authorities’ tendency to conduct only a superficial investigation, rather than to devote the resources necessary to uncovering the true scope of a targeted operation. We would welcome action by the Chinese government both to reduce the current thresholds, and to provide clearer guidance on the referral of cases to criminal authorities, ensuring that aggregate sales and evidence are taken into account. Where criminal actions are pursued, rights-holders have spoken positively regarding their interactions with the Public Security Bureau and the Ministry of Public Security. They’ve similarly reported improvements among prosecutors and the judiciary, noting several cases with significant prison terms and substantial fines. Civil enforcement is also said to have increased, and as a result, some rights-holders have encouraged additional training for the judiciary to ensure more consistent application of the law throughout the country.

Not surprisingly, the enforcement of intellectual property rights online remains a significant priority both for those in the hard goods and copyright sectors. China’s deficiencies in this respect are seen to have a significant negative impact in both the domestic market and around the world. China has an estimated 650 million internet users – the largest base of online consumers in the world. Those consumers are actively seeking out both branded goods and copyrighted content, and the Chinese government must take necessary action to ensure that its online retail market remains a safe and trusted outlet for consumers, while also protecting the rights of legitimate businesses and intellectual property owners seeking to sell to those consumers. With regard to those in the copyright sector, greater efforts must be made to ensure that consumers have access to legitimate content in the first place. A variety of impediments currently prevent, or significantly delay, consumers’ access to legitimate sources of content online, and are widely viewed as driving those consumers to illegitimate sources. Also, as previously noted, China-based manufacturers and sellers are driving a substantial portion of the online sales of counterfeit goods marketed to consumers throughout the world.

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. Our RogueBlock® program, launched in 2012, was developed in cooperation with the world’s largest credit card and money transfer companies, in a collaborative effort to identify and demonetize online retailers of counterfeit goods. A disproportionate number of these sites, their merchant banks, and their payment processors are operating out of China. It should be noted that while these sites may be operated from China, they typically target American and European consumers. 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.

Building upon our successful RogueBlock collaboration, we launched the IACC MarketSafe® initiative in 2014. That program, operated in collaboration with the Alibaba Group, was developed to combat the sale of counterfeit goods on the Taobao and Tmall platforms – two of the largest consumer-facing online marketplaces in the world. At the end of March, we will be launching the IACC MarketSafe Expansion Program, which will significantly increase the number and diversity of participants involved, while also bringing in additional platforms: Alibaba.com, Aliexpress.com, and 1688.com. The Expansion will be offered to participants at no cost.

Some brands have reported positive results in working with major Chinese platforms and law enforcement to investigate and prosecute large-scale operations with a brick-and-mortar component (i.e., manufacturing and distribution facilities in China, servicing the sellers' online presence). We've also seen evidence of greater willingness on the part of some intermediaries to work with rights-holders, but there remains a lack of consistency or wide-spread buy-in for such collaboration to-date. The Chinese government should encourage this type of positive engagement, as well as the recognition by online service providers of the role and responsibility that they have in ensuring that the online market is one that is safe for, and trusted by, consumers and businesses alike. While there has been some progress in addressing the online aspects of counterfeiting online, more must be done. Greater certainty with regard to the legal tools available is essential, as is more consistent enforcement. As noted above, IACC members will be closely monitoring the development of the forthcoming e-commerce law; it is vital that China gets it right.

Chinese exports of counterfeit goods also remained a priority concern for rights-holders in 2016. As noted previously, China remains the single-greatest source of production, globally, for the counterfeit goods found in retail markets. China Customs, as a result, serves as the first line of defense for the anti-counterfeiting efforts of every country in the world. We were disappointed to receive reports of decreased level of engagement and pro-active inspections by Customs during the past year. Rights-holders have also noted difficulties with regard to Customs' referrals for criminal investigations.

One issue that has been the focus of increased attention over the past few years concerns the significant increase in seizures of counterfeit goods by U.S. Customs via international mail and express consignments. There is a strong correlation between these increases and the explosion of China-based websites directed at U.S. consumers. China EMS appears to be the preferred method of shipping for most of these sites, and the EMS logo is frequently (and prominently) displayed on illicit sites. As reported by respondents, EMS generally allows shipments without a valid or verified return address, and without an accurate description of the goods. The latter is helpful in seeking to avoid detection by Customs (whether outbound by China Customs, or upon presentation to customs personnel in destination markets); the former is useful in

concealing the identity and business location of the counterfeiter. Rights-holders continue to explore ways in which to address this increasingly urgent problem.

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 2017. Accordingly, we support its retention on the Priority Watch List.

## **INDIA**

In 2016, the USTR retained India on the Special 301 Priority Watch List, citing extensive, and severe, problems faced by rights-holders across the entire spectrum of intellectual property rights. Most relevant to the IACC's membership were issues related to rights-acquisition due to "burdensome procedures" and "significant delays associated with cancellation and opposition proceedings," in addition to high levels of retail sales, manufacturing, importing, and exporting of counterfeit goods. Regrettably, during the IACC's consultations with members this year, we have continued to hear many of the same concerns that were raised in prior years. Despite some notable bright spots, India remains a country in which it is exceedingly difficult for brand-owners to obtain and enforce their rights.

In 2017, rights-holders across a wide range of product sectors continue to see very high levels of counterfeits in both physical and online markets. Effective border controls are lacking, and fair access to the market is diminished. As noted in last year's comments, India is viewed as one of the most difficult countries in the world from which to obtain a trademark registration, even for well-known brands with global consumer recognition. Absent a company's ability to obtain legal recognition for its marks, meaningful enforcement is all but precluded.

On a more positive note, respondents this year described continuing improvements in their interactions with both police and customs officials. While this engagement varies from region to region, brands have related positive experiences in particular in India's larger cities. These positive reports come despite enforcement personnel often being under-resourced. Enforcement personnel are viewed as eager to work with rights-holders, receptive to training, and more senior officers are taking an active role in engagement with the private sector. That top-level buy-in is seen as vital, in that it demonstrates greater political priority to address IP crimes and sends a message to the rank-and-file officers that their work on these issues is important.

Rights-holders have also pointed to an apparent increased perception of the health and safety implications inherent in product counterfeiting. Enforcement personnel have also been reported to have begun taking a broader view of the issue, invoking consumer fraud laws (e.g.,

Article 420 of the Indian Penal Code) where appropriate, which in turn results in more significant punishments to offenders and a greater deterrent effect.

Despite these encouraging reports, the environment in India remains extremely challenging for rights-holders. With a population surpassing one billion, it is essential that India's IPR regime continue to progress. While we're hopeful that things will continue to move in a positive direction, we recommend that India be retained on the Priority Watch List in 2017.

## **INDONESIA**

Last year, Indonesia was retained on the Special 301 Priority Watch List by the USTR. Based on member feedback during this year's consultations, the IACC supports its continued retention at the Priority Watch List level. Members have reported little, if any, improvement on the ground. They continue to describe high volumes of counterfeits and pirated goods in the local market, particularly in major cities and high-traffic tourist destinations. We likewise remain troubled by continuing reports of corruption and its role in preventing rights-holders from effectively enforcing their rights in the country.

Though some rights-holders report an increase in enforcement actions, they have also seen raids frustrated by leaks from within local enforcement agencies, providing advance notice to targets of impending actions. Likewise, members have described law enforcement officers' reluctance or outright refusal to take action against individuals involved in the counterfeit trade even when presented with clear evidence of illegal activity. The reputation for such practices has in some cases discouraged rights-holders from further engaging with law enforcement. Law enforcement also appear to be discouraged by the handling of IPR cases, noting that in spite of their work, prosecutions are slow (or may not take place at all). Where prosecutions have proceeded, rights-holders indicate that the judiciary often renders decisions that appear improper in light of the facts and applicable law, fail to provide a reasonable basis for their decisions, and typically impose the minimum available penalties. Enforcement personnel, aware of that latter tendency have, as a result, often encouraged rights-holders to seek extra-judicial settlement rather than to proceed to trial.

While corruption is described as the greatest impediment to enforcement in Indonesia, it is far from the only one. Border controls are viewed as lacking, with both importation and transshipment seen as significant problems. When taken together, the problems faced by IP owners in Indonesia remain severe. Accordingly, the IACC supports Indonesia's retention on the Priority Watch List in 2017.

In the coming year, we would strongly encourage the Indonesian government to undertake a holistic review of their efforts. Greater training, and better coordination is required between all stakeholders including police, prosecutors, customs officials, the judiciary, as well as private-sector representatives including rights-holders and NGOs. Further efforts to educate

the public and to increase awareness of the risks associated with IP crime should be undertaken as well.

## **THAILAND**

Thailand was retained on the Priority Watch List in 2016, with USTR highlighting numerous ongoing concerns impacting trademark and copyright owners. Comments received from IACC members during this year's consultations – citing corruption, insufficient penalties, ineffective policing, insufficient border control measures, large-scale retail trade, and difficulties with regard to rights acquisition – were consistent with those received in previous years in which the Coalition recommended placement on the Priority Watch List. In light of the lack of reported progress on these issues, the IACC supports Thailand's continued inclusion on the Priority Watch List.

IACC members appear generally satisfied with Thailand's statutory regime with regard to trademark counterfeiting, but the administration of those laws has created an exceedingly difficult environment in which to exercise those rights. The lack of discretion afforded to prosecutors has resulted in an over-burdened court system, as any case with sufficient evidence of a crime is prosecuted. The high volume of cases in turn precludes devoting additional resources to larger, more serious cases where more substantial penalties might be imposed. Respondents also point to provisions in the law that allow for an automatic sentence reduction for criminals who plead guilty, greatly decreasing the severity of the penalties imposed in practice. These factors also tend to discourage law enforcement personnel from more thoroughly investigating offenses or collecting evidence to support higher-level charges. Members also continue to report that enforcement of IP rights has been de-prioritized since the coup.

As in past years, respondents have highlighted difficulties obtaining trademark registrations in Thailand. The Trademark Office is seen as extremely inefficient, and the pendency of applications during the application process often extends for years, significantly diminishing rights-holders' abilities to take action against counterfeiters in the case of more recently introduced products or extensions of existing brands into new areas. We would encourage the Trademark Office to work with their U.S. counterparts to increase expertise and develop best practices with an aim toward significantly reducing examination times.

In light of the continued concerns cited by rights-holders, the IACC supports the retention of Thailand on the Priority Watch List in 2017.

## **EASTERN EUROPE and EURASIA**

### **RUSSIA**

While IACC members reported some bright spots with regard to the situation in Russia during the past year, the overwhelming consensus is that protecting and enforcing their intellectual property rights in Russia is extremely difficult, and the levels of counterfeit goods and pirated content remain extremely high. The trafficking of counterfeit goods online is rapidly becoming the greatest concern for those in the hard goods sectors, as has been the case for those in the content sectors in recent years. Customs enforcement remains problematic, and law enforcement are frequently described as uninterested in devoting time or resources to IP-related matters. In light of these issues, and others discussed further below, the IACC recommends as it has for over a decade, Russia's retention on the Priority Watch List.

Russia has implemented a number of changes to its IP regime in recent years, including the enactment of Part IV of the Civil Code and the creation of specialized IP courts. These actions have failed to address the most commonly voiced concern of rights-holders over the years however: enforcement, both at and within the country's borders. While brick and mortar retail locations and online retailers based in Russia are rife with counterfeit goods sourced from China, IACC members generally reported only nominal customs seizures throughout the past year. One respondent reported that its border seizures in 2016 totaled less than fifty items. Increased trafficking from China through Kazakhstan is a growing concern. Even those who reported positive interactions with Russian Customs noted that they saw progress only after numerous personnel changes. The laws in place are generally sufficient to permit brands to assert their rights, but there often appears little interest on the part of customs to undertake enforcement actions. Criminal enforcement is similarly problematic, with police enforcement described as "non-existent." Corruption within the ranks of law enforcement remains prevalent, with some well-known distribution centers of counterfeit goods such as the Gorbushka Mall in Moscow characterized as "untouchable," due to alleged police protectionism of store owners there.

As noted above, online enforcement is both a growing concern and a significant challenge for rights-holders. The police are described as uninterested in pursuing investigations against online sellers, while other routes of enforcement are simply unavailable. Russia's e-commerce market is estimated at over 9 billion Euros annually, and continues to grow, particularly with regard to product categories such as apparel, footwear, and sporting goods which are frequent targets of counterfeiters. Respondents also point to problems with cyber-squatting and other abusive domain name registrations on websites registered on .ru domains which are not subject to UDRP actions (nor to a comparable alternative remedy). As a result, many brands are left with little choice but to seek remedies via civil litigation. We would welcome an increased dialogue with Russia to address issues related to the illicit online market, and best practices for enforcement on the internet.



IACC members report mixed results with their civil enforcement efforts, though they generally speak positively with regard to the judiciary, who are described as unbiased, objective, and professional. Regardless of case outcomes, rights-holders have praised their issuance of soundly reasoned and fair judgments. Enforcement via civil litigation however can be a relatively slow, and very expensive, process. These factors may be compounded by the introduction of mandatory pre-trial procedures to encourage amicable settlements. Rights-holders have also questioned the advisability of such requirements, given an apparent reluctance of many judges to issue preliminary injunctions, and the potential impact these may have upon the preservation of property, evidence, and assets of a defendant.

Russia remains an extremely challenging country for rights-holders, but also an important one. Given the severity of the concerns, and the practical limitations on enforcement described by IACC members this year, we recommend Russia's retention on the Priority Watch List. We look forward to working with USTR to address the issues raised herein.

## **UKRAINE**

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. As a result of the political turmoil that arose shortly thereafter, some rights-holders suspended their brand protection programs in the country. Reports from rights-holders still active in the country however describe an exceedingly difficult environment. While the USTR has highlighted some progress in the recent past, we believe Ukraine's retention on the Priority Watch List remains justified.

IACC members have, regrettably, identified a number of obstacles to fully exercising their rights in Ukraine. Perhaps most notable among these are reports of a lack of positive, tangible results among a comprehensive range of government authorities tasked with some aspect of IP protection and enforcement. The police, Cyber-Police, Customs, State Fiscal Service, and General Prosecutor's Office are said to have provided little in the way of effective assistance in addressing counterfeiting in the Ukrainian market. While these agencies have expressed interest and support for dealing with acknowledged problems, they've demonstrated little follow-through. Rights-holders complain of both a lack of transparency and communication, with enforcement assistance offered and agreed to, then rescinded with no explanation. There is a widespread perception of corruption within various agencies, which is seen as a significant hindrance to meaningful enforcement.

Some legislative actions have been taken in the past year with the stated intent of improving Ukraine's statutory regime, though they've been met with mixed reviews. Even where the enactments are viewed positively, rights-holders have not yet seen any practical impact. On February 28, 2016, a new law amending the Criminal and Criminal Procedure Codes came into

force. The amendment is said to have deleted provisions from existing law on IP crime (including Article 229 of the Criminal Code relating to trademark infringement) concerning the confiscation and destruction of counterfeit goods, equipment and materials. As a result, the only remaining remedy is the imposition of a fine. On the other hand, in June of last year, the Parliament passed a law approving the establishment of a specialized IP court by the end of 2017. In addition, Parliament is considering a draft law intended to bring the Ukraine Customs Code into conformity with requirements under EU Regulation No 608/2013 involving small consignments of counterfeit goods. A comprehensive revision of Ukraine's IP laws is said to be underway, though progressing slowly.

Despite high volumes of counterfeit goods available in the retail market, Customs seizures remain relatively low and notifications to rights-holders remain infrequent. Rights-holders, meanwhile, point to numerous deficiencies in Ukraine's customs regime, including: a lack of procedures for destruction; a lack of transparency with regard to the disposal of seized goods; and Customs' lack of authority to take action against goods in-transit.

In the online space, rights-holders suffer many of the same problems in Ukraine as are reported in Russia, including the lack of a UDRP-like dispute resolution system, uncooperative ISPs, registrars and hosting companies; and legal and regulatory provisions that simply haven't been adapted for the online marketplace. In contrast to rights-holders' reports regarding Russia however, civil litigation in Ukraine is not typically seen as an enforcement option. The courts are described as exceedingly slow, even in relatively straightforward IP cases. And whereas Russian courts are viewed as providing well-reasoned and relatively predictable outcomes, concerns remain about corruption within the judiciary in Ukraine, further discouraging rights-holders from dedicating the time and financial resources to litigation.

Given the range and severity of the problems that rights-holders continue to face in Ukraine, we support its retention on the Priority Watch List in 2017.

## **SOUTH AMERICA**

### **ARGENTINA**

In 2016, USTR retained Argentina on the Special 301 Priority Watch List, citing numerous "long-standing and well-known deficiencies in IPR protection and enforcement," and noting the extreme challenges faced by rights-holders in the market. Among the issues highlighted were the lack of ex officio actions by police, non-deterrent sentencing in criminal matters, and a slow-moving judiciary. Regrettably, rights-holders continued to raise these and other issues when providing input for these comments.

Members have cited a lack of political will with regard to dealing with pervasive and well-known

problems in the market – perhaps most notably with regard to La Salada, which was included on USTR’s most recent Notorious Markets review. In the words of one commenter, it is less a concern of having the necessary tools or resources than that “no authority seems to be willing to bear the political cost of taking care of the situation.”

As a practical matter, rights-holders have few options in Argentina. Criminal prosecutions are not pursued proactively by the authorities, and where charges are brought, such efforts are hampered by a slow-moving judiciary and a lack of truly deterrent penalties. Civil actions face similar obstacles with regard to the speed at which they move through the courts; they’re also generally not seen to be cost-effective, as many defendants do not have sufficient recoverable assets to justify the cost of bringing the cases. Rights-holders’ sole recourse in many instances may be injunctive relief, which results in ongoing costs to monitor and ensure compliance. Some cite corruption as an aggravating factor to each of the above concerns, and diminished confidence in their ability to effectively assert their rights in the country. Rights-holders have, however, noted positive signals from the new administration and indicated their optimism that improvement is possible.

One area in which improvement would be greatly welcomed is the government’s handling of the trafficking of counterfeit goods and pirated content online. Respondents to our request for feedback this year indicated support for the adoption of new legislation to directly address these concerns. Similarly, we would encourage the Argentine government to work with both rights-holders and relevant intermediaries to provide a more holistic approach to IP protection and enforcement online.

In light of the above, the IACC recommends Argentina’s retention on the Special 301 Priority Watch List in 2017.

## **BRAZIL**

The IACC has recommended Brazil’s inclusion at the Watch List or Priority Watch List level for over a decade, citing a range of rights-holder concerns including legislative deficiencies, non-deterrent penalties, official corruption, lax enforcement, and widespread retail sales of counterfeit goods in both the brick-and-mortar and online marketplaces. In 2016, we recommended Brazil’s elevation to the Priority Watch List on the basis of input from our member companies concerning these and other issues. We reiterate that recommendation for 2017.

Rights-holders report a wide variety of challenges with regard to the enforcement of their rights in the Brazilian market. Beginning at the borders, seizures by Customs remain unacceptably low; particularly in light of the size of the population, the overall volume of imports, and the pervasiveness of counterfeits in the retail market, the relatively small number of seizures is

troubling to rights-holders. As highlighted for a number of years, significant trafficking of counterfeit goods into the country from Paraguay remains problematic. Members point to Brazil's high import tariffs – intended to foster domestic manufacturing – as a market access barrier, which contributes to the smuggling of lower cost knock-offs that undermine legitimate sales.

As in past years, rights-holders' reports concerning law enforcement personnel remains mixed. The DRCPIM in Rio has been commended for its efforts, as have specialized IP units in Brasilia. In Sao Paulo however, IP enforcement remains a low priority for the local government, and brands report little enforcement activity or successful actions even in well-known markets such as 25 de Marco and Paulista. As noted in the most recent Notorious Markets report, the cost to Sao Paulo, and to Brazil more broadly is substantial in terms of both lost revenue and jobs. Significantly greater political will from both local and national leaders, and a commitment to ensuring the application of sufficient resources to address these issues is vital.

Rights-holders similarly continue to raise concerns with regard to the efficiency of the judiciary in handling IP cases, with both civil and criminal actions reportedly taking years to resolve. Some also point to overly formalistic procedures that create an unnecessary burden on rights-holders, most notably onerous requirements when seeking injunctive relief. Respondents universally noted the lack of deterrent sentencing in counterfeiting cases, and reiterated calls for the approval of Bill number 333/1999, which would bring the authorized terms of imprisonment in counterfeiting cases in line with those available for copyright offenses. Rights-holders identified the low level of penalties currently authorized, and the lack of statutory or treble damages, as the most pressing obstacles to pursuing action through civil or criminal cases. Defendants have little incentive to plea bargain or consider settling a civil case under the current regime; similarly, the penalties are viewed as having little deterrent effect on recidivism.

As in a number of other jurisdictions, online trafficking of counterfeits is becoming an increasing priority for rights-holders in Brazil. As previously noted, the relative ease with which counterfeit goods are able to enter the country provides a steady supply of fakes, sourced primarily from China (though with some reporting local manufacturing in Nova Serrana in the southeast, and elsewhere), either directly to consumers or for resale through online marketplaces or stand-alone websites. While Brazil has adopted a new e-commerce law (number 12.965/14 – Marco Civil da Internet), rights-holders' ability to seek the removal of advertisements in the absence of a court order limits the law's effectiveness in the rapidly moving online space. Rights-holders would welcome further discussions with intermediaries, including marketplaces, to voluntarily develop best practices for dealing with illicit online sales.

The IACC has received reports of increased activity by the National Council Against Piracy and Intellectual Property Crimes ("CNCP"), which is a positive development since our filing last year. Overall however, there appears to be a consensus among participants in our Special 301 consultations this year that the environment for IP protection and enforcement has not

improved, and indeed has in some ways deteriorated, since our 2016 comments. As a result, we continue to recommend Brazil's inclusion on the Priority Watch List.

## WATCH LIST RECOMMENDATIONS

### ASIA-PACIFIC & SOUTH ASIA

#### **MALAYSIA**

While not appearing on USTR's Special 301 Watch List in 2016, the IACC has heard increased reports regarding the country during this year's consultations with members. Malaysia has made a number of appearances in the IACC's annual submissions, dating back over a decade. In 2005 and 2006, we recommended its inclusion on the Priority Watch List, and in 2007 on the Watch List. After several years off, Malaysia reappeared in 2014 and 2015, though without any recommended placement by USTR. Last year, as a result of the continuing (and increasing) concerns we've heard from members, we supported Malaysia's return to the Special 301 Watch List. We do so again this year.

IACC members have grown increasingly frustrated with the situation in Malaysia in recent years, citing a variety of concerns including: over-reliance on administrative actions, non-deterrent penalties, inefficient judicial processes, and insufficient border controls. Though Malaysia has a well-developed, and TRIPS compliant statutory regime, 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, the practical application of those laws and rights-holders' abilities to seek relief under those statutes is seen as exceedingly difficult.

Rights-holders first point to an over-reliance on administrative actions; criminal prosecutions of IP offenses are described as incredibly rare, or in the words of one respondent, "almost non-existent." As we've seen over the years, where criminal remedies are unavailable, deterrence is substantially decreased. One respondent describes raids as "merely superficial steps to plaster over the deep-rooted counterfeiting culture" that continues to flourish in Malaysia; and further notes that enforcement actions continue to be frustrated by corrupt officials providing advance notice to intended targets. Nominal fines and seizures of product are viewed as a cost of doing business, and rarely provide a significant disincentive to recidivism. In fact, respondents during this year's consultations specifically highlighted the fact that they continue to see a high number of repeat offenders operating in the Malaysian market. Such an environment is discouraging to those rights-holders who have made significant investments in their anti-counterfeiting programs in Malaysia, only to find themselves repeatedly going after many of the same offenders they've sought to bring to justice in the past. One would expect a similar level of disillusionment among law enforcement personnel.

Rights-holders have raised further concerns about the coordination between enforcement bodies, prosecutors, and the courts. One member cited an example of a series of raids which took place nearly two years ago resulting in the seizure of counterfeit goods. To date, no one

involved in those offenses has been prosecuted, and the retail locations implicated continue to operate with no apparent consequences. Further highlighting concerns with the efficiency of the judiciary, another rights-holder points to a case that, although concluded with a guilty verdict and sentencing to both imprisonment and fines, has dragged on for nearly five years. The sentence has not yet been executed, pending an appeal by the defendant. Both criminal prosecutions (when they can be obtained) and civil cases are said to result in unnecessarily lengthy trials, significantly increasing the costs to rights-holders in bringing them, delaying the administration of justice, and creating uncertainty for the business. These concerns are further exacerbated by a reported lack of regular communication from the court and prosecutors to provide updates on the status of pending cases.

Inadequate border controls and enforcement by Malaysian Customs also remain concerns. These efforts are viewed as being hampered by the lack of an effective trademark recordation system, and also by the need for better coordination between Customs and the Ministry of Domestic Trade Cooperative and Consumerism (MDTCC). When Customs identifies a suspicious consignment of products being imported into the country, they are supposed to contact the MDTCC. As described by members however, this rarely occurs in practice.

As noted in last year's comments, the Malaysian government has steadily increased the staffing and resources available to the enforcement division of the MDTCC, but further action is necessary above and beyond the application of manpower and funding. We reiterate our prior call for increased training for, and better coordination between, the judiciary, prosecutors, enforcement and customs personnel. Prosecutors should be encouraged to bring criminal charges, particularly in large and serious cases including those of repeat offenders. Likewise, judges should ensure that the penalties that they impose are sufficient to discourage future illegal activity. For all of the reasons described herein, we recommend Malaysia's return to the Special 301 Watch List.

## **VIETNAM**

Vietnam was retained on the Special 301 Watch List in 2016, with USTR noting, the continued widespread availability of counterfeit goods in physical markets, and growing concerns related to the online trade in counterfeit goods and pirated content. While IACC members have commented positively on some improvements in Vietnam over the past year, we continue to support the country's inclusion on the Special 301 Watch List in 2017.

A common concern raised by rights-holders for a number of years, Vietnam's focus on administrative enforcement is seen as a significant obstacle to meaningful enforcement of intellectual property rights. While it's often said that we cannot seize our way out of the problem of counterfeiting, seizures coupled with fines – particularly nominal fines – are not a solution either. Penalties for IP offenses in Vietnam remain too low to provide an effective deterrent against counterfeiting and piracy. As in past years, IACC members urge the

Vietnamese government to make greater use of criminal sanctions, particularly in larger, more serious cases. While we are aware of Penal Code amendments which came into force in July of last year, we have not received details of any perceived or actual impact of the new provisions thus far.

As noted above, rights-holders commented positively on three areas of perceived improvement during 2016. First, IACC member brands describe an apparent increased emphasis on the protection of intellectual property rights overall. Rights-holders were pleased with commitments made by the Vietnamese government during the TPP negotiations, and are hopeful that there will be follow-through in implementing those commitments in spite of the ultimate outcome of that agreement. Respondents were also heartened by increased border checks and seizures by Vietnamese Customs, as well as reportedly increased cross-border cooperation with their Chinese counterparts. Finally, rights-holders continue to single out the Vietnamese judiciary, describing it as “strong against counterfeiting,” and noting its consistent improvement and growing expertise in handling IP-related cases.

Rights-holders’ concerns in Vietnam remained consistent with those described last year however. In addition to the above-discussed issues relating to administrative enforcement, online sales and the need for greater tools to deal with that increased traffic are a growing priority. While the Ministry of Science and Technology is generally amenable to disabling websites upon conclusive evidence of sales of counterfeit goods, the number of such websites based in Vietnam, or directed at consumers there, appears to be increasing. More must be done to curb this activity, and the IACC would welcome opportunities to engage with the Vietnamese government on these issues.

As described in prior comments, rights-holders continue to express concerns related to corruption within Vietnam’s enforcement regime, and more specifically within the Market Management Bureau and Economic Police, which is said to have compromised enforcement actions and prosecutions.

While we continue to recommend Vietnam’s inclusion on the Special 301 Watch List, we would like to recognize the progress that has been made in recent years. Given the increased emphasis that has been seen on IPR, and how that has been reflected in practice, we are optimistic that the government will continue to build upon those efforts in 2017. We look forward to working with both the Vietnamese government and the USTR to ensure the further development of its IP enforcement regime.



## **EUROPE, MIDDLE EAST, AFRICA**

### **BULGARIA**

In 2016, the USTR retained Bulgaria on the Special 301 Watch List, citing the need for a number of legal reforms, increased priority on IP protection and enforcement, and inadequate response to concerns of online piracy. Trademark owners highlighted a number of similar issues during this year's consultations, including ones related to enforcement at and within Bulgaria's borders, insufficient coordination, and difficulties related to the adjudication of cases. Accordingly, we recommend Bulgaria's continued inclusion on the Watch List in 2017.

One respondent described the major obstacles to IPR enforcement in Bulgaria as being tied to the "fragmentation and superficiality" of the system. While rights-holders report some successful enforcement actions with police and customs units, those actions have tended to focus on low-level, highly-visible offenders such as retail vendors of counterfeit goods. Unfortunately, those actions are rarely followed by deeper investigations to uncover higher-level distributors, importers, or organized networks who supply the domestic retail trade. Criminal penalties imposed against such low-level offenders are insubstantial, often only amounting several months' probation and payment of a nominal fine.

Law enforcement agencies are said to suffer from frequent staffing changes due to insufficient funding; that insufficient funding is also seen as a contributing factor to corruption within some law enforcement agencies. With regard to the latter issue, rights-holders noted two significant police operations that led to the arrests of over 35 customs and border police officers.

While Bulgaria has established a Cyber and IPR Crimes Unit at the General Directorate for Combating Organized Crime (GDCOC), that unit's authority has been limited in practice to cases involving organized crime. As a result, other law enforcement agencies have been unable to make use of the unit's knowledge and expertise, severely limiting and delaying criminal enforcement against trafficking online.

In both criminal and civil matters, the judiciary is said to view IP cases as a low priority; they are not handled expeditiously, and there is a lack of consistent case law leading to uncertainty among prosecutors or plaintiffs in such cases. Rights-holders also report some degree of local protectionism, with judges demonstrating reluctance to award damages against local citizens in cases brought on behalf of foreign IP owners. For these reasons, the court system is viewed by many as ineffective.

IACC members have encouraged the completion of the updated Manual for Unified Practices in Investigating and Prosecuting IPR-related Crimes by the Supreme Prosecutorial Office of Cassation, and its adoption as a mandatory guide for local prosecutors, as steps that could be taken to improve criminal investigations and court proceedings. There is also clearly a need for greater resourcing of agencies tasked with protecting IP rights, and additional training for

police, customs officials, and the judiciary. Each of these though underscores the need for greater political will on the part of the government to address these considerable problems. Accordingly, the IACC recommends that Bulgaria remain on the Special 301 Watch List in 2017.

## **GREECE**

IACC members report continuing concerns in Greece largely in-line with those identified by USTR in last year's Special 301 Report, and with little or no change in regard to the severity of those problems. The Greek government fails to prioritize IPR protection, and enforcement of rights is hobbled by an overly-formalistic and bureaucratic system. By way of example, rights-holders point to the need for their lawyers to provide a special power of attorney for each case brought before the courts.

Though respondents complimented the Cyber Crime Police for its efficiency and engagement with rights-holders, and some rights-holders have seen an increase in police activity and raids, law enforcement is said to lack sufficient expertise on IP crimes. As in Bulgaria, enforcement personnel tend to focus their efforts on easy targets such as low-level retailers, while those further up the supply chain operate largely with impunity. The costs associated with enforcement are substantial – a fact credited to the slow movement of cases through the court system, and high fees for storage of evidence borne by rights-holders, particularly for those cases involving shipments through Piraeus, Greece's largest harbor.

Customs enforcement is said to be severely lacking, with relatively few seizures and no major cases reported. Rights-holders noted that they rarely receive notices of seizures, and also described Customs as severely under-resourced.

Finally, court proceedings are described as inefficient, in some cases taking years to conclude. The penalties assessed in most cases remain low, and fail to provide a meaningful deterrent. In light of the feedback we've received this year, the IACC encourages Greece's retention on the Special 301 Watch List in 2017.

## **KENYA**

For the fourth consecutive year, the IACC provides comments concerning the IPR legal and enforcement regimes in Kenya. As detailed in past submissions, members face a wide range of concerns in the country, including retail sales and finishing of counterfeit goods, trafficking in labels and packaging, significant border control issues, and corruption, among others. While rights-holders have applauded the efforts made by the Kenyan government in providing a strong legal regime, enforcement remains difficult in practice.

Since the early 2000s, the Kenyan government has aimed to comprehensively reform its legislation to bring its statutory regime into compliance with the TRIPS Agreement, and in line with other internationally accepted standards. Since 2001, Kenya has enacted the Industrial Property Act (2001), Copyright Act (2001), Trade Marks Act (2002), the Anti-Counterfeit Act (2008), and the Trade Description Act (2009). Kenya is also a signatory to numerous international and regional agreements including the Paris Convention for the Protection of Industrial Property, the Trademark Law Treaty, TRIPS, and the Lusaka Agreement establishing the African Regional Industrial Property Organization (ARIPO). In addition, Kenya has established specialized courts to deal with IPR-related matters, including the Industrial Property Tribunal and the Registrar of Trademarks.

The Anti-Counterfeit Act of 2008 (ACA) has been highlighted for its criminal measures which permit a first-time convicted offender to be imprisoned for up to five years and/or to be fined not less than three times the retail price of genuine goods comparable to those that served as the basis of the offense. The law also provides for sentencing enhancements in the case of repeat offenders – up to 15 years and/or five times the retail price of genuine comparable goods. In practice however, brand protection efforts remain challenging for rights-holders.

While the Anti-Counterfeiting Agency of Kenya (ACA Kenya) and police agencies are generally described as eager to work with rights-holders on enforcement actions, we've also received reports of inconsistency and brands sometimes experience significant delays in executing raids against targets. Court cases are also said to be greatly protracted, taking significant time to reach a final decision; and although significant sentences are authorized under the law, in practice, sentencing generally involves only a small fine. ACA Kenya has, and exercises, authority to settle matters out of court; and while this may speed up the resolution of a case, it typically also results in diminished penalties. Past, settled cases are not typically taken into consideration when sentencing an individual for subsequent offenses; deterrence against recidivism remains low.

The Kenyan government has demonstrated a commitment to strong IP rights, but in many cases lacks the resources to fully-implement necessary improvements. Increased and improved collaboration with trading partners and others with expertise in IP enforcement could improve results. We would likewise welcome the development of sentencing guidelines to ensure greater uniformity and certainty of penalties, not to mention increased deterrence. We look forward to further engagement with the Kenyan government to bring about these improvements.

## **KINGDOM OF SAUDI ARABIA**

The Kingdom of Saudi Arabia (“KSA” or “Saudi Arabia”) is one of the largest and most important consumer markets across the Middle East, and as such, holds strategic importance to rights-holders across all product sectors. IACC members’ concerns in Saudi Arabia remain similar to those reported in our 2016 comments, when the country returned to our recommendations for the first time in a number of years. Among those concerns, the most pronounced have been an overall lack of enforcement and the lack of significant, deterrent penalties when enforcement actions do take place.

The domestic retail market in Saudi Arabia remains awash in counterfeit goods, which are reported to enter the country primarily via Jebel Ali airport in the UAE, as well as via the seaports of Jeddah and Dammam. Effective customs enforcement is hampered by the liberal trade laws in the UAE and trade agreements between the UAE and KSA. Consumer products are typically imported through the UAE first, then re-exported to Saudi Arabia; the movement of those goods is largely unrestrained and without effective inspection. Customs is said to be reluctant to inspect shipments arriving from the UAE or other Gulf Cooperation Council countries.

Shipments of unfinished goods and components, as well as labels and packaging are reported to be an increasing problem. In some instances Customs officials are reported to have taken an overly-formalistic approach, seizing only finished counterfeits, but refusing to seize unfinished goods or labels stored alongside the finished products. And while some respondents noted Customs willingness to share information regarding seized shipments, they’ve also indicated that this is not consistent across all ports.

Within the domestic market, one respondent reported a significant drop-off with regard to market raids, and fewer seizures from those raids as well. The Ministry of Commerce and Industry is described as under-resourced, and at times uncooperative with rights-holders, particularly with regard to providing access to documentary evidence from raids, effectively precluding further investigation or action by the rights-holder. Greater transparency and a more consistent (or perhaps centralized) procedure for carrying out enforcement, and improved communication and coordination among Saudi enforcement bodies including the Ministry of Commerce, Police, Customs, and other local actors, are viewed as essential to improving the level of enforcement. Customs likewise requires a stronger mandate, and police should take a more proactive role in addressing the counterfeits in the market. Finally, the enforcement bodies in the KSA must know that their efforts are not being wasted; the courts must significantly increase the level of penalties that are imposed upon convicted offenders. Counterfeiters will continue to reap huge rewards in Saudi Arabia if their illicit actions are met only with nominal fines. All of which is to say, the Kingdom of Saudi Arabia must significantly increase its political will to effect change in the country’s IP regime. Absent such progress, the IACC supports the inclusion of Saudi Arabia on the Special 301 Watch List.

## **NIGERIA**

Rights-holders report little in the way of change in Nigeria during the past year, continuing to note a range of concerns including insufficient border controls, official corruption, and a significant retail trade in counterfeit goods. As discussed in last year's submission, the legal and regulatory regime currently in place in Nigeria is seen as very weak – particularly with regard to the penalties available in counterfeiting cases. In 2014, the Standards Organisation of Nigeria described the legal regime as “more of an incentive to counterfeiters than it was a deterrent.” Rights-holders' experience would seem to bear that out.

While some brands have reported the commencement of criminal cases during the past year, enforcement remains very difficult. In some instances, police have been forced to withdraw from investigation targets due to risks of public disorder. Greater efforts at public awareness may aid in minimizing these concerns, but at present, trafficking in counterfeit goods does not appear to be viewed as illegal or undesirable by the broader public. Where investigations and enforcement actions have proceeded to criminal trials, respondents note that they are slow to progress, and that even those that are concluded successfully result in weak sentences that lack any practical deterrent effect.

Accordingly, we reiterate last year's request that the USTR continue to closely monitor the situation in Nigeria, offering support where appropriate, to improve both the legal framework and its implementation.

## **ROMANIA**

Romania appears in our comments this year for the first time, with IACC members citing increased concerns tied to both brick-and-mortar and online distribution of counterfeit goods in the country. Border controls are identified as a key concern, with counterfeit goods entering the country freely through neighboring Bulgaria, and said to be sourced from Turkey – which itself has been highlighted in recent years due to its status as a key transshipment point for the region. Criminal prosecutions are described as seldom; both prosecutors and judges are reluctant to move forward with cases, viewing them as a low priority. Damages remain modest in those cases that do proceed, failing to deter recidivism.

There is a growing concern among right-holders in Romania with regard to online trafficking. Brands point to a lack of cooperation from intermediaries, including registrars and registries. It remains easy to register domains anonymously or with false data, increasing the difficulty in identifying targets for enforcement. Online counterfeiters either fail to maintain, or conceal, evidence concerning their volume of sales, frustrating efforts to establish damages. Shutting down locally hosted websites is described as slow and ineffective.

On balance, the comments received from IACC members this year underscore the continued need for improvements noted in last year's Special 301 Report by the USTR. Greater political priority and a more coordinated approach, along with greater resources and training for enforcement bodies, are essential to improving the situation in Romania. Accordingly, we recommend that Romania be held on the Watch List in 2017.

## **TURKEY**

2017 marks the tenth consecutive year in which the IACC has filed Special 301 comments regarding rights-holders' concerns in Turkey. As the gateway between Europe and Asia, Turkey has long been recognized as a country of strategic importance for intellectual property owners. Counterfeiting and piracy in the domestic market, and the country's status as a regional trade and transshipment hub have been highlighted for a number of years, along with concerns regarding its legislative and enforcement regimes. 2016 saw a great deal of action in Turkey, particularly in light of public sector restructuring, an increase in terrorist attacks, and the Syrian refugee crisis. While IACC members acknowledge that some progress has been made during the past year, many longstanding concerns still need to be addressed. Accordingly, we recommend Turkey's retention on the Special 301 Watch List in 2017.

Turkey perennially ranks as one of the leading sources of counterfeit goods entering the European Union. In the most recently published EU Customs statistics, Turkey ranked 4<sup>th</sup> (behind China, Hong Kong, and Malaysia) in terms of the total value of counterfeit goods seized entering the EU. With regard to the number of items seized, Turkey was identified as the number one source of counterfeit ready-to-wear clothing (32.92% of total seizures), second for cosmetics and perfumes (12.76%), and third for sports shoes (10.8%), other shoes (5.24%), and jewelry (5.5%). Customs enforcement has been a perennial concern of rights-holders, and remained so in 2016.

Rights-holders describe mixed results in their interactions with Turkish Customs, and generally view the level of seizures as insufficient, both in light of the widespread availability of counterfeit goods in the domestic retail market, and due to the above-described high volume of seizures in other jurisdictions that originated in or transited Turkey. Customs officials are said to be reluctant to share photos with rights-holders of goods subject to a detention decision, oftentimes precluding the brands' ability to provide assistance in authentication. Further, obtaining information regarding the importer or exporter tied to a detained shipment is generally not possible absent filing a complaint with the courts.

Historically, brands have cited numerous concerns with Turkey's judiciary, including a lack of expertise in handling IP-related cases, and relative lack of awareness regarding the range of harms inherent in the counterfeit trade. As a result, IP cases have often been treated as less serious offenses. Members have raised concerns that these problems may become more acute

following the firings of a large number of judges in the aftermath of the failed coup in July 2016. Increased training would be helpful in this regard.

On a more positive note, respondents indicated some improvement with regard to their ability to obtain search warrants. In the past, obtaining such warrants has been hampered by the imposition of onerous evidentiary burdens on rights-holders, with a limited right of appeal. It is reported that the appeals process now involves the possibility of referral to the specialist IP courts, which have been more receptive to rights-holders' arguments. It is hoped that this will lead to improved criminal enforcement; rights-holders have complimented the police departments and security units for their enthusiasm, while consistently decrying their limited ability to gather intelligence or make surveillance of targets. This has traditionally necessitated that rights-holders devote significant resources, including the engagement of private investigators to monitor the market for enforcement targets, or other activities typically carried out by the police in other jurisdictions.

In January, the Turkish government published a new Industrial Property Law which is aimed at helping rights-holders. While the IACC and its members are still in the process of reviewing its provisions, we are hopeful that it will go some way towards dealing with many of the problems that we've raised in past years' comments. We do note that Article 30 of the law specifies criminal activities constituting counterfeiting include not only the manufacturing of goods, but the sale or offering for sale, importing, exporting, or warehousing of counterfeit goods. Article 163 also provides a simplified procedure for the destruction of seized counterfeit goods, even during the prosecution stage, and without waiting for the final judgment of the court. The enactment of the new law should also provide essential clarity to the state of the law which has been absent since the previous law expired in 2008.

Turkey has clearly taken steps during the past year – in spite of a difficult environment – to address concerns related to its IPR regime. We are hopeful that this progress will continue in the coming year, and we welcome the opportunity to work with the government in ensuring the efficient implantation of its new legal provisions. Given the ongoing difficulties faced by rights-holders in the Turkish market however, and the continued concerns related to Turkey's border enforcement regime, we support its retention on the Special 301 Watch List in 2017.

## **UNITED ARAB EMIRATES**

Reports from IACC members concerning the United Arab Emirates have remained largely unchanged in recent years, and this trend continued in 2016. Members have consistently complimented law enforcement in key emirates, as well as the Department of Economic Development (DED) as “responsive,” “motivated,” and “cooperative” in anti-counterfeiting efforts. Regrettably, reports concerning Customs and the judiciary are far less effusive. The UAE has developed as a global hub – both for legitimate shipments and counterfeits. Its border enforcement measures against those latter imports and transshipments however is viewed as

wholly insufficient. Equally concerning are the Emirates' courts, where the imposition of deterrent sentences is described by rights-holders as "non-existent." For the reasons detailed herein, we support the retention of the UAE on the Special 301 Watch List in 2017, and would ask that USTR consider undertaking an Out-of-Cycle Review of the country in the coming year.

It is without question that organized, international criminal syndicates are exploiting the legitimate trade infrastructure that has been developed by the UAE to facilitate their illegal activities. The most significant factors contributing to this activity are, as mentioned above, the UAE's severely lacking border controls and its consistent failure to impose anything approaching substantial penalties on IP offenders. As reported by respondents during this year's consultations, these networks typically locate themselves in multiple Emirates, thereby complicating enforcement actions due to the need to coordinate among multiple agencies' jurisdictions. Rights-holders point to a number of customs-related concerns including the overall volume of seizures and the adoption of procedures that significantly reduce the effectiveness of their efforts. With regard to the first point, one major brand indicated that it had received only one seizure notification from Customs during all of 2016. Another global brand reports that, despite Dubai's importance as an international shipping hub, the port accounted for just slightly above 10% of its worldwide seizure cases over the past decade. In the first instance, the rights-holder also noted that Customs officials opted to re-export the goods in question by the time a positive authentication could be made. As a result, they were deprived of the opportunity of physically inspecting the goods, or seeking additional remedies.

The practice of re-exportation has been raised repeatedly by rights-holders in recent years. It is said to have been adopted in response to both environmental concerns raised by destruction of goods, and as a cost-saving measure to obviate the need for storage by Customs of the overwhelming volume of counterfeit goods passing through the UAE. Rights-holders have complained of a lack of transparency in the re-exporting procedures, resulting in a lack of actionable intelligence to undertake further investigation or enforcement. In some instances, goods have been said to be donated to charitable organizations, only to subsequently reappear in the market.

Customs officials are also described as extremely reluctant to operate inside of Free Trade Zones. Given the constraints on the DED's jurisdiction, and rights-holders' difficulty in physically accessing the areas, Customs' reluctance to take action in the FTZs has provided fertile ground for the operation of traffickers.

Customs procedures in cases where consignments have been intercepted and detained have been the cause of additional concerns from rights-holders. Upon detention of suspected counterfeit goods, Customs typically notifies the shipper prior to conducting a thorough inspection. This may lead to shippers seeking to corrupt the officials so that the goods will be released, or an abandonment of the goods, leaving either Customs or the relevant rights-holder with the expense of storage and disposal. Neither outcome is desirable.



In contrast to their dealings with Customs, rights-holders are generally positive when discussing their actions with the DED or the Police. While law enforcement authorities in Dubai and Abu Dhabi are said to be the most active on IPR-related cases, those in Ajman and Umm Al Quwain are reportedly showing greater interest in IP enforcement. Problems arise again however when such actions find their way to the court system. While there has been some noted improvement with regard to the judiciary's handling of cases as they've developed more familiarity with IP issues. In the civil realm, cases are often unnecessarily protracted affairs that significantly increase the cost to plaintiffs. In both criminal and civil matters, rights-holders are unanimous in the view that the penalties imposed are insufficient to serve any true deterrent value. By way of example, a rights-holder cited a case involving tens of millions of (US) dollars' worth of seized goods in which the perpetrator was fined less than \$3,000. In a subsequent case, the (repeat) offender received a brief (approximately 60-days) prison sentence.

New legislation adopted in late December 2016, and expected to come into force during the first half of 2017, will dramatically increase the potential maximum fine available for criminal IP infringement from the equivalent of approximately US\$1,000 to US\$272,000. While brands continue to study the new law, some have expressed optimism that the new provisions will provide the level of deterrence necessary to decrease the flow of counterfeit goods through the UAE. In the meantime however, the penalties imposed are viewed as little more than a cost of doing business for counterfeiters in the Emirates. We will continue to monitor the implementation of the new law, and the enforcement-related concerns outlined herein. While we are hopeful that the new law will bring about much-needed improvement, we support the retention of the United Arab Emirates on the Special 301 Watch List in 2017.

## **SOUTH AMERICA**

### **BOLIVIA**

Bolivia was retained on the Special 301 Watch List in 2016 due to continuing concerns related to IPR enforcement and reports of increased trafficking of counterfeit goods through the country's free zones to the broader region. While some rights-holders have reported progress during the past year, the improvement is described as very slow. IACC members' concerns in 2016 largely mirrored those identified in last year's filing, including significant levels of copyright piracy affecting the music, film and software industries, and numerous product sectors impacted by counterfeiting – most notably the apparel, footwear, leather goods, cosmetics and toy industries. Illicit goods are reported to be produced abroad, with large volumes of goods sourced from China and passing through the Iquique Free Zone in Chile. Rights-holders continue to advocate for increased action by Customs in targeting and inspecting container shipments. Similarly, IP owners encourage greater coordination between Bolivian Customs and the Trademark Office. While we are encouraged by the reported progress in Bolivia, the IACC recommends Bolivia's retention on the Watch List in 2017.

## COLOMBIA

The USTR retained Colombia on the Special 301 Watch List in 2016, citing the need for further implementation of IPR-related commitments under the United States-Colombia Trade Promotion Agreement, and improved enforcement at and within the country's borders, among other reasons. Regrettably, IACC members continue to raise concerns with the state of IP protection and enforcement in Colombia, and the need for greater progress in a number of areas. As a result, we recommend Colombia's retention on the Watch List in 2017.

Among the issues raised by members, the overall level of enforcement remains the greatest concern. Enforcement is generally described as lax, and although the Colombian police have reportedly conducted some raids and road stops throughout the year, such actions have not been consistent nor concerted enough to significantly deter the illicit activity. As in past years, IACC members reported that personnel from the dedicated IPR units established by law enforcement are frequently utilized to support other police units when "more pressing issues arise." This practice deprives those officials from developing greater experience and expertise in dealing with IP matters, and diminishes the value of having such specialized units in the first place. The lax enforcement is seen as contributing to a dramatic increase in the number and visibility of markets throughout Colombia dealing in counterfeit goods. Rights-holders also cite protectionism and corruption as allowing the counterfeit trade to flourish at several well-known markets in Bogota (Unilago, San Andresito, San Jose and Downtown Bogota). In the online context, we've received no reports of significant or sustained enforcement actions or prosecutions to combat the operation of large websites or mobile apps distributing pirated content – a concern highlighted by USTR last year.

Where enforcement actions have been taken against counterfeiters and pirates, respondents report that the prosecution of offenses remains cumbersome, and the judicial system inefficient. Penalties remain relatively low, and lack deterrence.

Insufficient border controls, likewise, were raised by rights-holders, underscoring a lack of improvement since the issue was noted in the USTR's 2016 report. Seizures are described as exceedingly low, particularly in light of the volume of trade, and the visibility of counterfeits in the market that appear to be sourced from abroad.

The Colombian government must demonstrate greater political will to address these issues. At present, IP crime is viewed as a low priority in the country; and the government's treatment of it as such carries over into the public's perception. Greater efforts are necessary to engage and educate the public about the importance of IP, the practical benefits that flow from IP protection such as increased investment, product safety, and others. But public awareness efforts cannot occur in a vacuum; they must be accompanied by consistent enforcement actions that demonstrate the government's own belief in the importance of protecting IP. While we remain hopeful for improvement on these issues with the continued implementation of the

CTPA, until greater progress materializes, the IACC recommends Colombia's retention on the Special 301 Watch List.

## **ECUADOR**

Last year, the USTR moved Ecuador from the Priority Watch List to the Watch List, citing positive legislative action, and the government's willingness to engage with the U.S. on ongoing concerns related to IPR protection and enforcement, while also acknowledging continued problems related to enforcement. Regrettably, in December of 2016, Ecuador's new Intellectual Property Law entered into force. While IP enforcement was already challenging for rights-holders in the market, the new law included provisions that have significantly exacerbated the problem. The most notable of these, raised by numerous respondents this year, involves the effective removal of Customs' ex officio seizure authority.

Over the years, the IACC has advocated for foreign governments to provide such authority; it is recognized as a border enforcement best practice, allowing customs personnel to act quickly, and without the increased cost (both monetary and in terms of time) imposed by requiring the intervention of the courts at such an early stage. Following the enactment of the new law however, rights-holders report that they've been informed that Customs will no longer seize counterfeit goods entering the country absent the request of the rights-holder and specific details about the shipment. While rights-holders' investigations sometimes reveal this sort of information in advance, those circumstances are relatively rare. As a result, the new approach to border enforcement will have the likely effect of precluding the overwhelming majority of customs seizures. In the rare instances where a rights-holder is able to provide detailed information about an incoming shipment of counterfeits before it has been released, the IP owner will be required not only to petition Customs to seize the goods, but also to file an additional court or administrative action within ten days, in order to have the seizure confirmed. Thus, the new procedures are expected to drastically decrease the overall seizures, while significantly increasing the cost of those that do take place.

Rights-holders' concerns are not limited to the border however, as underscored by comments received describing a host of issues including insufficient resources for law enforcement, increased retail sales of counterfeit goods, a lack of cooperation from the local (and in some instances, national) government, and apparent protectionism. By way of example, one rights-holder referenced a campaign against motion picture piracy that was carried out by the IP Office, but which focused on Ecuadorian films, with little or no consideration given to illicit sales of international films.

The low priority on enforcement, when taken with the recent legislative actions, has resulted in rights-holders questioning the government's commitment to progress on its previously acknowledged IPR problems. Accordingly, the IACC recommends that Ecuador be retained on the Watch List in 2017, but monitored closely. If rights-holders' concerns regarding the

removal of Customs' ex officio authority are borne out, and the overall enforcement situation fails to improve, its placement on the Special 301 list should be reconsidered.

## **PERU**

Peru was retained on the Special 301 Watch List in 2016, in which the USTR noted continuing concerns with the widespread availability of counterfeits in the domestic market, as well as the need for greater resources and more coordination among enforcement agencies. IACC members cited a wide range of concerns in Peru during this year's consultations, including each of those issues raised by USTR last year.

Rights-holders also cited obstacles to effectively enforcing their rights including burdensome requirements in litigation, the lack of statutory damages, and generally low penalties assessed to offenders. Border controls are among the greatest concerns expressed, particularly in light of reported increases in the production of counterfeit apparel for export to other South American markets. Corruption was likewise a frequent complaint, with respondents describing it as a significant hurdle to enforcement at and within Peru's borders.

Given the lack of reported progress during the past year, we support Peru's retention on the Special 301 Watch List in 2017.

## **NORTH AMERICA, CENTRAL AMERICA, CARIBBEAN**

### **CANADA**

For well over a decade, the IACC has recommended Canada's inclusion at the level of Watch List or above, citing a variety of rights-holder concerns including the country's customs enforcement, the lack of criminal remedies, its failure to undertake enforcement against goods in-transit, and others. Last year, the USTR retained Canada on the Special 301 Watch List, highlighting ongoing issues of concern for copyright, trademark, and patent owners. Based on member feedback during this year's consultations, the IACC supports Canada's continued retention on the Watch List.

In 2013, new legislation was introduced in Canada in an effort to address a number of long-standing rights-holder complaints about the Canadian IP regime. Passed in December of 2014, and taking effect January 1, 2015, the Combatting Counterfeit Goods Act provided for the first time the Canada Border Services Agency (CBSA) with ex officio authority to detain counterfeit goods at the border without a rights-holder first obtaining a court order for such. It also amended the Criminal Code to provide express authority to lay criminal charges on the basis

of trademark counterfeiting. Prior to its enactment, trademark owners were typically left to rely upon claims based in copyright, or otherwise to pursue civil enforcement. While the legislation was viewed as a step forward, rights-holders highlighted a number of concerns with certain substantive provisions, and Parliament's approach to the effort. Two years after its enactment, the consensus among respondents with regard to the new law and its implementation has not been positive.

As noted above, the Combatting Counterfeit Goods Act granted CBSA ex officio authority to detain counterfeit goods – a step that the Canadian government had been encouraged to take for a number of years. In implementing this authority, rights-holders have been asked to file a Request for Assistance with CBSA (roughly comparable to Customs recordation with CBP in the United States). To the best of our knowledge, over 150 brands have registered accordingly with CBSA during the past two years, yet detentions under the new procedure are estimated at approximately 50 during that period. Rights-holders have described the process as onerous and expensive, and as providing limited (if any) benefit. This is largely due to the fact that, as implemented, CBSA's authority to interdict counterfeit shipments remains extremely limited. After detaining the goods and notifying the relevant rights-holder, the rights-holder must file suit in federal court to effect a seizure of the goods. Failure to do so will result in the release of the goods. As such, rights-holders are forced to shoulder the burden of filing fees, legal fees, and storage costs while awaiting the court's determination. No expedited administrative procedure is available as in the U.S., and the lack of statutory or treble damages makes it exceedingly unlikely that a rights-holder will be able to recoup its costs related to the enforcement. This is particularly true in the case of goods detained via international mail and small-package consignments which are increasingly the preferred method of import for counterfeit products. Brands likewise report frustration that the information that they've provided to CBSA through the Request for Assistance process regarding known and suspected importers of counterfeit products appears to be going unused for purposes of targeting shipments, or addressing the problem of illicit imports in a more strategic fashion. While a few IP owners have reported successful actions under the new approach, with the importer agreeing to pay the brands' costs for storage, destruction, and in some cases legal fees; the overall impact of the new authority appears to be negligible.

Criminal enforcement in the wake of the new enactment also remains lacking. Brands continue to report a lack of interest among both law enforcement and prosecutors in pursuing IP cases, and in some instances law enforcement officers have expressed frustration at being told by their superiors not to devote resources to counterfeiting cases. Even in major cities with greater resources such as Montreal and Toronto, some rights-holders have been told explicitly by law enforcement and prosecutors that they consider IP offenses to be a civil matter, and that they should seek remedies accordingly. As previously discussed, the lack of statutory or treble damages, coupled with the inherent difficulty of proving damages in many IP cases, may discourage that course of action. The sense among brand owners is that there is little to no political will to address counterfeiting and piracy, and that Combatting Counterfeit Products Act was enacted as the bare minimum to address international concerns.

Overall, enforcement in Canada appears to have continued to decline over the past year. The Toronto Financial Crimes Unit, once a leader in dealing in counterfeit cases, did not proceed in 2016 with a follow-up to its highly successful Project Pace operation. Likewise, we've seen little if any involvement by the Royal Canadian Mounted Police (RCMP). Once viewed as a strong ally in the fight against counterfeits in Canada, the RCMP's activities in this area have greatly diminished in recent years. Requests for assistance from local law enforcement have likewise fallen upon deaf ears, and sellers of counterfeits appear to operate largely with impunity even in well-known sources such as the Pacific Mall, and in Toronto-area flea markets. While some local law enforcement take these matters seriously, they have been the exception rather than the rule. Even in cases with apparent organized crime involvement, law enforcement has often appeared extremely reluctant to pursue criminal IP matters. By way of example, the RCMP was advised of the presence of Hell's Angels members at the St. Eustache Flea Market – a venue well-known to house numerous sellers of counterfeit product – yet they've refused to proceed with a criminal investigation.

Not surprisingly, in light of the above, IP owners across nearly every product sector continue to report the widespread availability of counterfeit and pirated goods in the retail market – both in brick and mortar locations and online. Until such time as the Canadian government places a greater priority on combating IP crimes, the situation is unlikely to improve.

Rights-holders' concerns with regard to transshipment through Canada have been reported for a number of years. Not addressed by the Combatting Counterfeit Goods Act, the United States and Canada revisited the issue during negotiations of the TPP, as embodied in the countries' Side Letter to the main agreement. This was acknowledged in our comments last year as a step in the right direction, but a very small step. As discussed in relation to other countries in these comments, the very nature of the counterfeiting trade demands that countries not simply disregard the use of their trade infrastructure for the trafficking of illicit goods. Canada should empower the CBSA to detain counterfeit goods regardless of whether their purported final destination is within or beyond its own borders.

For each of the reasons detailed above, we encourage the USTR to retain Canada on the Special 301 Watch List in 2017.

## **MEXICO**

In 2016, the USTR commented positively regarding the creation of Attorney General's Office's Specialized IP Unit, and its creation of a Digital IP Crime Unit to combat problems with IP enforcement online; and remarked favorably about increased raids against well-known and notorious markets such as Tepito and San Juan de Dios. Mexico was retained on the Watch List however, due to a host of other long-standing concerns involving enforcement both at and within its borders. The IACC was heartened by commitments to addressing some of these

during negotiations of the Trans-Pacific Partnership agreement, but encourages Mexico's continued placement on the Watch List in 2017. Rights-holders continue to view the Mexican market as one in which enforcement is often exceedingly difficult, and hampered by unnecessarily formalistic procedures, non-deterrent penalties, and corruption. Counterfeit and pirated goods of all kinds remain widely available, and much work remains to be done.

The rights-holder complaints heard by the IACC during this year's consultations are consistent with those that have been reported in past years – the IACC has recommended Mexico's inclusion on the Special 301 Watch List for more than a decade. Widespread retail sales of counterfeit goods plague a variety of product sectors, and both physical and online piracy remain commonplace in the copyright sectors. Meaningful enforcement is hampered by inefficient court proceedings which may take years to reach final resolution, and which typically result in penalties that fail to deter recidivism; offenders often receive only nominal fines when convicted. Mexico's approach to enforcement has been described as overly-formalistic – typically in reference to narrowly defined roles of individual agencies – and lacking sufficient coordination. By way of example, rights-holders continue to decry Mexican Customs' lack of ex officio authority to seize counterfeit goods at the border. As the first line of defense against counterfeits entering the country, Customs should be able to act without first obtaining an order from a federal court, IMPI, or the PGR. This is a commonsense best practice for enforcement that has been implemented, and proven effective, in jurisdictions around the world.

Mexico's treatment of goods in-transit has raised similar objections from rights-holders. As noted in USTR's report last year, Mexico's policy with regard to such goods underwent a significant change several years ago, allowing action only in cases where there was evidence of “‘intent for commercial gain’ in Mexico.” While some members have reported successful actions against goods in-transit during the past year working with the Attorney General's Office and IMPI, there appears to be inconsistent support for such efforts. In last year's comments we stressed the fact that the counterfeiting trade is an inherently cross-border issue, necessitating cross-border cooperation. With reports of increased two-way trafficking between Mexico, Guatemala, and Belize, not to mention the substantial trade between Mexico and the United States; the policy on goods in-transit is extremely troubling. It sends a message that those goods passing through Mexico are our problem (or Guatemala's, or Belize's), but not Mexico's.

A more recent concern with regard to Customs enforcement is the use of purported experts to determine the authenticity of goods that have been detained by Customs. The qualifications of these experts have often been called into question, particularly when viewed in relation to rights-holders' own testimony. Simply put, no party is in a better position to determine the authenticity of goods than the brand itself. Engaging independent “experts” unnecessarily opens the door to corruption. In some cases, rights-holders report that prosecutors have relied inappropriately on legal opinions from such experts, going far beyond the factual question of whether suspect goods are genuine or counterfeit.

As seen in other jurisdictions, including the United States, counterfeiters seeking to import goods into Mexico often hide behind freight forwarders and customs brokers. As we understand it, there is no legal obligation for these intermediaries to disclose the identities or contact information for their clients, even when a seizure has taken place. We would strongly support the implementation of robust “Know Your Customer” provisions in the law, as well as clear requirements concerning the disclosure of relevant data including but not limited to the name and address of the importer and exporter, in cases where a shipment has been seized for violating intellectual property rights.

Not surprisingly, rights-holders also report a significant up-tick in the volume of counterfeit goods imported into Mexico via international mail and small parcel shipments. This appears to be a global trend, in line with increases in online sales and distribution direct to consumers. We would recommend Customs officials focus greater attention on these small shipments, and would welcome the opportunity to collaborate with Mexican Customs, the mail service and international express consignment companies to develop best practices in this area.

While Mexico has demonstrated notable improvements in some regards, the core problems of insufficient enforcement and non-deterrent penalties remain a significant concern for rights-holders. In the coming year, we hope to see the Mexican government take more concrete steps in demonstrating its commitment to protecting IP, to imposing meaningful punishments on offenders, and to empowering its authorities to take action against counterfeits at and within the country’s borders. Until such progress is seen, we recommend Mexico’s retention on the Special 301 Watch List.



## **OTHER OBSERVATIONS / NO RECOMMENDATION MADE**

### **ASIA-PACIFIC & SOUTH ASIA**

#### **CAMBODIA**

While the country has not previously appeared in our past years' comments to the USTR, and we make no recommendation for its inclusion on the Special 301 Watch List, IACC members wish to highlight Cambodia as a country of increasing concern in 2017. Members have reported an overall lack of engagement by law enforcement agencies, corruption, and an apparent uptick in the use of Cambodia as a transit point for the trafficking of counterfeit goods to other countries in the region. While copyright enforcement mechanisms are described as "quite good," enforcement of trademarks and designs lags behind, and is seen as very challenging. Rights-holders encourage the National Committee for Intellectual Property Rights – which includes 14 government and enforcement agencies – to take a more active role, and to work more closely with rights-holders to improve the country's legal and enforcement regime.

#### **HONG KONG**

Hong Kong was included in the IACC's Special 301 comments to the USTR for the first time last year, a decision motivated by Hong Kong's consistent appearance near the top of annual seizure statistics as a global source of counterfeit goods. Though not a major source for counterfeit manufacturing, Hong Kong ranks second, behind only China, in U.S. Customs & Border Protection's annual IPR-related seizure report, due to its status as a transshipment hub for exports from the People's Republic of China to major consumer markets including the United States, the European Union, Japan, and Korea.

The concerns raised by respondents during last year's consultations remained largely unchanged in 2016. Chinese exporters continue to make extensive use of Hong Kong-based freight forwarders as a means to obfuscating the true source of their illicit shipments, and to avoid targeting by customs agencies around the world. Those freight forwarders have remained uncooperative with law enforcement and rights-holders when goods have been interdicted, claiming that they're simply an intermediary with no knowledge of the infringing nature of the goods being shipped. They also generally refuse to disclose any information about the identity of their customers, arguing that their client information is confidential. The IACC believes that these problems could be greatly reduced with the adoption of clear "Know Your Customer" regulations to ensure that shipping intermediaries collect and maintain basic information regarding their clients, and the imposition of a clear duty to cooperate with investigators where a shipment has been determined to be counterfeit.

Rights-holders continue to hold Hong Kong Customs and Excise (HKC&E) in high esteem, noting their consistent and professional efforts – whether working independently, or in joint efforts with other agencies internationally.

Though we make no recommendation with regard to placement on the Special 301 Watch List, we strongly encourage Hong Kong to take action on this issue of enforcement against goods in-transit.

## **JAPAN**

The IACC wishes to reiterate its comments submitted last year with regard to Japan, while making no formal recommendation for its inclusion on the Special 301 Watch List. While Japan is broadly viewed as having a strong IPR regime overall, we wish to highlight four concerns raised by members during this year’s consultations (three of which were also raised last year.

The first of these involves Japan’s personal use exception for the importation of counterfeit goods. While we recognize that U.S. law does itself include a “personal use” exception to the importation of counterfeits, the exception applies to a single item within in class, personally brought into the country by an individual (e.g., a single counterfeit handbag carried in the luggage of an individual entering the country). As applied in Japan however, 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. This is increasingly problematic in light of the growing practice of shipping small parcels of counterfeit goods into the country, and the policy should be revisited by Japanese Customs.

As further noted last year, some IACC members have reported difficulties in recording their registered marks with Customs, describing arbitrary determinations by Customs to refuse recordation of marks where those marks are affixed to small components or products, on the basis that the use was not prominent enough. Further, Customs is said to have refused recordations, questioning whether a registered trademark actually qualifies as a trademark. Such refusals are inappropriate for a number of reasons, most notably that the Japan Patent Office is the competent authority for making determinations of trademark validity, and by issuing a registration has already resolved the issue in favor of the brand. Japanese Customs should not subsequently deny a trademark owner of the benefits accorded to it by the JPO.

Rights-holders also raised a new concern with regard to Customs enforcement this year, describing a practice of Japan Customs to (rather than seizing goods) permit importers to remove counterfeit marks from infringing goods and packaging, or to mark over / cover counterfeit marks, and releasing the modified goods to the importer. The IACC is continuing

to investigate these reports.

A final issue, also highlighted in our 2016 comments, concerns the enforcement of brands' rights on major online retail platforms in Japan. Japanese platforms are said to regularly reject takedown requests based upon claims of copyright (e.g., the use of copyrighted images owned by the brand, and intended to deceive consumers as to the source of the goods being sold), design rights, and others. They're also described as often making excessive and onerous requests for proof of rights-holders' claims before taking action. These practices greatly increase the time and expense of online enforcement efforts, and substantially decrease the effectiveness of online enforcement actions. Japanese platforms are reported to cause greater difficulties from an enforcement perspective than well-known platforms elsewhere in Asia.

We would welcome the assistance and attention of USTR to each of these issues in 2017.

## **PHILIPPINES**

In 2014, USTR removed the Philippines from the Special 301 Watch List, ending its decade-long placement at either the Watch List or Priority Watch List level. At that time, USTR noted that "significant challenges remain" for rights-holders in the country. Regrettably, this remained the case in 2016, and the IACC continues to field reports ranging from moderate to severe problems in the country, many pre-dating its removal from the Watch List three years ago.

As noted in last year's comments, rights-holders continue to describe positive interactions with both the National Bureau of Investigation (NBI) and the Intellectual Property Office of the Philippines (IPO-PHL). Both have demonstrated consistent improvement for a number of years, and their efforts are viewed as largely responsible for the progress that allowed the Philippines to come off the Special 301 Watch List in the first place. Both organizations are viewed as competent, professional, and responsive to the concerns of rights-holders. In short, they're seen as a strong ally in combating counterfeiting and piracy in the country.

Rights-holders' concerns in the Philippines continue to center around two areas: the judiciary and border enforcement. Though some brands cite successful raids in the market with enforcement bodies, they've seen little follow-through beyond those initial successes. Both prosecutors and judges are described as ineffective, inefficient, and lacking accountability. Brands report solid cases with significant evidence being refused by prosecutors or dismissed in early stages, raising the specter of corruption. Other cases linger on dockets with little activity, and little apparent interest in pushing them towards resolution. Defendants, well-aware of the situation, make a practice of dragging their feet, failing to appear for court-ordered mediation, with the knowledge that sanctions are unlikely. All the while, rights-holders

continue to incur greater costs both in terms of legal fees and storage fees for the seized goods held as evidence. Where cases are resolved, penalties are exceedingly low and fail to deter repeat offenses. As a result, some rights-holders have significantly scaled back (or abandoned altogether) their enforcement programs in the Philippines. The IACC strongly encourages the government of the Philippines to work with rights-holders and other governments to ensure that prosecutors and judges have the necessary training to efficiently and transparently deal with IP cases.

Border controls in the Philippines, likewise, remained a significant concern for rights-holders during the past year. In past submissions, the IACC has noted that although some domestic production and finishing of goods has been seen over the years, the majority of the counterfeit product in the local market appears to be imported from abroad. Obviously, the country's geography facilitates the smuggling of illicit goods into the country, but Customs officials must take a more active role in identifying key routes and entry points. Further, we would encourage greater collaboration with rights-holders to aid in targeting shipments, as well as expanded cooperation with other countries in the region to cut off counterfeits at their source.

Though we make no recommendation for the placement of the Philippines on the Watch List this year, we will continue to monitor the situation closely in 2017.

## **SINGAPORE**

IACC members' comments with regard to Singapore remain largely unchanged since last year's submission. As a major transshipment hub in Asia, rights-holders' concerns are primarily focused on the trafficking of counterfeit goods through the country to third markets, and its adoption of a regime that places significantly greater emphasis on trade facilitation than trade enforcement. As we noted in last year's comments, Singapore's enforcement regime creates substantial hurdles to effective enforcement against the trafficking of counterfeit goods. In light of these continued, and in some cases heightened concerns, we ask that USTR closely monitor the issues detailed in these comments.

Under the current border enforcement regime, Singapore's Trade Marks Act makes it exceedingly difficult for brand-owners to effect seizures of counterfeit goods by Customs. Three major factors feed into this difficulty. First, the Trade Marks Act limits the detention of suspected infringing goods to no more than 48 hours. In order to apprise itself of the seizure process, a rights-holder must also pay a minimum security deposit of S\$20,000 (approximately \$14,000) for each shipment. Further, if the importer objects to the seizure, the rights-holders' only recourse is to commence civil litigation against the importer and seeking an injunction to prevent the goods' release. These procedures are widely viewed as onerous, and the high costs make such actions an impractical and unfeasible foundation upon which to undertake enforcement on any substantial scale.

Some of these concerns could be abated if there was better coordination and a greater willingness for Customs to refer shipments of suspected (or confirmed) counterfeits to the Intellectual Property Rights Branch of the Police for criminal investigation, or by an expedited administrative proceeding to resolve any disputes between rights-holders and importers/exporters. Regrettably, IACC members report little apparent political will for either course of action. In late 2014, the Intellectual Property Office of Singapore undertook a public consultation on enhancing border protection, but despite significant feedback from the rights-holder community encouraging a more robust border enforcement regime, little or no progress has been reported over the past two years.

Respondents likewise continue to report difficulties when seeking enforcement in Singapore's free trade zone. Courts frequently refuse to issue search warrants for suspected counterfeit shipments if they've been imported into the FTZ. We would ask for clarification and guidance from the Intellectual Property Office regarding the courts' authority to grant such warrants. We welcome the opportunity to work with USTR and the government of Singapore to address these ongoing concerns in 2017.

## **EUROPE, MIDDLE EAST, AFRICA**

### **THE BALKANS**

The IACC received for the first time during this year's consultations, member input regarding growing concerns throughout the Balkans. Though we make no recommendation for the inclusion of Bosnia-Herzegovina, Croatia, or Serbia on USTR's Special 301 Watch List, we would like to draw attention to the issues raised with regard to the region.

In Bosnia and Herzegovina, we've received reports of increased trafficking taking place in the large informal market of Arizona, located in Brcko, on the border with Croatia. Arizona hosts an estimated 2,000 vendors, employing roughly 4,500, and hosts daily visitors in the tens of thousands. The trade in Arizona is primarily focused on wholesale distribution, and the market has gained a reputation for not only sales of counterfeits, but also the "finishing" of unbranded goods. It is also viewed as a supplier for smaller retail markets along the Croatian border. The market is under the jurisdiction of the three main administrative entities, but poor coordination has made enforcement incredibly difficult.

With regard to Serbia, rights-holders have highlighted the trade in informal markets in Novi Pazar, as well as in Subotica near the Hungarian border, as hotspots for the counterfeit trade in the country. In Subotica, it's estimated that upwards of 80% of the traffic involves foreign buyers who then transport the goods across the border for resale in Hungary.

Members likewise report that seizures by Customs official in Bosnia and Herzegovina, Serbia, and Croatia have decreased over the past year, allowing the trade in counterfeits to flourish throughout the region.

## **EASTERN EUROPE and EURASIA**

### **KAZAKHSTAN**

The Republic of Kazakhstan makes its first appearance in the IACC's annual Special 301 comments, as a result of increasing concerns raised by rights-holders during this year's consultations. Its inclusion is not surprising however, both in light of reports from rights-holders in recent years of increased manufacturing of counterfeit goods in the more remote west of China, and Kazakhstan's geography. Situated on China's northwest border, the country offers shipping routes to southeast and central Russia, other parts of central Asia, as well as a route to the Middle East. The Khorgas Free Trade Zone is seen as a strategically important, yet poorly enforced gateway in the region.

Rights-holders report a number of challenges related to border controls and customs enforcement, describing IP enforcement as a low priority, particularly in comparison to other trade-related enforcement activity such as that against misdeclared or under-valued goods. The low priority on IP enforcement is thought to be tied to the fact that many businesses are engaged in illicit trafficking, and increased enforcement could result in economic instability and increased unemployment.

Legal and enforcement procedures are described as "extremely slow and complex." By way of example, one respondent noted that the Department of State Revenues of the Ministry of Finance, which has jurisdiction, conducts its own authentication examination of goods, even after the relevant rights-holder has performed an authentication. The DSR's examination is carried out in spite of its lack of expertise to make an accurate determination, and the process is described as extremely protracted. Court proceedings are similarly described as lengthy and inefficient, resulting in increased costs to the rights-holder.

## **SOUTH AMERICA**

### **PARAGUAY**

IACC members have continued to monitor the situation in Paraguay since its removal from the Special 301 Watch List in 2015. While we've continued to receive reports of trafficking of counterfeit goods in the consumer electronics and apparel sectors, and for needed improvements with regard to border controls, the imposition of deterrent penalties, and

dealing with corruption; overall, the comments we've received this year underscored the progress seen in the country.

The National Directorate for Intellectual Property (DINAPI) has been complimented for its effectiveness, in spite of rights-holders' views that it's being allocated insufficient resources. Members encourage DINAPI to continue its public outreach campaigns and to build upon its efforts to coordinate the work of other institutions in Paraguay. We'd urge greater cooperation between Paraguayan Customs and rights-holders in the coming year. Paraguay has one of the few formal recordation systems for intellectual property rights in the region, but officers are said to reach out only rarely to rights-holders to provide notifications of seizures, or to seek rights-holders' assistance in authenticating suspect goods. Better cooperation is viewed as an opportunity to significantly increase the number of customs seizures.

Official corruption remains a major concern of rights-holders in the region. The government must ensure that the procedures for inspection, enforcement, and adjudication in IP cases is undertaken in a transparent manner. As noted in the Notorious Market Report, Ciudad del Este remains the greatest source of consternation among IP owners. One respondent describes the level of corruption there as "total," stating that enforcement is a near impossibility. Rights-holders point to offenders being notified of impending actions, threats against prosecutors and rights-holders' legal representatives, and other significant opposition to cleaning up the illicit traffic in the region.

Where rights-holders have been able to overcome the above issues, the effectiveness of their efforts continues to be constrained by the judiciary's failure to impose truly deterrent penalties. Counterfeiters appear to have little expectation that they'll be brought to account for their illegal activities, and even less expectation that they will pay a hefty price for them. We would encourage the Paraguayan government to ensure that prosecutors and the judiciary recognize the significance of IP crimes, and where necessary, to ensure the availability of penalties designed to discourage recidivism.

## **NORTH AMERICA, CENTRAL AMERICA, CARIBBEAN**

### **DOMINICAN REPUBLIC**

Though not currently posing a major concern, rights-holders have noticed an apparent increase in retail sales of luxury goods, along with increased seizures, both in terms of imports and transshipments to South American markets.

## **GUATEMALA**

Guatemala appears to be a growing concern, particularly for rights-holders in the apparel sector. Manufacturing of counterfeit clothing, retail sales of counterfeit goods, and transshipment are the key concerns noted by IACC members. Further, there is said to be a lack of coordination between the relevant enforcement bodies, resulting in limited enforcement actions or cases.

## **HONDURAS**

Rights-holders in the apparel sector report a lack of assistance from Customs, and note that since the government's decision to disband the IP Prosecutor's Office, they've had few options for effective enforcement.