

**Submission of the  
International AntiCounterfeiting Coalition  
to the  
United States Trade Representative**

**2023 Special 301 Review  
Identification of Countries  
Under Section 182 of the  
Trade Act of 1974  
Request for Public Comment  
87 FR 76660 - 61 (December 15, 2022)**

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**January 30, 2023**

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## INTRODUCTION

The International AntiCounterfeiting Coalition, Inc. (“IACC”), is pleased to submit these recommendations to the Office of the United States Trade Representative (“USTR”), pursuant to the request published in the Federal Register on December 15, 2022, seeking written comments 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 manufacturers, trade associations, and professional firms, spanning a broad cross-section of industries; our members represent thousands of 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 policymakers 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 to encourage the application of resources sufficient to implement and enforce those regimes.

To that end, the IACC worked with both foreign government officials and the private sector throughout the past year to identify, and to seek remedies to, legislative deficiencies and practical impediments to IP enforcement. The IACC has also led the development of voluntary collaborative programs on a global scale to address key priorities in the online space, including its RogueBlock and IACC MarketSafe programs. The role of governments in encouraging these types of collaborative approaches remains vital. Further, rightsholders continue to face obstacles to acquiring and effectively enforcing IP rights that require direct intervention by governments at home and abroad. These challenges continue to evolve, and we welcome the assistance of the U.S. government in resolving both the new concerns highlighted in this year’s comments, and those which have been reported in past years’ submissions.

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 manufactured 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. We look forward to working with you to ensure the safety of consumers and the vitality of the global marketplace for legitimate manufacturers and retailers.

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. It should be noted, however, that the countries and issues discussed herein do not represent 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 the concerns highlighted by IACC members involve long-standing issues that have been raised in previous years' filings.

Our comments this year cover thirty-four countries and span 5 continents, underscoring the truly global scope of the problems faced by rights-holders. Six countries are recommended for inclusion at the Priority Watch List level, and an additional eighteen for the Watch List. We also provide additional comments concerning issues raised by rights-holders with respect to ten additional jurisdictions, but with no recommendation. It is hoped that those comments will serve to inform the U.S. Government's ongoing work throughout the coming year.

We thank you for the opportunity to share our experiences.

## **PRIORITY WATCH LIST RECOMMENDATIONS**

### **ASIA-PACIFIC REGION**

#### **CHINA**

The IACC concurred with USTR's placement of China on the Priority Watch List in 2022. Despite significant progress made in the country over the past two decades – particularly with respect to ongoing work to modernize its statutory regime, the imposition of more meaningful and deterrent penalties, and increased understanding of the benefits inherent in robust IP protections – China remains the jurisdiction of greatest concern for rights-holders across nearly every product sector. While we wish to acknowledge the steps China has made, and to encourage further progress, we must also acknowledge that the illicit goods that continue to flood consumer markets in the United States and countless other jurisdictions around the world are sourced, overwhelmingly, from China. As a result, we support China's retention on the Special 301 Priority Watch List again this year.

IACC members continue to closely monitor legislative and regulatory developments in China, and offered feedback this year on a variety of recent proposals and amendments. As noted in last year's submissions, proposed revisions to the E-Commerce Law have garnered significant attention. The IACC and several member brands offered comments in response to a 2021 solicitation by the State Administration for Market Regulation, though we've seen little acknowledgement of the concerns raised during that process. Among those issues highlighted for consideration were proposed amendments to Article 43 that would allow the reinstatement of reported listings by e-commerce platforms upon receipt of a guarantee. Some brands have viewed this as a hindrance to effective enforcement which allows infringers to continue profiting unnecessarily. Others have also highlighted a concern with another proposed revision to Article 43 which appears to provide for only a doubling of damages for false statements by online sellers in contrast to the 5x damages authorized under Article 63 of the Trademark Act. As a general matter, the revisions to the E-Commerce Law should go further in encouraging greater collaboration between stakeholders and a more proactive approach to IP enforcement. Rights-holders also continue to express a desire for greater transparency in this undertaking.

Respondents from the pharmaceutical sector highlighted additional concerns under China's current statutory regime. For example, Article 121 of the new Drugs Administration Law is seen as hampering enforcement against counterfeit medicines by imposing new requirements to obtain a quality test report for suspect goods from the Institute for Drug Control; doing so is often a practical impossibility. This change, along with recent Criminal Law amendments and judicial pronouncements are said to have made it significantly more difficult to investigate falsified drugs, increasing the harms not only to legitimate producers, but also to the general public.

On a more positive note, amendments to the Criminal Law that took effect in early 2021, to expand the scope of criminal counterfeiting to cover services, and to increase the maximum prison sentences authorized for counterfeiting, were welcomed by rights-holders; though to date most have reported minimal practical impact from those changes. As noted in last year's comments, rights-holders also expressed dismay over changes adopted in calculating the level of offenses (from illegal "income" to illegal "gains"). Those latter changes have been seen to have a negative impact on the willingness of enforcement agencies to pursue offenses, and as a result, brands continue to report difficulties in obtaining assistance in pursuing service mark violations.

Improving enforcement has long been a top priority for rights-holders in China, and without question, rights-holders' reports concerning the level and effectiveness of the assistance they receive from Chinese law enforcement are far more positive today than even just a few years ago, particularly in China's larger cities. Further afield, however, many describe significantly greater challenges, and law enforcement personnel far less willing to assist. Some respondents reported encountering significant protectionism in third-tier cities such as Shantou. Some rights-holders also continue to report an unwillingness among some enforcement agencies to pursue actions against individuals in possession of, or supplying, components, labels, and the like, even where they're clearly intended for use in the production of counterfeit items.

Though recent years have brought about increases in criminal actions, administrative enforcement remains the primary avenue for brands seeking to protect their rights. Some brands reported significant decreases in the number of administrative raids and volume of seizures in the market over the past year, though this may be attributable to complications associated with pandemic restrictions. Rights-holders also continue to raise concerns highlighted last year regarding administrative authorities' refusals to pursue action against targets who are able to provide evidence that they obtained their counterfeit inventory from a "legitimate source." In many cases, even something as simple as an invoice has been sufficient to provide a "free pass" to offenders. Another frequently cited challenge involves administrative authorities' often narrow approach to enforcement against clearly infringing goods that fall outside of the specific class or subclass of a brand's trademark registration.

Comments received in connection with criminal enforcement in China during this year's consultations were fairly mixed. As noted above with respect to administrative actions, many brands reported significant decreases in the number of criminal raids over the past year. In numerous past submissions, we've commented on the adverse impact that China's case transfer thresholds have on criminal enforcement, and in turn, on the overall level of deterrence provided under the Chinese enforcement regime. Those concerns remain pronounced.

Border enforcement remained a key priority for rights-holders across all product sectors over the past year, a fact that will surely come as no surprise given China's status as the

single largest source of counterfeit goods sold around the world. Without question, fundamental and holistic improvements to the customs enforcement regime are necessary. Several brands encouraged a greater emphasis on the oversight and regulation of shipping intermediaries, the imposition of know-your-customer duties throughout the distribution chain (accompanied by meaningful enforcement of those obligations), and increased leveraging of available data for targeted interdictions against illicit exports. In other words, China should be taking the type of steps to enforce against counterfeit exports that have been (and continue to be) implemented in the import context by customs agencies around the world.

Rights-holders also cited Chinese privacy and data security laws as contributing to increased difficulties in pursuing multi-jurisdictional investigations, and tracing counterfeit supply chains back to their source. The failure to take relatively simple steps to verify the identities of individuals and businesses involved in commercial scale shipping (whether via high volumes of small consignments or through traditional air and ocean cargo) continues to enable illicit trafficking on a monumental scale while making meaningful enforcement near-impossible.

The overwhelming volume of small consignments that continue to strain the abilities of customs agencies here and in countless other jurisdictions are seen as strongly correlated to online sellers active on Chinese e-commerce channels. Enforcement on major online platforms remains inconsistent, with brands citing widely differing levels of support from various players in that sector. Enforcement agencies continue to struggle in their efforts to combat online trafficking, particularly with respect to collecting electronic evidence to demonstrate the extent of illegal business activity. Prosecutors, likewise, are said to be reluctant to consider evidence of past online sales in assessing the appropriateness of criminal charges in connection with online trafficking. The ease with which counterfeiters can maintain their anonymity, given prohibitions on the disclosure of their identities by ISPs, coupled with the inability to sue anonymous counterfeiters is said to effectively immunize many bad actors online.

In last year's Special 301 report, USTR highlighted long-standing concerns of rights-holders related to bad faith trademarks; despite some initiatives undertaken during the past two years by the China Trademark Office (CTMO) and the China National IP Administration (CNIPA), bad faith applications and registrations remain a significant concern. Brands underscored the overwhelming volume of the problem, with some reportedly being forced to file several hundred actions on bad faith grounds each year. The resulting costs and other associated strains on brands' resources are immense. And while some described nominal improvements in addressing high-volume "serial" bad faith applicants, thanks to CTMO's adopted practice of suspending the examination of applications by companies who exceed 50 applications within a 30-day window; it appears some of those entities are adopting new strategies involving fewer but more targeted filings to feign an appearance of legitimacy and to avoid the threshold imposed by CTMO. Member brands further argued that their concerns are exacerbated by China's

strictly applied sub-class system. On balance, respondents reported that substantive progress has been slow to materialize.

Given the range and severity of these and other concerns highlighted by rights-holders over the past year, we support China's retention on the Priority Watch List in 2023.

## **INDIA**

The IACC agreed with USTR's decision to retain India on the Priority Watch List last year, citing a variety of concerns impacting a number of product sectors, including significant delays in the prosecution of trademark applications, backlogs in the court system, and the overall volume of counterfeit goods seen in the Indian market. While we wish to acknowledge the progress India has made in addressing rights-holders' concerns, and the government's increased priority for doing so, we continue to support India's retention on the Priority Watch List this year.

We received largely positive reports from IACC members this year concerning their interactions with Indian law enforcement agencies. The police are described as supportive, and many respondents commented on the level of buy-in that has been seen throughout their ranks. This has led to regular criminal raids and significant seizures within the domestic market. Several brands however also highlighted concerns raised in past submissions with respect to frequent delays in the execution of raids due to overly-bureaucratic procedures and the need to obtain multiple approvals before moving ahead with a raid. One brand suggested that the Trade Marks Registry should provide a designated officer for responding to law enforcement inquiries to increase efficiency. Rights-holders also frequently expressed their desire that police adopt a more strategic approach to enforcement and to better leverage intelligence generated by raids to identify additional targets further up the supply chain. A greater level of information sharing and increased collaboration were also cited as priorities. While police departments in some larger cities have established Economic Offence Wings, IP has not been included as a focus; rights-holders would welcome the development of specialized IP units as well. Online enforcement was also said to be hindered by the lack of specific criminal provisions to address counterfeiting and piracy through e-commerce channels.

Though some respondents reported increased interdictions at the border over the past year, several commented that the volume of seizures still does not reach the levels expected for a market of India's size. And while many of the counterfeit goods on offer in local markets are undoubtedly produced domestically, it is evident that large volumes of counterfeits sourced from abroad are passing through Indian ports with relative ease. A common complaint focused on the onerous bonding and bank guarantee requirements associated with the seizure process, particularly given the length of time it often takes to resolve a case. Respondents offered a number of suggestions for improving the customs



regime, including the development of a simplified filing and renewal procedure for Customs notices and increased IP training for Customs officers. One brand decried Customs' narrow interpretation of its IPR Enforcement Rules, noting that Customs will often take action only against goods bearing identical trademarks, while allowing entry of goods with deceptively similar indicia or only minor alterations to a registered mark. Others argued for the provision of more detailed information on import documents and bills of lading, with the aim of improving Customs' profiling and targeting against illicit imports. Several called for more streamlined procedures and increased transparency around the destruction of seized counterfeits, citing a lack of notifications or proof of destruction.

With respect to India's judicial system, rights-holders' priority concern in 2022 remained the significant backlogs seen in the court system (and the protracted nature of court proceedings that have contributed to those backlogs). This has been a frequent complaint for a number of years, and progress towards addressing these challenges has been slow to materialize. Rights-holders' frustrations were even more pronounced in the criminal context, with some respondents citing prosecutions that have stretched beyond a decade without resolution. Criminal sentences are generally seen as lacking deterrence; one brand cited a case involving counterfeit pharmaceuticals in which the defendant explicitly admitted his guilt, yet received a fine of less than USD\$100. Rights-holders did express their approval for India's decision to abolish the Intellectual Property Appellate Board (IPAB), and the subsequent creation of an IP Division in the High Courts. It is hoped that these steps will alleviate some of the historical concerns noted above.

While India continues to make progress in its efforts to address the significant and long-standing challenges faced by intellectual property owners, based on the feedback we've received this year, we support its retention on the Priority Watch List again in 2023.

## **INDONESIA**

Indonesia was retained on the Priority Watch List in 2022, with USTR citing "widespread piracy and counterfeiting and, in particular, the lack of enforcement against counterfeit products." As discussed below, those concerns remained pronounced over the past year. Accordingly, we support Indonesia's placement at the Priority Watch List level again in 2023.

Rights-holders were uniform in their feedback concerning Indonesia during this year's consultations, describing unacceptably low levels of enforcement in the internal market, continued growth in the volume of online trafficking, minimal customs seizures, and few criminal enforcement actions or prosecutions. In recent years, the Indonesian government has repeatedly stated its commitment to addressing long-standing concerns of IP owners, though in the view of many brands, that rhetoric has not been accompanied

by meaningful actions or any measurable decrease in the level of counterfeiting seen in the country.

Enforcement within the domestic market was described in dire terms, with administrative and criminal raids against counterfeiting operations characterized as “near impossible,” “largely ineffective,” and “completely unworkable.” Respondents attributed the current state of affairs to high turnover within the Directorate General of Intellectual Property Rights (DGIPR) and its Directorate of Investigation (PPNS) resulting in inconsistent enforcement strategies, along with the insufficient resourcing of those entities, poor coordination with other relevant agencies (such as the National Agency for Drug and Food Control), lacking communication and cooperation with rights-holders, and ingrained corruption.

The PPNS announced the development of a new internal task force in 2022, purportedly aimed at streamlining and expediting IP-related complaints. In practice, the system continues to be viewed as overly bureaucratic with onerous evidence and legalization requirements that significantly delay enforcement actions, if they occur at all. One brand reported a six month lead time between filing a complaint and the execution of a raid which ultimately proved unsuccessful.

Some respondents decried the lack of information made available to stakeholders, and further expressed their desire for the publication of official reports detailing raid data (including the number of raids carried out), comprehensive seizure statistics, and information concerning the number of administrative and criminal cases initiated as a result of enforcement actions (including the case outcomes).

Consistent with the reports of lacking enforcement, most respondents described little or no experience with the Indonesian judicial system; the lack of cases is seen as necessarily limiting the ability of prosecutors and judges to develop expertise on matters related to IP.

Feedback concerning Indonesia's border enforcement regime was no more favorable than that heard with respect to enforcement in the internal market. Despite the implementation of new procedures nominally aimed at addressing long-standing problems, rights-holders continue to face numerous obstacles to effectively enforcing their IP rights at the border. In past submissions, the IACC has been highly critical of Indonesia's policy of restricting recordation with Customs to domestic entities, as it requires rights-holders to unnecessarily incur costs associated with establishing a local subsidiary or else be precluded from making use of the system entirely. Respondents also pointed to onerous timelines imposed by Customs and exorbitant bonds demanded as security for the interdiction of even small consignments. IP-related seizures remain extremely rare, and rights-holders note that while Customs has ex officio authority to seize shipments of counterfeit goods, that power is seldom invoked.

Another increasing priority for rights-holders in recent years has been the growing online sales of counterfeits through popular Indonesian e-commerce channels. In the view of rights-holders, Indonesia's efforts to address this illicit activity have, to date, fallen short. However, we have heard reports of a proposal currently under consideration through which DGIPR, the Ministry of Communications, and the Ministry of Trade would seek to develop a voluntary code of conduct under the auspices of a memorandum of understanding between major e-commerce platforms and IP owners. The effort would, among other things, reportedly establish best practices and guidelines for dealing with repeat infringers and making law enforcement referrals. We are currently seeking additional information about this proposal.

Some brands cite increasing concerns related to bad faith registrations, largely attributed to examiners' reluctance to refuse applications on bad faith grounds and the lack of effective cancellation procedures.

Rights-holders remain extremely frustrated over the lack of progress in Indonesia since its placement on the Priority Watch List. As characterized by one brand, there is a perception that the Indonesian government has been more focused on creating the appearance of progress rather than real, measurable improvement. Indonesia's stated commitment to addressing the range of issues faced by rights-holders in the country must be accompanied by concrete steps aimed at decreasing the illicit trafficking that has long plagued the market. Accordingly, we support Indonesia's retention on the Priority Watch List in 2023.

## **PHILIPPINES**

During last year's cycle, the IACC recommended that the Philippines be placed on the Special 301 Watch List, citing a variety of long-standing deficiencies in the country's enforcement regime, coupled with slow-moving (and relatively few) prosecutions of IP crimes, and an overall lack of progress in addressing the high volume of counterfeit goods on offer in the domestic market. The concerns voiced by rights-holders during this year's process were even more pronounced, and said to be driven by both a lack of political priority and an infrastructure that is insufficient to make a meaningful impact on the ingrained counterfeit trade. In light of the increasing concerns highlighted by rights-holders this year, we encourage USTR's placement of the Philippines at the Priority Watch List level.

Both the level and effectiveness of enforcement remained a significant concern during the past year, with rights-holders from multiple product sectors reporting an apparent increase in the visibility of counterfeit goods in the local market. IP owners in the apparel sector pointed to significant volumes of counterfeit product being imported from Bangladesh-based manufacturers, and identified the Philippines as an emerging hub for distribution to other markets in the region. While the National Bureau of Investigation

(NBI) is described as a consistent partner, and was complimented for its willingness to assist brands in protecting their rights, the impact of the NBI's efforts is said to be greatly diminished by a lack of follow-through by prosecutors and lengthy judicial proceedings. Enforcement activity is also hindered by instances of protectionism (in the form of attempted interventions by government officials on behalf of well-connected targets), and according to some reports, instances of corruption within frontline personnel. The widespread availability of counterfeit goods in the marketplace – including in well-known and notorious markets highlighted by USTR in past years – and the openness of those sales, are indicators of both the ineffectiveness of enforcement efforts and the lack of deterrence that they're generating.

Rights-holders registered similar concerns with respect to the online trafficking of counterfeits in the Philippines, mirroring problems seen in countless other jurisdictions. Sales through standalone websites and e-commerce platforms, as well as through social media channels continue to increase, as counterfeiters seek to exploit the ease of market entry and the anonymity afforded by the online market. We would welcome the application of greater resources and priority for addressing this growing problem.

Respondents' assessments of the border enforcement regime were similarly unfavorable. Despite the volume of counterfeit goods flowing into the country, the Bureau of Customs is described by some as a reluctant partner at best, often insisting that it lacks the ability and authority to enforce against illicit imports on the basis of IP violations. As a result, most brands report few seizures at ports upon goods' entry. Rights-holders had expressed some optimism for improvement with the initiation of a campaign in 2021 by Customs' Intellectual Property Rights Division that resulted in a number of large-scale seizures in warehouses (subsequent to the goods' entry). Unfortunately, the program appears to have been discontinued without explanation in mid-2022. It's also worth noting however that even positive reports concerning Customs' efforts have historically been offered with a disclaimer. Proper documentation (including accurate inventories of the goods seized), coordination with other authorities to facilitate further investigation or prosecution of the responsible parties, and transparency with respect to the ultimate disposal of goods seized by Customs has often been said to be lacking. To that latter point, one respondent offered anecdotes involving raids in which the targets stated that they had obtained their inventory from the very facilities tasked with destroying them.

Successful enforcement actions are ultimately meaningless absent follow-through by prosecutors and the courts. Regrettably, lack of sufficient follow-through has been a consistent point of frustration for rights-holders for many years. Rights-holders lay much of the blame for this at the feet of prosecutors, who are characterized as disinterested in pursuing IP cases, and said to frequently press brands to simply settle disputes directly with the counterfeiters. Prosecutors' reluctance to pursue cases is broadly credited for the "glacial pace" with which cases are resolved, averaging five to six years at the trial level; in the case of appeals, the timelines stretch even further, with some exceeding a decade in length.

While deterrent penalties are available, as a practical matter, they're rarely seen. Convictions are reportedly uncommon, a fact attributed in part to the protracted nature of proceedings (which also greatly incentivizes settlement before a case is concluded). We've also received troubling reports regarding prosecutors' willingness to "settle" cases unilaterally, offering to drop all charges in exchange for payment from the defendant.

The consensus view expressed during this year's consultations is that the environment for IP protection in the Philippines remains exceedingly difficult for rights-holders, and indeed, appears to be deteriorating. Most, if not all, of the concerns raised herein are long-standing problems for which meaningful progress has failed to materialize over a number of years. Given the feedback received, we support USTR's placement of the Philippines on the Special 301 Priority Watch List in 2023.

## **EUROPE – MIDDLE EAST – AFRICA REGION**

### **RUSSIA**

USTR retained Russia on the Priority Watch List in 2022, citing a lack of meaningful progress with respect to numerous long-standing concerns related to the protection and enforcement of IP rights in the country. The IACC concurred with USTR's decision, while highlighting members' concerns related to online piracy and sales of counterfeit goods, inconsistent border enforcement, and other issues.

Overall, we received substantially less input regarding the IP landscape in Russia over the past year; this should come as little surprise given the suspension of business operations in the country by many Western companies following Russia's invasion of Ukraine, and the subsequent imposition of sanctions on Russia by governments around the world. Needless to say, there is considerable uncertainty regarding the current environment for IP enforcement in Russia.

In response to the sanctions regime, numerous proposals aimed at punishing Western companies (and countries) were considered and/or implemented, including the removal of parallel import restrictions; we've also heard many reports concerning an apparent overall reduction in the level of enforcement with fewer raids, seizures, and prosecutions of IP offenses over the past year. Though some rights-holders indicated that they've received seizure notifications or were otherwise aware of enforcement actions involving their brands, the consensus view is that enforcement agencies have been far less active over the past year. That reduction in activity is thought to be due, in part, to direction from the Russian government to deprioritize IPR enforcement. Such reports are

obviously troubling, given that rights-holders have historically expressed the view that the level of enforcement was already inadequate.

In light of the feedback received during this year's consultations, we support Russia's retention on the Special 301 Priority Watch List again in 2023.

## **AMERICAS REGION**

### **MEXICO**

Mexico has made perennial appearances in the IACC's Special 301 submissions for well over a decade. Rights-holders' frustrations resulted in a Priority Watch List recommendation last year, with IACC members citing a continued deterioration of the level of IP protection in the country. Member brands continued to strike a pessimistic tone during this year's consultations.

Since assuming power, the Obrador administration has de-prioritized IP enforcement, undoing much of the progress that had materialized in past years. Criminal investigations and enforcement are described by some as "a practical impossibility" as the Office of the Attorney General has reportedly been instructed to suspend nearly all such activity. One brand further elaborated on these concerns, stating that the Attorney General's Office had refused to support criminal raids against targets unless law enforcement could identify the source of the goods – a near-absolute bar to enforcement, considering the complexity of supply chains for counterfeit goods. Ultimately, IP owners are left with few options aside from pursuing administrative actions through the Mexican Institute of Industrial Property (IMPI). And while IMPI was commended by some for its consistent efforts among challenging circumstances, that agency's ability to support rights-holders has itself been hampered by staffing reductions and budget cuts. As a result, rights-holders have seen increasing delays and an ever-growing backlog of cases. The focus on administrative remedies, which necessarily result in less stringent penalties than those available in criminal cases, will also undoubtedly diminish deterrence and foster recidivism.

Customs enforcement in Mexico remains difficult for a number of reasons; in recent years, rights-holders have expressed dismay at Mexican Customs' lack of ex officio authority, lack of authority to act against transshipments, and inability to seize goods absent the intervention and assistance of IMPI or the Attorney General's Office. No progress has been reported on any of those concerns, despite rights-holders consistent pleas to address the structural impediments faced by Customs. While several brands commented positively regarding the efforts made by Customs, the policies and procedures currently in place, along with resource limitations, have served to severely limit the effectiveness of

Mexico’s border regime. As a result, counterfeiters continue to exploit the country as an import hub for bringing their illicit goods to markets throughout Central America. Similar to concerns highlighted in our comments about Hong Kong, rights-holders have encountered a lack of cooperation from freight forwarders who often play a key role in the illicit trafficking. Customs’ reliance on “experts” to authenticate suspect goods continues to be a concern, and is seen as fostering opportunities for corruption. Last year, Customs’ responsibilities were brought under the authority of the military; most respondents indicated that they’ve yet to see any significant change in operations to date, but we will continue to monitor those developments.

Rights-holders also reiterated a variety of concerns highlighted in previous submissions, including significant volumes of counterfeit manufacturing (supplying both sales in the local market and exports to other markets in Central America, as well as the United States), high levels of corruption, overly-bureaucratic procedures, and a thriving online market for counterfeit and pirated products.

In light of these significant and continuing concerns, we again recommend Mexico’s elevation to the Priority Watch List in 2023.

## **WATCH LIST RECOMMENDATIONS**

### **ASIA-PACIFIC REGION**

#### **MALAYSIA**

During this year’s consultations, rights-holders continued to report a variety of challenges to effectively protecting their intellectual property in Malaysia. Among the most frequently heard complaints were a lack of effective border measures, insufficient levels of criminal enforcement along with few criminal prosecutions, and the application of non-deterrent penalties that fail to discourage recidivism. Member companies within the apparel sector detailed growing concerns about the prevalence of Bangladesh-sourced counterfeits in the local market, as well as the exploitation of Malaysia’s lax customs enforcement for transshipment to other markets in the region. In light of the feedback received from rights-holders this year, we support Malaysia’s placement on the Special 301 Watch List in 2023.

As in past years, respondents were largely complimentary of the Ministry of Domestic Trade (MDT), which oversees both criminal and administrative enforcement in Malaysia.

In contrast to past years however, some have noted a diminished level of responsiveness and stated that they'd seen increased lead times for carrying out raids. Others complained of inconsistent procedures and the imposition of burdensome documentation requirements when they've sought to obtain enforcement assistance. Rights-holders consistently expressed a desire for a more pro-active approach to enforcement, as well as for more extensive follow-up investigations. Raids and seizures were described as an end unto themselves, with little emphasis placed on gathering intelligence to pursue suppliers or manufacturers. Administrative sanctions remain the norm in Malaysia even in cases involving significant volumes, values, or recidivism; they typically result in seizures of counterfeits, along with warnings or nominal fines. Criminal prosecutions are said to be a rarity, and where they do occur, are reported to be protracted affairs resulting in meager sentences that lack deterrence. Some brands expressed dismay regarding instances in which targets appear to have been tipped off in advance of actions, leading to poor results, and raising concerns about possible corruption.

As stated at the outset, rights-holders expressed great frustration with the Malaysian border enforcement regime during this year's consultations, describing the Royal Malaysian Customs Department as "inactive," "ineffective," and "inefficient." Respondents point to underlying deficiencies with Malaysia's statutory framework – e.g., provisions of the Trademarks Act that impose onerous requirements on IP owners seeking enforcement, as well as the lack of express provisions in Malaysia's Customs Act pertaining to enforcement against counterfeits – as a major contributing factor. The lack of a recordation system is also seen as significantly impeding border enforcement. Proactive enforcement against illicit shipments is said to be non-existent, and coordination between the RMCD and MDT is described as sorely lacking.

As in countless other jurisdictions, online sales of counterfeit goods are a source of growing concern in Malaysia, and brands highlighted the need for increased enforcement aimed at reining in such trafficking, and to ensure accountability in the online market.

Given the continuing challenges faced by intellectual property owners in the Malaysian market, we support its placement on the Special 301 Watch List this year.

## **THAILAND**

The IACC agreed with USTR's decision to retain Thailand on the Special 301 Watch List in 2022. As detailed in last year's submission, rights-holders were largely positive in their comments concerning the apparent increase in priority for IP protection within the government, though they remained troubled by the overall level of counterfeits available in the domestic market, growing online trafficking, and a number of other persistent concerns highlighted in prior years' comments. Unfortunately, many of those same concerns were heard from rights-holders again during this year's consultations.



Respondents commented positively on Thailand’s overall legislative framework, describing it as “generally strong” and “sufficient to enable meaningful enforcement.” However, they also highlighted two areas for potential improvement of the existing regime. First, rights-holders expressed their desire for the adoption of specific provisions in the law to prohibit the bad faith registration of trademarks; while some have found success challenging bad faith marks under Section 8(9) of the Trademark Act (which prohibits registration of any mark which is contrary to public order, morality, or public policy), there is a lack of clarity on the issue that could be resolved by the enactment of an explicit prohibition on bad faith filings. A second area for potential improvement identified by respondents involved further developing the country’s legal framework to more effectively address growing online sales. While acknowledging efforts undertaken by the Thai government in recent years to combat online sales, evaluating and updating existing laws to require enhanced vetting of sellers and increased accountability by online marketplaces would be a welcome step.

Rights-holders have long noted however that a good legal framework alone is not enough to effectively deal with counterfeiting; it must be accompanied by strong enforcement. Unfortunately, many brands continue to report challenges in enforcing their rights in the Thai market. As described in past submissions, criminal enforcement in Thailand is often seen to focus on “volume over value;” enforcement agencies are said to be more inclined to pursue low-level offenders, rather than targeting larger, more organized networks involved in production and distribution.

Enforcement duties are divided between local police, the Economic Crime Suppression Division of the Royal Thai Police (ECSD), and the Ministry of Justice’s Department of Special Investigation (DSI). The ECSD was generally viewed as the fastest enforcement option by respondents, though reported to often not pursue follow-up investigations following the execution of raids. The DSI, though complimented for their reliability and their handling of larger, more complex cases, was also said to be hindered by overly-bureaucratic processes that often delayed investigations and resolutions.

While Thailand’s enforcement agencies were generally described as supportive and receptive, some brands expressed a desire for greater collaboration with their counterparts, stating that coordination and intelligence sharing has been limited by the country’s data protection and privacy regulations.

With respect to Thailand’s border enforcement regime, rights-holders welcomed the introduction of a new recordation database by Customs in mid-2022; the prior iteration jointly maintained by Customs and the Department of Intellectual Property was described as unwieldy and ineffective. Disappointingly, respondents have informed us that Customs is requiring IP owners to refile their previously recorded marks in the new system, rather than simply importing the data from the legacy system, imposing an unnecessary burden on those rights-holders. Rights-holders will be closely monitoring the implementation of the new system, in hopes that it will significantly increase the number of border seizures. At present, interdictions are reportedly very low; one global

brand reported only a handful of seizures in 2022, all involving small consignments. The volume of seizures is a point of frustration for numerous brands, particularly in light of the visibility of counterfeits in brick and mortar outlets and on e-commerce sites operating in Thailand. On a more positive note, some respondents complimented Thai Customs for their receptivity to intelligence offered by IP owners, and their willingness to participate in trainings aimed at furthering their expertise on IP-related matters.

Thailand has a well-developed judicial framework with specialized IP courts and prosecutors, and growing expertise within the ranks of its judges. Because Thailand has a civil law tradition, courts' decisions often offer minimal insights regarding the rationale underlying the decisions, which might be helpful in handling subsequent matters. Prosecutors are also said to have significant caseloads; some argue that those caseloads are the logical result the Thai approach to enforcement (critiqued above). Pursuing low-hanging fruit necessarily leads to a high volume of low-value cases. This may also contribute to another common complaint of rights-holders – courts rarely impose significant penalties for those “minor offenses,” often only nominal fines and suspended prison sentences that lack deterrence.

We would welcome further engagement with the Thai government during the coming year; but given the range of concerns that continue to be reported by member brands, we support Thailand's placement at the Watch List level again in 2023.

## **VIETNAM**

The IACC concurred with USTR's decision to retain Vietnam on the Special 301 Watch List in 2022, noting that despite some positive reports concerning an increased emphasis on IPR protection by the Vietnamese government, a number of long-standing challenges to effective enforcement continued to trouble rights-holders. These included a perceived over-reliance on administrative enforcement, and the need for more deterrent penalties to discourage recidivism.

Rights-holders again this year commented positively on the increased priority that the government has placed on improving the environment for IP protection, and noted greater engagement with customs and enforcement agencies during 2022, citing more regular outreach and communications from authorities. Some also reported an uptick in requests for training opportunities, which we view as indicative of Vietnam's commitment to continued improvement.

One area in which such improvement would be particularly welcome is in addressing significant backlogs and delays in the examination and appeals process at the Intellectual Property Office of Vietnam. The ability to obtain a trademark registration is obviously fundamental to any brand's ability to assert and protect its rights in a country; rights-

holders would welcome further efforts to increase the efficiency of the registration process.

With respect to enforcement issues, respondents singled out Vietnamese Customs and the Market Surveillance Agency for praise, due to increased seizure and raid activity, particularly along the country's border with China. One member brand reported multiple seizures, each involving tens of thousands of counterfeit items. As detailed in last year's comments though, continued vigilance and efforts are vital, as the flow of counterfeits into the country from China is seemingly unending. That flood of fake products remains a significant threat to the legitimate market.

Consistent with feedback received during past years, rights-holders continued to report more consistent and effective enforcement activity in the northern part of the country, while noting fewer and less frequent raids and seizures in the south. We've also heard troubling reports of raids being compromised when targets were tipped off in advance, raising concerns about possible corruption.

Rights-holders stressed however that stepped-up enforcement in the form of raids and seizures is not by itself a recipe for holistic improvement in the environment for IP in Vietnam, because the penalties imposed for violations – particularly those arising from administrative enforcement actions – remain too low to serve as a significant deterrent. We would encourage a greater emphasis on criminal prosecutions, especially in those cases involving recidivists.

As has been the case in countless other jurisdictions in recent years, there has been considerable growth in the trafficking of counterfeit goods online in Vietnam; that trend became even more pronounced with the rise of the COVID pandemic. While we've heard positive feedback regarding the efforts of the Ministry of Science and Technology and the Market Control Board, and some brands report making inroads with popular e-commerce platforms in the country, the volume of trafficking online continues to increase. Addressing these illicit sales remains a key priority for rights-holders across virtually every product sector. We also wish to note the growing concerns relayed by some member brands during this year's consultations related to "live sales" via social media platforms (as distinct from more traditional sales via standalone websites and multi-seller online marketplaces). We would welcome further efforts by the Vietnamese government to crack down on such sales.

While we certainly acknowledge the progress that has been made by Vietnam in recent years, given the range and severity of the challenges that rights-holders continue to face there, we support Vietnam's retention on the Watch List again in 2023.

## **EUROPE – MIDDLE EAST – AFRICA REGION**

### **EGYPT**

While acknowledging the efforts of the Egyptian government in last year's report, USTR stressed the need for further progress on a range of IP protection and enforcement issues in support of its retention of Egypt on the Special 301 Watch List in 2022. The IACC agreed with that decision last year, and continues to support Egypt's placement on the Watch List in 2023.

Many of the concerns heard during last year's consultations were raised again this year. Several brands commented positively regarding their interactions with law enforcement; one IACC member in the pharmaceutical sector noted increased engagement by the Ministry of Health's Inspector General Directorate resulting in improved enforcement outcomes. Most respondents' shared a view though that the overall impact of enforcement efforts continues to be hindered by budget and manpower limitations. As noted in prior years' submissions, insufficient resourcing has often led to delays in the execution of raids, which in turn may negatively impact outcomes. The lack of manpower has occasionally been cited to explain the apparent reluctance to pursue large-scale raids in some of Egypt's more well-known outlets for counterfeit sales. It is also viewed as limiting law enforcement's ability to collect intelligence and conduct more intensive investigations. Finally, the lack of government storage facilities, and the resulting practice that has been adopted (under which defendants retain possession of the counterfeit goods following a raid, but prior to a final decision from the courts) has been highlighted as a concern in numerous past filings. Several brands expressed their desire for greater collaboration with Egyptian authorities, while noting that law enforcement is often reluctant to seek assistance from their private sector counterparts in conducting raids or authenticating products.

And though respondents tended to stress the positive aspects of their engagement with law enforcement, their feedback concerning Egyptian Customs were decidedly less positive. Member brands bemoaned the "bureaucratic," "uncertain," and "inconsistent," seizure process, while describing the "nearly non-existent" volume of interdictions at the country's borders. The lack of a recordation process was also cited as a source of frustration, along with a lack of transparency with regard to the final disposition of seized counterfeits. To that final point, some brands have shared alarming reports of seized goods being sold at auction by Customs.

Given rights-holders' continuing concerns regarding the protection and enforcement of their rights, both at and within Egypt's borders, we support Egypt's retention on the Watch List in 2023.

## KENYA

In our comments to USTR during last year's Special 301 process, the IACC highlighted rights-holders' dismay over an apparent increase in the trafficking of counterfeit goods in and through Kenya. We are disappointed to report that those concerns have grown even more pronounced since our last filing.

Though we know that USTR is already of aware of the issue, we would also like to stress IACC members' great concern with respect to Kenya's implementation of a mandatory recordation regime, effective January 1<sup>st</sup> of this year. The requirement has been characterized by some as an unnecessary burden, by others as an impermissible formality, and by still others as little more than a mechanism for revenue generation. The fee to record a trademark is reported to be \$90, plus an additional \$10 per International Class, and must be renewed annually. In contrast to the United States' voluntary recordation system, Kenya's new regime is mandatory, and failure to comply may result in criminal sanctions. We will continue to monitor these developments, and welcome the attention of the U.S. government to this issue.

Enforcement, both at and within Kenya's borders, was a point of significant frustration since our last submission to USTR. Intellectual property owners have long faced challenges in protecting and enforcing their rights in Kenya, though historically, rights-holders have noted consistent support from the country's Anti-Counterfeit Authority (ACA). Despite resource limitations, the ACA was seen as committed to combatting the illicit trafficking of counterfeits and open to collaboration with brands. Over the past year however, we've received extremely troubling reports from member brands regarding their interactions with the agency. One stakeholder described the ACA as well-intentioned, but largely ineffectual. Budget cuts, staffing reductions, and a deprioritizing of IP in general are all attributed for the deterioration. According to reports we've received, the ACA no longer has personnel stationed at ports of entry, and as a result border inspections for IP violations have effectively ceased (as Kenya's customs personnel has not typically handled those responsibilities). The ACA is also said to have been ordered to "stand down" in the local market, enabling more widespread and open sales of counterfeits.

Some rights-holders assert though that the situation in Kenya has progressed beyond a mere decrease in priority and engagement, and into outright hostility for IP. One brand, who'd previously enjoyed robust cooperation and reported regular seizures, detailed their more recent experience. Dating back to mid-2022, they highlighted several instances in which they had identified containers with counterfeit goods entering, or transiting through Kenya en route to other African nations. Despite filing complaints, and obtaining court orders and search warrants, in accordance with established protocols, the shipments (which contained, in aggregate, nearly half a million counterfeit items) were inexplicably released. To date, that brand has received no explanation or justification for the ACA's decision to release the goods. The same brand further noted that, contrary to past practice, the ACA is no longer sharing information concerning, or ensuring safe passage for, known shipments of counterfeits that might enable a seizure or follow-on

investigation at the final destination of the goods. The ACA has, in the past, demonstrated its ability to be a strong and reliable partner to rights-holders, but the sharp contrast between respondents' past experience and the current state of affairs is troubling to say the least. It is vital that the Kenyan government empower the agency and ensure that it is properly resourced if they hope to correct course.

In light of the feedback received from IACC members during this year's consultations, and their growing concerns over the deteriorating environment for IP in the country, we support Kenya's placement on the Special 301 Watch List in 2023.

## **OMAN**

IACC members continue to report significant frustration regarding the high volume of counterfeit trafficking in Oman, and, as described by one respondent, the "complete disinterest and lack of political will" of the Omani government to address the concerns voiced by rights-holders. We offered similar feedback during last year's process; while the country was not named in USTR's report last year, we urge Oman's placement on the Watch List in 2023.

Rights-holders described the problems faced in Oman as a "top down" issue, stating that the government has simply failed to prioritize IP protection. The disinterest is said to have filtered down to the Ministry of Commerce, the Police, and the National IP Office, resulting in minimal, if any, assistance or enforcement related activities. One global brand reported no raids or seizures, despite the high visibility of counterfeits of their products in the local market, and despite repeated attempts to engage with the authorities.

The apparent apathy and disregard of the government in the face of rights-holders' requests for assistance has left brands with little hope for improvement absent intervention by the U.S. government. We would welcome USTR's support in addressing these concerns in the coming year.

## **PAKISTAN**

Pakistan was retained on the Special 301 Watch List in 2022. While USTR acknowledged ongoing "positive dialogue with the United States on intellectual property matters" as well as significant steps in connection with capacity building and training, a wide assortment of concerns continue to plague rights-holders in numerous product sectors. While the IACC received only limited input regarding Pakistan during last year's consultations, and did not make any formal recommendation for its placement, we concurred with USTR's

decision. In light of feedback received this year, we would support Pakistan’s retention on the Watch List again in 2023.

A primary concern raised by IACC members during this year’s discussions involved the Pakistan IP Office’s handling of bad faith trademark filings, even in those cases that are relatively clear cut. One brand described its struggles in connection with a local entity in Pakistan that has filed numerous applications for identical or nearly identical marks, some of which the IPO has ultimately approved for registration despite the IACC member brand’s own pre-existing registrations. As a result, the brand has been forced to file dozens of actions seeking to oppose or cancel the Pakistani entity’s applications and registrations. As described by the brand, these disputes are not “close calls” requiring significant analysis, and should be easily resolved; to date, however, over 20 such opposition and cancellation proceedings remain pending. The failure to effectively deal with bad faith filings can lead to significant reputational and economic harm, and has an adverse impact on brands’ ability to enforce their rights in the country. Promptly resolving these matters is essential to minimizing that harm.

On a more positive note, one IACC member brand wished to acknowledge the support and effective assistance that they’ve received over the past year by Pakistan’s enforcement personnel. They’ve been particularly pleased with the efforts of customs officials, citing regular seizures and consistent engagement. One area of concern was noted however, in connection with provisions of a trade agreement between Pakistan and Afghanistan, under which goods transiting Pakistan en route to or from Afghanistan are (with minimal exceptions, such as shipments involving weapons or narcotics) not subject to detention or seizure. Customs officials in Pakistan have stated that they lack the authority to interdict shipments even when they are known to consist of counterfeit goods that would otherwise be subject to seizure. We are seeking additional information regarding this issue, and hope to provide further details as they become available.

While we are somewhat encouraged by the positive engagement described by some respondents during this year’s consultations, we support Pakistan’s retention on the Special 301 Watch List in 2023.

## **SAUDI ARABIA**

Saudi Arabia was removed from the Special 301 list in 2022, following four consecutive appearances at the Priority Watch List level. In comments filed during last year’s process, the IACC expressed support for Saudi Arabia’s retention on the Priority Watch List. Despite notable progress in some areas, and significant steps initiated in conjunction with the centralization of enforcement and coordination of government activities related to intellectual property under the auspices of the Saudi Authority for Intellectual Property (SAIP), rights-holders continued to report significant and long-standing concerns last year. And while we remain optimistic about the prospects for holistic improvements in

the environment for IP protection under the SAIP's guidance, rights-holders' feedback this year underscored that much of the hoped-for progress has not yet materialized. Indeed, many have reported a deterioration in enforcement throughout the transitional period. Accordingly, we ask USTR to consider returning Saudi Arabia to the Watch List this year, or alternatively, to consider an Out-of-Cycle Review to assess the practical impacts of the reorganization on rights-holders in the Saudi market.

Perhaps the most commonly heard phrase during our Special 301 discussions with brands in connection with Saudi Arabia this year was "growing pains." Following years of working directly with their counterparts in the Police, at Saudi Customs, and at the Ministry of Commerce's Anti-Counterfeiting and Fraud Division; many brands had developed positive working relationships with those agencies, and personnel at those agencies had developed a significant level of expertise in enforcing IP rights. Many, however, described difficulties in identifying, and engaging and collaborating with new personnel at the SAIP responsible for IP. The struggles highlighted by rights-holders may be most pronounced with respect to Saudi Arabia's border enforcement regime – in past years identified by IACC members as among the strongest in the Middle East. Regrettably, border seizures are reported to have significantly decreased over the past year; and in contrast to past experience, brands have reported receiving notifications of seizures only after significant delays (or in some cases, not at all). Similar incidents were reported with respect to prosecutorial referrals, and the provision of post-raid reports. On a more positive note, some brands noted SAIP's apparent commitment to improvement, and cited its willingness to engage with stakeholders to seek assistance and feedback on their efforts.

While most respondents expressed optimism that, given the opportunity to develop more internal expertise in handling IP matters, as well as adequate resourcing, the above-noted concerns will diminish; at present trademark owners face a challenging environment. As in past years, rights-holders again bemoaned the "seize and cite" approach to enforcement in the internal market, under which IP violations often result in little more than a warning or nominal fine, along with an "in situ seizure" of the contraband (akin to that described in our comments concerning Egypt). Follow-on investigations after raids have been carried out are infrequent. Where cases are pursued against offenders, a final resolution may take years, and truly deterrent penalties, such as imprisonment or the closure of businesses engaged in illegal activity remain rare.

Last June, we had an opportunity to meet with His Excellency Dr. Abdulaziz AlSwailem, CEO and Mrs. Aljawharah A. Alrajeh, Head of BOD and Advisors Office with the SAIP during a meeting at our Washington, DC headquarters. [During that meeting, we were able to discuss some of the challenges faced by rights-holders, and opportunities for closer collaboration between the SAIP and the IACC.](#) The SAIP expressed a willingness to engage with us on matters impacting SME rights-holders – a shared priority of our organizations - and to explore opportunities for capacity building via jointly organized events. We were pleased with the SAIP's stated commitment to improving the environment for IP in Saudi Arabia, but we have been disappointed by the lack of concrete progress on the discussed



projects since that meeting took place. While there are undoubtedly many competing priorities for the agency's limited bandwidth, we are hopeful that the SAIP will seek to re-engage on these issues in the coming year. The Saudi government's reorganization of its IP protection and enforcement framework under the authority of SAIP may pay dividends in the coming years, but more must be done to follow through on promised reforms. In the interim, we continue to support Saudi Arabia's placement on the Special 301 Watch List in 2023.

## **TURKEY**

Given its status as both a source of counterfeit manufacturing and a major transit hub for the entry of counterfeit goods into European markets, rights-holders have consistently stressed the vital importance that Turkey plays in the global distribution of counterfeits. The country consistently ranks among the top countries of origin for illicit products intercepted by European customs agencies, and is also seen to have a thriving trade within its domestic market. These and other factors have contributed to Turkey's perennial appearances on USTR's Special 301 Watch List, as well as reports published by the European Union concerning the trafficking of counterfeit products. In light of rights-holders' feedback during this year's process, we support Turkey's continued retention on the Watch List in 2023.

Border enforcement has long been a priority concern voiced by rights-holders, and that remained the case in 2022. Though we received some positive reports from brands who'd experienced increased seizures over the past year, and others cited an apparent increase in the engagement of Turkish Customs; numerous others described results in-line with their historical results, and continue to view Customs as under-performing. Border enforcement is at times inconsistent, often involves a significant cost burden, and procedures are generally seen as onerous and overly-bureaucratic. Rights-holders are hopeful that the implementation of new regulations will alleviate some of these issues by streamlining existing procedures and expediting the disposal of seized goods.

IACC members were broadly positive in their remarks concerning the support provided by Turkey's Anti-Smuggling Police, IP Crime Police and the Gendarmerie. Several, including brands in the pharmaceutical and electronics sectors, wished to highlight large-scale raids, and an increase in proactive investigations over the past year. The impact of enforcement in the internal market, however, continues to be diminished by a number of factors, including resource limitations, a lack of ex officio powers, and competing priorities that limit the bandwidth of law enforcement agencies.

The greatest obstacle to effective enforcement cited by many rights-holders though is the difficulty experienced in obtaining search and seizure orders. As described in past submissions, the detailed information and evidence required to support those filings is often an insurmountable hurdle. The process is both opaque and inconsistent, with the

specific requirements seeming to vary from one prosecutor to the next. Some viewed this as indicative of prosecutors' disinterest in IP matters, while others saw it as apparent protectionism; in either case, it represents a significant impediment to obtaining assistance from Turkish enforcement agencies.

Respondents offered a range of opinions regarding their experiences with the judiciary and the adjudication of cases, but a number of deficiencies were cited consistently during this year's consultations. Foremost among these was a need for the imposition of stronger, more deterrent penalties for IP offenses. In most cases, convictions result in a suspended sentence, or perhaps a nominal fine. Another common concern involves the inadequate resourcing of the courts, which has led to overworked judges, prosecutors, and support staff, and which has in turn resulted in a significant backlog of cases – one brand cited a counterfeiting case which had been pending in excess of five years. Some believe that this has both contributed to and exacerbated the level of turnover experienced in recent years, and the loss of critical expertise on IP issues within the judicial ranks. The delays in resolving cases also necessarily increase the costs associated with brands' enforcement of their rights, as they're typically expected to cover the storage fees for any goods seized and held as evidence for the duration of the proceedings.

Respondents also reiterated their concerns, raised in prior years' submissions, with respect to the use of court-appointed "experts" to render opinions regarding the authenticity of goods at issue in a given case. Despite the fact that rights-holders are unquestionably better qualified to make such determinations, courts frequently reject rights-holders' own analyses based on objective and verifiable criteria, in favor of the court's appointed expert. This approach has been adopted by a number of jurisdictions around the world, and it remains a source of considerable frustration.

Given the range and severity of the challenges that rights-holders continue to face there, we support Turkey's retention on the Special 301 Watch List again this year.

## **UNITED ARAB EMIRATES**

Though it was not included in USTR's final report last year, the IACC reiterated calls for the addition of the United Arab Emirates to the Special 301 Watch List in 2022. We do so again this year.

Despite some notable improvements to the IP landscape in recent years, including heightened enforcement leading to the clean-up of notorious counterfeiting hot spots such as the Ajman China Mall and Dubai's Dragon Mart; rights-holders continued to highlight significant challenges in the UAE. Perhaps chief among these are long-standing issues related to customs enforcement. As a key shipping hub between Asia, Africa, and Europe, the Emirates are vitally important to global trade; unfortunately, member brands continue to report significant deficiencies in the country's border enforcement regime.

One complaint heard repeatedly during this year’s consultations involved the lack of proactive enforcement efforts undertaken by Customs. As described by one respondent, “We’ve not seen a single detention or seizure by Customs over the past year that wasn’t predicated on our filing of a complaint with Customs.” It was further noted that, in many cases, Customs has refused to accept intelligence from rights-holders about potential targets absent the filing of a formal complaint. As noted in past years, enforcement against targets in the country’s Free Trade Zones is seen by many as nearly impossible. Jurisdictions recognized as “high-performing” in terms of customs enforcement, typically stress the importance of collaboration, information sharing, and pro-active targeting and enforcement. As described by rights-holders, these characteristics are not widely seen in the UAE. Not surprisingly, high volumes of counterfeit goods continue to enter the local market, as demonstrated by the number and size of seizures arising out of raids by the Police and Departments of Economic Development throughout the country. Far greater volumes continue on to supply other markets in Africa and Europe.

The activity and engagement of the DEDs and Police was, as in past years, viewed as a bright spot by most respondents. Both groups are said to express genuine enthusiasm to address rights-holders’ concerns. Their efforts are deserving of greater support however, as some report that while the agencies have the desire to conduct deeper investigations into targets following raids and seizures, they often lack sufficient resources to do so; facilitating those efforts could pay significant dividends by rooting out broader networks involved in the distribution of counterfeits. Additional support for their efforts would also be welcomed from the courts. Several brands highlighted their view that, too often, courts fail to impose significant penalties for counterfeiting offenses. This is all the more frustrating as the UAE has implemented increased penalties for such violations in recent years; in practice, however, the judiciary appears reluctant to impose harsher sentences. Unsurprisingly, recidivism remains common.

In light of the feedback received from IACC members during this year’s consultations, we recommend that the United Arab Emirates be added to the Special 301 Watch List for 2023.

## **AMERICAS REGION**

### **BRAZIL**

Brazil was retained on the Special 301 Watch List during the 2022 process, with USTR citing a variety of concerns impacting rights-holders, including “excessively high” levels of online piracy, signal piracy, the use of illicit streaming devices, and widespread sales of counterfeit goods both online and in brick and mortar outlets. Despite acknowledgements of apparent increases in enforcement, the legislative and enforcement

regimes continued to be seen as insufficient to bring about necessary progress on these and other long-standing concerns. In our own comments, we highlighted additional concerns raised by rights-holders relating to border enforcement, the inefficiency of the judiciary, and apparent increases in the sales of counterfeits online.

Participants in the IACC's Special 301 consultations this year reiterated many of the concerns described in past submissions; among the most frequently voiced complaints were the need for increased criminal enforcement and for the imposition of more deterrent penalties (in both criminal and civil cases). With respect to the former issue, one brand cited nearly two dozen pending requests for enforcement actions, some of which have seen no progress for over a year, despite efforts to engage with enforcement authorities. Law enforcement is said frequently to blame a lack of resources and manpower for its perceived inactivity. And while we agree that, historically, Brazilian enforcement agencies have been under-resourced, such excuses often ring hollow where the relevant brands have undertaken significant efforts to minimize that burden by conducting extensive investigations in advance, and providing law enforcement with comprehensive evidence packages.

The lack of deterrent penalties for IP offenses in Brazil – both with respect to those authorized by statute and those actually imposed by the judiciary – is seen by some as a contributing factor to law enforcement's disinterest. Offenders are unlikely to serve significant (or any) jail time, and fines imposed may bear no little relation to the economic injury suffered by rights-holders or consumers. As a result, rights-holders describe a never-ending cycle in which authorities target the same well-known outlets over and over again, seizing massive quantities of goods, only for the counterfeiters to promptly resume their illicit sales. The lack of statutory or treble damages in counterfeiting cases is seen to exacerbate these concerns. The end result is an overall lack of deterrence. Accordingly, some respondents express little surprise that law enforcement officers remain disinterested in pursuing IP offenses, given the expectation that such efforts will have no lasting impact.

In a number of prior years' submissions, the IACC has detailed rights-holders' frustrations related to the inefficiency of Brazil's court system. Those complaints continued during this year's process; both criminal and civil cases are said to typically take years to conclude. As in past years, respondents also underscored the need for prosecutors and judges to receive additional training, and would welcome the development of specialized IP courts to increase the expertise and efficiency with which IP cases are handled.

In our comments to USTR last year, we noted increasing concerns among IACC members with respect to online trafficking in Brazil, while also expressing some optimism for improvement following the government's implementation of a "Best Practices Guide" for marketplaces and online platforms to address such activity. We were pleased by the adoption of the guidance by many platforms, and some respondents have reported a decrease in the visibility of counterfeits seen in those marketplaces. However, the overall volume of counterfeit goods available through websites, e-commerce marketplaces, and

social media platforms in Brazil remains exceedingly high. The Brazilian government and enforcement agencies must place a greater emphasis on reining in this online trafficking. Regrettably, we have heard unconfirmed reports that the newly-elected government may roll-back some of the policies that previously offered rights-holders some optimism for improvement in this area.

Another significant concern detailed in last year's submission involved the infiltration of counterfeit goods in the government procurement process. While existing law provides for significant penalties in such cases, including debarment from competing for future government contracts, enforcement by the responsible authorities was viewed as deficient. Respondents reported no apparent progress on this issue over the course of the past year.

Border enforcement has long been a priority concern in Brazil, most notably in the Tri-Border region. Some respondents point to Brazil's imposition of high tariffs, intended to encourage local manufacturing, as a contributing factor to the smuggling of counterfeits and other illicit goods into the country. Customs seizures remained low in 2022, and rights-holders stressed the need for a more collaborative approach to enforcement. At present, Customs typically refuses to provide any relevant information concerning the identities of parties involved in importing or exporting counterfeit goods, citing confidentiality provisions of the Brazilian Tax Code. As a result, even where illicit shipments are seized, it is nearly impossible for rights-holders to conduct any meaningful follow-on investigations into the broader distribution network.

On a more positive note, one IACC member wished to highlight the efforts of the Federal Highway Patrol and Brazilian Customs for undertaking a collaborative enforcement initiative targeting the smuggling of illicit goods (including counterfeits) near the Brazilian border. Given historical concerns regarding the sufficiency of resources available for IP enforcement, such coordination between enforcement agencies may provide a means to more effectively leveraging those resources that are available. As discussed above, however, the efforts of police and customs officials must be met with follow-through by the country's prosecutors and judges.

We would welcome progress on these and other longstanding issues in Brazil. In light of the concerns detailed in these and past filings however, the IACC recommends Brazil's retention on the Watch List in 2023.

## **CANADA**

Canada was retained on the Watch List during last year's Special 301 process; despite "significant progress in IP protection and enforcement ... particularly in areas where there have been long-standing concerns." In our submission to USTR last January however, we noted little progress on a variety of other long-standing concerns – most notably with

respect to Canada's lack of effective border controls, and low levels of enforcement within the internal market in both the online and brick and mortar contexts. The views of the situation in Canada expressed by rights-holders during this year's consultations remained largely unchanged since last year's filing.

Nearly a decade after its enactment in 2014, the Combating Counterfeit Products Act has failed to bring about the holistic improvement to the Canadian IP regime that was once hoped for. While the legislation provided the Canada Border Services Agency (CBSA) with expanded authority to seize counterfeit goods at the country's borders, the practical impact of the new law is viewed by most as negligible. Year after year, CBSA reports a paltry number of seizures, most consisting of low-volume / low-value shipments; many brands continue to see no seizures at all. The availability of counterfeit goods in the local market, including at hot spots such as the Pacific Mall, leaves no doubt however that large volumes of counterfeits continue to find their way into the country with relative ease.

Even where CBSA is able to detain illicit shipments prior to entry, the procedure adopted under the CCPA seems designed to discourage rights-holders from availing themselves of Customs' expanded authority. Absent an agreement on the part of the importer to abandon the relevant shipment, rights-holders must take the often costly and time-consuming step of filing a lawsuit to perfect the seizure, in contrast to more efficient and expedited procedures such as those available in the U.S. and numerous other jurisdictions. These concerns have been raised since, and indeed, even prior to the law's enactment, but to no avail.

Enforcement within Canada's borders, likewise, remains a source of significant frustration. Law enforcement personnel have been described by brands as largely disinterested in pursuing criminal investigations, with some rights-holders reporting that enforcement agencies have encouraged them to simply pursue offenses civilly. Given the unavailability of statutory or treble damages, such an approach may be impractical; but even where doing so is possible, such civil suits are seen as providing minimal deterrence. Not surprisingly, recidivism remains a common concern among rights-holders.

Respondents also highlighted the need for more substantive efforts to address the growing online trafficking of counterfeits through e-commerce marketplaces, social media platforms, and standalone websites. Canada is viewed as lagging behind many other developed jurisdictions both in terms of the statutory tools available to address the illicit online trade, and with respect to the resources devoted by enforcement agencies to combat it.

Ultimately, the challenges faced by rights-holders in Canada are attributed by many to the government's continued failure to acknowledge the scope, severity, and seriousness of these issues. Given the consistent lack of improvement seen over the course of many years, and absent meaningful steps to correct course, the IACC recommends Canada's retention on the Watch List again in 2023.

## **COLOMBIA**

Colombia was retained on USTR’s Special 301 Watch List in 2022, with the agency citing limited success in combating counterfeiting, “[h]igh levels of digital piracy,” signal piracy, continued widespread sales of illicit goods in local outlets, and a need to increase efforts at addressing online and mobile piracy, among other factors. The IACC concurred with that decision, and recommended Colombia’s placement on the Watch List in last year’s filing. Unfortunately, IACC members’ feedback regarding their experience in Colombia remained largely unchanged over the past year. A recurring theme in respondents’ comments this year (and last) was that the Colombian government has failed to prioritize IP protection, and that the lack of political will to address long-standing concerns of rights-holders is reflected throughout the country’s enforcement regime.

While rights-holders continue to report positive working relationships with law enforcement and customs officials, with several singling out the Fiscal & Customs Police (POLFA) for praise; brands also voiced increasing frustration about the level of support received from enforcement agencies, particularly in light of the significant investments of time and resources they’ve made themselves to undertake preliminary investigations, conduct undercover purchases, and to facilitate trainings for law enforcement. The consensus among respondents was that enforcement agencies continue to lack the manpower and resources necessary to significantly decrease the availability of counterfeit goods in the local market. Seizures and criminal raids remain relatively low, particularly given the size of the market and the visibility of counterfeits in well-known markets such as Unilago, San Andresito, San Jose, and others. The overall lack of enforcement has, not surprisingly, caused some brands to conclude that the problems seen in Colombia stem not simply from a lack of political will to address IP crime, but also due to active protectionism.

The lack of priority for IP protection was most frequently raised in connection with the judiciary, which is said to not consider IP crimes to be “serious offenses.” That view is reflected in the level of penalties typically imposed for counterfeiting offenses – generally far below the four to eight years authorized by law. Given the relatively low risk of significant consequences, even where a conviction is obtained, Colombia’s existing regime provides minimal deterrence against recidivism. This, in turn, underscores the message to enforcement personnel that IP offenses should not be considered a priority.

As stated by one contributor, the Colombian government is treating counterfeiting as a nuisance rather than as a crime that poses very real threats to the community. One member company offered an extremely troubling report concerning an incident in Cali, during late 2021, to illustrate the folly in that approach. In December of that year, the local health authority uncovered a number of counterfeit vaccines during an inspection at a vaccination clinic. Despite that discovery, and for reasons that remain unclear, the clinic was permitted to continue operating. Further, we’re aware of no criminal investigation undertaken to determine how the counterfeit doses infiltrated the supply chain, who was responsible for that breach, or from where the counterfeit vaccines were

sourced. Given the clear health and safety implications of such an incident, we're left to wonder what sort of IP crimes the government will deem to be serious.

We would welcome concrete steps by the Colombian government in the coming year to demonstrate its clear commitment to prioritizing IP enforcement. Until such progress materializes however, we support Colombia's retention on the Watch List.

## **ECUADOR**

Ecuador was retained on the Special 301 Watch List in 2022, with USTR citing the country's ineffective legal and regulatory regimes, and weak enforcement against counterfeiting and piracy, among other concerns. The IACC concurred with that assessment, while also highlighting rights-holders' concerns related to the country's border enforcement regime. IACC members continued to describe IP enforcement in Ecuador as "challenging" during this year's consultations.

As reported in prior years' submissions, the IP Office is said to be chronically under-resourced, with an antiquated IT infrastructure that has contributed to significant backlogs in cases and filings; brands also noted inaccurate or outdated information in the IP Office's registration database.

Rights-holders continue to stress the need for improvements in Ecuador's border enforcement regime. A law enacted in 2016, severely limiting Customs' authority to seize counterfeit goods, and requiring rights-holders to provide detailed intelligence about illicit shipments in order to obtain assistance, was thankfully repealed in late 2021. Despite this positive step however, seizures remain infrequent. Brands pointed to a number of contributing factors, including Ecuador's lack of an effective recordation system, a lack of coordination between Customs and the IP Office, and Customs' lack of authority to seize transshipped goods. An additional concern – highlighted in our comments related to numerous jurisdictions last year – is the requirement that a court-appointed expert confirm a shipment is counterfeit in order for the suspect goods to be seized. The IACC has long taken the position that the rights-holder itself is far more capable of accurately and efficiently authenticating such goods than third-party "experts" who in many cases lack the expertise necessary to make such determinations. The process adopted in Ecuador (and elsewhere) unnecessarily increases the costs associated with enforcement, while introducing additional uncertainty into the process.

While we are encouraged by the steps that have been taken to begin addressing longstanding deficiencies in Ecuador's border enforcement regime, much work remains to be done. Accordingly, we encourage USTR to retain Ecuador on the Special 301 Watch List in 2023.



## **GUATEMALA**

Guatemala was retained on the Special 301 Watch List by USTR in 2022. In rendering its decision, the agency cited inconsistent enforcement and poor coordination among Guatemalan enforcement bodies, the need to strengthen the country's border measures, widespread copyright piracy, and a host of related concerns. IACC members, most notably within the apparel and footwear sectors, have raised alarms regarding many of these issues, and noted significant increases in counterfeit manufacturing and distribution in Guatemala in each of the past two years. Those concerns were highlighted again during this year's consultations, along with similarly troubling reports from member companies in the pharmaceutical and healthcare industry.

While the Guatemalan government is undoubtedly aware of the extent of the illicit activity, both in terms of production and distribution (both in the internal market and exports to other countries throughout Latin America), respondents reported limited apparent interest by the authorities in reining in the illegal trade.

Enforcement activity is viewed as exceedingly low. The DIPAFRONT, Guatemala's enforcement body tasked with managing counterfeiting and customs related matters are described by some as "largely unresponsive," though brands have also noted that the organization's efforts are hindered by bureaucratic limitations on their ability to perform raids and seize counterfeit goods. The lack of a customs recordation regime is also seen as limiting the ability of Guatemalan enforcement agencies to do more in this area.

We have recently heard some reports regarding IP-focused trainings for DIPAFRONT and the Superintendencia de Administración Tributaria (SAT) planned for 2023, leading to some optimism that the government may finally be seeking to correct course. At this time however, and until substantive progress is achieved on the issues raised in these and past comments, IACC members see little to justify Guatemala's removal from the Special 301 Watch List.

## **PANAMA**

Rights-holders have registered growing concerns related to Panama in each of our past two Special 301 submissions. That deterioration was seen to continue during 2022, and the country – once lauded by many as the gold standard for enforcement in Latin America – is now viewed in a decidedly less positive light.

As a key distribution and transit hub, Panama's importance to IP owners in the region cannot be overstated. Regrettably, respondents during this year's consultations continued to cite exceedingly low seizures by Panamanian Customs (both in terms of the number of seizures and the volume of goods in aggregate), particularly when viewed in

relation to comparable jurisdictions with similar enforcement authority. While Customs has ex officio powers, they appear in recent years to be disinclined to use them; the volume of proactive enforcement against illicit imports, or against shipments transiting Panama, is reported to have decreased significantly.

Similar concerns were voiced with respect to law enforcement activity within Panama's borders, with few criminal raids occurring. One rights-holder described further frustrations, detailing a poorly-handled criminal raid that was carried out by law enforcement without prior consultation or notice to the brand. Given the brand's past efforts to cooperate with the authorities, and to act as an effective partner to enforcement personnel, the outcome was seen as very discouraging.

Rights-holders noted their consistent efforts to engage with their counterparts, including by conducting trainings for law enforcement and customs officials, but those activities have resulted in no apparent increase in the level or effectiveness of enforcement. Inquiries to Panamanian enforcement bodies about the decreased levels of enforcement and reductions in seizure numbers have received no substantive response.

The current environment in Panama is perhaps all the more frustrating given the country's relatively recent status as one of the leaders in IP enforcement across all of Latin America. Rights-holders know that Panama is capable of doing far more than what they have shown in the past few years.

In light of the continued, and increasing, concerns detailed by rights-holders during this year's consultations, we support USTR's placement of Panama on the Special 301 Watch List in 2023.

## **PARAGUAY**

In 2022, USTR retained Paraguay on the Special 301 Watch List, citing the country's failures to make good on numerous commitments included in the Memorandum of Understanding the country signed with the United States in June 2015, including the adoption and implementation of deterrent penalties for IP violations. USTR further noted Paraguay's continued status a major transshipment point for counterfeit and pirated goods. The IACC concurred with Paraguay's placement, noting that despite some reported improvements in recent years, the environment for IP protection continued to be plagued by lax border measures, poor coordination between relevant enforcement bodies, and a largely reactive approach to enforcement. In light of the feedback received from rights-holders during this year's consultations, we recommend Paraguay's retention on the Special 301 Watch List again in 2023.

At the outset of our discussions, rights-holders noted that Paraguay's existing statutory regime is sorely outdated. The main law governing IP protection, Law No. 1328/98 was

enacted a quarter of a century ago, and is, not surprisingly, viewed by many as insufficient to address many of the practical challenges faced by rights-holders in today's market. Authorized penalties for IP offenses remain too lenient, and provide little deterrence – a fact underscored by the prevalence of recidivism seen by rights-holders. Brands also bemoaned the application of Law No. 1286/98, which allows prosecutors significant discretion to suspend criminal actions, and for courts to suspend or reduce penalties for individuals convicted of violations.

Customs enforcement remains a priority concern for rights-holders across all sectors. As described in past years' submissions, the seizure process is viewed as unnecessarily cumbersome and resource-intensive. The difficulties experienced by some brands are seen as contributing to lower than expected seizures on an annual basis, particularly given the visibility of counterfeits in the domestic market and the volume of counterfeits with a nexus to Paraguay seized elsewhere in Latin America.

Some brands have reported a marked improvement in law enforcement's willingness to carry out significant criminal raids resulting in increased seizures. We've also received more positive reports concerning brands' interactions with the National Directorate for Intellectual Property (DINAPI), the IP Prosecutor's Office, and the Economic Crimes Unit of the National Police. Historically, these groups have also been seen as under-resourced, limiting their effectiveness.

Unfortunately, where the efforts of enforcement personnel in Paraguay have led to criminal prosecutions, the results have been less than stellar. Rights-holders point to disparities in expertise among the judiciary and prosecutors, and the nominal penalties that are typically imposed for violations as contributing to these outcomes. Others continue to highlight concerns related to apparent corruption within the ranks of the judiciary.

Ultimately, respondents expressed a consensus view that IP enforcement is not a priority for the Paraguayan government. Given the scope and severity of the concerns highlighted by rights-holders again this year, we support Paraguay's retention on the Special 301 Watch List in 2023.

## **PERU**

The IACC concurred with USTR's decision last year to retain Peru on the Special 301 Watch List. While rights-holders commented positively on their interactions with enforcement personnel, citing their professionalism and responsiveness, they also highlighted concerns raised in numerous prior years' submissions, including slow moving court proceedings, non-deterrent penalties, and the government's continued failure to provide the level of resources necessary to address the trafficking of counterfeit goods in

the country. Many of these same complaints were registered again during this year's consultations, and we support Peru's placement on the Watch List again in 2023.

Respondents' interactions with law enforcement personnel were again cited as a bright spot among rights-holders during this year's process. The National Police are described as dedicated, and willing to assist brands' efforts, despite limited resources. IACC members were pleased by their counterparts willingness to participate in trainings, and those capacity building efforts have contributed to a growing expertise among enforcement personnel.

With respect to administrative IP enforcement, Peru's National Institute for the Defense of Competition and the Protection of Intellectual Property (INDECOPI) has been increasingly active in recent years. IP owners expressed some frustration however with the costs associated with administrative enforcement, particularly in light of the nominal penalties that typically arise from such actions. Rights-holders must pay a prescribed fee (approximately USD\$200) for each action pursued against an individual / business entity, and those fees can mount quickly as counterfeit imports more frequently involve higher volumes of small consignments. Others noted that, while INDECOPI may order the payment of legal fees and costs by infringers, the enforcement of those orders is often lacking, leaving the brands themselves to assume the costs associated with enforcement. Respondents also expressed dismay with respect to a recent measure approved by the Peruvian Ministry of Economy and Finance that appears likely to drastically reduce INDECOPI's activity in the coming year by reducing the Institute's number of monthly sessions by anywhere from one half to one fifth of what had previously been the norm.

While Peruvian Customs was described in largely positive terms, we have received disappointing reports of substantial decreases in the number of detentions and seizures of counterfeit goods at the border. Intellectual property enforcement metrics are said to no longer be considered a significant component of the agency's annual objectives; as a result, rights-holders have had to redouble their efforts to ensure that IP enforcement is made a priority. Coordination between Customs and the Copyright / Trademark Offices has also been inconsistent at times, leading to delayed notifications of rights-holders, and in some cases lost opportunities to pursue legal action against detained shipments.

We received mixed reviews concerning Peru's judiciary during this year's discussions. On the one hand, rights-holders expressed strong support for the organization of the system, with specialized courts for intellectual property and customs crimes; this approach is seen as allowing for the development of greater expertise among judges and prosecutors. However, prosecutions are described as slow-moving, which brands attribute to a lack of sufficient resources, and prosecutors described by some as overwhelmed by the volume of cases for which they're responsible. Some also point to the imposition of low penalties as a contributing factor; there is minimal deterrence against offending or re-offending when IP crimes are not treated as serious violations, so the volume of cases is likely to remain high.

The current civil unrest and concerns related to the stability of the current government have been cause for further concerns among stakeholders; we will continue to monitor the situation throughout 2023. At present, given the feedback received from IACC members, we support Peru's continued inclusion on the Special 301 Watch List.

## **OTHER OBSERVATIONS**

### **ASIA-PACIFIC REGION**

#### **BANGLADESH**

While we made no formal recommendation for its placement on the Special 301 Watch List in our filing with USTR last year, the IACC noted the growing apprehension among rights-holders – particularly those in the apparel, footwear, and luxury goods sectors – regarding the emergence of Bangladesh in recent years as a major source of counterfeit goods. Respondents during this year's consultations reiterated many of the same concerns detailed in our two most recent Special 301 filings. We would welcome USTR's attention to these issues in 2023.

Rights-holders reported apparent increases in the volume of counterfeit goods manufactured in Bangladesh, continuing a trend described in recent years. Seizures of counterfeits sourced from Bangladesh have become increasingly common in other jurisdictions – respondents cited enforcement actions in over a dozen global markets in which the goods seized could be traced back to manufacturers in Bangladesh. Regrettably, the government has shown little interest in addressing illicit production and distribution, and enforcement both within and at the country's borders is said to remain a low priority. Despite their clear authority to investigate matters related to IP, complaints filed by brands with the Criminal Investigation Department of the Police, or with the Rapid Action Battalion, have failed to result in enforcement actions.

Respondent brands underscored the need for greater training among both law enforcement and customs agencies. Though Customs has authority to act against exports of counterfeit goods, brands were unaware of any such actions over the past year. They cited a general lack of awareness regarding IPR among border personnel, while also describing the country's recordation process as “dysfunctional,” “lacking transparency,” and “unnecessarily slow.”

The overall lack of enforcement is widely viewed as a significant factor in the growth of counterfeit exports through traditional distribution models and to the increased visibility of Bangladesh-based sellers on e-commerce and social media platforms. Rights-holders have also reported increased incidents of Bangladeshi sellers operating abroad, and

apparently working with suppliers back home to establish more formal and sophisticated distribution networks.

Strong frameworks for the protection and enforcement of intellectual property rights are highly-correlated with a number of key factors related to economic stability and development, including foreign investment. With Bangladesh set to move from “least developed” to “developing” status in 2026, its implementation of a reliable IP regime, or failure to do so, will undoubtedly play a major role in determining the country’s pace of development in the coming decades. The current landscape – particularly given the growing perception that one of the country’s key industries is rife with counterfeits – is therefore cause for significant concern. We would welcome USTR’s engagement with the Bangladeshi government in the coming year, with an aim towards addressing rights-holders’ concerns set forth in these, and past years’, comments.

## **CAMBODIA**

IACC members’ feedback concerning Cambodia during this year’s consultations remained largely unchanged from that heard in recent years. As was the case in Bangladesh, respondents in the apparel sector reported significant increases in the volume of counterfeit production and distribution, largely correlated with COVID-related decreases in demand for the country’s highly-skilled garment industry. Ineffective enforcement at the country’s borders and in the internal market and inefficient case management by prosecutors and judges, coupled with excessive costs, protectionism, and lacking transparency, among other issues, were cited by rights-holders in describing their holistic concerns with Cambodia’s IP protection and enforcement regime.

With respect to criminal prosecutions, brands highlighted the excessive costs associated with pursuing actions. Cases are said to progress very slowly, often taking years to resolve – a fact attributed to the lack of experience and expertise among prosecutors and the judiciary. The protracted nature of legal proceedings creates an undue burden on IP owners, who are typically required to cover costs associated with the storage of any seized goods for the duration of the trial. Some noted prosecutors’ apparent reluctance to pursue criminal cases, and encouragement of brands to pursue negotiated settlements even where the evidence of a violation is clear. Other respondents reported limited or no experience with Cambodian courts, crediting a consistent lack of cooperation from enforcement authorities. Obtaining assistance for raids against manufacturing, storage, or distribution sites – even in well-known markets – was described by one brand as “near impossible.” Others cited incidents of apparent protectionism and concerns of official corruption due to failed raids, or raids that failed to materialize at all despite the provision of comprehensive intelligence on targets. Administrative enforcement is similarly seen as ineffective. Respondents bemoaned the process as lengthy, overly bureaucratic, and lacking any real deterrence against recidivism.

The challenges faced by brands with respect to border enforcement in Cambodia largely mirror those reported in connection with Bangladesh. While Cambodian Customs has ex officio authority to seize goods for IP violations, such occurrences are said to be exceedingly rare. Where goods are detained by Customs, rights-holders are typically required to pursue an action in the courts to perfect their seizure. That process is seen by many as cost prohibitive as it entails not only the normal costs for legal representation and court fees, but also costs associated with storage of the relevant goods in the interim, and in some cases the posting of a security bond. Those costs are said to be difficult to justify, with some describing a lack of transparency with regard to the final disposition of the seized goods. While Customs periodically announces “destruction ceremonies” in which seized products are disposed of, brands noted that they’re rarely provided an itemized inventory of the relevant goods or sufficient notice to attend and witness the destruction.

In light of the reported deficiencies in both the border and internal market enforcement regimes, it is perhaps unsurprising that brick and mortar markets and e-commerce platforms throughout the region, most notably in Vietnam and Thailand, are awash in counterfeits sourced from Cambodia.

Given the continued deterioration of the landscape for IP owners there, we would welcome increased engagement by USTR with the Cambodian government to address these concerns, and those voiced in prior years’ submissions.

## **HONG KONG**

Hong Kong remains a key transit hub for the trafficking of counterfeit goods produced in mainland China, consistently ranking as the second largest source of counterfeits seized at the U.S. border. According to U.S. Customs & Border Protection’s most recently published statistics, shipments arriving from Hong Kong led to nearly 20,000 seizures valued at over \$600 million.

IACC members have, over the years, typically described their engagement with the Hong Kong Customs and Excise Department (HKC&E) in positive terms. They’ve also consistently expressed, however, their belief that HKC&E could significantly reduce the volume of counterfeits arriving in our ports, and others around the world, by adopting some modest changes in their approach to enforcement.

China-based manufacturers and distributors continue to exploit gaps in Hong Kong’s enforcement regime to facilitate their trafficking of counterfeit goods; one frequently employed strategy is to use the services of Hong Kong-based freight forwarders to conceal the actual source of the goods. Rights-holders have found those companies largely unwilling to assist HKC&E in investigations following seizures. On the contrary, they typically disclaim any knowledge of the illicit nature of the goods that they’re transporting,

and assert duties of confidentiality to avoid providing any substantive help to enforcement personnel, or else they provide information that they know (or should know) is inaccurate. We would welcome the adoption of clear “know your customer” requirements and the imposition of disclosure obligations on shipping intermediaries to ensure that HKC&E is able to obtain accurate information regarding the parties responsible for counterfeit shipments once they’ve been detained or seized.

Rights-holders also noted a reluctance on the part of HKC&E to provide information and documentation concerning the identities of importers and exporters involved in the shipping of counterfeit goods, as well as other information that might enable follow-on investigations by rights-holders. Such information is routinely provided in other by many customs agencies, but Hong Kong remains an outlier among jurisdictions with well-developed enforcement regimes.

We would encourage further engagement with HKC&E in the coming year to address these concerns.

## **SINGAPORE**

Rights-holders continued to express frustration with Singapore’s customs regime during this year’s Special 301 consultations. Nearly a decade after the 2014 initiation of public consultations by the Intellectual Property Office of Singapore, aimed at strengthening the country’s enforcement of IP at the border, respondents have noted little in the way of substantive improvement. Singapore continues to lack an IP recordation system; and as described in past filings, its existing framework is viewed by many as prioritizing trade facilitation at the expense of enforcement, and placing unnecessary burdens on IP owners who would seek to enforce their rights.

The tight timelines and excessive security bonds required in order to ensure a seizure of detained goods, has in some cases entirely foreclosed brands’ ability to effectively enforce their marks, particularly when an importer / exporter objects to the seizures. Where seizures do take place, some respondents describe them as “an end in themselves,” noting that follow-on criminal investigations remain a rarity. A lack of effective coordination between Singapore’s customs and police agencies is said to exacerbate the problems.

These are not new concerns, having been voiced by rights-holders at least as far back as the 2014 consultations; regrettably, the government of Singapore has demonstrated no political will to resolve these issues. While we make no formal recommendation for Singapore’s inclusion on the Special 301 Watch List, we would welcome increased engagement with the Singaporean government to underscore the need for significant improvements to the country’s border enforcement regime.



## **EUROPE – MIDDLE EAST – AFRICA REGION**

### **EUROPEAN UNION**

While we make no formal recommendation for the placement of the European Union on the Special 301 Watch List, the IACC wishes to highlight some significant concerns raised by rights-holders during this year's consultations.

Viewing it as an indication of the EUIPO's commitment to addressing long-standing problems faced by rights-holders due to EU Member States' disparate approaches to the issue, rights-holders welcomed the 2021 commencement of convergence project 13 (CP13), an internal harmonization initiative focusing on bad faith trademark registrations. Unfortunately, the initial optimism expressed by some brands has been diminished as a result of what they view as its failure to address some of their central concerns, most notably the inability to prevent bad faith trademark registrations throughout the EU's bifurcated trademark system.

Respondents noted that, while the EU Trade Mark Regulation permits invalidation of a mark registered in bad faith, the EUIPO cannot reject, nor can trademark owners oppose, a trademark application on the basis of bad faith. They likewise underscored that the EU Trade Mark Directive only requires Member States to empower their intellectual property offices to allow invalidation based on bad faith. Member states are allowed, but not required, to provide their IP offices authority to reject trademarks applied for in bad faith, including through oppositions. By limiting the tools available to legitimate businesses, the EU's approach adversely impacts rights-holders' abilities to efficiently and promptly address bad faith applications before more significant reputational or economic injury has materialized.

The CP13 initiative should address these issues head-on; its failure to do so will necessarily increase confusion in the European market, to the detriment of both consumers and brands.

Rights-holders' concerns with respect to bad faith registrations are exacerbated by the partially integrated registration system that exists across the EU and its Member States. As detailed in prior submissions, counterfeiters have become adept at exploiting the registration process by filing bad faith applications with Member States' IP offices that are known to only conduct perfunctory examinations, that fail to protect well-known marks, or that may simply lack the resources and manpower to perform high-quality examinations. With that registration in hand, the bad actors are then able to "legitimize" their illicit sales (an approach often seen by counterfeiters attempting to gain access to important e-commerce channels), evade enforcement efforts, and in some cases, block the expansion of the legitimate trademark owner's business. The retention of individual Member State trademark regimes not only reduces the benefit of an EU-wide trademark

system, it creates a much more onerous and costly system, operating to the disadvantage of legitimate trademark owners and consumers.

We would welcome USTR's engagement with the EUIPO and EU Member States on these and other concerns related to bad faith filings in 2023.

## **FRANCE**

Though we make no recommendation for France's placement on the Special 301 Watch List, the IACC would like to draw attention to concerns raised by rights-holders during this year's consultations.

Historically, France has been viewed as a global leader in IP protection and enforcement; but rights-holders have noted a trend of declining customs seizures there in recent years. Respondents described a significant decrease, not seen in other EU jurisdictions, during the latter part of 2022. Equally troubling are reports that French Customs, whose mandate includes both border controls and proactive investigations within the domestic market, has registered a significant decline in that latter category as well. And while the Gendarmerie and the National Police have endeavored to increase their own IP-focused work, they're said to lack the necessary resources to fully compensate for Customs' diminished activity.

Rights-holders expressed confusion over the underlying cause of these declines, and with a concurrent lack of communication from Customs regarding these issues.

We would welcome further engagement regarding these matters of growing concern.

## **KUWAIT**

The IACC expressed support for Kuwait's retention on the Special 301 Watch List last year; however, noting "continued and significant progress," including the creation of online portals by the Copyright Office and Ministry of Commerce and Industry (MOCI) to facilitate the submission of reported violations, USTR removed Kuwait from the Watch List.

Despite the enhanced reporting mechanism that was rolled out in late 2021, rights-holders continue to highlight significant challenges to enforcing their rights in the country. Feedback from stakeholders in last year's comments noted that enforcement personnel often seemed disinterested in pursuing cases, and unwilling to take ownership of investigations; those complaints were voiced again during this year's process. Where cases are pursued, respondents described a variety of frustrations, including a lack of

transparency, refusals to allow brand representatives an opportunity to witness raids, and inconsistent communications regarding the status and outcomes of investigations. The common practice of allowing counterfeiters to retain possession of illicit goods, rather than physically seizing them and securely storing the items through the conclusion of court proceedings, is also cited as a source of frustration by rights-holders.

Court proceedings in Kuwait are described as slow-moving, and often taking years to resolve due to overly-bureaucratic procedures and a perceived lack of expertise among the judiciary.

Border enforcement, likewise, remains a priority concern; one global brand reported no seizures at all over the past year.

While we recognize the positive steps taken by the Kuwaiti government in recent years, the country remains an exceedingly challenging jurisdiction for rights-holders. We welcome USTR's continued engagement on these concerns in 2023.

## **NIGERIA**

IACC members' comments concerning Nigeria during this year's consultations largely mirrored those detailed in past submissions. While rights-holders have found their counterparts in law enforcement to be supportive and interested in doing more to enforce IP rights in the country in recent years, significant improvements have failed to materialize. That result is attributed to a range of factors including the need for legislative and regulatory reform (particularly with respect to the penalties available under Nigerian law for IP-related offenses), lacking coordination between relevant enforcement agencies, insufficient resourcing, and a lack of political priority to address these and other long-standing concerns.

Rights-holders encouraged the adoption of more deterrent penalties, noting the lack of statutory damages under the current legislative framework. IP owners are also typically expected to cover the costs of storage and destruction of seized counterfeit goods, a burden that would be more appropriately borne by the counterfeiters themselves. Where violations are prosecuted, the penalties imposed are often limited to nominal fines. Due to the often-protracted nature of legal proceedings, and costs associated with pursuing such actions (including the aforementioned costs involved in storing seized goods / preserving evidence of the offense), some rights-holders have questioned whether the costs of enforcement outweigh the benefits.

Given these factors, it was unsurprising to hear concerns about the overall dearth of IP-related cases, and a need to further develop jurisprudence in these areas. The lack of cases is also seen as contributing to a lack of expertise concerning intellectual property among Nigeria's judges and prosecutors. The perceived view among those key stakeholders, that

IP crimes are not serious offenses, is seen as aggravating the problem of non-deterrent sentencing.

We would welcome the U.S. government's engagement on these concerns during 2023.

## **SOUTH AFRICA**

IACC members registered growing concerns this year regarding the protection and enforcement of intellectual property rights in South Africa. An outdated statutory framework, ineffective coordination between relevant enforcement authorities, and an apparent lack of priority on the part of the government to address long-standing complaints from rights-holders are all cited as factors contributing to the current difficulties faced by brands in the country. The environment has continued to deteriorate over the past year.

Respondents expressed their support for a comprehensive review of the South African legislative regime for IP, including the Trade Mark Act, Copyright Act, Design Act, and Counterfeit Goods Act. The present laws are described as outdated, having failed to keep pace with new technologies and the evolving production and distribution models that typify the modern trade in counterfeit goods. Support within the government for such an initiative has thus far failed to materialize.

Rights-holders also noted significant frustrations with South Africa's enforcement apparatus. The South African Revenue Services (SARS) and the South African Police Service (SAPS) remain under-resourced, and brands report little in the way of collaboration between the agencies. Some attributed the lack of collaboration to insufficient high-level support from the government, rather than seeing it as a reflection of the agencies' own level interest in pursuing IP crimes. Still others point to the lingering effects of COVID-19 restrictions which adversely impacted a number of law enforcement IPR initiatives. Whatever the reason, brands have seen diminished enforcement activity in recent years.

Enforcement along South Africa's borders, likewise, remains a concern. Greater resourcing and manpower is deemed essential, particularly at more remote border crossings where enforcement personnel may be subject to heightened safety and security threats. The need for more effective controls in South African free trade zones, such as Coega, Richard Bay, East London, Saldanha Bay, and Dube Port was also highlighted as a priority concern.

We would welcome USTR's attention to these concerns in the coming year.

## **UKRAINE**

The IACC agreed with the decision by USTR to suspend its Special 301 review of Ukraine last year, citing the country's invasion by Russia. In light of the ongoing war, we support the continuation of that suspension.