Governance Frameworks to Counter Illicit Trade

OECD

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Foreword

Globalisation and free trade are strong drivers of economic growth. They have also opened up new opportunities for illicit trade activities. Criminal networks benefit from these opportunities at the expense of public safety, human rights, legitimate business activity and sustainable environmental resources. Consumers rely on effective institutions and law enforcement to protect them from the risks of illicit goods. Businesses also rely on them to counter and deter illicit markets. Trade in counterfeit goods undermines the legitimate competitive advantage of rights holders, and hampers innovation, employment and long-term economic growth. Illicit trade may also ultimately undermine the rule of law and citizens' trust in government.

So far, the governments' response to the risk of illicit trade has been largely unco-ordinated and left many enforcement gaps that are easily exploited by criminal networks. Governments from all countries need to reassess their institutional capacities to counter illicit trade and identify the areas where action is needed, especially where it would yield the greatest public benefits.

This report looks at the institutional capacity to effectively counter illicit trade. Part One looks at challenges in existing enforcement frameworks at the global level, including those related to small shipments and to goods transiting through free trade zones. Part Two surveys some enforcement practices in BRICS Economies.

This study was conducted under the aegis of the OECD Task Force on Countering Illicit Trade (TF-CIT), which is part of the OECD High Level Risk Forum. The TF-CIT and HLRF focus on evidence-based research and advanced analytics to map and understand the market vulnerabilities exploited and created by illicit trade.

This quantitative analysis in this report is based on a unique, global dataset of customs seizures over the period 2011-13. It also benefitted from structured interviews with trade and customs experts. The main dataset on customs seizures of counterfeit and pirated products was provided on behalf of the global customs community by the World Customs Organization (WCO). It was complemented by the European Union data provided by the European Commission's Directorate-General for Taxation and Customs Union (DG TAXUD), and by the US data received from the United States Department of Homeland Security (DHS).

This report is meant to contribute to a shared understanding across countries affected by illicit trade. The goal is to develop common solutions to address this risk. The study shows that effective governance frameworks and public institutions and international cooperation can improve the ability of countries to respond efficiently in a co-ordinated way to the growing scourge of illicit trade.

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The report was prepared under the supervision of Stéphane Jacobzone, Deputy Head of Division, Reform of the Public Sector. The first part of the report was drafted by Jack Radisch, Senior Project Manager, Piotr Stryszowski, Senior Economist, together with Michael Morantz, policy analyst and Peter Avery, senior consultant, with significant contributions from Florence Mouradian, economist. The second part of the report was prepared by Piotr Stryszowski, Peter Avery, and Florence Mouradian.

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The quantitative research in this study relied on rich, global database on customs seizures, provided by the World Customs Organization (WCO) and supplemented with regional data submitted by the European Commission's Directorate-General for Taxation and Customs Union, the US Customs and Border Protection Agency and the US Immigration and Customs Enforcement. The authors express their gratitude for the data and for the valuable support of these institutions.

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Executive Summary

Transnational criminal networks profit from trafficking and illegal trade in narcotics, arms, persons, tobacco, counterfeit consumer goods, and wildlife. Billions of dollars from these activities flow through the global economy each year, distorting local economies, diminishing legitimate business revenues, eroding social conditions and fuelling conflicts. This report on governance frameworks to counter illicit trade was prepared under the OECD Task Force on Countering Illicit Trade (TF-CIT). It promotes tractable policy reforms and fosters international cooperation aimed at the reduction and deterrence of the risk of illicit trade. It draws on a network of specialists from multiple countries and economies, as part of the OECD High Level Risk Forum (HLRF), which works with governments to better understand the full range of complex risks and threats.

Effective action to counter illicit trade and support for governance frameworks to lower the incidence of such trade are key policy concerns for governments as they support the promotion of economic prosperity. The growth of world trade that has been facilitated by the reduction of tariffs, trade barriers and regulatory burdens and by technological and logistical advances has provided benefits for both business and consumers. At the same time, freer trade has provided opportunities for criminals engaged in illicit trade to expand their operations. Their activities undermine economies by reducing government tax revenues, lowering firms' profits and their innovation incentives, while also jeopardising public health and security.

Governments have taken actions to counter illicit trade, but they are often uncoordinated and/or poorly implemented. In addition, criminal networks have been able to react quickly and dynamically to avoid detection and circumvent law enforcement. As a result, governments need to re-examine their institutional capacities to counter the illicit trade.

The first part of this report provides a general overview of enforcement challenges, analysing the adequacy and effectiveness of sanctions, investigating in more depth the issue of small shipments and focusing on the misuse of free trade zones as hubs for managing trade in illicit products. The second part of the report focuses on some enforcement practices in BRICS economies. Emerging economies, including BRICS, are important players and their active engagement in developing governance strategies to counter illicit trade is essential.

Part One: countering illicit trade, enforcement challenges

The first part of this report provides an overview of key institutional capacities, before assessing in more detail three areas where the strengthening of institutional capacities is urgently needed to improve efforts to counter illicit trade. The three areas include:

(i) enhancing the effectiveness of penalties and sanctions for countering illicit trade,

(ii) finding ways to improve the screening of the rising volume of small shipments for illicit products, and

(iii) eliminating criminal activities related to illicit trade that are carried out in free trade zones.

In each area the report identifies policy actions that need to be taken to improve the ability of governments to assess the risk of illicit trade in various guises, and to target, deter, and eventually interdict the activities of criminal networks.

Penalties and sanctions are key deterrents for illicit actors, as these actors will prefer to trade in goods where rewards are highest, and the risks are lowest. Criminal networks, particularly those associated with transnational organised crime, respond to changes in the risk-reward structures. Such structures are affected by international legal frameworks, national legislation and enforcement policies. The environment is one of a constantly evolving "interdiction-adaptation" cycle, where customs and criminal networks respond to the changing tactics of each other to gain an upper hand. Success depends on the i) sanctions available for offences, ii) the ability of law enforcement to enforce legislation and iii) the capacity to investigate and, where appropriate, cooperate with foreign authorities.

Regarding the policies to enhance the effectiveness of penalties and sanctions these actions include:

- Strengthening co-operation and expanding the scope of international frameworks, including existing international treaties to counter illicit trade.
- Raising the risk/reward ratio by expanding the scope of penalties to include ancillary legislation.
- Developing and implementing national strategies to counter illicit trade.

The sharp growth in the use of **postal and courier streams** as a delivery method for smuggling small packages containing prohibited or restricted goods has significantly impacted the institutional capacities of governments to effectively screen and interdict the goods.

Online sales of products have further complicated the situation, providing a means to boost trade in small shipments as consumers are able to purchase items directly from suppliers, in small, individualised quantities. In effect, the importance of large firms and retailers as importing agents has declined, with consumers becoming far more active in this regard. This shift has affected the regulatory and policy framework for law enforcement, and the ability of customs, police and other relevant government agencies to stop illicit trade.

There are a number of policy actions that could be taken by governments to counter trade in illicit products via small shipments, by, for example:

- Engaging courier and postal intermediaries in efforts to detect and interdict trade in illicit products.
- Building on best practices identified in pilot projects to improve i) the quality of small shipment data available to customs authorities, and ii) risk assessment techniques.
- Expanding capacity for accessing, integrating and evaluating datasets from stakeholders.
- Engaging e-commerce platform operators in efforts to detect online transactions in illicit products.
- Strengthening efforts to move against parties engaged in online trade of illicit products.

Free trade zones facilitate trade by providing advantages to business with respect to tariffs, financing, ownership, taxes and other regulatory measures that would otherwise be applicable in the host country. The reduction in regulatory and legal burdens, "red-tape" and tariffs are key in this regard. The limited institutional capacities to oversee FTZs activities in many countries can often lead to growth of illicit trade, and other forms of criminality, such as fraud and money laundering. These activities benefit from the lack of sufficient oversight within FTZs, enabling illicit businesses to reap the financial benefits of zones, with lower risks of measures being taken to curb their activities. Without further actions from governments to increase oversight and transparency in FTZs, criminal elements will continue to use zones to exploit the shortcomings in institutional law enforcement capacities. The analysis identifies a number of policy areas to combat illicit trade and related criminal activities in FTZs, including:

- Formalising the definition of FTZs.
- Improving zone supervision, by i) expanding information requirements for goods moving through zones, ii) penalising misuse of zones, iii) enhancing security screenings, and iv) maintaining adequate numbers of officials with ex-officio[1] authority to supervise or control FTZs (or free zones) within their customs territory and according to the applicable provisions.
- Strengthening cooperation with stakeholders and encouraging of development codes of conduct for FTZs.
- Enhancing formal responsibilities of zone operators.
- Streamlining customs procedures.
- Ensuring wide participation of countries in FTZ-related discussions.

Part two: Survey of some enforcement practices in BRICS economies

The second part of the report focuses on some enforcement practices in BRICS economies related to intellectual property (IP). Ensuring effective enforcement of intellectual property laws and support for governance frameworks are key policy concerns for promoting innovation-driven economic prosperity and for disrupting criminal networks. The intangible assets embodied in patents, trade secrets, copyrights and trademarks that support economic development are vulnerable to unauthorised use even though they are protected by laws enforcing intellectual property rights. Effective governance frameworks that enable efficient IP management and protection and enforcement are therefore critically important.

While efforts to implement effective IP governance frameworks are underway worldwide, counterfeiting and piracy continue to pose threats to rights holders, businesses, and consumers. Economies have worked together, multilaterally and through international organisations, to develop IP frameworks that balance, protect and enforce the interests of rights holders with those of other stakeholders within and across jurisdictions. Despite these efforts, infringement of IP rights remains a significant problem. According to a 2016 OECD - EUIPO report that assesses the magnitude and scope of counterfeiting and piracy worldwide, the total volume of trade in fakes was estimated at up to USD 461 billion, or 2.5 % of world imports in 2013.

This is a global and rapidly evolving challenge. The 2016 OECD-EUIPO report shows that counterfeit and pirated products are prevalent in virtually all economies, on all continents. These products are delivered through complex trade routes, with numerous intermediaries. Counterfeiters are exploiting modern logistical technologies in their

operations, and are taking advantage of e-commerce platforms to enhance their commercial activities.

Emerging economies, including BRICS, are important global players and their active engagement is essential in responding to this threat. The OECD-EUIPO report highlights that middle-income and emerging economies tend to be the most important players in these markets for fake goods. Consequently their active engagement in developing governance strategies against counterfeit trade is essential. The five BRICS economies are involved to varying extents. China is by far the largest source economy of counterfeit and pirated products in the world, both in terms of value and volume, far ahead of all other economies. Between 2011 and 2013, some 67% of the total value of counterfeit and pirated world imports, and 63% of the number of global customs seizures originated in China. India ranked 6th, accounting for 6% of the total seized value of counterfeit and pirated goods worldwide, and 2% of the total number of customs seizures. Russia ranked 36th; Brazil, 60th; and South Africa, 86th.

Weak enforcement of IP laws, the low risk of detection, combined with the high profitability of counterfeiting and piracy operations and relatively low penalties are key factors undermining effective counterfeiting-related IP protection and enforcement. The assessments of the effectiveness of the IP regimes carried out by governments and industry indicate there is scope for considerable improvement in most of these jurisdictions. The US government and the European Commission have identified four of the countries (Brazil, China, India and the Russian Federation) for close monitoring, and they are supporting continuous engagement with them to improve their performance in combatting counterfeiting and piracy. Strengthening performance requires multiple actions, including:

- Examining the adequacy of enforcement. This includes the continuing review of the level of resources devoted to enforcement systems and the tools available to governments and private right holders. International sharing of experiences on this front could help improve the situation significantly.
- Reviewing the deterrents to counterfeiting, including the effectiveness of penalties and the implementation of these penalties through criminal justice systems.
- Exploring ways to step up public reporting on counterfeiting and piracy-related IP infringement.
- Promoting accession and effective implementation of international IP agreements by the countries covered in the report.
- Examining ways to expand education and public awareness campaigns.

In recent years some progress has been made in all the BRICS economies in enhancing IP legal frameworks. Efforts have been made in the BRICS economies to *i)* enhance the role of IP in promoting innovation and *ii)* strengthen measures to protect IP from infringement. Relative to the other BRICS countries, China has been at the forefront in initial efforts of developing and implementing programmes to boost development of IP frameworks and to strengthen institutions for protecting and enforcing IP rights.

In general, legal systems in the BRICS countries provide *de jure* authority for parties whose IP rights have been infringed to seek to have the infringing acts stopped and the counterfeit and pirated goods confiscated and, eventually, destroyed. In addition, laws generally provide that compensation can be sought through civil actions. Where statutory damages can be sought in lieu of actual damages, however, the levels of compensation are far lower than those provided for in, for example, the United States. The *de facto*

reality in BRICS countries is that parties are often unable to effectively enforce their IP rights in the courts or other government administrative fora, and are often left without effective remedies.

The developments of legal frameworks are complemented by educational campaigns. Each of the economies covered is taking steps to promote the role of intellectual property in their jurisdictions. Attention is being paid to raising public awareness of the negative effects of counterfeiting and piracy. Campaigns have been carried out to raise awareness of the importance of buying original products and the penalties arising from the purchase of pirated and counterfeit products.

Despite the progress made there is scope for further action. While appreciation of the economic importance of IP is growing in the economies covered, and measures are being taken to better protect IP rights, there is clearly scope for further action.

Note

[1] The term ex-officio here refers to the inherent authority of a public office in its remit to initiate an investigation of a violation of law, as opposed to possessing authority to act only when notified by a third party.

Part One: Countering Illicit Trade, enforcement challenges

1. Key Institutional Capacities to Counter Illicit Trade

This chapter provides an overview of the rationale for taking action to address more effectively the threat of illicit trade. It i) examines the adequacy and effectiveness of sanctions and penalties in deterring criminal activities involving illicit trade, ii) explores the role of small shipments, and iii) assesses enforcement challenges in countering illicit trade in free trade zone. Policy recommendations to enhance institutional capacities in these three areas are presented.

The liberalisation of international trade and reductions in trade barriers has provided benefits for both business and consumers. The freer exchange of goods and services has, however, at the same time provided enhanced opportunities for parties engaged in trade in illicit products to pursue criminal activities. Criminal networks, operating in the shadows of globalisation, undercut the full benefits to be gained from openness to trade, exploiting the same global logistics networks as legitimate global enterprises, for their own illicit financial gain. Their activities are detrimental to countries, depriving governments of tax and related revenues, while also jeopardizing public health and security.

Governments have taken a range of actions to counter illicit trade, but their efforts have fallen short in many respects, as criminal networks are quick to adapt their operations to avoid detection and circumvent law enforcement. In response, governments need to enhance their efforts to counter the illicit trade, by, among other things, strengthening the capacities of law enforcement to share information across borders. They also need to closely examine the policies that may inadvertently create business opportunities for criminals, and they need to find ways to shrink the market for illicit products, by reducing consumer demand for such goods.

This report examines three areas where the strengthening of institutional capacities is urgently needed to improve efforts to counter illicit trade. It identifies actions that need to be taken to improve the ability of governments to assess the risk of illicit trade in various guises, and to target, deter, and eventually interdict the activities of criminal networks, which are converging. The assessment builds on existing OECD reports which helped to map the threats, providing recommendations for policies that could be developed to reduce and deter illicit trade.

1.1. Enhancing the effectiveness of penalties and sanctions for countering illicit trade

The risk of interdiction, severity of the penalties and sanctions applied to trade in illicit products and the degree to which penalties and sanctions are applied, are factors that parties engaged in such trade take into account when pursuing their criminal activities. There is a shared understanding among policymakers that illicit actors will prefer to trade in goods where rewards are highest, and the risks of are lowest. The environment is one of a constantly evolving “interdiction-adaptation” cycle, where enforcement authorities and criminal networks respond to the changing tactics of each other to gain an upper hand. In addition, national and international policy-based strategies can be an important element of deterrence frameworks, to the extent that they raise the prospects of enforcement actions.

Certain illicit products are of strategic interest for criminal enterprises due to the low risk of detection and/or interdiction and the significant revenue base that this provides for actors engaged in these forms of trafficking. These include counterfeit products and wildlife trafficking, which go largely unpunished due to difficulties in coordinating effective responses, the impact of corruption in markets, lenient sanctions, and perceptions that these are “victimless” crimes that do not warrant significant action. Law enforcement instead tends to focus on more dangerous activities, such as trade in narcotics, and arms and human trafficking.

1.1.1. Legal frameworks for countering illicit trade

Legal frameworks for countering illicit trade include those concluded at the international level, as well as those developed and implemented at national levels.

International framework

International conventions, laws and agreements govern the global efforts to counter illicit trade. They provide a broad set of tools and guidance that can be applied to nearly all forms of illicit trade. Criminal activities are covered by cross-sectoral agreements, such as the United Nations Convention against Corruption (UNCAC), the United Nations Convention against Transnational Organized Crime (UNTOC) and the UN Convention on the Suppression of the Financing of Terrorism. The effective interpretation and implementation of these agreements can increase the effectiveness of prosecuting certain forms of illicit trade, by helping to increase sentences and to cut off important sources of funding to criminal networks.

In addition to these conventions, a number of agreements are in place that concern specific sectors:

- *Tobacco*. The WHO's *Framework Convention on Tobacco Control* (FCTC) is an agreement that is limited in scope as it does not address illicit trade, instead stipulating the conditions for the legal trade in tobacco. Unlicensed tobacco remains outside of the scope of the FCTC and presently member countries are not required to seize unlicensed tobacco. A separate WHO agreement, the Protocol to Eliminate Illicit Trade in Tobacco Products, has only been ratified by 26 countries; ratification by 40 is required to bring it into force.

- *Counterfeit goods in transit.* The WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) leaves it to its members to determine what sanctions, if any, are to be applied to counterfeit goods transiting their territories. National legal frameworks can, for example, provide for the seizure of counterfeits in transit or prior to commercial declaration, or not. With respect to counterfeit and pirated goods imported into or located within WTO Member States, they "*shall* provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available *shall* include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity." (see TRIPS Art. 61)

- *Narcotics*. The UN's Single Convention on Narcotic Drugs stipulates that narcotics are illegal under international law and as such must be seized at any and all points in the trade chain by ratifying members. Two additional UN instruments are also relevant in the sector: the Convention on Psychotropic Substances and the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

- *Counterfeit pharmaceuticals.* The Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health (or MEDICRIME convention) is a multilateral convention of the Council of Europe aiming at prevention of counterfeiting medical products. Its purpose is threefold): a) providing for the criminalisation of certain acts; b) protecting the

rights of victims of the offences established under the Convention; c) promoting national and international co-operation. The treaty entered into force on 1 January 2016

- *Wildlife trafficking*. The Convention on International Trade in Endangered Species of Wild Fauna and Flora classifies species according to their level of threat for extinction. Controls on importation and exportation are established for each category. In the absence of compliance, trade in species under any three of these categories is banned. When wildlife products are traded in violation of CITES rules, states are required to use sanctions to punish actors. Penalties are administered in the form of civil or criminal penalties, as fines, imprisonment or other actions to be determined by the state in question.

The scope of international instruments is more comprehensive for certain forms of illicit trade than others. Institutional capacities are generally less comprehensive, for example, in the case of illicit goods that cannot be easily distinguished visually from legal items (such as illicit tobacco or counterfeit clothing). Trade in illicit goods is further complicated by the actions that parties take to exploit regulatory gaps found in transit hubs, such as free trade zones and complex transit arrangements.

Regional agreements also govern efforts to counter illicit trade. In the European Union, Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 establishes the legal framework for fighting criminal fraud that affects the Union's financial interests (OJ L 198/29 of 27.07.2017).

National penalties and sanctions

National penalties and sanctions comprise those that are directed at specific forms of illicit trade, and those that can be applied more generally to criminal activity. *Principal legislation*, for example, would cover drug trafficking, illegal tobacco trade, importing counterfeits, and importing and selling prohibited wildlife products. In addition to civil and administrative penalties, traders could be subject to criminal sanctions. Table 1.1 summarises the maximum incarceration sentences in six selected countries.

Table 1.1. Summary of maximum incarceration in selected countries

	Belgium	Brazil	Canada	France	United Kingdom	United States	Average
IPR infringements (incl. infringement of trademarks and copyrights	5 years	1 year	5 years	5 years + customs penalties (up to 10)	10 years	10 years	6 years
Narcotics trafficking	15 years	15 years	10 years	10 years[3]	Up to life sentence	Up to life sentence	25 years[1]
Wildlife trafficking (of CITES products)	5 years	none	5 years	2 years	5 years	5 years	3.5 years
Contraband / illicit tobacco smuggling (or fraud)	2 years (fraud)	n/a[2]	5 years	7 years (fraud)	7 years (fraud)	5 years	5 years

Notes: [1] In calculating the average, life sentences are approximated at 50 years; [2] Not available; [3] Or life sentence in certain cases.

More general, *ancillary legislation*, however, can also be applied in some instances if specific crimes include money laundering, handling or possessing the proceeds of crime, corruption and embezzlement, or organised crime or racketeering. These penalties are generally higher than those applicable to illicit trade in specific products. While ancillary laws require principal criminal charges or predicate offences to be brought against the perpetrators, they can have a multiplier effect on the impact of the principal penalty by tackling the greater criminal networks, financing of crime, and other practices associated with the crime.

Table 1.2. Summary of maximum penalties for ancillary offences in selected countries

Offence	Penalty	Country						Average
		Belgium	Brazil	Canada	France	United Kingdom	United States	
Money laundering	Incarceration (max)	5 years	10 years	5 years	5 years	14 years	10 years	8 years
	Fine (max)	EUR 5 million	USD 9 million	CAD 500,000	EUR 375,000	GBP 1 million and up	USD 500,000 or 2x value	
Tax evasion	Incarceration (max)	5 years[1]	n/a[3]	2-5 years[2]	3 years	5 years	5 years	5 years
	Fine (max)	EUR 500,000	300%	200%	200%	200%	USD 100,000	
Participation in organised crime / racketeering	Incarceration (max)	5 years	8 years	5 years	10 years	5 years	20 years - life	9 years
	Fine (max)	n/a3	n/a[3]	n/a[3]	EUR 75,000 or 10 times value of fraud	open	Up to USD 250,000	

Notes: [1] Belgium - Modification Art. 98 on revenue taxes [Code des impôts sur les revenus] 1992]; [2] Canada Excise Tax Act, R.S.C., 1985, c. E-15 ; [3] Not available.

1.1.2. National policies and programmes to punish and deter illicit trade

In addition to the international and national legal frameworks to counter illicit trade, institutional capacities to counter illicit trade depend on the use of policy-based initiatives to strengthen programmes and establish strategic priorities that inform police, customs and prosecutors of the high-level guiding principles and priorities that support their work. National strategies and policy statements can provide roadmaps and support coordination of multi-agency approaches to enhance prosecution and punitive efforts against illicit trade. The use of the ancillary national legislation described above is often informed or driven by national strategies.

Such policies and programmes targeting priority areas can include a whole-of-government approach to address a particular form of illicit trade via the key agencies and ministries concerned. They can highlight what ancillary laws are to be used and what levels of inter-governmental cooperation are expected to achieve goals. In addition, these strategies may invoke international (intra-governmental) coordination and may encourage the use of bilateral treaties, such as mutual assistance agreements, to enhance the

institutional capacities to counter illicit trade across borders. Finally, these strategies can encourage the use of stronger sanctions for the principal offence, calling for the added weight of maximum sentences for egregious offences, citing the social or economic harm as a justification for such sanctions.

1.1.3. Use of criminal and civil penalties and sanctions

Governments impose penalties through administrative (civil) action and criminal proceedings. Criminal proceedings are generally associated with heavier punitive sanctions than administrative sanctions. Criminal cases seek to punish parties engaged in criminal activity, through financial penalties, incarceration and/or deprivation of certain rights and freedoms. The scope of criminal actions is greater than in civil actions, as they can include investigations, supported by search warrants, which can explore and uncover dealings beyond the narrow body of evidence revealed by the offence in question.

Both civil and criminal courts are used in the case of illicit trade and other related offences. In addition to administrative penalties, civil courts can also be used in cases where an offence is deemed to cause harm or damages, but the damages do not require criminal or severe charges. Civil procedures can be initiated by plaintiffs to sue for compensation and restitution, including damages and, in some cases, punitive damages to deter further infringements.

Evidence suggests that national policies and practises towards illicit trade are bringing the two forms of penalty systems closer together in their use and interchangeability. Policy discussions on the relative costs of using criminal procedures and relative ease of imposing administrative penalties have led some governments to use civil penalties more broadly. Moreover, an increased focus on trade facilitation and cost reduction has created a push for corrective (administrative) action rather than punitive ones.

1.1.4. Policies to enhance the effectiveness of penalties and sanctions

The maximum penalties and sanctions that can be applied for engaging in illicit trade are substantial, but the persistence and level of such trade suggest that more needs to be done to enhance deterrence. A number of actions could be taken by governments in three key areas to this end, as follows:

Strengthen co-operation and expand the scope of international frameworks.

International treaties governing narcotics, such as the United Nations Single Convention on Narcotics, seek to promote international cooperation between law enforcement authorities, with a view towards elevating transaction costs and risks for criminal networks. The growing size of illicit trade in other goods, such as counterfeits, tobacco and wildlife, demonstrate that urgent action is needed to strengthen international legal frameworks for these crimes as well. Countries need to work on enhancing prosecution of IPR related crimes in third party or transit economies, while continuing to develop and implement a comprehensive agreement on illicit tobacco smuggling that builds upon the existing framework convention.

Countries also need to work to apply other existing legal principles, including those embodied in the United Nations Convention against Corruption (UNCAC) and the United Nations Convention against Transnational Organized Crime (UNTOC), to a broader range of illicit activities. As it stands, these principles are used extensively for "conventional" forms of illicit trade such as narcotics smuggling, but often do not apply

to other areas, such as counterfeiting and wildlife trafficking, which are two forms of illicit trade that are closely associated with corruption and transnational organised crime.

Raise the risk/reward ratio by expanding the scope of penalties to include ancillary legislation.

Proceeds of crime legislation serve to reduce the profitability of crime by confiscating and thereby depriving criminals of their illicit gains. These penalties can be high; applying them more broadly would help to cut off funding of criminal actors, while addressing the root motivation of illicit actors, thereby lowering the incentive to commit illegal acts.

Extending proceeds of crime provisions to include, for example, tobacco and counterfeit products could have a significant impact on the risk-reward structure of actors in illicit trade; the process to build precedent and develop resilient institutional capacities to investigate and prosecute these crimes can, however, be difficult.

The legislation enabling authorities to freeze the proceeds of crime can be further strengthened by including provisions that, for example, reverse the burden of proof from enforcement authorities to the criminal parties, and extend powers of seizure to include illicit activities beyond the crime in question.

Investigations into criminal behaviour related to illicit transnational trade frequently have an international dimension, as financial transactions are conducted internationally and monies are often laundered via off-shore financial institutions, or employ trade based money laundering schemes so that illicit profits are portrayed as legitimate earnings that have been generated through legitimate trade. Multilateral cooperation through mutual legal assistance agreements and other vehicles is a valuable tool that can be used effectively to uncover and seize assets held abroad.

From a practical standpoint, resource constraints are commonly cited as reasons for limiting crime-fighting efforts. The prosecution of ancillary legislation, for example, can be complex and require significant financial support. The freezing and seizure of property and monies can thus be a challenging task, requiring close collaboration between customs, police and financial intelligence units or agencies responsible for forensic accounting. For example, money laundering offences require participation of specialised financial intelligence units and often call upon other branches of government and law enforcement, which may require significant coordination and resources. This demonstrates the need to develop targeted and impactful policies in a well-structured, efficient manner.

Checks and balances need to be in place to prevent undue application or mishandling of proceeds of crime acts so as to allay concerns about the use of sanctions to reach beyond the crime itself and into the other assets of the criminal actors. Strong transparency, internal controls, and oversight are thus necessary prerequisites to ensure the successful deployment of these tools.

Develop and implement national strategies to counter illicit trade.

The development of national policies and programmes to combat illicit trade can be achieved with greater ease than can the passage of new laws and the negotiation of international treaties. Such an approach has the potential to deliver quick and effective responses to challenges, and they can be useful in boosting inter-agency cooperation and

otherwise enhancing efforts to address illicit trade issues and deter and prosecute those engaged in such trade.

Generally, such strategies could include the use of specific principal and ancillary laws to prosecute offences and deter illicit trade in selected areas. However, the value of national strategies can be limited, to the extent international legal frameworks that aim at promoting international cooperation, which is key to success, are weak or absent. International frameworks are best when they complement national strategies. For example, the application and use of the UN conventions on organised crime, corruption, and criminal/terrorist finance can be instrumental to achieving national goals, which are increasingly reliant upon international cooperation for their success.

1.2. The increased role of small shipments in facilitating illicit trade

The growth of small shipments in international trade has been accompanied by their use as vessels for illicit goods such as narcotics, chemicals, weapons and counterfeits. The sheer quantity presents a significant challenge for customs and law enforcement authorities. Capacity to target and interdict illicit trade on a granular scale without interfering with the legitimate flow of products is limited, as is capacity to carry out effective risk assessment analysis and product inspections. Criminal networks that are engaged in the sale of illicit goods are increasingly exploiting the institutional gaps and vulnerabilities present in postal and courier operations. The seriousness of the situation is supported by the OECD survey of member countries, where most respondents indicated that the growing volume of small parcels posed a major threat to their ability to combat illicit trade (Box 1.1).

Box 1.1. OECD 2016 Survey on institutional capacities to counter illicit trade

The OECD illicit trade survey was distributed to OECD member countries. It consisted of three parts: one on penalty schemes, one on the issue of misuse of small shipments and one on problems related to Free Trade Zones (FTZs). The survey was sent to the 35 OECD member countries. Three responses were received to the first part of the survey on penalties, 15 responses to the small shipments-specific part and 10 responses to the part on FTZs.

The survey consisted of 45 closed questions: nine concerned penalties; 15, small shipments; and 21, FTZs. Sample questions included: "Please indicate the three most common seizures in illicit goods via small shipments", "Does your government have a national strategy to address the growing risks from illicit trade in small packages via postal and courier services?", "What are the identified forms of illicit trade or illegal activity in "high-risk" foreign FTZs?" and "What, if any, challenges do your administration face in recording 100% of shipments into and out of the FTZ?".

The sale of products online has further complicated the situation, providing bad actors with a means to boost trade in small shipments as consumers are able to purchase items directly from suppliers, in small, individualised quantities. In effect, the importance of large firms and retailers as importing agents has declined, with consumers becoming far more active in this regard. This shift has affected the regulatory and policy framework for law enforcement, and the ability of customs, police and other relevant government agencies to stop illicit trade.

1.2.1. Adequacy of information and the role of intermediaries and vendors

The provision of advance commercial information on small shipments is uneven or contains gaps. There are important data quality issues that remain due to omissions or mistakes in data (either accidental or intentional) that affect the risk-assessment process. Low information quality and lack of information or description on small packages are important in this regard. The consequences are significant as the capacity of authorities to diminish risks to health, safety and the security of citizens is mitigated. In some instances, governments are working with courier and postal bodies to obtain advance commercial information. The postal stream poses the most significant challenge in nearly all countries surveyed, due to structural gaps in obtaining data before arrival, and a lack of recourse for data inaccuracies.

Data quality remains a cause for concern in both courier and postal streams. When data quality issues arise, customs often have no recourse or redress when dealing with non-commercial actors.

There are important capacity-based differences between the courier and postal intermediaries that must be taken into account. Survey results and discussions with experts indicate that the postal stream represents a more important risk for illicit trade due to the frequent absence of proper risk assessment, reflecting the fact that accurate and advance data is less frequently available for postal modes. In the courier mode, advance information is likely to be more readily available, but effective (two-way) cooperation between express companies and customs administrations remains challenging.

1.2.2. Postal intermediaries

Postal intermediaries often lack the appropriate infrastructure to fully digitize shipments. The current international legal framework under the Universal Postal Union (UPU) does not require advance transmission of information that would be useful for risk assessing products. Updates to IT infrastructure are being affected by concerns over their affordability.

Several pilot projects are underway to tackle key information challenges in OECD and non-OECD economies; they are aimed at addressing ways to deal with the information gaps continue to affect abilities to stop illicit goods.

1.2.3. Courier intermediaries

“Data rich” courier intermediaries (i.e. express companies) pose a different set of challenges. Whereas postal companies are generally single national entities, express firms are a more disparate group and are not represented by a single international body. They are instead associated with industry groups, such as the Global Express Association and regional bodies, but these groups do not have the ability to dictate or enforce international standards. Couriers are, however, subject to national regulations and laws in the jurisdictions in which they operate. Customs authorities have expressed concerns over difficulties in obtaining adequate information on shipments from courier companies; the limited ability to process data and information from various disparate sources has been flagged as an issue in this regard.

Discussions with courier companies indicate that efforts have been made to transmit electronic information on shipments to customs that would enable customs authorities to carry out risk assessment and target suspect shipments more effectively. Courier companies in some instances are providing access to facilities, allowing customs

inspection of goods upon arrival, and are working with enforcement to locate and seize accounts of clients known to use this mode for illicit trade.

1.2.4. Current successes in security and facilitation

Pilot projects focusing on national security risks for air shipments (i.e. explosives and other harmful products) are focusing on requirements for the provision of advance data, in electronic form, before the loading of goods onto airplanes. The projects, which are being carried out in the European Union, Canada, the United States, as well as other countries, have been successful in finding ways to secure advance data in order to help screen for threats. They have been based on effective inter-agency cooperation and public-private sector coordination.

1.2.5. E-commerce and illicit trade

The sale of illicit goods continues on large, web-based retail platforms and on independently hosted sites. New trends, including the use of social media and person-to-person encrypted chats, are also emerging as new transaction platforms to re-direct or finalize transactions; these mechanisms are in addition to known illicit marketplaces on the "dark web". Continuing to build partnerships among law enforcement, working with Internet service providers (ISPs) for website take downs, and developing agreements with e-commerce platform operators are important tools, but the rapid evolution of e-commerce necessitates a more systematic approach to tackling online illicit trade, focusing on ways to stop it at the source.

As with couriers, major e-commerce platform operators platforms possess large amounts of detailed data and information on the description of goods being traded, their value, the vendors involved, the consumers and the histories of parties using the platforms. This information, alongside other important indicators, can be useful for risk-assessment. There are, however, few agreements between authorities and e-commerce vendors to facilitate information exchange.

1.2.6. Policies to combat growth in trade in illicit products via small shipments

The sharp growth in the use of postal and courier streams as a delivery method for smuggling small packages containing prohibited or restricted goods has significantly impacted the institutional capacities of governments to effectively screen and interdict the goods. Criminal networks are exploiting gaps in these institutional capacities to benefit their illicit activities. Governments need to consider taking the following actions to address the situation:

Engage courier and postal intermediaries in efforts to detect and interdict trade in illicit products.

Courier and postal intermediaries face different challenges when addressing issues related to illicit trade. Governments and international organisations should address each separately and reforms should be undertaken to strengthen mechanisms for detecting and interdicting illicit trade; cooperation amongst the different parties should be encouraged in this regard.

Build on best practices identified in pilot projects to improve i) the quality of small shipment data available to customs authorities and ii) risk assessment techniques.

Pilot projects for enhancing air security involving small packages illustrate ways in which the exchange of important information can be relayed to authorities to enable them to make more informed decisions on transport risks. Customs authorities need to build on the good practices that have been identified; this would include mandating preload advance cargo information and exploring ways in which the measures could be expanded to enhance the risk-assessment of small packages, with minimal impacts on legitimate trade.

Expand capacity for accessing, integrating and evaluating datasets from stakeholders.

Customs should explore ways of using technology and innovation, including data analytics and machine-based learning, in more progressive, forward-looking ways. Large amounts of information are likely to be available electronically from parties involved in trade, and customs should work to find ways of integrating this information into their databases in a seamless manner, with a view towards improving risk assessment and the modelling techniques that they are using.

Engage e-commerce platform operators in efforts to detect online transactions in illicit products.

E-commerce transactions are "faceless", in the sense that transactions do not involve physical sellers or buyers (at least in a traditional sense); this complicates customs risk assessment as the supply chains can be highly disaggregated. Customs needs to engage with the industry with a compliance-based approach to develop trusted traders; large online e-commerce vendors that can act as authorised economic operators (AEOs) not only for vendor-based revenue collection, but also for holding firms accountable for the products that are sold on their platforms.

Strengthen efforts to move against parties engaged in online trade of illicit products.

Law enforcement would benefit from addressing the risks of cybercrime and illicit trade in e-commerce from a top-down approach. This would include shutting down web-retailers that engage in illicit trade and cooperating with foreign and domestic law enforcement entities to impose injunctions and pursue "take-down" requests of websites. Governments also need to develop new methods for maintaining forward-looking visions on the constantly evolving situation in cybercrime.

1.3. Combatting illicit trade and related criminal activities in free trade zones

Free trade zones have long been a part of world trade, dating back to at least the early 1700's. Originally established as means to facilitate goods in transit by relieving traders from many customs formalities that would otherwise apply to goods entering into a country for consumption, the purpose of zones has evolved into a tool for attracting foreign investment and promoting economic development and growth, particularly in developing countries. Benefits have, however, also accrued to advanced economies, as evidenced by the several hundred zones operating in the United States alone.

The specific benefits offered by zones differ according to the different laws and regulations of the countries where they are established. The costs and benefits to businesses and host countries thus vary considerably from one economy to another. For businesses, the benefits that zones offer can include: tax and customs duties exemptions, labour and immigration rules that are more flexible than those applicable in the customs territory of host countries, lighter regulation and oversight of corporate activities, fewer restrictions on corporate activities, and opportunities to improve distribution of goods to diverse markets. On the other hand, the costs of establishing a business in a zone, which might include a variety of special zone fees, may be lower than would otherwise be the case if the same business were established outside the zone and within the territory of the host country.

For host countries, zones can be beneficial to economies, to the extent that they attract foreign investment (particularly in high-tech industries), create jobs (particularly higher-skill) and enhance export performance. The benefits for the host countries, however, come at a cost, to the extent that government revenues are foregone and fall short of any revenue gains that might otherwise occur through zone activities. Moreover, potential benefits to economies would only apply to those zone activities which would otherwise not have otherwise been established in the customs territory of host countries.

Lightly regulated zones are, however, also attractive to parties engaged in illegal and criminal activities. Zones have facilitated trade in counterfeit and pirated products, smuggling and money laundering, often providing bad actors a relatively safe environment for carrying out their illicit activities. The problem is aggravated in instances where governments do not police zones adequately; this can occur when zones are deemed to be foreign entities that are outside of the scope of domestic policing activities. It can be further aggravated when zones are operated by private parties. These parties' main interests are likely to be in finding ways to expand zone occupancy and provide profitable services to zone businesses. They may therefore have little direct interest and/or capacity in law enforcement, may not have the capacity or authority for scrutinising zone operations. Even where government authorities are actively involved in overseeing zone activities, there is evidence that co-ordination between these authorities and zone operators, particularly those that are private parties, can be weak, providing further scope for bad actors to exploit zones for their illicit activities.

1.3.1. International regulatory framework

Zones are governed principally by agreements reached in the World Customs Organization (WCO) and the World Trade Organization (WTO). In the case of the WCO, zones are specifically addressed in an annex to the Revised Kyoto Convention (RKC); while zones are subject to general WTO rules, they are not specifically mentioned in key texts.

World Customs Organization

The RKC has historically been the principal instrument aimed at international harmonisation of customs practises for import and export procedures. Annex D, Chapter 2 of the convention provides an extensive framework for the regulation of FTZs and customs warehouses. However, the annexes of the RKC are not part of the core text to which contracting parties are bound, and have only been signed by a few economies; of the 110 signatories that are party to the RKC, just 24 are contracting parties to this chapter, with 6 countries indicating certain reservations to the text. This is indicative of

the global lack of acceptance of a common standard for zone organisation. Moreover, the convention contains few compliance mechanisms that could be used to enforce provisions (such as binding dispute resolution mechanisms).

World Trade Organization

The WTO makes no specific mention of FTZs in its principal agreements, providing no definitions of FTZs or export processing zones. However, in some instances, WTO has noted that some zone benefits might be considered as export subsidies, which are governed by the WTO Agreement on Subsidies and Countervailing Measures (ASCM); such subsidies are prohibited under that agreement. In principle, however, there is no current indication that the status of agreements such as TRIPS and the enforcement of related WTO rules, are not applicable within FTZs, but no official WTO text has formally confirmed this.

1.3.2. Evidence of illicit trade in FTZs

The existence of illicit trade in FTZs is well-documented. A 2010 study by the OECD's Financial Action Task Force identifies FTZs as posing a high risk for money laundering and a risk to the integrity of global financial regulatory standards. In the report, informed by a member country questionnaire, FATF documents the lack of adequate oversight, inadequate standards for business registration practices, and inadequate (or absent) use of anti-money laundering practices in certain FTZs around the world. The report also notes that inadequate documentary requirements for imports and exports can lead to the exploitation of such zones for the use in fraud and trade-based money laundering operations.

Other forms of illicit trade and criminal activity that have been noted are as follows:

- *Tobacco*. Reports by the OECD (2016), INTERPOL (2014) and the International Tax and Investment Center (2013) document the exploitation of FTZs by criminal networks specializing in illicit tobacco trade, particularly for unlicensed and duty-unpaid cigarettes ("illicit whites").

- *Counterfeit products.* Reports by the OECD and the European Union Intellectual Property Office (2016 and 2017), EUROPOL (2015) and the Business Action to Stop Counterfeiting and Piracy (2013) show that the market for fakes is supported by a series of global export hubs, many of which are identified as FTZs. The reports provide specific examples of the nature and scope of the counterfeiting.

- *Arms and other controlled goods*. A report in the Strategic Trade Review published in 2016 highlights the strategic trade control vulnerabilities of FTZs. This report notes that FTZs represent threaten to undermine anti-proliferation efforts, citing a case where controlled goods that were subject to an embargo were smuggled via FTZs to an embargoed country, using false declarations to avoid scrutiny. The report notes that trade in such goods, which include products such as uranium enrichment machinery, weapons and small arms, and dual use goods, can use zones as transhipment points to avoid sanctions.

- *Illegal gambling*. A 2017 report on FTZs and gambling by the International Centre for Sport and Security notes a broad range of illicit activities that are carried out in FTZs. In addition to illegal gambling, the report notes that the lack

of financial oversight in some zones has resulted in casinos operating in zones becoming prime targets for money laundering operations.

1.3.3. Policies to combat illicit trade and related criminal activities in FTZs

The considerable number of criminal networks operating in FTZs highlights a clear and pressing need to address the risk of illicit trade in FTZs through a coordinated and coherent response by all economies affected by illicit trade. The harmful effects from counterfeits, tobacco smuggling, arms trafficking, illegal gambling, and numerous other forms of criminal activities that are taking place in FTZs need to be addressed through collective action to overcome the coordination failures associated with a lack of enforcement in FTZs.

There are presently no wide-reaching international frameworks that set out a series of rules or governing regulations for FTZs (including the activities that may or may not take place and guidelines for information sharing). The absence of effective controls not only leads to diminished oversight, but also a misunderstanding among law enforcement of the risks of certain FTZs and the activities that take place therein.

Moreover, there are significant shortcomings in the management of zones that need to be addressed, including i) gaps in institutional capacities for exercising oversight and conduct inspections in FTZs, ii) lack of commercial information on activities conducted within FTZs, iii) ineffective information sharing between customs administrations on goods departing FTZs and arriving in national territories and iv) low levels of effective private-public sector coordination, including between zone operators, trade and logistics firms.

To address these issues, countries need to work together to develop a common international framework or set of standards that enables greater transparency, and a mechanism to ensure compliance with these standards. The following actions need to be considered.

Formalise definition of FTZs.

There is no current consensus on the international legal framework or definition of an FTZ. The considerable growth of FTZs in size and number demonstrates a pressing need to include them in a formal and codified manner in international agreements.

Expand information requirements for goods moving through zones, penalise misuse of zones and enhance security screening

A number of good practices have been identified for developing information that can to help enhance efforts to combat criminal activities in zones. The use of restricted (high risk) goods lists, mandatory submission of electronic data, rapid adjudication of violations in zones and severe monetary fines for violations, as well as enhanced security screening, represent good practises that should represent minimum requirements for FTZs.

Strengthen cooperation with stakeholders and encourage development of codes of conduct.

Engaging the private sector is an invaluable step in ensuring more effective oversight of FTZs and enhancing institutional capacities. FTZ authorities (both private and publicly owned) should be encouraged to enter into voluntary codes of conduct. These can include

guidelines for FTZ operators to achieve better business practices and promote supply chain security with certification-style standards or other mechanisms that enable governments and business to distinguish "clean" FTZs from non-compliant zones that pose a significant risk for legitimate business. Governments can encourage the adoption of such codes by jointly committing to recognising certification standards through memoranda and joint agreements, and by recognising that non-compliant zones pose a risk for illicit trade. At the same time, the development of FTZs must be accompanied by capacity building; governments and industry need to provide their expertise and guidance to provide support for this, which would include guidance on modernizing zone infrastructure.

Enhance formal responsibilities of zone operators.

Government-led initiatives such as authorized economic operator (AEO) style certification schemes for FTZs may be a useful model to ensure sounder operation of the zones. AEO certifications are already used for various operators in trade, and are considered an essential tool in trade facilitation. The AEO model could ensure higher rates of commercial compliance by guaranteeing the rights or privileges of parties operating beyond customs control, covering, for example, accurate data recording and book-keeping, openness to customs audit and more stringent security standards for employees.

Streamline customs procedures, and maintain adequate numbers of enforcement officials with ex-officio authority to supervise or control FTZs (or free zones) within their customs territory and according to the applicable provisions.

In addition to using zones to boost FDI and exports, some countries rely on zones to provide traders with a means for avoiding inefficient customs practices that add red tape and delays. To reduce reliance on zones for these purposes, countries should explore ways to streamline their general customs procedures. Furthermore, each country should ensure that it has adequate numbers of officials with ex-officio authority to supervise or control all FTZs within their customs territory and according to the applicable provisions. As a best practice, this authority should include, at minimum, the power to detain suspected counterfeits, and when legally endorsed, the power to destroy counterfeit goods

Ensure wide participation of countries in FTZ discussions.

Discussions on ways to improve efforts to combat criminal activities in zones involves a broad range of countries, all of which need to be involved in developing effective solutions, particularly in light of the different interests that they may have.

2. Effectiveness of Enforcement Frameworks for Countering Illicit Trade

This chapter analyses the effectiveness of the sanctions and penalties being used to counter illicit trade. It provides an overview of sanction regimes and legal frameworks at the international and national levels, along with an assessment of the national policies and programmes being employed. Case studies are presented on i) counterfeit goods, ii) illicit tobacco trade, iii) illicit trade in narcotics iv) pharmaceuticals and v) illegal wildlife trafficking. The chapter also explores how the criminal and legal frameworks could be enhanced.

2.1. Overview and conclusions

This assessment of the effectiveness of sanctions and penalties being used to counter illicit trade is based on the presumption that illicit actors will prefer to trade in goods where rewards are highest, and the risks are lowest. Criminal networks, particularly those associated with transnational organised crime, respond to changes in the risk-reward structures that are affected by international legal frameworks, national legislation and enforcement policies. The environment is one of a constantly evolving "interdiction-adaptation" cycle, where customs and criminal networks respond to the changing tactics of each another to gain an upper hand (Basu, 2014[1]). Success on the part of governments depends on the i) deterrent sanctions available for customs offences, ii) the ability of law enforcement to enforce legislation and iii) the capacity to investigate and, where appropriate, cooperate with foreign authorities.

The international and national frameworks, policy-based national strategies and monetary fines and criminal sanctions, together provide an indicator on the focus and determination of governments to counter specific forms of illicit trade. The adequacy of fines and sanctions are the key. Measures can include injunctions, financial penalties and fines, asset seizures, restrictions on access to the financial system and incarceration. Each of these measures could be applied in conjunction with one another, or independently, and at varying degrees of severity. It is important to note, however, that there is no consensus on the relationship between the duration or severity of measures and their effectiveness to deter illicit activity.

Previous OECD work shows certain illicit commodities are of strategic interest for criminal enterprises due to the low-risk of detection and/or interdiction and the significant revenue base this provides for actors engaged in these forms of trafficking. These include counterfeiting, wildlife trafficking and illegal fisheries, which go widely unpunished due to difficulties in coordinating effective responses, the impact of corruption in markets, lenient sanctions, and perceptions that these are "victimless" crimes that do not warrant significant action. Law enforcement instead tends to focus on more dangerous activities, such as trade in narcotics weapons, and human trafficking (OECD, 2008[2]) (OECD, 2016[3]).

This analysis also builds on previous OECD work on illicit trade. This includes findings from the 2016 OECD-EUIPO report on trade in counterfeit and pirated goods, which found the global market for fake goods represented up to 2.5% of global trade in 2013 (USD 461 billion) (OECD/EUIPO, 2016[4]). The report underscores the importance of understanding the shifting characteristics of illicit trade, noting that counterfeit trade is replacing other forms of illicit trade as low risk, high reward activities for criminal organisations.[1]

The assessment i) analyses the gaps in policy and enforcement in relation to penalties for criminal activity associated with illicit trade, drawing on a stocktaking of institutional capacities and ii) sets forth policy recommendations to address the gaps. The analysis is based on desk research, fact finding interviews, discussions and meetings, as well as preliminary findings from the aforementioned 2016 OECD survey on institutional capacities to counter illicit trade.[2]

2.1.1. Strengthening co-operation and expanding the scope of international frameworks

International treaties governing narcotics, such as the United Nations Single Convention on Narcotics, seek to promote international cooperation between law enforcement authorities, with a view towards elevating transaction costs and risks for criminal networks. The growing size of illicit trade in other goods, such as counterfeits and tobacco and wildlife, demonstrate that urgent action is needed to strengthen international legal frameworks for these crimes as well. Countries need to work enhancing prosecution of IPR related crimes in third party or transit economies, while continuing to develop and implement a comprehensive agreement on illicit tobacco smuggling that builds upon the existing framework convention on the product (see below).

Countries need to work to apply other existing legal principles, including those embodied in the United Nations Convention against Corruption (UNCAC) and the United Nations Convention against Transnational Organised Crime (UNTOC), to a broader range of illicit activities. As it stands, these principles are used extensively for "conventional" forms of illicit trade such as narcotics smuggling, but often do not apply to other areas, such as counterfeiting and wildlife trafficking, which are two forms of illicit trade closely associated with corruption and transnational organised crime.

2.1.2. Raising the risk/reward ratio by expanding the scope of penalties to include ancillary legislation, such as proceeds of crime provisions anti-money laundering legislation

Proceeds of crime legislation serves to "reduce the profitability of crime by confiscating and thereby depriving criminals of their illicit profits" (UNICRI-BASCAP, 2015[5]). These penalties can be high; applying them more broadly would help to cut off funding of criminal actors, while addressing the root motivation of illicit actors, thereby lowering the incentive to commit illegal acts.

Extending proceeds of crime provisions to include, for example, tobacco and counterfeit products could have a significant impact on the risk-reward structure of actors in illicit trade; the process to build precedent and develop resilient institutional capacities to investigate and prosecute these crimes can, however, be difficult.

The legislation enabling authorities to freeze the proceeds of crime can be strengthened by including provisions that, for example, reverse the burden of proof from enforcement authorities to the criminal parties, and extend powers of seizure to include illicit activities beyond the crime in question. The UK Proceeds of Crime Act (POCA), for example, has simplified the processes for confiscating suspected proceeds of illicit trade transactions. Under the POCA, seizures can also extend to unexplained sources of wealth and "lavish lifestyles" (UK POCA, 2002[6]). Following the money more aggressively could also help to uncover additional networks of illicit actors and beneficiaries.

Investigations into criminal behaviour related to illicit transnational trade frequently have an international dimension, as financial transactions are conducted internationally and monies are often laundered via off-shore financial institutions, or through trade-based money laundering schemes so that illicit profits are portrayed as legitimate earnings generated through legitimate trade. Multilateral cooperation through mutual legal assistance agreements and other vehicles is a valuable tool that can be used effectively to uncover and seize assets held abroad.

From a practical standpoint, resource constraints are commonly cited as reasons for limiting crime-fighting efforts. The prosecution of ancillary legislation, for example, can be complex and require significant financial support. In Canada, the justice department notes "the forfeiture of crime proceeds can be quite complex as the government must prove the ownership of property and trace it to criminal behaviour" (Canada Department of Justice, 2017[7]). The freezing and seizure of property and monies can thus be a challenging task, requiring close collaboration between customs, police and financial intelligence units or agencies responsible for forensic accounting. For example, money laundering offences require participation of specialised financial intelligence units and often call upon other branches of government and law enforcement, which may require significant coordination and resources. This demonstrates the need to develop targeted and impactful policies in a well-structured, efficient manner.

Checks and balances need to be in place to prevent undue application or mishandling of proceeds of criminal acts so as to allay concerns about the use of sanctions to reach beyond the crime itself and into the other assets of the criminal actors, using methods such as asset seizure and forfeiture. Strong transparency, internal controls, and oversight are thus necessary prerequisites to ensure the successful deployment of these tools.

2.1.3. Developing and implementing national strategies to counter illicit trade

The development of national policies and programmes to combat illicit trade can be achieved with greater ease than can the passage of new laws and the negotiation of international treaties. Such an approach has the potential to deliver quick and effective responses to challenges. This is borne out in the assessments described below on tobacco (UK example) and wildlife (US example), where the pursuit of national policies had a significant impact in driving resources and the interest of national law enforcement bodies, courts and other stakeholders towards a common objective, with well-established toolkits.

National strategies can be useful in boosting inter-agency cooperation and otherwise enhancing efforts to address illicit trade issues and deter and prosecute those engaged in such trade. Generally, such strategies should include the use of specific principal and ancillary laws to prosecute offences and deter illicit trade in selected areas. However, the value of national strategies can be limited, to the extent that international legal frameworks that aim at promoting international cooperation, which is key to success, are weak or absent. International frameworks are best when they complement national strategies. For example, the application and use of the UN conventions on organised crime, corruption, and criminal/terrorist finance can be instrumental to achieving national goals, which are increasingly reliant upon international cooperation for their success.

2.2. Legal frameworks for countering illicit trade

2.2.1. International legal framework

There is no single international legal framework that "gives a common understanding of concepts on an international platform; creates minimum standards and requires the harmonization of national legislation creating channels of international cooperation" (INTERPOL, 2014[8]). Rather, there is a patchwork of international conventions, laws and agreements that currently govern the global efforts to counter illicit trade (Table 2.1). Cross-sectoral agreements provide a broad set of tools and guidance that can be applied to nearly all forms of illicit trade. In particular, the United Nations Convention against

Corruption (UNCAC) and the United Nations Convention against Transnational Organised Crime (UNTOC) establish a global framework for addressing criminal offences, including participation in organised crime and issues related to the handling of proceeds of crime. The effective interpretation and implementation of these agreements can increase the effectiveness of prosecuting certain forms of illicit trade, by helping to increase sentences and to cut off important sources of funding to criminal networks.

The framework also includes a number of sector-specific agreements, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

Other agreements include:

- The WHO's Framework Convention on Tobacco Control (FCTC) is an agreement that is limited in scope as it does not address illicit trade, instead stipulating the conditions for the legal trade in tobacco. Unlicensed tobacco remains outside of the scope of the FCTC and presently member countries are not required to seize unlicensed tobacco. A separate WHO agreement, the Protocol to Eliminate Illicit Trade in Tobacco Products, has only been ratified by 26 countries; ratification by 40 is required to bring it into force.

The WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) leaves it to its members to determine what sanctions, if any, are to be applied to counterfeit goods transiting their territories. National legal frameworks can, for example, provide for the seizure of counterfeits in transit or prior to commercial declaration, or not.

The UN's Single Convention on Narcotic Drugs stipulates that narcotics are illegal under international law and as such must be seized at any and all points in the trade chain by ratifying members.

Table 2.1. Summary of selected international instruments governing illicit trade

Sector or activity	Instrument	Year	Number of adhering parties
IPR infringements (incl. infringement of trademarks and copyrights	WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS)	1994	164
Drugs / narcotics	Single Convention on Narcotic Drugs Convention on Psychotropic Substances UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances	1961 1971 1988	185 183 189
Wildlife trafficking	Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)	1973	183
Illicit tobacco	Framework Convention on Tobacco Control (FCTC) Protocol to Eliminate Illicit Trade in Tobacco Products	2003 2012	180 26
Organised crime	UN Convention on Transnational Organised Crime (UNTOC)	2000	179
Corruption	UN Convention Against Corruption (UNCAC)	2003	180
Illicit Financial Flows / Money Laundering	UN Convention on the Suppression of the Financing of Terrorism	1999	187

Sources: WTO, UNODC, CITES, WHO, UN.

The scope of international instruments is more comprehensive for certain forms of illicit trade than others. It can be noted that the institutional capacities are generally less comprehensive for illicit goods that cannot be easily distinguished visually from legal items (such as illicit tobacco or counterfeit clothing). Trade in illicit goods is further complicated by the actions parties take to exploit regulatory gaps found in transit hubs, such as Free Trade Zones (FTZs) (see Chapter 43), and complex transit arrangements. The impunity with which unlicensed tobacco and IPR infringing products can be shipped around the globe is an indicator that current international frameworks must be enhanced. Box 2.1 provides an example of the impact of international legal frameworks on enforcement capacities, indicating how regional frameworks are being used to enforce IP infringements.

Box 2.1. Counterfeit electronics shipped through Belgium to Colombia

In 2011, Belgian authorities stopped a shipment of counterfeit electronics destined for Colombia from Hong Kong. The electronics that were discovered at the Belgian point of interception to be counterfeit would have violated EU law had they entered into the economy. However, as goods were destined to a non-EU area, there were no international or domestic rules in place in Belgium to prevent the counterfeit goods from continuing to their intended destination.

Some jurisdictions have responded by adopting enhanced national legislation. In the European Union, the Trade Mark Directive and the Trade Mark Regulation were adopted in 2015 and 2016, respectively. Under these instruments the owners of EU trade marks are entitled to prevent parties from bringing infringing goods into the EU, even if the goods are in transit to third countries and not destined for EU markets. Actions, however, would be terminated in instances where the party declaring or holding the goods was able to provide evidence that the rights holder was not entitled to prohibit the placing of the goods on the market in the country of final destination.

Sources: (BASCAP, 2013[9]), EU Directive (2015/2436) and EU Regulation (2015/2424)

The enforcement of narcotics trafficking, on the other hand, can occur at various points, even in the midst of transport on high seas. Treaty obligations under the UN Convention against Illicit Traffic in Narcotics provide the framework for local and extraterritorial actions and interdictions of goods at origin and points of transit (Fritch, 2009[10]). The possibility of intercepting the narcotics at virtually any point in time elevates the level of risk for criminal networks transporting these goods.

International enforcement operations in a maritime environment provide an example of how international laws can be used to combat transnational organised criminality and prevent the illicit trade at all points in the chain. The US Coast guard, EUROPOL and other enforcement agencies patrol and conduct extraterritorial operations targeting narcotics trade. The US Coast guard operates in international waters in the Eastern Pacific, Caribbean and the Gulf of Mexico to enforce such laws and conduct operations and inspections for drugs on the high seas (Box 2.2).

Box 2.2. Seizure of narcotics on the high seas

In March, 2017, US and Canadian Coast Guard authorities conducted joint interdiction missions that ended in the seizure of over 16 tons of cocaine worth USD 420 million. These interdictions were conducted in international waters in the eastern Pacific Ocean. The authorities were authorised under international law to conduct operations in international waters. Drugs such as cocaine fall under the international legal frameworks stipulated by the UN Single Conventions on Narcotics (Gonzales-Pinto, 2008[10]). The US Coast Guard is known to conduct operations on a regular basis in international waters in the eastern Pacific, Caribbean and the Gulf of Mexico areas.

Source: (USCG, 2017[11])

2.2.2. National legal frameworks

National legal frameworks can be broken into two broad categories of principal and ancillary laws:

- *Principal legislation* aimed at punishing the (predicate) trafficking offence in question. Such legislation could address drug trafficking, importing counterfeits, importing and selling prohibited wildlife products.
- *Ancillary legislation* to punish and deter the other crimes associated with this predicate offence.[3] Ancillary legislation could cover crimes that include money laundering, handling or possessing the proceeds of crime, corruption and embezzlement, and organised crime or racketeering.

Principal legislation related to illicit trade

Principal legislation refers to laws enacted to deter and punish the specific offence of trafficking or sale of prohibited or controlled goods in illicit trade. The effective use of principal legislation is measured by the penalties imposed and their frequency of application. The principal laws to punish and deter illicit trade are unique to each form of criminal behaviour. Table 2.2 summarises the maximum incarceration available for different types of illicit trade, in selected countries.

Table 2.2. Summary of maximum incarceration in selected countries

	Belgium	Brazil	Canada	France	United Kingdom	United States	Average
IPR infringements (incl. infringement of trademarks and copyrights	5 years	1 year	5 years	5 years + customs penalties (up to 10)	10 years	10 years	6 years
Narcotics trafficking	15 years	15 years	10 years	10 years[3]	Up to life sentence	Up to life sentence	25 years[1]
Wildlife trafficking (of CITES products)	5 years	none	5 years	2 years	5 years	5 years	3.5 years
Contraband / illicit tobacco smuggling (or fraud)	2 years (fraud)	n/a[2]	5 years	7 years (fraud)	7 years (fraud)	5 years	5 years

Notes: [1] In calculating the average, life sentences are approximated at 50 years; [2] Not available; [3] Or life sentence in certain cases.

As the table suggests, most of the offences listed carry sentences that can be labelled as "serious crimes" according to UNODC's definition (penalties of 4 or more years in prison). The penalties, however, differ depending on the type of illicit trade. Narcotics trafficking offences, for example, carry maximum sentences that are over four times longer than counterfeiting offences. Tobacco smuggling is often punished through tax evasion and fraud laws (e.g. in the United Kingdom, France and Belgium). Their maximum penalties are 80% lower on average than narcotics crimes. The lowest maximum sentences are observed in wildlife trafficking, accounting for on average 3.5 years for maximum sentences.

While the overview of maximum sentences provides important insights into the varied levels of penalties associated with the different types of illicit trade, they do not, it should be noted, reflect i) the rate of conviction or ii) the actual (real) length of sentences and penalties.

Ancillary legislation related to illicit trade

As mentioned above, ancillary laws refer to all forms of penalties used in a complementary manner to principal laws. They relate to the illicit nature of the transactions or behaviour associated with the crimes themselves, and often focus on the financial element of the crime in question. The laws are important as criminal elements are very sensitive to the risks of financial and economic loss, both in the short, medium and long terms.

In comparison to some of the maximum sentences associated with certain forms of illicit trade, such as counterfeiting and wildlife trafficking, charges with an ancillary offence may carry heavier sentences (Table 2.3). For example, the laundering of proceeds of crime from wildlife trafficking can bring on average up to eight years in prison, which is more than twice the average maximum sentence for the principal offence. It should be noted that the table does not include penalties under aggravated circumstances.

Table 2.3. Summary of maximum penalties for ancillary offences in selected countries

Offence	Penalty	Country						Average
		Belgium	Brazil	Canada	France	United Kingdom	United States	
Money laundering	Incarceration (max)	5 years	10 years	5 years	5 years	14 years	10 years	8 years
	Fine (max)	EUR 5 million	USD 9 million	CAD 500,000	EUR 375,000	GBP 1 million and up	USD 500,000 or 2x value	
Tax evasion	Incarceration (max)	5 years[1]	n/a[3]	2-5 years[2]	3 years	5 years	5 years	5 years
	Fine (max)	EUR 500,000	300%	200%	200%	200%	USD 100,000	
Participation in organised crime / racketeering	Incarceration (max)	5 years	8 years	5 years	10 years	5 years	20 years - life	9 years
	Fine (max)	n/a3	n/a[3]	n/a[3]	EUR 75,000 or 10 times value of fraud	open	Up to USD 250,000	

Note: [1] Belgium - Modification Art. 98 on revenue taxes [Code des impôts sur les revenus] 1992]; [2] Canada Excise Tax Act, R.S.C., 1985, c. E-15 ; [3] Not available.

While ancillary laws require principal criminal charges or predicate offences to be brought against the perpetrators, they can have a multiplying effect on the impact of the principal penalty by tackling the greater criminal networks, financing of crime, and other practices associated with the crime. At present, there is little data openly available on the use of ancillary charges and related predicate offences. The 2016 OECD survey and desk research conducted on penalties and sanctions for illicit trade attempted to determine what forms of ancillary penalties are used most commonly with forms of illicit trade; limited information, however, surfaced. The gathering of such data could be useful to inform governments on most effective forms of ancillary legislation that can be leveraged to combat illicit trade.

Country assessments indicate that certain types of illicit trade are more commonly associated with prosecution using ancillary offences. Examples from Brazil and the United Kingdom, involving tobacco smuggling, are summarised below:

- In Brazil, the large scale, and highly lucrative smuggling of contraband tobacco from neighbouring Paraguay is frequently dismissed as a “petty” crime with few implications. Often, people caught smuggling tobacco across the border will have their goods seized and prosecutions for smuggling are generally light, and limited to the single smuggler (Guttierez, 2016[12]). Moreover, analysis indicates that investigations into ancillary offences, such as corruption, organised crime and money laundering are rare, which weakens deterrence and the effectiveness of enforcement.
- In the United Kingdom, tobacco enforcement by Her Majesty’s Revenue and Customs (HMRC) has been more successful, reflecting the effects of actions

taken to recover lost revenue under the 2015 Illicit Tobacco Strategy, which is described further below.[4] In light of the multi-billion pound tax loss identified by HMRC, illicit tobacco has been prioritised as a crime that involves other serious offences, including serious tax fraud and other ancillary offences. The result has been the handing down of significant sentences and application of considerable fines for tobacco smuggling offences, which has led to a narrowing of tax losses.

2.2.3. National policies and programmes to punish and deter illicit trade

In addition to the international and national legal frameworks to counter illicit trade, institutional capacities to counter illicit trade can be enhanced by the use of policy-based initiatives to strengthen programmes and establish strategic priorities that inform police, customs and prosecutors of the high-level guiding principles and priorities that support their work. National strategies are important policy statements that can provide roadmaps and support coordination of multi-agency approaches to enhance prosecution and punitive efforts against illicit trade. As the example in the previous section demonstrates, the use of ancillary national legislation is often informed or driven by national strategies.

Policies and programmes for priority areas of focus can include a whole-of-government approach to address a particular form of illicit trade via the key agencies and ministries concerned. These strategies can highlight what ancillary laws are to be used and what levels of inter-governmental cooperation are expected to achieve goals. In addition, these strategies may invoke international (intra-governmental) coordination and may encourage the use of bilateral treaties, such as mutual assistance agreements, to enhance the institutional capacities to counter illicit trade across borders. Finally, these strategies can encourage the use of stronger sanctions for the principal offence, calling for the added weight of maximum sentences for egregious offences, citing the social or economic harm as a justification for such sanctions. Examples of such strategies, in the United States and the United Kingdom, are presented in Box 2.3.

Box 2.3. Examples of national strategies in the United States and the United Kingdom

The two cases below outline policies and programme to counter illicit trade of a specific type. Both of these strategies advocate the use of strong penalties. The strategies reflect a "whole of government" position to ensure that enforcement is tied to prosecution, and that prosecution is tied to overarching national priorities, thus serving as a communication tool to demonstrate unified resolve and focus.

US national strategy for combating wildlife trafficking and trade in elephant ivory

The 2014 US strategy on combating wildlife trafficking outlines the government's strategic priorities to stop the illicit trade in endangered species (listed under CITES and in particular ivory and rhino horn). The outlined policies include i) strengthening enforcement, ii) reducing demand and iii) strengthening international partnerships. In pursuing the strategic priorities, the US signals its intent to coordinate intergovernmental and intra-governmental efforts to enhance institutional capacities to counter illicit trade by enhancing penalties and widening the scope of available tools (both principal and ancillary) to prosecute offenders. In particular, the enforcement component calls for:

- Using civil asset seizure and forfeiture legislation.
- Prosecuting and addressing corruption.

UK tobacco strategy

The UK HMRC's national strategy has been credited with successfully reducing the supply of illicit tobacco and having a positive impact on revenue collection since its inception in 2000. Since then, the total illicit share of cigarettes in the market has fallen from 22% in to 11%, in 2013-2014.The strategy, carried out over several years, highlights the importance of persistent multi-agency coordination and international cooperation to enhance the institutional capacities to counter illicit trade. The following sanctions are laid out as part of the strategy to enhance the effectiveness of the tobacco strategy:

- Seizure of goods.
- Seizure of vehicles/vessels.
- Seizure of cash as the proceeds of crime.
- Criminal prosecution with a custodial sentence of up to seven years.
- Confiscation of assets as part of the proceeds of crime.
- Assessment for the loss of duty.
- Financial wrongdoing penalties of up to 100 per cent of the duty due.
- Civil action, including winding up orders and bankruptcy.
- Fines of up to GBP 5,000 for selling illicit tobacco not bearing the UK duty-paid fiscal mark.
- Prohibition on the sale of tobacco products for up to six months.
- Referral for withdrawal of hauler's license.
- "Naming & shaming".

Sources: (White House, 2016[13]), (HMRC, 2015[14])

2.3. Specific areas of illicit trade

This section provides an assessment of the international and national legal frameworks, and the national programmes and policies to address illicit trade in four areas, i) counterfeits, ii) illicit tobacco, iii) narcotics and iv) wildlife trafficking.

2.3.1. Counterfeits

International legal framework

The WTO TRIPS is the single most important agreement governing intellectual property rights (IPR). Part III of the agreement stipulates the enforcement of IPR should include civil, administrative and criminal sanctions. The TRIPS agreement establishes specific obligations that enable plaintiffs to claim damages, injunctions, and indemnification as recourse, through civil suits. Article 61 establishes the obligations for criminal enforcement and sanctions of IPR infringement on a commercial scale, and when done wilfully, stating:

"*Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity*."

The agreement also establishes a standard framework for border measures to be taken in the event of *prima facie* evidence that infringement is taking place. This would include the lodging of a complaint with customs to suspend the release of goods for entry into the country concerned. Under TRIPS, the use ex-officio powers by customs, which would enable customs to take actions on its own authority, is optional.

The TRIPS guidelines establish a basis for legal and practical approaches for national counterfeiting practices and laws; they leave it to the discretion of member states to apply these guidelines to small consignments and courier shipments below *de minimis* (low value) thresholds.

Table 2.4 provides a summary of the scope of the sanctions possible in Belgium, Brazil, Canada, France, the United Kingdom and the United States. Further information on the situation in the European Union and the United States is provided in Box 2.4.

Table 2.4. Scope of sanctions for illicit trade in counterfeits in selected countries

Scope of sanctions	Belgium	Brazil	Canada	France	United Kingdom	United States
Customs ex-officio powers?	Yes	Yes	Yes	Yes	Yes	Yes
Days to retain goods without application for action from rights holder?[1]	4 days	10 days	10 days	4 days	4 days	10 days
Criminal prosecution?	Yes	Yes (but rare)	Yes (but rare)	Yes	Yes	Yes
Maximum Sentence	5 years	1 year	5 years	5 years + customs penalties (up to 10)	10 years	10 years
Maximum penalty	EUR 100,000	n/a[2]	Up to CAD 1,000,000	EUR up to 10x value of goods	Unlimited	Up to USD 2,000,000 (first offence)
Civil enforcement?	Yes	Yes	n/a	Yes	Yes	Yes
Customs has authority to destroy suspected goods	Yes – EU Regulation (608/2013)	No – by injunction only	No – rights holder obligation	Yes – EU Regulation (608/2013)	Yes – EU Regulation (608/2013)	Yes
System to automatically record trademarks?	Yes – EU Regulation and OHIM enforcement database	Yes – 2013 National Trademark Owners Directory	Yes – but not systematic. Request for assistance can be filed	Yes – EU Regulation and OHIM enforcement database	Yes – EU Regulation and OHIM enforcement database	Yes – CBP registration

Note: [1] Time periods may be shorter for perishable goods in instances across countries; [2] Not available.
Sources: OECD Secretariat research.

Box 2.4. Criminal sanctions and civil remedies in the European Union and the United States

European Union

The EU adopted Regulation (EU) No 608/2013, in 2013, which, among other things, accelerates the ability of rights holders to initiate proceedings against a counterfeiting party, and for customs authorities to destroy the goods.

Rights holders may submit their application to customs for action on an annual basis, supplying customs information with technical data on the characteristics of genuine products, and a description to assist customs in their determination of infringing items. The rights holders are also required to register annually providing customs authorities with contact information and technical product specifications to be used to determine the authenticity of a suspect product. The new regulation also contains a provision for the destruction of goods without initiation of civil proceedings. Upon request from the right holder, goods suspected of being counterfeit can be destroyed without needing approval from the rights holder in every case. In most cases, the cost of destruction under this regulation is to be covered by the rights holder. In some cases, this means the destruction of certain product categories may incur significant costs to the rights holder.

Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights (IPRED) strengthens enforcement of property rights by enhancing and reforming the application of civil remedies in EU jurisdictions. The directive simplifies civil injunctions processes and guarantees rights holders certain abilities, including possibilities to request the seizure of productive mechanisms, and seizing financial assets. Moreover, the directive also covers measures to preserve evidence, the right to information, provisional and precautionary measures, corrective measures and injunctions. In addition, the directive reduces the burden of proof that rights holders must provide in infringement cases, requiring only that "reasonably available evidence sufficient to support its claim" be presented to courts.

In November 2017 the Commission adopted a Guidance Communication clarifying the provisions of IPRED where there were differing interpretations in EU countries. The guidance is more precise in a number of areas, including its scope, rules on obtaining and preserving evidence, injunctions, and calculation of damages. The guidance is based on rulings by the European Court of Justice and best practices developed in EU countries.

US criminal legislation for combatting counterfeiting: A two-track system for counterfeit prosecution

In the United States, civil offences for counterfeiting may be pursued under the Trademark Act of 1946 (also known as the Lanham Act). For criminal convictions, the federal Trademark Counterfeiting Act (TCA) is used to prosecute persons in the “most egregious instances of counterfeiting” (McKenna, 2014[15]). Whereas under the Lanham act, there is no mens rea requirement for civil penalties, criminal convictions require a much stronger degree of proof to ensure a successful conviction. This includes a demonstration of “indistinguishability” of the counterfeit product from the authentic one being copied. For this reason, civil cases are used much more commonly for enforcement of counterfeiting and trademark infringement laws. When criminal charges are brought against actors importing counterfeits, authorities commonly pursue prosecution with other serious offences, including money laundering, and fraud.

Sources: (EU, 2013[16]); (EP, 2004[17]); (McKenna, 2014[15])

Civil sanctions for counterfeiting

Once a rights holder decides to initiate proceedings against an importer/exporter of counterfeit goods, a civil suit can be filed. This is often the principal means of deterrence for IP related crime and counterfeiting. Civil suits are applied in the majority of countries as a system to obtain redress from damages or injury based on forgone profits and sales in the country of destination for the counterfeit goods. The cost of such suits can be very high. In the UK, for instance, a full trial may cost in excess of GBP 200,000 (Fellows, 2015[18]), thus presenting a considerable risk to the rights holder if it is not successful in its claim.

The burden of proof required in a civil case is associated with a probability of culpability (rather than a full burden of proof beyond reasonable doubt). However, in certain economies (such as Germany, Italy and Portugal), this risk is exacerbated by additional burdens of proof: a rights holder may have to prove intentional or neglectful infringement of trademarks in order to receive damages. Proving and determining intent can, however, be a difficult task, and may dissuade legal action.

A recent study by the European Intellectual Property Organisation (EUIPO) on the indemnification for lost profits and costs notes the recovery of legal expenses for cases brought against the offending party is highly variable, depending significantly on the practices of the civil court in question. For instance, in Italy, just 13% of court costs are recovered on average, whereas in Sweden, 100% of costs are recovered (OHIM, 2014[19]).

Criminal penalties for counterfeiting

A range of criminal penalties for counterfeiting are available, but, based on discussions and research, their application remains limited. Analysis carried out by EUIPO has found criminal cases against actors engaged in counterfeiting are less common than civil suits. Judicial authorities are known to seek criminal prosecutions in rare cases of egregious IP violations, when they occur on a large scale with significant impact on safety or security. In the United Kingdom, the Ministry of Justice recorded 490 convictions for Trade Mark Act violations in 2015 (UKIPO, 2015[20]). In the United States, in 2016, the number of national counterfeiting convictions for importing fake items totalled 68, according to US Department of Justice statistics.[5] In the United States, several cases of criminal prosecution relating to counterfeiting have included charges of money laundering and involved the application of proceeds of crime legislation and racketeering, laws. It appears, however, that there is limited use of ancillary legislation for counterfeiting offences.

Role of rights holders

Prior to seizure and the prosecution of counterfeiting offences, rights holders must submit applications for action in many countries; this may be done in advance, for a pre-determined duration. Relative to other forms of illicit trade in this report, the seizure of counterfeit goods is the only form of illicit trade requiring active participation from the private sector to seize and destroy goods and to prosecute offenders (for both criminal and civil penalties).

All customs administrations in the countries studied grant ex-officio powers to customs authorities to detain suspected counterfeits; however, these powers of detention are limited in time, after which goods must be released. During this period a decision must be made by the rights holder to initiate a potentially costly proceeding against the alleged

perpetrator of the infringement. In the countries studied, the time period ranged from 4-30 days. In other countries, the time allocation may be far less (1-2 days). The holder (or plaintiff) therefore becomes the party which decides whether penalties will be pursued.

In practice, rights holders will often not pursue legal action against an infringing party. Small to medium size trademark holders are particularly unlikely to pursue legal action due to costs. However, even large rights holders are known to refuse to initiate proceedings. Some companies follow internal guidelines for minimum threshold for goods to be challenged, based on the value or volume concerned; these internal thresholds can become known to counterfeit importers; this can severely undermine the institutional capacities to punish and deter illicit actors. This finding is particularly significant as over 60% of all seizures occur in the postal and courier mode, the majority of which contain 10 items per shipment, or less.

Customs authorities have also noted shipments of counterfeit products often contain several different trademarks mixed together, further complicating the decision to initiate legal processes. In such cases, rights holders may elect not to proceed due to legal cost considerations. When this is the case, the goods must be released by customs.

In some cases, rights holders must pay warehousing and/or destruction costs for the infringing goods, adding to the costs of challenging the products.[6] This may also be a deterrent for the prosecution of counterfeits due to the high costs incurred in the storage and destruction of these products, especially with respect to chemical or potentially hazardous products.

In some OECD countries the legal recourse to deter the counterfeiting of goods has shifted towards stronger penalties. In the United States, a series of legislative reforms were undertaken in the early 2000s in response to renewed pressures from industry regarding online piracy, but these modifications applied to physical infringements as well. The reforms included stronger criminal penalties and higher fines. Across Europe, countries have also strengthened IP legislation and penalties in recent years, recognising the increasing threat from counterfeiting. In Canada, legislative reforms increased sentences and created ex-officio powers for customs. However, in spite of these amendments, the institutional gaps to counter this form of illicit trade remain significant.

Situation in the BRICS economies

The report on Part two of the work on illicit trade[7] provides further information on the approaches taken to combat IPR infringement, in Brazil, China, India, Russia and South Africa (OECD/EUIPO, 2017[21]). All five of the BRICS economies have legal frameworks to protect IP and use somewhat similar approaches to enforcement. In general, legal systems in the BRICS countries provide some *de jure* authority for parties whose IP rights have been infringed to seek to have the infringing acts stopped and the counterfeit and pirated goods confiscated and, eventually, destroyed. In addition, laws generally provide that compensation can be sought through civil actions. The level of compensation is generally based on lost profits, sales or forgone royalties. In two of the economies, China and the Russian Federation, rights holders can forego compensation based on actual damages, which can be difficult to calculate, and opt instead for "statutory damages", which is a sum assessed upon showing an infringement has taken place.

The *de facto* reality in BRICS countries is that parties often are unable to enforce effectively their IPR in the courts or other government administrative fora, and often are

left without effective remedies. This reality was accurately summarised in the 2014 WTO Trade Policy Review (China), *viz*., "perhaps the more good news is that many challenges seem to stem from the application of laws, rules and regulations, rather than their content as such. The less good news however… is that much remains to be done in this area" (WTO, 2014[22]).

Statutory damages range from up to USD 79,000 in the Russian Federation, to as much as USD 462,000 in the case of trademark infringements in China (Table 2.5). Criminal sanctions are also available in the five jurisdictions, for most types of infringements. In addition, infringers can be subject to government fines in all five economies, particularly in criminal cases, where it can be in lieu of, or in addition to, imprisonment. In the case of China, the scope of fines is greatest; such fines can be imposed in non-criminal cases for patent, copyright and trademark infringement.

Table 2.5. Selected features of IP regimes in Brazil, China, India, Russian Federation and South Africa, 2016

Item	Brazil	China	India	Russian Federation	South Africa
Statutory damages availability					
Patents?	x	≤ USD 140 000	x	≤ USD 72 000	x
Trademarks?	x	≤ USD 430 000	x	≤ USD 72 000	x
Copyright?	x	≤ USD 72 000	x	≤ USD 72 000	x
Administrative civil fines					
Patents?	x	≤ 4x illicit gain (1)	x	≤USD 570(2)	x
Trademarks?	x	≤ 5x illicit gain (3)	x	≤ USD 2 900(2)	x
Copyright?	x	< 5x illicit gain 3)	x	≤USD 570(2)	x
Criminal sanctions (imprisonment and/or fines)					
Imprisonment or deprivation of liberty, up to:					
Patents?	1 year	3 years	x	5 years (4)	x
Trademarks?	1 year	7 years (5)	3 years	6 years (4)	5 years (6)
Copyrights?	4 years (7)	7 years (5)	3 years (8)	6 years (4)	5 years (6)
Fines:					
Patents?	✓	X	x	≤ USD 4 300 (9)	x
Trademarks?	✓	X	≤ USD 2 900	≤ USD 14000(10)	≤ USD 650 (11)
Copyrights?	✓	X	≤ USD 2 900	≤ USD 7 200 (12)	≤ USD 650 (11)
Other features					
IP courts exist?	✓	✓	x	✓	x
Parallel imports allowed?	?(13)	✓(14)	✓(15)	x	✓
Compulsory licensing possible?	✓(16)	✓	✓	✓	✓

Notes: National currency amounts have been translated into USD, based on average exchange rates in 2016 (see, See www.irs.gov/individuals/international-taxpayers/yearly-average-currency-exchange-rates). (1) If the unlawful gain is not known, a fine < USD 36 000 can be imposed. (2) Applicable to legal entities. (3) If the illicit revenue is less than USD 7 200, or is not known, a fine < USD 36 000 can be imposed. (4) Applicable when a group of persons or organised group of infringers is involved. (5) Applicable to cases which are deemed to be serious in nature. (6) For repeat offenders; first offence is for up to 3 years. (7) Applicable to infringement which is commercial in nature. (8) Applicable for repeat offences and certain types of copyright infringement. (9) Applicable to groups; fine can also be calculated on the basis of an amount equal to up to 8 months wage or salary of a convicted person. (10) Applicable to groups; fine can also be calculated on the basis of an amount equal to up to 5 years wage or salary, or other income, of a convicted person. (11) For repeat offenders; first offence is up to $376. (12) Applicable to groups; fine can also be calculated on the basis of an amount equal to up to 3 years wage or salary, or other income, of a convicted person. (13) Situation under review. (14) Allowed for patented goods; no rules for trademarked and copyrighted materials. (15) Allowed for trademarked but not copyrighted materials. (16) Applicable to patents.
Source: (OECD/EUIPO, 2017[21]).

The remedies available in the five economies are lower than those in some other jurisdictions. In the United States, for example, statutory damages for trademark infringement can reach USD 2 million, while those applicable to copyright can reach USD 150,000, in cases where the infringement is wilful (Yeh, 2016). With respect to

criminal sanctions, a first offence involving a trademark infringement can result in imprisonment for a period of up to 10 years and/or a fine of up to USD 5 million (in the case of organisations). Higher penalties may apply for repeat offences and offences involving physical harm. In the case of copyright infringement, criminal sanctions include imprisonment for up to 5 years and/or fines up to USD 500,000 (for organisations).

Protection of IP rights holders from parallel imports differs in a number of other areas. The Russian Federation does not allow "parallel imports", which are products marketed by a rights holder, or with the rights holder's permission, in one country and imported into another country without the approval of the rights holder. China, India and South Africa, on the other hand, allow parallel imports, in certain instances. It is not clear whether Brazil allows parallel imports as there are conflicting decisions in this area.[8]

Policy considerations

Despite reforms, the difficulties in detecting trademark infringement and the conditionality of seizures result in a limited capacity to counter illicit trade in counterfeits. While policy proposals and international legal consensus support the protection and enforcement of IPR, the role of rights holders as principal actors in determining whether actions will be pursued, and the financial burden and risks that the rights holders shoulder, are often constrained by gaps in legal regimes including inadequate scope of coverage, ineffective deterrent civil and criminal penalties, ineffective government agencies with whom to partner, and ineffective courts in which to litigate private IPR enforcement cases.

While counterfeiting affects specific trademark holders' profits, on a larger scale, the damage to institutions, revenue collection and public health have become more apparent over time. The consequences of the illicit trade in counterfeits are thus not unlike other forms of illicit trade. As a result, further discussion is needed on what policy or legal responses can be developed to more sustainably address the institutional challenges to punish and deter illicit trade.

Moreover, institutional reform appears slow to translate into enforcement priorities among law enforcement agencies. According to a survey conducted by the EUIPO, the customs administrations of EU Members often do set counterfeiting and IPR crimes with equal priority as many other offences such as narcotics trade and other forms of smuggling (DG TAXUD, 2015[23]).

There are a number of other concerns. While trademark infringement is treated as a criminal act under Article 61 of the TRIPS agreement, for example, enforcement action in this regard can be problematic as the enforcement procedures and responsibilities of government agencies may not be clearly defined. Another issue concerns the operation of global value chains; trademarks and logos may be exported from one location, while an unlabelled product or components arrive from another for final assembly and/or packaging in, for example, a Free Trade Zone where oversight and customs control is often not required and therefore TRIPS is not enforced. The prosecution of counterfeits in international trading hubs and zones requires further study, to understand what legal tools, including mutual assistance agreements, or reforms to the trading system, could be employed to foster greater cooperation for the identification and deterrence of IP crime at point of export.

2.3.2. Tobacco

In 2011, some 570 billion illicit cigarettes were consumed worldwide (OECD 2016). The unregulated, unlawful and un-controlled access to illicit or "cheap whites", counterfeits and contraband tobacco at lower, untaxed prices adds to the already significant health and safety risks of tobacco for the public, and undermines the tobacco reduction strategies of public health bodies.[9] Across the whole of the European Union, illicit tobacco represents over EUR 10 billion (USD 10.6 billion) in lost revenue annually (OLAF, 2015[24])

In the United Kingdom alone, it is estimated the global tax revenue loss on tobacco is over GBP 2 billion (USD 2.5 billion) annually, representing over 20% of the revenues generated from tobacco taxes. The profits from the illegal sale of tobacco often go to organised criminal groups which are also actively engaged in other forms of smuggling, including human trafficking and drug smuggling. Tobacco sale and smuggling have also been linked to the financing of international terrorist groups (HMRC, 2015[14]).

Trade in illicit tobacco has evolved in recent years. According to the European Commission, contraband cigarettes have steadily declined over the past 15 years, whereas "today's market sees an ever-growing share of "cheap whites" (OLAF, 2015[25]). According to Member States' seizure data, eight of the 10 most seized cigarette brands in 2013 were "cheap whites".

The illicit tobacco, particularly the trade in illicit "cheap whites", is considered a relatively safe area of operation by organised crime compared with other forms of illegal activity such as narcotics. Contrary to popular perceptions, the risk/reward structure of illicit tobacco makes the market for such products highly lucrative and attractive, particularly when there are significant taxes that increase the relative price differential between taxed and untaxed products. The July 2016 Eurobarometer report commissioned by the European Anti-Fraud Office (OLAF), and the DG Communication arm of the European Commission demonstrated "only a small proportion of Europeans recognise that the black market is one of the key revenue sources for organised crime groups" (Eurobarometer, 2015[26]).

In the absence of an international framework that deals adequately and specifically with illicit products that are otherwise legal, illicit tobacco will continue to be traded. Under current arrangements, illicit whites are used i) in carousel fraud,[10] ii) in transit schemes via free trade zones, where a container is intentionally "lost" as it is shipped through a zone, iii) in the under-valuation of goods..

In France, the Directorate-General of Customs and Indirect Taxes (Direction Générale des Douanes et Droits Indirects, DGDDI) has seen a steady increase in tobacco seizures over the past ten years. In 2015, it recorded a 50% increase from the previous year in tobacco seizures by volume, nearly tripling the figures from 2006 and 2007. While the increases in seizures cannot be directly associated with a one-to-one increase in the volume of illicit trade in general, it suggests a growing trend. Transport of illicit tobacco products through small parcels is increasing most, with organised criminal organisations using the online platforms opportunistically to market their products while increasing courier delivery (DGDDI, 2015[27]).

International legal frameworks

The difficulties in distinguishing illicit tobacco from licit products complicate the detection and seizure of illicit whites. As discussed below, a number of initiatives have been taken by the international community to address the situation.

The 2005 Framework Convention on Tobacco Control (FCTC) is a WHO-led initiative to reduce the global health risks posed by tobacco; it is legally binding in 180 ratifying countries. Article 15 of the convention contains several recommendations concerning the tracking and tracing of tobacco trade, cross-border data exchanges, monitoring and special licensing requirements governing tobacco movements, and provisions pertaining to penalties to deter illicit trade (WHO, 2005[28]).

A 2012 Protocol to Eliminate Trade in Illicit Tobacco Products is appended to the FCTC. Among its articles, this protocol establishes specific requirements for global supply chain control, and includes tracking and tracing requirements. The protocol specifies that dissuasive and effective sanctions, both criminal and civil, should be adopted to prevent illicit tobacco trade. The protocol has been ratified by 33 parties, which is currently below the minimum of 40 necessary for entry into force.[11]

In cases where tobacco smuggling meets the UNODC definition of a "serious crime", provisions of the UNTOC may be employed. Moreover, the provisions of UNCAC can be applied when corruption, including the payment of a bribe, is suspected. Both of these treaties call for the application of ancillary laws on money laundering, and seizure of the proceeds of crime. Existing information on the extent to which these additional remedies are being used is not readily accessible.

Criminal laws

In most countries surveyed, with the exception of Canada and the United States, there are no sector-specific or principal criminal laws covering tobacco smuggling that provide for specific sentences and penalties for tobacco-related crimes (Table 2.6). Instead, law enforcement agencies rely extensively on charges such as fraud and smuggling offences that are generic and do not specifically target one particular commodity type or product. In a 2013 communication from the European Commission to the Council and the EU Parliament, four drivers were identified as the enablers of illicit tobacco trade: substantial loopholes, inadequate supply chain control, significant challenges to enforcement, and low sanctions (EU/EC, 2003[29]). Similarly, a FATF report on smuggling found, "tobacco smuggling is attractive to criminals (or opportunists), for several reasons, including the generation of large sums of money for criminal reinvestment or funding lavish lifestyles, and the perception of lesser punitive sanctions or penalties if caught smuggling" (FATF, 2011[30]).

Table 2.6. Scope of legal sanctions governing illicit trade in tobacco in selected countries

Scope	Belgium	Brazil	Canada	France	United Kingdom	United States
Customs ex-officio powers?-	Yes	Yes	Yes	Yes	Yes	Yes
Laws specific to tobacco smuggling?	No	No	Tackling Contraband Tobacco ActS.C. 2014, c. 23	Yes	No	Yes (18 USCS 2341, et seq.)
If yes: maximum sentence	-	-	5 years	10 years	-	5 years
Licensing – official authorisation to sell, produce, export, etc.	Yes	Yes	Yes	Yes	Yes	Yes
National anti-tobacco strategy?	?	?	Yes	Yes	Yes	?
Ratified FCTC?	Yes	Yes	Yes	Yes	Yes	No
Ratified WHO Illicit Trade Protocol?	Signed	No	No	Yes - 2015	Signed	No

Source: OECD Secretariat research.

Policies and programmes

The absence of specific legislation covering tobacco smuggling means policy makers need to use generic laws and special programmes to address the challenges. As the situations in Brazil and the United Kingdom show, instruments for addressing tax evasion and customs offences such as smuggling are the most important for combatting illicit tobacco trade. In the case of Brazil, provisions of fraud and proceeds of crime legislation are not used; as a result, there are few effective penalties to interdict networks of illicit tobacco smuggling (Box 2.5). In the United Kingdom, however, the national tobacco strategy makes use of, among other things, fraud and proceeds of crime legislation; this approach appears to be having a significant effect on smuggling of illicit whites (Box 2.6).

Box 2.5. Sanctions applied to illicit trade in cigarettes in Brazil

Brazil is the country that has been most affected by illicit trade in cigarettes in South America. Of the estimated USD 900 million in foregone revenue from illicit tobacco across MERCOSUR countries, Brazil accounts for some 71% of this total loss (Ramos, 2009[31]). Several policy-based reforms have shown encouraging signs of increasing revenues and preventing the growth of illicit tobacco sales. From 2008 to 2013, the price of a pack increased from fewer than BRL 4 to BRL 5.5; at the same time, revenues grew while total consumption fell (Ross, 2015[32]).

However, while domestic growth in the production of illicit tobacco has been largely stifled due to reforms, the prevalence of imported illicit tobacco remains relatively unchanged. It is estimated that roughly 20% of tobacco consumed in Brazil remains illicit (Ross, 2015[32]).

While all MERCOSUR countries have implemented similar legislation to counter illicit trade, through criminal and monetary penalties, inadequate enforcement of these laws, differences in tax rated and varying enforcement capacities have enabled countries such as Paraguay to produce massive amounts of cigarettes, which are then clandestinely shipped to neighbouring countries, such as Brazil. An analysis of criminal sanctions and prosecutions of illicit trade has shown that convictions for tobacco related offences in Brazil are rare. In addition, tobacco is not considered an illegal product in any form, even contraband or illicit. The absence of a specific policy or law to treat illicit tobacco with greater harshness has allowed criminal organisations to operate with relative impunity. Few, if any, sentences related to trafficking, organised crime, proceeds of crime and money laundering legislation are imposed on illicit tobacco trade.

The situation suggests that a whole-of-government approach to tackling illicit tobacco is required to combat the illicit market. While domestic reforms for tackling illicit tobacco smuggling in Brazil have increased revenues and decreased consumption, the conditions in Brazil underscore the importance of developing a multi-dimensional response that includes international and multilateral dimensions.

Sources: (Ramos, 2009[31]); (Ross, 2015[32]).

Box 2.6. Sanctions applied to tobacco smuggling in the United Kingdom

In the United Kingdom, the prosecution of tobacco smuggling via criminal penalties such as excise fraud is being used widely. Under Her Majesty's Customs and Excise Tobacco Strategy, UK authorities seized more than 26 billion cigarettes and 4,300 tonnes of hand-rolled tobacco during 2000-14. Over this same period, there have been more than 4,000 criminal prosecutions for tobacco offences and the total illicit share of cigarettes in the market has fallen from 22% in 2000, to 11% in 2013-2014 (HMRC, 2015[14]).

The majority of the cases are prosecuted using fraud or smuggling penalties, which carry penalties of up to 7 years and 5 years' incarceration, respectively, and penalties that are unlimited, or up to 200% of the value of a shipment, in the case of smuggling. As previously mentioned, the United Kingdom has adopted a multi-faceted approach to tackle illicit tobacco trade. Its sanctions toolkit, for example, includes series of measures that could be pursued, including:

- Seizure of goods.
- Seizure of vehicles/vessels.
- Seizure of cash as the proceeds of crime.
- Criminal prosecution with a custodial sentence of up to seven years.
- Confiscation of assets as part of the proceeds of crime.
- Assessment for the loss of duty.
- Financial wrongdoing penalties of up to 100 per cent of the duty due.
- Civil action, including winding up orders and bankruptcy.
- Fines of up to GBP 5,000 for selling illicit tobacco not bearing the UK duty-paid fiscal mark.
- Prohibition on the sale of tobacco products for up to six months.
- Referral for withdrawal of hauler's license.
- "Naming & shaming"

Source: (HMRC, 2015[14]).

Policy considerations

A lack of broad international consensus and the absence of specific contraband tobacco legislation in most of the countries surveyed have led to significant institutional vulnerabilities. The deployment of ancillary laws, including border measures and other customs measures, and enforcement of criminal penalties for fraud are therefore needed to deal with illicit tobacco offences. As the situation in the United Kingdom shows, the use of national strategies can be effective in the case of tobacco smuggling. However, as the case of Brazil shows, in the absence of a whole-of-government approach, legal gaps enable illicit trade to continue to thrive, despite reforms. As the case of the United Kingdom shows, developing a multifaceted toolkit to tackle both domestic and international trade, alongside sanctions for both domestic and international criminal networks, can be highly effective.

The lack of a specific international framework that governs conditions or requirements for export and transit of tobacco products and that differentiates legitimate tobacco

products from illicit ones needs to be considered. The unregulated nature of trade poses a risk to revenue collection, health, safety and security, while providing organised crime with opportunities to generate significant revenues. Weaknesses in international cooperation result in a much heavier burden on individual countries to address the problem.

The lack of specific contraband tobacco legislation in many of the countries studied places additional importance on the need for countries to administer policies and national strategies that mobilise law enforcement to use other tools, including fraud, smuggling and proceeds of crime legislation, to prosecute and punish these offences using a broad range of ancillary penalties. The absence of penalties that are tied to the actual legal/illegal status of tobacco products and the focus on the conditions surrounding importation often result in illicit tobacco being subject to fraud offences or other, lesser punishments. Illicit trade is thus not sufficiently stigmatised; as a result court actions appear to diminish the severity of offences, treating them seemingly as minor crimes.

2.3.3. Narcotics

The global market in narcotics is considered to be the single largest type of illicit trade worldwide. Substances include opiates, cocaine, cannabis, and growth in psychoactive substances (NPS). The UNODC has noted that the trade in NPS has increased considerably in recent years, representing an increasingly large share of global drug trade flows. According to the 2014 UN World Drug Report, the number of NPS drug types has more than doubled over the period 2009-2013, which has created new challenges with respect to identification of the substances and eventual prosecution of offences (UNODC, 2014[33]). The challenges are heightened as NPS production uses precursor chemicals and purpose-built laboratories, and can take place in nearly any location around the world.

The online purchase and sale of drugs, including precursor chemicals, are a growing phenomenon, with parties relying on postal and courier systems as a system of delivery across the globe. Online storefronts are known to use anonymous network configurations to access sites on the “Dark net”, where they sell a wide variety of illicit substances and precursors. Untraceable crypto-currencies are often used to avoid financial scrutiny.

The ties between organised crime and drug smuggling are well documented. The adoption of new technologies, indicators and investigative tools specifically for drug interdiction has elevated the transaction costs of narcotics trafficking. The complex methods of dissimulation and coordination required to evade detection throughout the trade chain in response have continued to elevate the costs of concealment from law enforcement authorities. In response, organised criminal groups have become highly specialised in specific stages of the production, export, import and sale of the substances.

International legal framework

The UNODC Single Convention on Narcotic Drugs (1961), the Convention on Psychotropic Substances (1971) and the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) comprise the global framework governing the manufacture, import and export of narcotics. The global consensus on the illegal nature of these substances has facilitated actions to interdict trade at all points in the supply and distribution chain. The instruments are based on a shared notion that narcotics pose significant social and economic harm, foster organised crime and erode state institutions through, for example, corruption. This perception is reflected in the higher sentences and penalties often associated with narcotics trade. The 1988 convention, for example, calls

for boosting penalties through the use of proceeds of crime and organised crime legislation where possible.

Legal frameworks for criminal prosecution of illicit narcotics smuggling

Research conducted by UNODC has indicated penalties on the trafficking and use of drugs are among the highest in the world for non-violent offences (Lai, 2012[34]). Drug trafficking offences encompass acts of transport, possession and sale of illegal substances. They are often combined with customs related offences such as making false declarations, smuggling, fraud and other penalties. Research has shown that large scale trafficking is frequently used as the predicate offence for other serious crimes, including money laundering, transnational organised crime and the financing of terrorism.

Contraventions of laws on drug smuggling almost always face criminal sanctions. The determination of their severity can include the estimated size and value of the seizures of the narcotics, as well as the level of harm that the drug could cause. The "street value" of the drugs is one factor, but there are many others that could be considered aggravating factors that will increase the severity of punishments. These could include the abuse of authority (corruption), ties to organised criminality and involvement in the use of illegal? weapons or possession of weapons. Since narcotics cases are always criminal in nature, warrants, searches and seizures of further evidence are common; the processes can broaden the range of criminal sanctions available to authorities.

The length of punishment for the importation of narcotics and applicable fines vary widely among countries (Table 2.7). In the United States, the penalties for illegal importation of drugs can carry sentences of up to 40 years in jail for a first offence, and USD 5 million in criminal fines, which is higher than for the other forms of illicit trade reviewed. In several non-OECD countries, more severe sentences for drug smuggling, including the death penalty, are possible.

Table 2.7. Sanctions for illicit trade in narcotics in selected countries

Type of sanction	Belgium	Brazil	Canada	France	United Kingdom	United States
Maximum sentence	15 years	15 years	10 years	10 years (life sentence in some cases)	Up to life sentence	Up to life sentence
Maximum fine	?	n/a[1]	Up to CAD 2,000	Up to EUR 7,600,000 fine or 2.5 x value (customs laws)	Up to 3x est. value of drugs seized	Up to USD 5,000,000 of or 25,000,000 for organisations
Civil penalties	No specific penalties	None indicated	No specific penalties	No specific penalties	No specific penalties	In the case of trans-shipment or transport offences for shipping firm USD 25,000 fine
"Aggravating circumstances" increase penalties?	Yes	Yes	Yes	Yes	Yes	Yes

Note: [1]Not available.
Source: OECD Secretariat research.

2.3.4. Pharmaceuticals

Trade in counterfeit and substandard medicine is a significant threat that has a direct negative impact on health, potentially depriving users of appropriate treatment and contributing to global microbial resistance. Pharmaceutical companies also suffer a loss in revenue and reputation, and increased costs for security that result in turn in reduced incentives to invest in costly scientific research on new medicines. It is a huge industry; trade in trademark-infringing medicines alone (which could include some substandard products) amounted to more than USD 16 billion in 2013, meaning that about 3.3% of pharmaceuticals traded worldwide were fake (OECD/EUIPO, 2017[35]).

Successfully combatting counterfeit medicines requires more extensive information sharing across agencies and nations. Initiatives such as the Medicrime convention, treat the counterfeiting of medicines as criminal fraud against ill people, undermining public trust in the capacity of governments to provide effective health services (Box 2.7) (OECD, 2016[3]).

Box 2.7. The Medicrime Convention

In October 2011, a dozen countries signed on to the Council of Europe's Medicrime Convention, the first major international treaty to make dealing in counterfeit drugs and devices a criminal offence. The convention, which took three years to draft, requires signatories to have the necessary criminal law in place to detect, enforce and punish such crimes. Under the convention, it is a criminal offence to "manufacture, supply, offer to supply or traffic in counterfeit medical products; to falsify documents, to manufacture and supply medical products without authorisation; and to market drugs without complying with industry standards". The penalties are to be established by individual economies.

It was hoped that the convention would strengthen international co-operation and information sharing (Watson, 2011[36]). Notably, in the 2014 INTERPOL reports on pharmaceutical counterfeiting, numerous European countries positively commented on the Medicrime Convention (INTERPOL, 2014[37]) (INTERPOL, 2014[38]). In the six years since the signing of the Medicrime Convention, 27 countries signed on to the convention, but only 11 have ratified it, suggesting that this channel for combating counterfeit drugs is likely to face an arduous process.

Source: (OECD, 2016[3]).

2.3.5. Wildlife trafficking

The killing of endangered species and trade in rare animals has risen considerably in recent years. The crime of wildlife trafficking, falling more broadly into the category of environmental crime, is commonly viewed as a "low risk, high reward" activity for the parties involved (OECD, 2016[3]). The issue has been particularly important in sub-Saharan Africa, where the number of trafficked elephants and rhinos has grown at unsustainable rates that, if unchecked, could lead to the extinction of sub-species and threaten the existence of elephants and rhinos worldwide.

In South Africa, the number of rhinos poached for their horns has grown more than tenfold during 2009-14. Over the three-year period ending in 2015, over 100,000 African elephants were poached for their ivory. The trade in illegal wildlife products has been

valued at nearly USD 10 billion annually. Global networks of criminal and terrorist actors have been known to use poaching as a means to derive funds for the financing of their activities; in many cases, the proceeds contribute to the corruption of local authorities, and the erosion of institutions and public trust.

The unsustainable rise in trafficking of wildlife products threatens the livelihood of communities deriving economic gains from tourism and threatens global ecological balances. The economic impact of trafficking over the long term far exceeds any short term economic gains from the sale of the limited stocks of illicit wildlife products.

Globally, all countries and regions are affected from the trafficking in wildlife products. Most of the trade in ivory and rhino horns that takes place is managed by networks in sub-Saharan Africa and destination economies such as China, Vietnam and Thailand. Europe and North America are important players as well. Europe, for example, is the largest exporter of legally traded ivory labelled as "antique" to the rest of the world. In transit, European airports, ports and courier hubs serve as transit points for endangered species, including live species to be used as food products and even rare and exotic pets. For example, species of European animals, including critically endangered ones such as European eels from freshwater rivers across Europe, are consumed traditionally in markets such as China, contributing to a multi-million dollar industry in live animal trade.

International legal framework

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) governs international trade of species, and sets out classifications for over 35,000 animal types. The illicit nature of wildlife products is determined by the categorisation of these under the convention, which was signed in 1973 and currently includes over 183 parties. CITES contains three categories, which are used to classify species according to their level of threat for extinction. Controls on importation and exportation are established for each category. In the absence of compliance, trade in species under any three of these categories is banned.

When wildlife products are traded in violation of CITES rules, states are required to use sanctions to punish actors for such crimes. Penalties are administered for violations, in the form of civil or criminal penalties, as fines, imprisonment or other actions, which are to be determined by the state in question. CITES therefore does not specifically seek to harmonise or guide the type of sanctions.

Perceptions and institutional capacities

A UNODC study of 131 countries found that 72% of respondents did not consider wildlife trafficking to be a serious crime.[12] Of the countries surveyed, nearly one third imposed only a fine for trafficking endangered species (UNODC, 2016[39]). These figures are an important indicator of global attitudes towards wildlife trafficking.

In many instances, networks of criminals appear to act with impunity in the hunting, trade and sale of these species, particularly in source countries across sub-Saharan and East Africa. The transnational criminal enterprises that operate in both source and destination economies that are also operating money laundering and corruption rings are rarely prosecuted for the ancillary crimes. The weakness of institutions (notably the court and judiciary systems), and perceptions of wildlife trafficking as minor, inconsequential crimes facilitate the illicit trade.

The country assessments presented below indicate that further research is required to obtain a clearer understanding of the mechanisms that enable illicit trade to be carried out in an unfettered manner, that prevent reforms, and that inhibit, obfuscate or otherwise purposefully dismantle the ability of courts to properly prosecute illicit traders. Anecdotal research suggests that corruption and deficiencies in law enforcement, judicial proceedings and in the political sphere play significant roles in this regard.

Country assessments

A recent overview of legal instruments and enforcement actions was conducted for some 11 sources and destination countries by DLA Piper for the Royal Foundation in the United Kingdom. The study reviews the situation in Botswana, Cameroon, China, the Democratic Republic of Congo, Kenya, Malaysia, the Philippines, Tanzania, Thailand, Uganda and Vietnam. Key findings for some of these economies are summarised in Table 2.8.

Table 2.8. Overview of penalties for trading in illegally poached wildlife (tusk and horn) in selected source economies

Element	Botswana	Cameroon	Democratic Republic of the Congo	Kenya	Tanzania	Uganda
CITES convention in force	Yes	Yes	Yes	Yes	Yes	No
Criminal sanctions	Yes	Yes	Yes	Yes	Yes	Yes
Maximum fine	USD 5,740	USD 20,000	USD 20	USD 475	USD 308	USD 4,050
Maximum sentence	15 years for rhinoceros' horn; 10 years for elephants	3 years	1 year	10 years (usually an alternative to fine)	7 years	7+ years
Ancillary Legislation						
Anti-money laundering legislation can be used?	Yes	No	No	Yes	Yes	Yes
Corruption mentioned as a key barrier to justice?	Yes	Yes	Yes	Yes	Yes	Yes
Proceeds of crime laws (asset seizure)	Yes	Yes	No	Yes	n/a[1]	n/a1

Note: [1] Not available.
Source: (DLA Piper, 2015[40]).

The report shows there are punitive tools in place in various sub-Saharan source countries, and many countries of destination across East Asia. In destination economies, penalties applied are generally more severe. However, growing demand, and a lack of effective institutional capacities enable networks operating within black markets to continue to thrive. Evidence suggests there are significant constraints on enforcement activities and prosecution.

In the case of Kenya, many barriers still exist for the prosecution of illegal wildlife trafficking, despite significant penalties and/or reforms to the principal legislation (Box 2.8). The use of ancillary actions, such as application of money laundering and organised crime laws, remains difficult due to constraints in institutional structures and funding/resource issues.

Box 2.8. The Kenya Wildlife Conservation and Management Act of 2013 (WCMA)

Prior to adoption of the Kenya Wildlife Conservation and Management Act of 2013 (WCMA), trafficking in wildlife products carried sentences of up to 10 years. However, a review of jurisprudence conducted by TRAFFIC (a wildlife conservation and data collection agency) found that from 2008, only 7% of offenders were incarcerated after conviction for cases of ivory and rhino horn trafficking. Research attributed the low rate of prosecution to, among other things, the general perception of wildlife trafficking as a misdemeanour and poor case file management (TRAFFIC, 2016[41]).

The 2013 reform resulted in higher penalties and monetary fines; these included monetary amounts of approximately USD 200,000 in 2015 and/or life imprisonment for the killing of threatened or endangered species. While the legislative reform has led to several high profile arrests, there are still severe shortfalls in the prosecution of trafficking, reflecting shortfalls in the institutional capacities of courts to prosecute such forms of illicit trade.

Furthermore, the conservation authority with responsibility for enforcing the WCMA is not empowered to charge violators with ancillary legislation such as found in laws prohibiting money laundering and organised crime (TRAFFIC, 2016[41]). Other law enforcement bodies, such as the police, are required to investigate and prosecute such cases, but they never do predicate offences related to wildlife crimes. The administrative silos under which different law enforcement authorities operate deprive prosecutions under the WCMA from pursuing penalties available under ancillary legislation.

Sources: (TRAFFIC, 2016[41]); (Republic of Kenya Wildlife Conservation and Management Act, 2013[42])

Institutional challenges in source economies

Source countries appear to have considerable weaknesses in their justice systems, exhibiting inadequate capacity or lack of jurisprudence for moving against wildlife trafficking crimes. In many cases, offenders are provided with the choice of imprisonment or paying a fine, with the latter prevailing in countries such as Kenya and Uganda. Such fines can be low. In Uganda, for example, a group of poachers caught killing a mountain gorilla was fined just USD 14 per person. While these sums may represent a significant portion of monthly or yearly salaries they are not a deterring factor when well-financed international organised crime syndicates are involved.

Reviews of the enforcement of anti-trafficking laws reveal they are often not highly effective. Mandatory minimum sentences are not provided for, nor are sentencing guidelines; as a result judges may impose sentences which fall far short of the maximum levels allowed. In fact, there was little evidence provided in the report of maximum sentences having been applied. More often than not, it is noted, wildlife crime is treated as a misdemeanour or petty crime.

Corruption and illicit wildlife trade, it should be noted, are often closely related offences. In one instance, wildlife officers in Kenya were arrested on corruption charges for poaching the animals they were responsible for protecting. In Uganda, the army was said to have crossed into the Democratic Republic of the Congo and slaughtered 22 elephants, earning over USD 1million in profit. While pursuing corruption charges would be beneficial in fighting illicit trade, there are difficulties in doing so, given the significant resources required to pursue cases.

Institutional frameworks in destination economies

In destination economies, monetary penalties and custodial sentences are much higher than in source countries, and higher penalties tend to be applied (Table 2.9). In China, for instance, hundreds of cases have been reported where prosecutions resulted in life sentences. In Malaysia, a transit point for wildlife products that are eventually shipped to China, certain cases of wildlife trafficking have resulted in multi-year imprisonment. That said, there is still criticism that incarceration rates are rare and/or too low and, when applied, too lenient. Information on how laws are being applied, however, is relatively weak; efforts to improve the situation would be beneficial.

Table 2.9. Penalties for the import and sale of wildlife products

	China	Malaysia	Philippines	Thailand	Vietnam
Criminal sanctions?	Yes	Yes	Yes	Yes	?
Maximum fine	n/a1	USD 300,000	USD 20,000	USD 1,200	USD 23,000
Maximum Sentence	Life	7 years	12 years	4 years	7 years
Ancillary Legislation					
Anti-money laundering legislation used in wildlife trafficking cases?	Not frequent	Yes?	No cases	n/a[1]	n/a[1]
Corruption mentioned as a key barrier to justice?	Yes	Yes	Yes	n/a[1]	Yes
Application of anti-corruption legislation used in wildlife trafficking	Infrequent	Infrequent	Infrequent	n/a[1]	No
Applications of proceeds of crime laws	n/a1	n/a[1]	No cases	n/a[1]	No

Note: [1] Not available.
Source: OECD Secretariat research.

As in source countries, the prosecution and enforcement of criminal laws for wildlife trafficking in destination countries is marred by allegations of corruption, which is mentioned frequently in the literature. In Vietnam, non-governmental organisations tracing the flow of illegal wildlife products have noted that officials in positions of legal authority are alleged to be deriving personal gain from the trafficking of illegal species (TRAFFIC, 2012[43]). The use of ancillary legislation in such cases, however, is relatively low. Moreover, wildlife crimes are rarely used as the predicate offence for investigation involving money laundering or organised crime.

Policy considerations

The analysis above shows there are common weaknesses in the institutional capacities to counter illicit trade in source and destination economies for wildlife products. The ties between corruption and wildlife trafficking merit further research and more information on these ties needs to be collected and shared.

The tables of source and destination economies' institutional and legal capacities show the range of principal and ancillary actions that can be taken to counter illicit trade. A cursory review of jurisprudence, however, reveals that wildlife crimes are generally perceived as minor offences, and, despite reforms to judicial systems that have, among other things, enhanced sentences, there are still few cases of strong penalties being applied. Effectiveness depends critically on efforts that include border measures, local law enforcement actions and international cooperation. In addition, policies and programmes to enhance the institutional capacity to counter illicit trade are necessary to

provide direction and coordination. Finally, the prevalence of corruption, and the ties to organised criminality in both source and destination economies is of concern and point to the need for fostering institutional reform to address the situation.

2.4. Enhancing the effectiveness of penalties to counter illicit trade

Criminal proceedings are generally associated with heavier punitive sanctions than administrative sanctions, which are designed for "infringements characterised by a lower degree of criminality" (MAINSTRAT, 2008[44]).

Criminal cases seek to punish parties engaged in criminal activity, through financial penalties, incarceration and/or deprivation of certain rights and freedoms. The scope of criminal actions is greater than in civil actions, as they can include investigations, supported by search warrants, which can explore and uncover dealings beyond the narrow body of evidence revealed by the offence in question.

Both civil and criminal courts are used in the case of illicit trade and other related offences. In addition to administrative penalties, civil courts can also be used in cases where an offence is deemed to cause harm or damage, but the damage does not require criminal or severe charges. Civil procedures can be initiated by plaintiffs to sue for compensation and restitution, including damage and, in some cases, punitive damages to deter further infringements.

Evidence suggests national policies and practices towards illicit trade are bringing the two forms of penalty systems closer together in their use and interchangeability. Policy discussions on the relative costs of criminal systems and relative ease of imposing administrative penalties have led some governments to use civil penalties more frequently. Moreover, an increased focus on trade facilitation and cost reduction has created a push for corrective (administrative) action rather than punitive ones.

2.4.1. Merits of civil penalties to combat illicit trade

Civil penalties can play an effective role in deterring certain offences as civil proceedings i) require a lower burden of proof, ii) can be carried out more quickly, iii) cost less than criminal cases, and iv) can be used to provide plaintiffs with restitution. In the case of trade in counterfeits, civil penalties are the primary deterrence tool, enabling private rights holders to initiate proceedings to recover lost revenues from the infringing party. Studies have shown, however, that rights holders do not use of such actions in a consistent manner. With respect to the value of such actions, the EUIPO suggests that civil penalties can be most effective and useful if they are i) compelling and proportionate to the offence, ii) codified unambiguously to facilitate application of laws in a systematic and proven basis and iii) cost-effective for a plaintiff, providing some degree of certainty of a payoff. Costly court battles and uncertainty about the outcomes in administrative proceedings is, however, frequent, which diminish their value to plaintiffs.

As Table 2.10 shows, the scope of administrative penalties focuses narrowly on an infraction or infringement. The administrative proceedings cannot be used to uncover further evidence of criminality, or networks or organised elements through, for example, search warrants. As such, actors cannot be charged with ancillary offences such as money laundering, or organised crime; the deterrence value of civil actions is thus limited.

Table 2.10. Key differences between civil and criminal penalties

Element	Criminal penalties	Civil penalties
Monetary penalties	Yes	Yes
Punitive damages	Yes	No (except in rare cases)
Conviction of a crime	Yes	No
Possibility to expand scope of offence	Yes	No
Custodial sentences (incarceration)	Yes	No
Injunctions (e.g. cease and desist orders)	Yes	Yes
Ancillary penalties (such as those applicable to money laundering and organised crime.)	Yes	No
Plaintiff	Public	Private or Public
Burden of proof	Beyond reasonable doubt	Balance of probability ("51%")

Source: OECD Secretariat research.

2.4.2. Criminal or civil penalties?

Criminal sanctions against illicit trade are used to deter and punish serious offences considered to cause harm to the greater good or society. They are applied in cases where there is a demonstrable threat to the health, safety and security of persons, and where there are "moral violations" that are at odds with social welfare. Criminal acts often carry maximum and minimum sentences, handed down by a magistrate or judge. In criminal courts, the burden of proof is "beyond reasonable doubt". Incarceration (custodial sentences), restitution and fines are commonly used penalties.

The effectiveness of criminal sentences in deterring illicit trade depends on far more than the duration of the maximum prison sentence or the size of the fines. The effectiveness depends importantly on i) the efficiency of the judicial process, which can be compromised by court delays, procedural issues and the length of cases, and ii) jurisprudence, where the subjective views of a judge can influence treatment of a crime as serious or minor.

At European level, a 2011 report by Europe's customs coordinating authority, DG TAXUD, offered a review of EU Member States' application of civil (administrative) and criminal penalties for infractions under customs law. In this report, Member States were asked to consider a range of infractions, including smuggling, fraud and making false declarations. The study finds that the "boundaries between criminal and non-criminal treatment of customs infringements are diverse" across Member States. They are seen as having differing definitions, thresholds, and interpretations of customs laws. Even among relatively homogenous economies, uniformity is, therefore, rare.

The study by DG TAXUD and the research conducted so far on the choices between criminal and civil penalties lead to the conclusion that the use and flexibility of both criminal and civil penalties have merits, and no decisive guideline can be established for the specific use of either form of penalty.

The findings indicate that decisions to use criminal or civil penalties can rely on:

- Volume of goods seized.
- Severity of the infraction (based on social perceptions, social cost).
- Aggravating or mitigating factors (e.g. repeat offence, flagrant violations of trust).

- The perceived or intangible societal costs of the infraction.
- The cost of investigating and prosecuting an infraction (including the length of the court case and the likelihood of success).

Notes

[1] Counterfeiting and piracy are terms used to describe a range of illicit activities related to infringement of intellectual property rights (IPR); this report focuses primarily on the infringement of trademarks, the form of infringement that was found to be most common in the 2016 report, and uses the term "counterfeit" to describe tangible goods that infringe trademarks.

[2] The analysis also draws on findings from assessments carried out by other international organisations and multilateral bodies that specialise in law enforcement and illicit trade, including INTERPOL, WCO, Europol, DG TAXUD and the UNODC; it also makes use of proceedings from past meetings hosted by the TF-CIT.

[3] The terms ancillary and principal legislation are borrowed from the terminology employed in a DLA Piper report on wildlife crime (see www.dlapiperprobono.com/export/sites/pro-bono/downloads/pdfs/Illegal-Wildlife-Trade-Report-2014.pdf).

[4] See: http://ash.org.uk/media-and-news/press-releases-media-and-news/new-government-anti-illicit-tobacco-strategy/.

[5] See United States Department of Justice PRO IP Act Final Report 2016. Available at: www.justice.gov/iptf/page/file/947136/download.

[6] In EU Member States, under Regulation 608/2013/EU, when requested by the customs authorities, the right holder has to reimburse the costs incurred by the customs authorities, or other parties acting on behalf of customs authorities, from the moment of detention or suspension of the release of the goods, including storage and handling of the goods. If rights holders are liable for paying these costs, they are entitled to seek compensation from the infringer. Rights holders may, however, be deterred from seeking redress as infringers may be difficult to reach, particularly in instances where they become unavailable (e.g. when an importer ceases to exist as a legal person).

[7] See the report Governance Frameworks for Combatting Counterfeiting in Brics Economies (GOV/PGC/HLRF/TFCIT(2017)2/REV2)

[8] See for example P. Mena Barreto (2017), *Tackling grey market goods in Brazil*, World Trademark Review (70).

[9] INTERPOL defines illicit whites as "[n]ew cigarette brands (generally with registered trade brands) produced legally in one jurisdiction but produced intentionally for smuggling into other countries where there is no prior legal market for them. Tax can be possibly paid in production country, but that is rare (INTERPOL, 2014[8]).

[10] The term "carousel fraud" refers to misappropriation of Value Added Tax (VAT) by organised crime groups by misusing the way VAT payments are regulated in an international trade context between economies where there is a free flow of goods.

[11] See: www.who.int/fctc/protocol/en/.

[12] The UNODC defines serious crimes as those with a sentence of over 4 years in prison.

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3. Role of Small Shipments in Illicit Trade and its impact on enforcement

This chapter analyses the effectiveness of the governance frameworks to counter and to prevent the misuse of postal and courier streams as a delivery method for smuggling small packages containing prohibited or restricted goods. It provides an overview of current situation and identifies key areas for policy consideration including specific institutional and information gaps related to e-commerce.

3.1. Overview and conclusions

Recent evidence collected from law enforcement agencies indicates a significant growth in the use of postal and courier streams as a delivery method for smuggling small packages containing prohibited or restricted goods. This growth in small shipments has significantly impacted the institutional capacities of governments to effectively screen and interdict illicit goods. Criminal networks are exploiting gaps in these institutional capacities to perform their illicit activities.

Online sales of products have further complicated the situation, providing bad actors with a means to boost trade in small shipments as consumers are able to purchase items directly from suppliers, in small, individualised quantities. In effect, the importance of large firms and retailers as importing agents has declined, with consumers becoming far more active in this regard. This shift has affected the regulatory and policy framework for law enforcement, and the ability of customs, police and other relevant government agencies to stop illicit trade.

3.1.1. Adequacy of information and the role of intermediaries and vendors

Advance commercial information on small shipments is uneven or contains gaps. There are important data quality issues that remain due to omissions or mistakes in data (either accidental or intentional) that affect the risk-assessment process. Low information quality and the lack of information or description on small packages are important in this regard. The consequences are significant as the capacity of authorities to reduce risks to health, safety and the security of citizens is mitigated. In some instances, governments are working with courier and postal bodies to obtain advance commercial information. The postal stream poses the most significant challenge in nearly all countries covered by the 2016 OECD survey, due to structural gaps in obtaining data before arrival, and a lack of recourse for data inaccuracies.

Data quality remains a cause for concern in both courier and postal streams. When data quality issues arise, customs often have no recourse or redress when dealing with non-commercial actors.

There are important capacity-based differences between the courier and postal intermediaries that must be taken into account. Survey results and discussions with experts indicate that the postal stream represents a more important risk for illicit trade due to the frequent absence of proper risk assessment, reflecting the fact that accurate and advance data is less frequently available for postal modes. In the courier mode, advance information is likely to be more readily available, but effective (two-way) cooperation between express companies and customs administrations remains challenging.

3.1.2. Postal intermediaries

Postal intermediaries often lack the appropriate infrastructure to fully digitise shipments. The current international legal framework under the Universal Postal Union (UPU) does not require advance transmission of information that would be useful for risk assessing products. Updates to IT infrastructure are being affected by concerns over their affordability.

Several pilot projects are underway to tackle key information challenges in OECD and non-OECD economies. They are aimed at addressing ways to deal with the information gaps continue to affect abilities to stop illicit goods.

3.1.3. Courier intermediaries

"Data rich" courier intermediaries (i.e. express companies) pose a different set of challenges. Whereas postal companies are generally single national entities, express firms are a more disparate group and are not represented by a single international body. They are instead associated with industry groups, such as the Global Express Association and regional bodies, but these groups do not have the ability to dictate or enforce international standards. Couriers are, however, subject to the national regulations and laws in the jurisdictions in which they operate. Customs authorities have expressed concerns over difficulties in obtaining adequate information on shipments from courier companies. The limited ability to process data and information from various disparate sources has been flagged as an issue in this regard.

Discussions with courier companies indicate that efforts have been made to transmit electronic information on shipments to customs that would enable the customs authorities to carry out risk assessment and target suspect shipments more effectively. Courier companies in some instances are providing access to facilities, allowing customs inspection of goods upon arrival, and are working with enforcement to locate and seize accounts of clients known to use this mode for illicit trade.

3.1.4. Current successes in security and facilitation

Pilot projects focusing on national security risks for air shipments (i.e. explosives and other harmful products) are focusing on requirements for the provision of advance data, in electronic form, before the loading of goods onto airplanes. The projects, which are being carried out in the European Union, Canada, the United States, as well as other countries, have been successful in finding ways to secure advance data in order to help screen for threats. They have been based on effective inter-agency cooperation and public-private sector coordination.

3.1.5. E-commerce and illicit trade

The sale of illicit goods continues on large, web-based retail platforms and on independently hosted sites. New developments, including the use of social media and person-to-person encrypted chats, are also emerging as new transaction platforms to re-direct or finalise transactions. These mechanisms are in addition to known illicit marketplaces on the "dark web". Continuing to build partnerships among law enforcement, working with Internet service providers (ISPs) for website take downs, and developing agreements with e-commerce platform operators are important tools, but the rapid evolution of e-commerce necessitates a more systematic approach to tackling online illicit trade, focusing on ways to stop it at the source.

In markets such as the European Union, the role and responsibility of online intermediaries is provided for a number of directives. E-Commerce Directive 2000/31/EC establishes rules governing e-commerce that seek to remove barriers to e-commerce and provide legal clarity for businesses and consumers, while promoting an even playing field among economic actors. The provisions of the directive establish rules on transparency and clarify the liability of intermediaries. With respect to the latter, intermediaries are not liable if they fulfil the following conditions (EC, 2000[45]):

- Service providers hosting content, once they are aware of the illegal nature of the hosted content, need to remove it or disable access to it expeditiously.

- To be covered by the liability exemption they have to play a neutral, merely technical and passive role towards the hosted content.

As with couriers, the platforms of major e-commerce operators possess large amounts of detailed data and information on the description of goods being traded, their value, the vendors involved, the consumers and the histories of parties using the platforms. This information, alongside other important indicators, can be useful for risk-assessment. There are, however, few agreements between authorities and e-commerce vendors to facilitate information exchange.

3.1.6. Policy issues

Key policy issues are as follows:

- Courier and postal intermediaries face different challenges with respect to addressing issues related to illicit trade. Governments and international organisations should address each separately and reforms should be undertaken to strengthen mechanisms for detecting and interdicting illicit trade; cooperation amongst the different parties should be pursued in this regard.

- Pilot projects for enhancing air security involving small packages illustrate ways in which the exchange of important information can be relayed to authorities to enable them to make more informed decisions on transport risks. Customs should build on the good practices identified; this would include mandating preload advance cargo information and exploring ways in which the measures could be expanded to enhance the risk-assessment of small packages, with minimal impacts on legitimate trade.

- Customs should explore ways of using technology and innovation, including data analytics and machine-based learning, in more progressive, forward-looking ways. Large amounts of information are likely to be available electronically from parties involved in trade, and customs should find ways of integrating this information into their databases in a seamless manner, with a view towards improving risk assessment and the modelling techniques that they are using.

- E-commerce transactions are “faceless”, in the sense that transactions do not involve physical sellers or buyers, at least in a traditional sense; this complicates customs risk assessment as the supply chains can be highly disaggregated. (WCO, 2014[46]). Customs needs to engage with industry, promoting a compliance-based approach to develop trusted traders; large online e-commerce vendors can act as authorised economic operators (AEOs) not only for vendor-based revenue collection, but also for holding firms accountable for the products that are sold on their platforms.

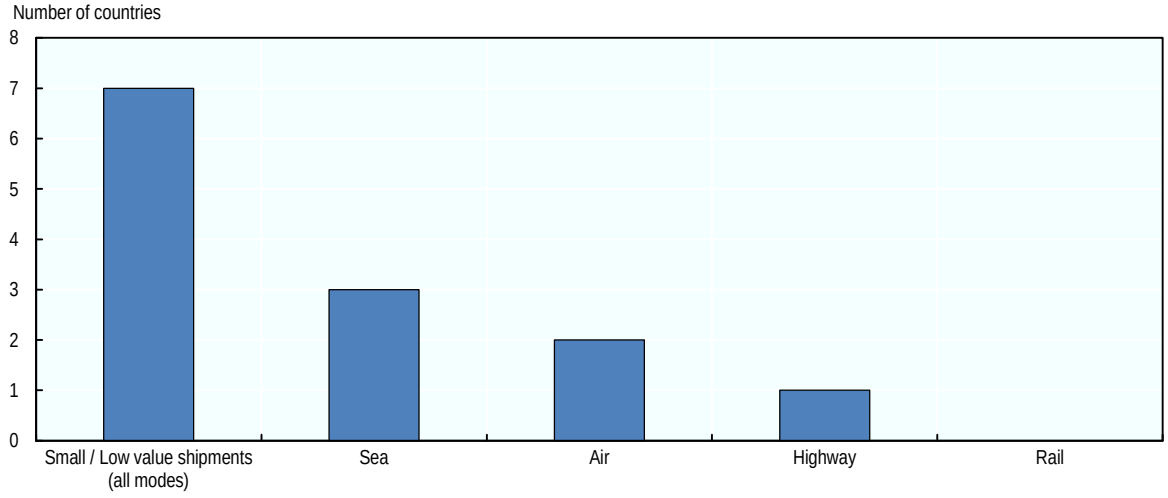
- Law enforcement would benefit from addressing the risks of cybercrime and illicit trade in e-commerce from a top-down approach. This would include shutting down web-retailers that engage in illicit trade and cooperating with foreign and domestic law enforcement entities to impose injunctions and pursue “take-down” requests of websites. Governments also need to develop new methods for maintaining forward-looking visions on the constantly evolving situation in cybercrime.

- Governments need to continue to collaborate with private sector and non-governmental actors to discourage the use of online retail storefronts as facilitators of illicit trade. Governments should secure commitments from the private sector to help prevent the advertisement and/or sale of illicit goods (in particular wildlife products and counterfeit products) on these platforms.

3.2. Small shipments and trade in illicit products

The growth of small parcels in international trade presents significant challenges for law enforcement authorities. Their ability to target and interdict illicit trade on a granular scale in ways that do not interfere with the legitimate flow of products is limited, as is their capacity to carry out effective risk assessment analysis and product inspections. Criminal networks that are engaged in the sale of illicit goods are increasingly exploiting the institutional gaps and vulnerabilities present in postal and courier operations. The seriousness of the situation is supported by the 2016OECD survey of member countries, where most respondents indicated that the growing volume of small parcels posed a major threat to their ability to combat illicit trade (Figure 3.1). E-commerce was also identified by a majority of respondents as posing a serious challenge.

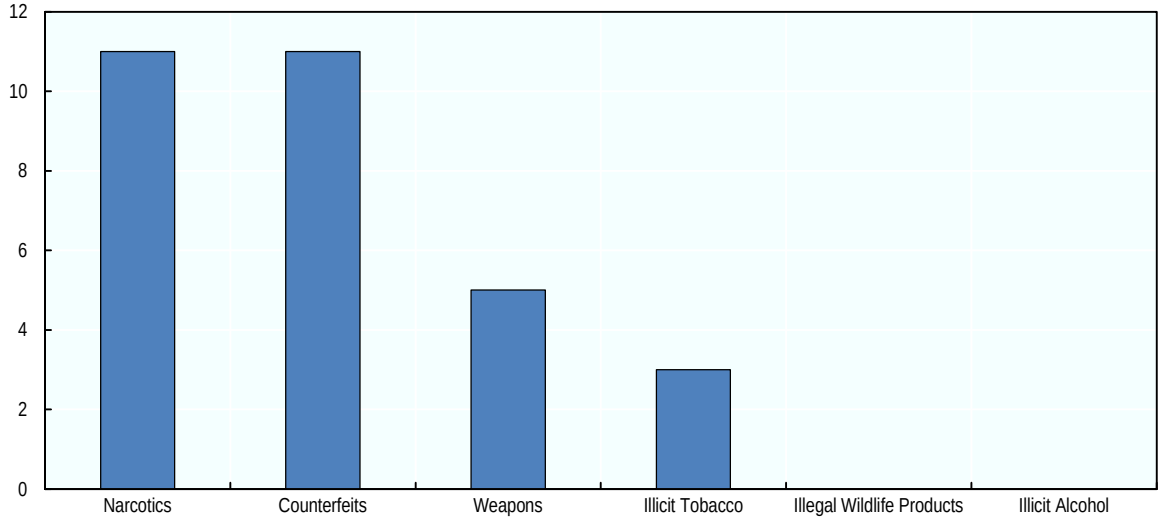
Figure 3.1. Highest risks for illicit trade



Notes: Based on fifteen country responses to the 2016 OECD Survey (see Box 1.1). The figures on the left scale correspond to the number of countries that ranked each risk in the above list as the highest one for illicit trade.

With respect to e-commerce, counterfeit products and narcotics were identified in the surveys as accounting for the most seizures, followed by weapons and illicit tobacco (Figure 3.2). For criminal networks, shipping in multiple, smaller consignments that are facilitated via online sales, helps to spread detection risks, and minimise losses from interdiction. This technique, commonly known as diversification, is a standard risk management principle that lends itself to the export and import of illegal products in small quantities, using parcels.

Figure 3.2. Most frequent types of seizures in small shipments



Notes: Based on fifteen country responses to the 2016 OECD Survey (see Box 1.1). The figures on the left scale correspond to the number of countries that indicated the types of illicit goods listed above as the most commonly seized via small shipments (three choices were possible).

The nature of the threats is evident in France, where illicit products are being shipped into CDG airport in small consignments (Box 3.1). Similar techniques are being used in the United States to ship opioids into the country (Box 3.2).

Box 3.1. Anonymity, and perceptions of impunity: A case study on illicit trade, small shipments and e-commerce in France

In France, e-commerce accounts for approximately EUR 72 billion in sales annually, and in Europe, that figure exceeds EUR 530 billion (FEVAD, 2017[47]). The exponential growth in e-commerce volumes have fundamentally shifted the way in which French customs must handle risks in the postal and courier streams for goods that are arriving from outside the European Union. In 2012, French Customs seized some 2.8 tons of narcotics, 29.5 tons of illicit tobacco, and 1.4 million counterfeit articles. Some 31% of all seizures in postal and courier modes were counterfeit products.

In a report to the French senate, French customs (DGDDI) notes that a majority of parcels and packages arrive by air via postal or express (courier) at Roissy airport outside Paris. From 2015 to 2016, e-commerce sales increased by nearly 15% per year, with over 40% of French online consumers having purchased goods internationally over the past year (FEVAD, 2017[47]). The amount of information available on these imports is far less than the data provided for conventional imports in the commercial (or high value) streams, and is not often received in advance. This lack of data affects DGDDI's ability to target and interdict illicit cargoes as automated targeting systems cannot be used. E-commerce items must be reviewed via visual inspection and with inspection tools on site. Combined with the vast number of parcels, this poses a significant challenge for customs; the lack of capacity to manage the e commerce trade has provided openings for illicit trade.

The report also describes how cyber criminals behind these forms of illicit trade are able to operate with relative impunity, noting that online transactions are often shrouded in anonymity, making interdiction increasingly difficult for customs. To counter this threat, in 2009 DGDDI created a specialised service to fight against cyber-criminality, and in 2015, legislative changes enabled this group to engage the illicit traders by conducting online purchase orders using pseudonyms (DGDDI, 2016[48]). Furthermore, there is evidence that small volume transactions are being used to evade taxes. The value of VAT collected in ports such as Roissy, for example, is minimal. Of the EUR 359 billion collected in duties and taxes in 2012, just EUR 750,000 was collected from express freight, and none from postal. DGDDI observes that revenues are being foregone, as commercial importers may be using small parcels or mislabelling higher value goods to evade taxes.

The report calls for several steps to be taken to facilitate and finance the operations of customs to address the new e-commerce related risks, including:

- Establishing an automated data interface with postal and courier companies for automated targeting processes, and an automated financial data exchange with payment service providers and proprietary information with Internet Service Providers.
- Working towards a system of VAT collection at the source (i.e. a vendor-based collection model).
- Re-evaluating the system of *de minimis* (low value shipments) in express modes as a result of fiscal fraud concerns.

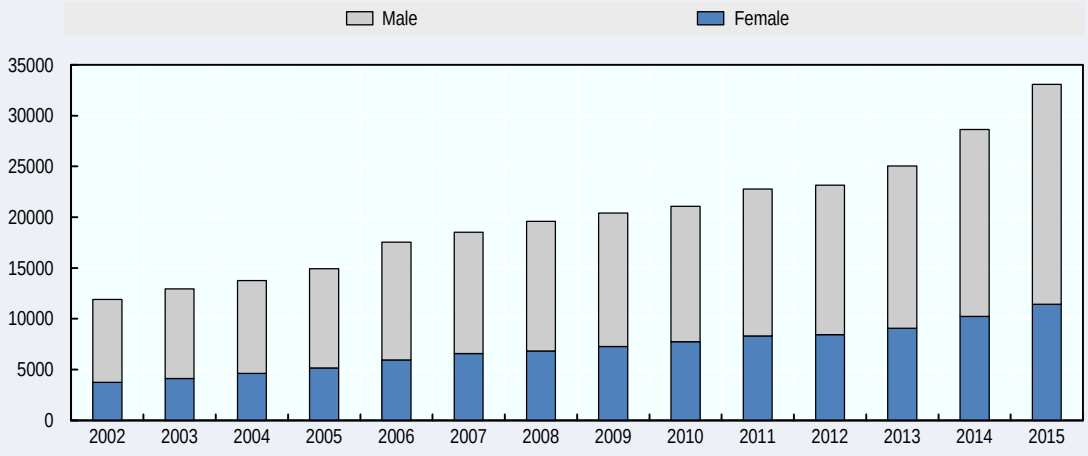
Adapting and revamping current information and targeting systems on the customs side to ensure compatibility with express and postal freight information.

Sources: (FEVAD, 2017[47]); (DGDDI, 2016[48]); (Sénat, 2013[49]).

Box 3.2. The use of postal and courier shipments to fuel the opioid epidemic in the United States

The recent rise in synthetic drug trafficking of narcotics such as fentanyl (and stronger substitutes such as carfentanyl, an elephant tranquiliser) has contributed to the recent drug overdose crisis in the United States and in other countries, such as Canada. Some 91 daily overdose deaths were recorded on average in the United States from opioids in 2015. Moreover, the number of deaths from fentanyl doubled from 2015-2016 according to preliminary figures from the CDC.

Figure 3.3. US Annual Opioid Overdose Deaths



Of the opioid classes of drugs, fentanyl is up to 50 times more powerful than heroin. It can be ordered online from source economies, and can be paid for in crypto-currencies. Fentanyl is then sent via postal streams in small boxes, packages and envelopes that are difficult to monitor and dangerous to handle for officers inspecting the goods. Up to 10,000 doses of carfentanyl, for example, can be contained in a single envelope. For law enforcement officers who may handle these goods, opening a package for inspection can lead to a fatal overdose. Officers must therefore exercise extreme caution when inspecting small packages, and all postal modes in Canada and the U.S are now equipped with special handling tools and overdose kits.

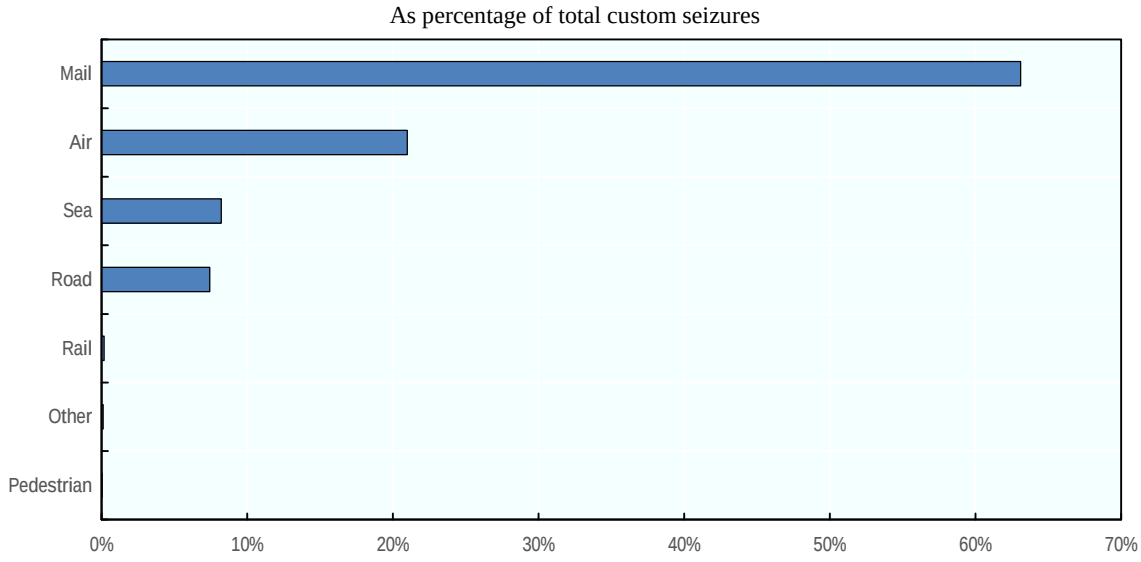
According to the US Customs and Border Protection (CBP), the primary mode of shipment for such drugs from international sources is via postal (mail facilities) and express consignment carrier facilities, and often in quantities that are less than 1 kilogram in order to evade detection. The significant volume of postal and courier shipments poses a serious risk to the institutional capacities of law enforcement to interdict such shipments on a large scale. According to CBP, advance commercial information is available for express and carrier importers, but postal information is still not generally required. Officers usually must rely on manual inspection techniques to interdict illicit trade in the postal mode.

Sources: (CDC, 2016[50]); (DHS, 2017[51]); (CDC WONDER, 2017[52])

3.3. The role of e-commerce in facilitating the diffusion of counterfeits

The 2016 OECD-EUIPO study on trade in counterfeit and pirated goods indicates that the majority of counterfeit goods (in terms of the number of cases) found their way into the economies of destination countries by way of small parcels, employing postal or courier routes solutions (OECD/EUIPO, 2016[4]). From 2011-2013, nearly 62% of seizures (by value) of counterfeits arrived via mail (i.e. via postal and courier routes) (Figure 3.4). In a market valued at over USD 460 billion, small parcels are thus the most popular conveyance method for counterfeit and pirated products. The rise in the number of small shipments sent by mail or express seems to be directly related to the rapid growth of the Internet, and particularly e-commerce.

Figure 3.4. Conveyance methods for IP-infringing products, 2011-2013

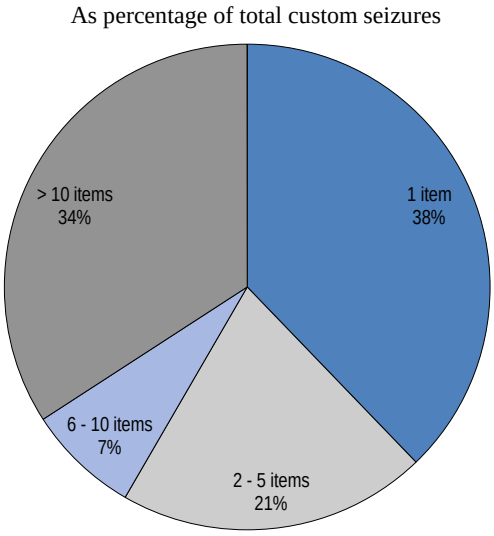


Source: (OECD/EUIPO, 2016[4]).

The 2016 report highlights principal provenance and destination economies, and establishes the most common commodity types in counterfeit trade. Commodities such as textiles, footwear, and jewellery are more commonly counterfeit than others. The report also identifies the key points of provenance, and destination of counterfeit products. Countries such as China, Hong Kong, Turkey, Thailand and Singapore are noted as the largest provenance economies. Provenance economies are identified either as important transit points in international trade, or as producing economies. Based on the analysis of EU trade data on counterfeits, China appears as the largest producing economy. Trademark holders whose rights are infringed are largely located in OECD countries, and include the United States, Italy, France and Switzerland as the main targets of counterfeit goods.

The majority of all counterfeit seizures were in small packages, with 10 items or less seized in the majority of cases (Figure 3.5). This also suggests that shipments in air mode and perhaps others may also have been intended for eventual courier delivery.

Figure 3.5. Size of shipments of IP-infringing products, 2011-2013



Source: (OECD/EUIPO, 2016[4]).

The 2016 OECD-EUIPO study on trade in counterfeit and pirated goods makes the observation that the share of small shipments, mostly by postage or by express services, keeps growing due to the shrinking costs of such modes of transport and the increasing importance of Internet and e-commerce in international trade. The findings and information contained in the counterfeiting report puts a significant value on the global trade in fakes, and provides important evidence for the significant exploitation of global logistics chains in small shipments. E-commerce platforms represent ideal storefronts for counterfeits. The use of online sales of fakes puts access to high or low-quality fakes at the fingertips of nearly every potential consumer with a mobile device or computer. The multiplicity of such websites and the difficulty of tracking the origin, sale and destination of the large number of parcels also complicate matters. For example, customs administrations have noted that expedited release with generic declarations for goods that include titles such as *"shoes"; "clothing";* or *"watches"* makes it very challenging to risk-assess goods based on description alone.

The reason for a growing number of counterfeits have become shipped in small packages may be that exporters and importers also face a relatively low risk of prosecution from shipping illicit products in the mail. Customs administrations have remarked that small numbers of fakes often do not draw legal action from rights holders, which do not deem the size of the detained small shipment to be worthy of legal action due to high costs of proceedings; such goods are therefore released. Importation of counterfeits via postal and courier remains a significant challenge for customs administrations due to difficulties in adequately targeting and seizing goods suspected of being fake.

Using e-commerce to market fakes can present an even more serious risk when the goods in question are counterfeit food products or medicines. Fake pharmaceuticals are noted to be traded in large quantities, and can be ordered online from websites. The OECD's 2016 report "Converging Criminal Networks" on illicit trade provides an overview of the illicit trade in counterfeit medicines. A particularly important element in the sale and distribution of these harmful counterfeits (that often contain inactive or dangerous

ingredients) are "online pharmacy" e-commerce web platforms (OECD, 2016[3]). Studies by the WHO have shown that of the drugs sold online via e-commerce platforms, more than 50% of the medicines were found to be fake. The report also finds that over 90% of sites did not require a prescription to purchase drugs online, and the majority of sites were not authorised vendors.

The use of e-commerce and delivery of small packages via courier and postal services of large quantities of fake drugs poses a significant and pressing challenge to law enforcement, police and health authorities. Often these drugs are sold at a significant discount, and often customs authorities do not have the resources or the technical capacities to interdict or differentiate fake pharmaceuticals. In addition, the rights holder for pharmaceutical products must be contacted to verify these goods, which further complicates efforts to seize and destroy these products. This, in turn, raises the costs of checks and detention for customs and presents additional challenges to enforcement authorities. Managing such a huge volume of seizures, from processing to destruction, in an environmentally friendly way, represents a significant burden on the operations of customs and costs to taxpayers (Europol/OHIM, 2015[53]).

For enforcement authorities, postal and express shipments containing counterfeit products tend to be more difficult to detect and to detain. Consequently, the misuse of e-commerce for counterfeiting purposes imposes an additional significant burden onto enforcement authorities (Box 3.3). Even though e-commerce offers businesses great productivity-enhancing tools, it also provides a powerful platform for counterfeiters and pirates to engage large numbers of potential consumers in a cost-effective manner.

Box 3.3. Commercial versus E-Commerce Import : Two Common Scenarios

The examples below are useful to describe the difference in process and procedures for the risk assessment, targeting and processing of shipments in traditional commercial streams versus low-value shipment (e-commerce) streams. The two examples are constructed using information obtained from various customs administrations and discussions with relevant stakeholders, and represent the general norm experienced among OECD economies for both types of shipments:

Commercial importation of footwear

For a commercial (large scale) shipment of footwear, a single declaration from a commercial importer is often made for one or more shipping containers, which could hold hundreds, or thousands, of pairs of shoes, tagged with relevant Harmonized System (HS) tariff classification codes for assessing duties and taxes. Several different shipping containers full of the same products could be consolidated under the same declaration and bill of lading. The accompanying documentation and export/import permits are used to conduct a risk assessment in advance of the physical arrival of the goods at the port of entry. The information available provides customs targeting staff with the ability to complete a pre-arrival risk assessment to determine whether the goods warrant physical inspection upon arrival. The importer is held to account for the accuracy of this information under the risk of civil and criminal sanctions, which include compliance-based regulatory penalties for infractions, such as monetary penalties and punitive fines. Registered business numbers for import are used for historical checks of importing trends and past infractions. Importers may also hold a status as an Authorized Economic Operator (AEO), providing customs with enhanced detailed information on the security and compliance profile of the importer or exporter in question. Goods are often also sent in bond to warehouses where they can also be audited and verified. For trusted traders, the shipments can also be liable for post-clearance audit, and other forms of commercial customs verification for compliance monitoring.

If the shipment of shoes is suspected of being counterfeit, the goods will be held and can be subsequently seized by customs. When the rights holder is contacted, a determination can be made to pursue civil action against the infringing party. Customs may also levy fines for mis-declarations and customs infractions. In the case of thousands of pairs of shoes, a rights holder will often elect to pursue this case against a large scale importer, and criminal investigations by the customs or police administration may also follow against the importer and exporters.

Personal e-commerce importer of footwear

Small (low-value) e-commerce shipments would include, for example, a single pair of footwear ordered online from an e-commerce vendor and expedited. In the postal and courier streams, parcels are x-rayed before departure for explosives and other high-risk indicators, but not for other infringements or prohibited substances (i.e. narcotics, pre-cursors, counterfeits, labels, etc.). If arriving via a courier company, customs may receive some data on the shipments in advance from the courier companies, but the information is typically not in a machine-readable

format for customs risk-profiling and can only be accessed on the courier company premises because of legal concerns with information sharing. If arriving in the postal mode, no advance electronic data is available. The shipment arrives among thousands of other small parcels in individually labelled boxes at the mail or courier centre for processing. There is often no background information on the importer, no way to verify data accuracy, and no past historical data. Risk assessment, screening and inspection must be done on a unit-by-unit basis, and must take into account varying details and routings of each parcel of package, relying on the description of goods at export (which may be improperly described or falsified).

If a shipment of shoes is suspected of being counterfeit, the pair of shoes can be held and subsequently seized by customs. When the rights holder is contacted, the party concerned may wish to pursue civil action against the importer. In the case of a single pair of shoes, civil action is rare, due to burdensome legal costs; destruction of the shoes may be authorised, but often the scale of the infraction does not warrant further measures such as criminal investigations or civil penalties. At times, the shipment must be allowed to continue to destination if the rights holder has not registered their trademark with customs.

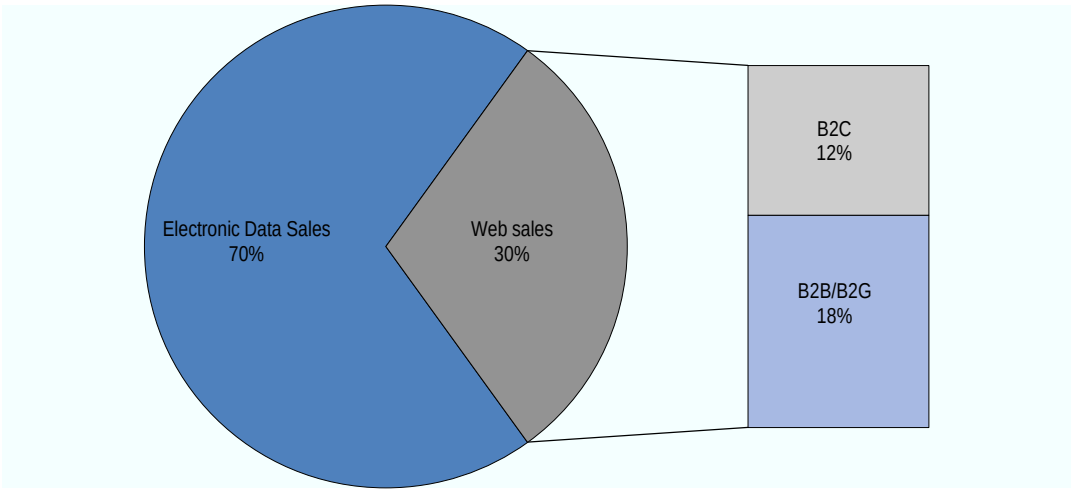
Sources: Internal consultations and discussions with Customs Officials.

In recent years, the growth of e-commerce) has significantly outpaced the growth rates of global trade (UNCTAD, 2016[54]). Technological advances in smartphones, tablets and online business platforms have revolutionised the way consumers purchase goods, affecting the distribution channels and logistics systems for their delivery. Small shipments are now a commonplace option for personalised orders completed online.

According to the 2009 OECD definition (which replaces the early definition from 2001), the term e-commerce "includes any transaction for the sale or purchase of goods and services conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders. Payment and the ultimate delivery of the goods or services do not have to be conducted online, while orders made by telephone calls, facsimile or manually typed e-mail are excluded" (OECD, 2011). However, discussions with law enforcement and member countries suggest that the areas of growth and interest to the OECD for this report are consumer-based trade, and the rise in small low-value shipments via small packages in postal and courier that have ensued.

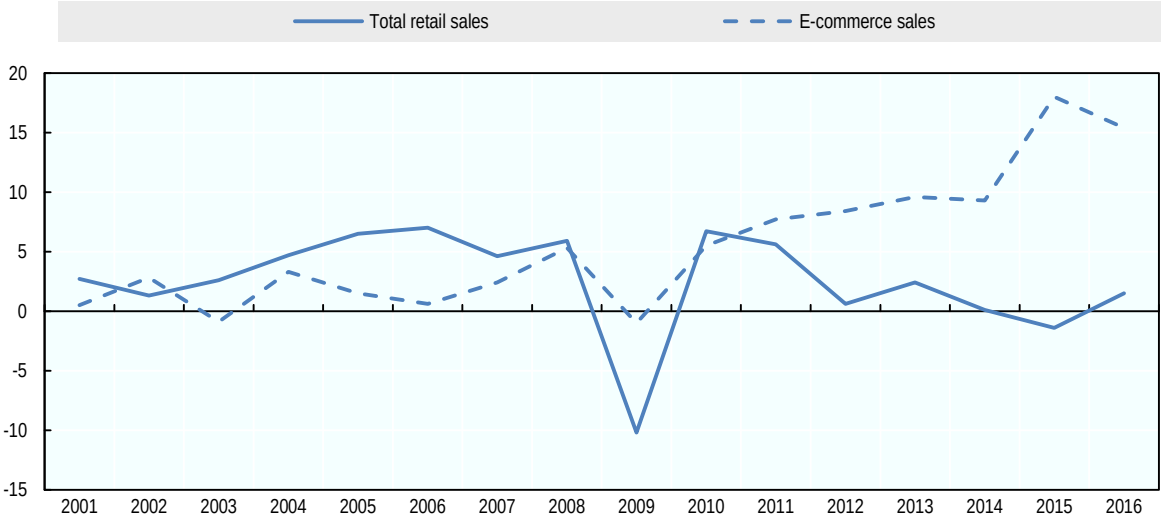
According to the above noted definition, e-commerce is largely made up of business to business transactions (B2B) (electronic data interchanges and B2B web-sales). Business to consumer (B2C) sales in the European Union account for just 12% of all e-commerce sales by value; nonetheless, B2C growth has continued to expand by over 20% per annum in recent periods (Figure 3.6 and Figure 3.7) (E-commerce Europe, 2015). In the United States, consumer e-commerce as a portion of all retail doubled from 2010 to 2015, to nearly 7% of all retail commerce. B2C e-commerce is predicted to double in global market share during 2013 to 2018, to USD 2.4 trillion (Statistica, 2017[55]).

Figure 3.6. E-commerce revenues in the European Union



Source: (UNCTAD, 2016[54]).

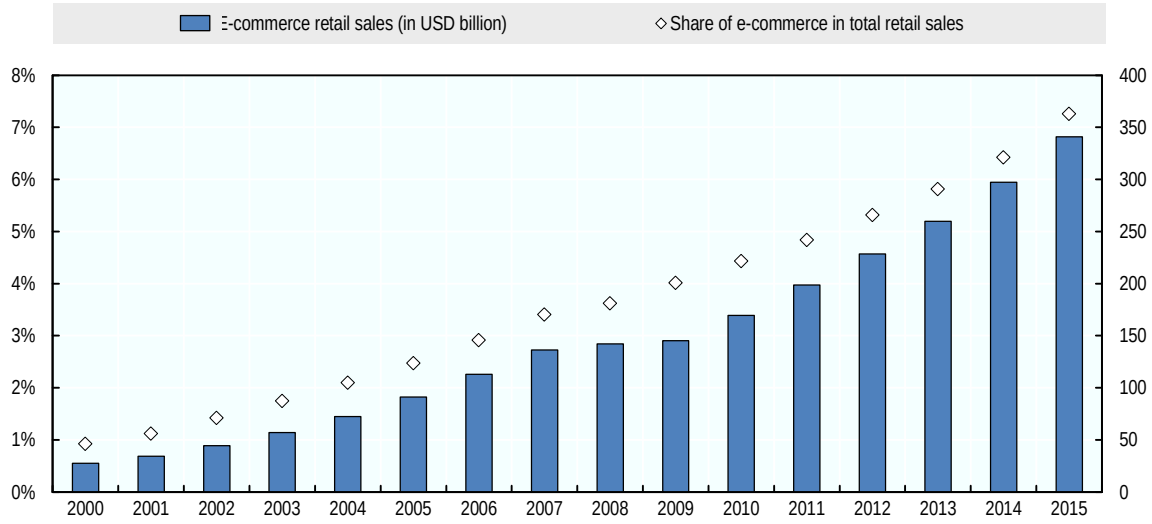
Figure 3.7. Total retail trade vs e-commerce in Europe – Index of turnover



Notes: Percentage change compared to same period in previous year. Calendar adjusted data, not seasonally adjusted data. Data are for the European Union (28 countries).
Source: Eurostat (2017), Short-Term and Business Statistics (SBS) Database – Wholesale and Retail Trade, http://ec.europa.eu/eurostat/cache/metadata/en/sts_esms.htm, last accessed in December 2017.

In the United States e-commerce sales as a proportion of total retail sales grew from 0.9% in 2000 to over 7% in 2015. The growth of consumer and retail e-commerce is facilitated by the access to online shopping via large retail websites, as well as hundreds of thousands of independent retailers.

Figure 3.8. Estimated annual retail sales of e-commerce in the United States



Source: (U.S. DoC, 2017[56]).

By 2018, global B2C e-commerce sales are expected to exceed USD 2.4 trillion annually (Statistica, 2017[55]). Markets such as China and other East Asian economies are some of the largest sources of this growth. E-commerce also holds many opportunities for growth and development of trade in developing economies. The increasing penetration of mobile data networks is facilitating access to online vendors and a range of products that may have been previously unavailable to consumers, while bypassing the need for large-scale retail solutions.

3.4. E-commerce and illicit trade in wildlife

The illegal trafficking of species and wildlife products, particularly sub-Saharan African species (including ivory and rhino horn), has reached unprecedented levels. Markets in Asia are most frequently the destination economies, but OECD countries, including countries such as Japan and members of the European Union and the United States also play important roles as transit, destination, and even source countries for rare species and illegal products. Recent research conducted by Europol finds that Europe remains a hub as destination, transit and source for various forms of illegal wildlife trafficking, whose high profitability and low-risk is further entrenched by shipments via e-commerce with relatively lower likelihood of detection (Europol, 2017[57]). According to recent seizure data from France, for example, customs (DGDDI) has noted a sharp increase in ivory and other wildlife trafficking seizures in courier streams at airports. Europe is also not excluded from wildlife trafficking as a source destination for endangered or protected species (Box 3.4).

Box 3.4. European Union as source transit and destination for wildlife products via e-commerce

According to figures by Interpol, between 2007 and 2011, small parcels, (many of which According to figures by Interpol, between 2007 and 2011, small parcels, (many of which represent online transactions) accounted for 22 per cent of illegally traded wildlife and wildlife products seized in the European Union. In recent years, seizures from the European Union have included various animals or animal parts that were likely to have been ordered online. These include numerous different species:

- 116 000 dead seahorses in Germany in transit from Peru to Hong Kong in May 2013.
- 152 ivory carvings from Kenya and Nigeria in Germany destined for Hong Kong in March 2014
- 170 specimens of radiated tortoise (CITES Appendix I) in parcels in transit in France.
- 60 000 tablets of Cape Aloe (CITES Appendix II) were seized in multiple parcels destined for France in 2014

Europe as a Source: European eel trade

The European Union is also a source for the illegal wildlife trade. In recent years, French customs have seized numerous shipments of live animals, notably European eels (Anguilla anguilla, in infant form, also known as glass eels) *en route* to Asia. After significant population declines of up to 95% in total populations, the eel is now considered to be critically endangered (IUCN, 2017[58]). With EU-wide restrictions, the international trade outside of the EU is banned. In infant form, these eels can be easily transported in the thousands in small boxes via air-mail. When shipped, the eels are worth up to EUR 1200-1500/kg in East Asian markets. Once at the destination, the eels are farmed until adulthood, and then sold at significant profit as delicacies. Seized eels have been found in air freight, and in smaller quantities in personal shipments from Western Europe towards the Eastern periphery countries, where they are then flown via air to their destinations in Asia. The likelihood that these are also being shipped via airmail is also high. In their legitimate (live) form, other species of European eels (such as American eels) can be purchased online and delivered via small packages around the world.

Europe as a source: Illicit "antique" ivory

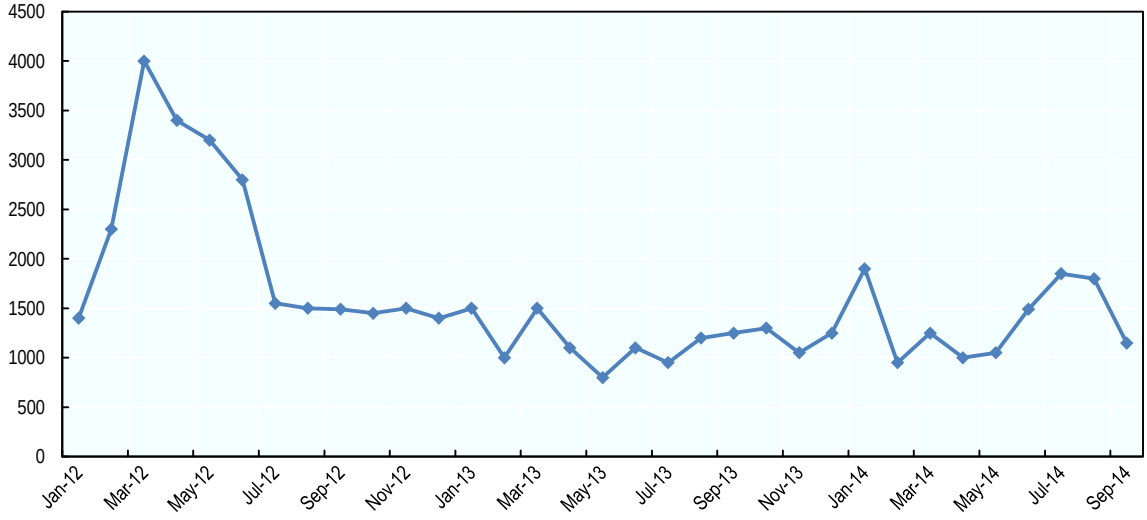
In Europe, wildlife products such as finished ivory are also known to be exported towards economies such as China, boosted by the recent growing demand for ivory in this region, and a considerable supply of existing "worked" ivory pieces in exporting economies. According to the European Commission, both legal (pre- CITES convention, antiques) and illegal pieces are known to feed Asian demand (EC, 2016[59]). Many "worked" pieces of ivory are smaller in size, or easily fit into small packages, making them an easy target for sale and export via e-commerce. Authorities in some countries, such as the United Kingdom, have moved to ban the trade in all ivory, including antique and pre-convention forms, to address this form of illicit trade as well.

Sources: (IUCN, 2017[58]); (EC, 2016[59]).

E-commerce and the online marketplace for wildlife trafficking

The wildlife trade monitoring network TRAFFIC, an international non-governmental body working on reducing the trafficking of endangered species and wildlife products, conducts work on e-commerce and its role in facilitating illicit trafficking of wildlife products to destination economies. In 2010, TRAFFIC established a monitoring system for websites and online e-commerce platforms and forums that have wildlife products for sale. In 2012, it found over 4,000 new online advertisements were posted monthly on Chinese language websites for the sale of products. Following engagement and official cooperation with the Chinese National Forest Policy Bureau, Chinese CITES Management Authority and 15 of the largest e-commerce vendors (including Alibaba, Tencent and Taobao), the parties moved to ban hosting of illegal wildlife ads. As Figure 3.9 shows, this led to a marked decrease in new advertisements.

Figure 3.9. Number of new monthly wildlife product advertisements (Jan 2012 – Sept 2014)



Source: (TRAFFIC, 2015[60]).

The work undertaken by TRAFFIC in cooperation with public and private sector stakeholders stands as a case study in the engagement of e-commerce vendors to work more effectively with governments and law enforcement to prevent the exploitation of logistics networks in e-commerce for illicit trade. In light of China's experience in effectively combating wildlife cybercrime, TRAFFIC plans to share China's best practices with other countries through cybercrime training and workshops for enforcement officials and private parties.

However the notable decrease in e-commerce advertisements may have pushed the use of e-commerce platforms and advertising to other, closed forums that continue to use web-based systems to conduct illicit trade. TRAFFIC has noted, for instance, a rise in social network-based sales and direct interaction, rather than open web-platforms, pointing to an evolving response to efforts to dissuade and remove supply facilitators.

Investigations indicate that criminal networks have moved to e-commerce via open and closed networks to operate surreptitiously and anonymously online. Information received from ongoing monitoring of these transactions indicates that the growth in social media-based transactions has posed an emerging challenge, which is further particularly to the

extent that the networks employed are encrypted. The adoption of anonymous network configurations and encrypted exchanges (otherwise known as the "the dark-web"), are growing challenges for law enforcement's ability to detect illicit trade in wildlife, but also many other illicit goods. The data provided from TRAFFIC in two reports "Moving Targets" and "Deadly Messaging" indicate that e-commerce is increasingly used on both web and social media platforms for illicit trade in wildlife products (TRAFFIC, 2015[60]). WeChat, the most popular social media platform in China, has large amounts of illegal ivory products posted. From May to July 2015, 58 identified WeChat accounts were examined on 47 occasions by TRAFFIC; a total of 10,650 advertisements of illegal ivory trade, consisting of 57,479 pictures and 580 videos, were discovered.

To help support international efforts at addressing this issue, a CITES CoP17 Doc.29 proposal submitted by Kenya on "Combating wildlife cybercrime" was accepted by the Parties during CoP17. The Decision 17.92-92 "Combating Wildlife Cybercrime" (in effect since 2 January 2017) directed Parties to, among other things:

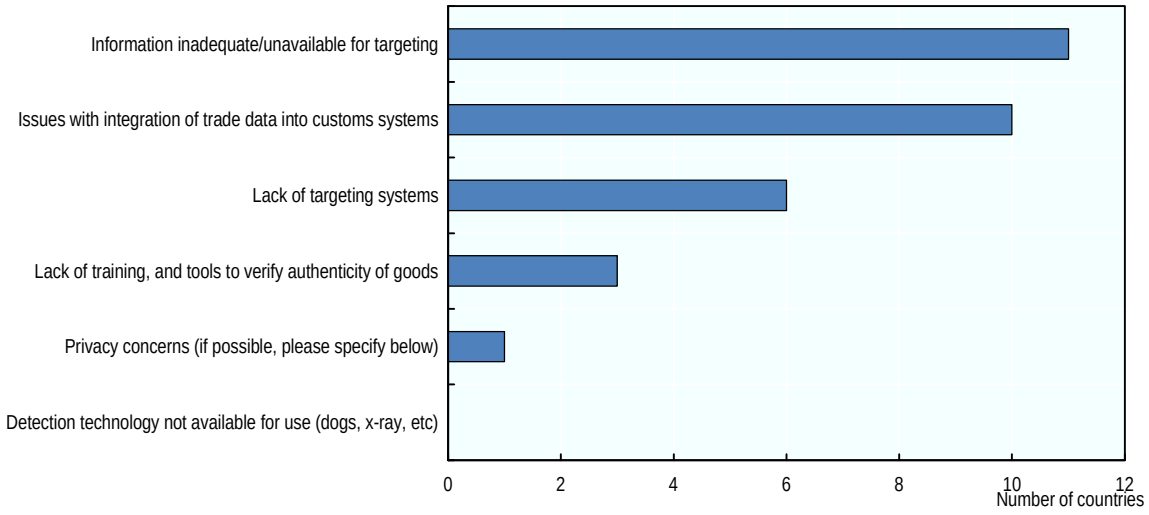
- provide the Secretariat with any changes or updates to domestic legislation that pertain to wildlife cybercrime as well as any other relevant domestic measures; and
- provide the Secretariat any best practice models that pertain to regulation of online marketplaces and social media platforms, including enforcement protocols.

3.5. Specific institutional and information gaps related to E-commerce

One of the main tools at the disposal of customs administrations for interdicting illicit trade is risk assessment. Risk assessment is commonly conducted using electronic systems that automatically integrate information and data elements, creating a risk score for each shipment. This risk score is then provided to the customs officers responsible for inspecting shipments so that they can target and identify those goods that present the highest risk for physical inspection. Due to the large volume of imports processed on a daily basis by customs administrations, risk assessment systems are an invaluable tool to help mitigate threats and risks while facilitating legitimate trade (i.e. without opening and inspecting all shipments). However, this model relies extensively on the acquisition and integration of relevant data that can be provided to customs authorities.

Country responses on the most significant challenges to law enforcements' ability to risk-assess and target illicit trade are shown below (Figure 3.10). The majority of country responses confirm earlier findings from discussions and related research that information is either of low quality, is unavailable, or that the data and information that is made available is not easily integrated into risk-assessment systems.

Figure 3.10. Most important difficulties in receiving, processing and risk-assessing parcels in the postal and courier modes



Notes: Based on fifteen country responses to the 2016 OECD Survey (see Box 1.1). The figures on the bottom scale correspond to the number of countries that mentioned the difficulties listed above as the most significant in receiving, processing and risk-assessing parcels in the postal and courier bodies (other than lack of resources). Three choices were possible.

For modern customs administrations, the institutional capacity to counter illicit trade hinges on the ability to use a number of tools to i) systematically risk-assess products at the earliest point in the trade chain without compromising accuracy of information, and ii) efficiently examine goods deemed to be high-risk, with the goal of stopping illicit trade while minimising impact on the flow of legitimate goods (Figure 3.11). The growing size of e-commerce has created vast amounts electronic data on e-commerce shipments. Logistics and courier companies, and to a lesser extent, postal firms, collect significant amounts of information. For instance, the name, address, and detailed description on products are obtained by courier companies for costs and for billing information, and to ensure the security of transport. Waybills, addresses, and contact details are also important for the delivery of the products. However, this information is often not conveyed to customs in an automated manner.

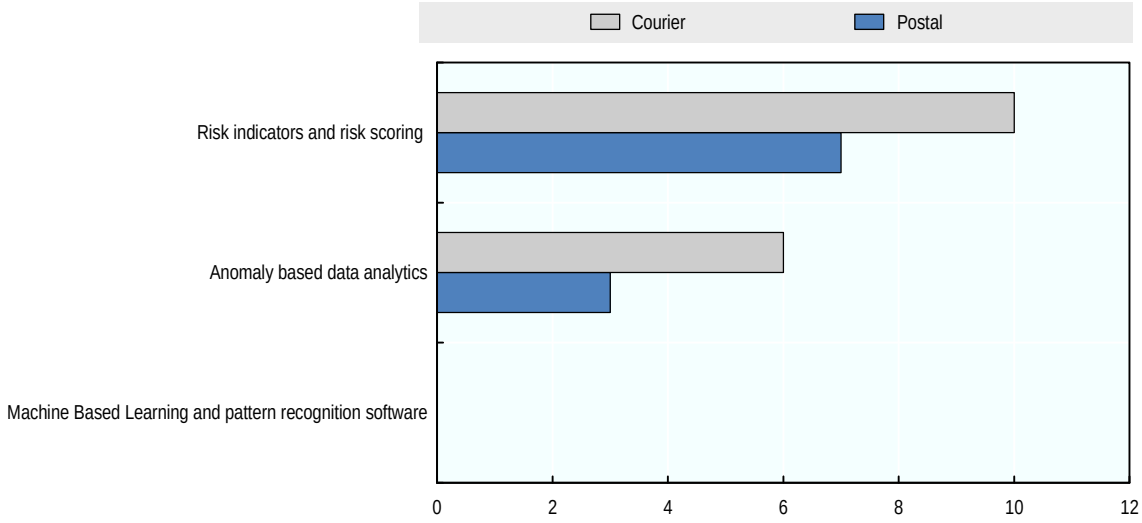
In instances where data is obtained electronically for e-commerce shipments, intermediaries get information on packages before departure, and will store and transmit this information for accounting, records and internal and external security screening (for terrorism and other product safety related concerns while *en-route* via air). However, many issues exist with respect to the transmission of data and information to customs. Based on discussions with various customs administrations, the OECD has identified the following issues with products shipped by courier and postal modes:

i) For postal shipments in particular, large data sets containing declarations are provided to customs with minimal advance notice or immediately at the point of requested release, leaving authorities with little or no time to effectively risk-assess the information.
ii) Information on shipper, consignee, and other information may be acquired by intermediaries well in advance of the arrival to the destination in electronic

format; however, this information may not be transmitted to customs due to a lack of existing arrangements (i.e. no legal obligation to disclose such information).

iii) Customs and intermediaries' data may also be in separate and distinct formats, and systems integration is often minimal; data cannot, therefore, be easily transmitted into customs targeting systems.

Figure 3.11. Use of risk assessment tools in courier and postal services



Note: Based on fifteen country responses to the 2016 OECD Survey (see Box 1.1). The figures on the bottom scale correspond to the number of countries that mentioned to use the risk assessment tools listed above for postal parcels and courier.

In some instances, customs officers are granted access to courier intermediaries' warehouses and facilities where small shipments arrive to review data on proprietary servers. In discussions with customs administrations, there are, however, many instances where the data cannot be shared with customs, thus preventing the transmission into customs risk-assessment systems. The discussions held with several governments have confirmed that in various instances, there are important gaps in the institutional capacity to effectively risk-assess shipments in advance, or in a systematic fashion due to issues with information exchange.

3.5.1. Information quality for small shipments

For both postal and courier modes, the declarations and description of the products arriving may lack detail, information and accuracy, leading to challenges in properly risk-assessing products. In commercial shipments, the onus is on the importer to ensure accurate declarations, as this information is required to for tariff collection purposes, and compliance with commercial requirements. Risks to the importer in the case of mis-declaration or under-valuation of products can include civil or criminal penalties.

In the small-shipments stream, information accuracy has been identified as one of the largest challenges affecting customs ability to effectively risk-assess small shipments via postal and courier modes. Data quality issues are common due to human error and lower data requirements. The verification and compliance requirements for this cannot be effectively enforced due to resource constraints and lack of recourse. Customs

administrations have identified this issue as a major institutional gap in their ability to adequately interdict illicit trade in small parcels.

3.5.2. Advance information

Some customs administrations have implemented advance commercial information agreements with certain courier companies, enabling a review of limited data elements in advance of the arrival of shipments. The receipt of advance information for postal companies, however, remains a particularly challenging issue.

The provision of advance information is critical for customs authorities as it enables them to enter the data into automated risk assessment programs in a timely manner, thereby facilitating their ability to single out high-risk goods and facilitate low-risk products. Provision of advance commercial information is becoming more common, enabling customs authorities to, in effect, "push the border out" as risk-assessment for health, safety and security can be carried out prior to the arrival of goods; the buffer time can be used by customs to carry out risk-assessment on the products and select those goods requiring enhanced screening or inspection while immediately releasing low-risk goods into the economy. EU regulations under the Entry Summary Declaration (ENS) require data for targeting and risk-assessment purposes to be provided up to 24 hours in advance for maritime commercial shipments and four hours in advance for commercial air, road and rail shipments. In the postal and courier modes, there are however no current requirements to require ENS prior to arrival.

For small shipments, the integration of accurate advance information has proven difficult not only due to the above mentioned issues of data quality, but due to integration of IT systems, and lack of digital information. Table 3.1 summarises EU regulations for advance data first for illicit trade targeting and second for security purposes.

Table 3.1. Example of EU regulations for submission of advance data for illicit trade risk assessment

	Commercial Air*	Commercial Maritime	Commercial Road and Rail	Low-Value Postal**	Low-Value Courier**
EU Requirements for Pre-Arrival Data for Targeting for	4 hours before arrival or "wheels up" (if flight is shorter than 4hrs)*	24 hours before arrival	4 hours before arrival	Exempt	Exempt
Pre-Load Advanced Cargo Information (security screening)	Yes	Yes	Yes	Yes	Yes

Notes: *For all air shipments, pre-load data is provided and screening (x-ray, etc.) may take place prior to take-off for security reasons. However, no risk-assessment takes place for prohibited goods for reasons of targeting; **It should be noted that all small shipments use air, highway, rail and maritime shipping methods. However, these packages are defined not by their method of transportation but their low value, thus placing them in a category of their own.
Source: (EC, 2016[61])

As the table above shows, EU regulations have established a framework for advance pre-load information on targeting for security-related threats across all commercial modes and small shipment modes, including screening for improvised explosive devices/. However, for targeting purposes, information is not yet available in advance for courier and postal deliveries. This illustrates the common capacity gaps in the ability to effectively risk-

assess and interdict illicit trade conducted in the postal and courier streams via e-commerce.

3.6. The role of shipping intermediaries in stopping illicit trade

Both postal and courier companies play a vital role in the fight against illicit trade and the converging criminal networks that underpin these global flows. The arrival of goods into the custody of shipping firms is the most opportune point of access for customs and law enforcement to apprehend and detect illicit products prior to enter into an economy. However, information and data on the millions of boxes is essential to assess how and where to look for the proverbial needles in the haystack. As the section below notes, postal and courier services each pose their own challenges for authorities.

3.6.1. Postal services

With large, centralised warehouses to process and intake international mail and packages, postal companies have a history of working with customs administrations and have served as the point of intervention for inspection of international parcels. From 2011 to 2014, the number of small package deliveries via mail has grown by nearly 50% globally (UPU, 2016[62]). This growth has created important pressure on the capacities to monitor and interdict illicit trade at postal facilities (see Box 3.5 and Box 3.6).

The most important challenge identified by postal administrations is a dearth of pre-arrival information. The significant growth in parcel volumes signifies that officers operating within postal facilities are required to do much of the inspection in a manual manner, immediately upon arrival. Governments have responded to this challenge by developing pilot projects and postal modernisation schemes that include national and multilateral strategies. This includes the integration of customs screening and inspection infrastructure into the postal processing chain for physical inspection upon arrival. These strategies involve the use of systems to divert packages for inspection, automated scanning of parcels using x-ray, and other technologies. The goal is to increase speed of inspections while minimising their impact, providing customs with ease of access along certain points for officers to inspect and review shipments.

Large “dumps” of parcels arriving by plane or truckload are difficult (if not impossible) to risk assess and target appropriately without sufficient advance information or data to review declared contents. Discussions with customs administrations and postal agencies have indicated that progress has been made in several OECD countries to update equipment and scanning technologies and to improve the access of customs to packages for rapid inspection. Nonetheless, the physical inspections of parcels remain only a component of the institutional capacity of customs to counter illicit trade in small packages.

In some countries, postal bodies receive electronic information on shipments prior to arrival from foreign postal counterparts. If a cooperation agreement or working level agreement exists with the customs authority in that country, the postal organisation can then share this information for risk assessment prior to shipment arrival. However, quality issues remain an important obstacle.

Box 3.5. Current challenges faced by postal services

Postal services are considered to be "network" industries that, alongside other such industries (that include electricity and communications), have traditionally been public monopolies. Postal services began to face reforms and pressures for privatisation in the 1990s, and today continue to face rapid changes from declining volumes in traditional letter (mail) deliveries and growing volumes of parcels (small packages). Reforms include privatisation and expansion of activities to include courier/express deliveries. However, most countries still require postal services to guarantee universal access to mail and postal-based services. In Europe, the European Union has passed Directive 97/67/EC as part of an initiative to ensure that a minimum degree of service is maintained, but also requires that postal services be subject to fair competition from private courier services.

Postal services' provision of letter mail has declined steadily, and currently represents on average less than half of the revenue generation for the top 20 largest postal bodies in the world (UPU, 2016[62]). The loss of business in letter mail has been replaced by the growth of small shipments, many of which are sold via e-commerce. While e-commerce represents a growth market for postal services, they increasingly face competition from rapid delivery courier services from private logistics companies. Overall, the reduction of letter mail has eroded a traditional source of revenue for postal services, while the growth of e-commerce has thrust the traditionally monopolistic entities into a highly competitive market. This has resulted in significant new challenges for this industry.

Postal regimes are governed by a specific set of guidelines agreed upon by the Universal Postal Union (UPU), a treaty level agreement associated with the United Nations, with over 192 members (UPU, 2014[63]). Contrary to conventions under the WCO (such as the RKC), the regulations set forth by the Union are binding on member countries and are not subject to reservations (Art. 22). The UPU sets forth regulations for the format of mail and postage universal "language", including mandatory and optional data elements. For packages above a certain weight (parcels), certain mandatory data are required to send packages via the mail. Moreover, information must be provided to customs for shipments below a value of approximately EUR 300, through form CN22. Under the agreement, customs are required to accept packages based on this information provided. The data elements provided in the CN22 are, however, limited for risk assessment purposes; furthermore, these documents are not required to be submitted electronically in advance.

The UPU CN23 is intended as the next step for parcels, and is currently employed in the European Union for parcels whose values are greater than EUR 300 in value, but are less than or equal to EUR 8,000; more detailed information is required in these instances, including the name and address of sippers, and other information that would be useful for risk assessment.

The European Union has piloted a project under its "2020" project to ensure that the data elements required under the CN23 are provided in advance under the Electronic Notification System (ENS) of advance data. The project attempts to identify elements that can be used i) for immediate risks (i.e. "bomb in box") as well as ii) for customs declaration and risks related to illicit trade. The results of the pilot project have indicated its feasibility for widespread application; however many barriers remain, including legacy infrastructures and slow IT development which have led to delays in the program's implementation.

Sources: (UPU, 2014[63]); (UPU, 2016[62]); (EC, 2016[64])

Box 3.6. Australia - New Zealand Secure Trade Lane (Green Lane) Initiative

To respond to the growing challenges and risks associated with the rapid growth of B2C and C2C commerce, New Zealand Customs and the Australian Department of Immigration and Border Protection [DIBP] have jointly developed a model for a secure trade lane between New Zealand and Australia for trusted traders. This model exploits current frameworks for cooperation, such as the UPU Customs Declaration System, and relies on standard-setting agreements between the WCO and UPU for message language. This "Green Lane" project secures the postal stream between two countries on a bilateral basis, by sharing data and reducing reliance on border measures at arrival. The goal of the project is to enhance facilitation while adding dimensions of security that were otherwise unattainable.

The system pilot relies on data that is provided from authorised economic operators (AEO) trusted traders that pre-screen data which can then be scored as "low-risk". The classification of large portions of commerce into "green lane" then enables officers to dedicate resources towards other more challenging shipments that do not have trusted status. The multiagency initiative involves six agencies, including customs and postal bodies, and other government departments that are concerned with health and safety matters. Currently underway are tests to explore the reliability of "green lane" shipment can data, how trusted and non-trusted expediters can be identified, and how to improve speed and facilitation. The project is enabled through a bilateral Mutual Recognition Agreement for AEOs that was reached between both border agencies; the longer term goal is to expand the initiative into a regional one that combines bi-lateral agreements into multilateral ones through replication of partnerships. Expected benefits of this pilot include:

- Faster clearance and release of low-risk e-Commerce items.
- Faster delivery and service for clients.
- Cost savings and resource optimization towards high-risk items
- Improved data quality received from e-sellers.
- A more targeted and intelligence-based model for profiling and assessment.
- Improved "strike rate" and interception of high-risk items

Source: (DIBP, 2017[65]).

From discussions with customs administrations, it is clear there remains a widespread lack of electronic information. French Customs reported that in 2012, data was often unavailable in electronic format, and information provided on the mandatory CN22 and CN23 forms could be inaccurate (see Annex A). As mentioned in Box 3.7, in the European Union, current initiatives are underway to explore how the use of electronic data used for security (i.e. "bomb in box") could be expanded to cover risk assessment for illicit trade. The EU system requires enhanced IT infrastructure and reliable data sources that are ensured via effective international cooperation with foreign postal administrations. As the pilot projects in the European Union suggest, information being provided in electronic format on a more systematic basis will also facilitate the transfer of advance commercial information, which can significantly improve turnaround for

customs processing as well as risk-assessing. However, many gaps and challenges remain to the implementation of such systems.

3.6.2. Courier / express services

In addition postal shipments, customs administrations have expressed challenges in working with courier companies and establishing systems to integrate and exchange electronic data that is often used by courier and express services. Responses to OECD surveys from customs administrations from several countries reveal that these administrations often do not have systematic access to electronic data from courier companies. Information relayed from Express (courier) companies is often limited or compatible with their systems. This can negatively affect risk assessment[1]

For express parcels, the institutional capacities of customs are limited by restrictions often related to integration of systems. Customs officers are often granted access to use and review internal commercial systems, or are provided with a large list of declarations / packages arriving in a given timeline, but their ability to risk-assess these products remains highly limited without the use of integrated data exchanges and adequate "co-created" systems of data exchange that satisfy both public and private requirements.

Research and discussions with experts indicate that the scope of the issue with courier companies requires that initiative be taken to enhance institutional capacities to counter illicit trade. For instance, customs administrations have noted that it is increasingly imperative to gain access to the detailed databases of information on arriving shipments (Sénat, 2013[49]). If provided in advance, and if customs are able to process the data using correct IT infrastructure, detailed descriptions can be reviewed, and individual items identified for examination can then be put on "customs hold" pending an examination from customs at the facility, or delivered to a customs warehouse (as is the case in countries such as the United States, which works with companies such as FedEx and DHL) (Box 3.7). However, numerous customs administrations do not have the needed agreements in place, or lack the proper risk analysis tools to receive and analyse this data. Border clearance procedures done manually, or reviewed at the point of entry, are thus limited in their impact, and can delay arrival of packages; the process is slow, leading to low examination rates and a reduced ability to detect illicit goods, while negatively impacting trade facilitation.

Box 3.7. Experiences from the private sector: European Express Association and OLAF pilot projects

The European Express Association collaborated in a recent pilot project with the European Anti-Fraud Office (OLAF) to identify threats and develop operational targets for countering illicit trade. Electronic information for IP infringing goods arriving into EU member states was provided to customs. Courier companies such as DHL used internal targeting programs and data to identify illicit trade and submit this information to customs. Courier companies are not in position to determine whether or not goods are in fact counterfeit, as rights holders must be contacted via the correct channels (i.e. via customs) to seize goods. In cases for suspected counterfeit goods identified at the source travelling to the United States, the goods were seized upon arrival. However, in the case of arrivals in EU economies, the experiences were mixed. Customs administrations did not necessarily seize the goods or contact rights holders in all instances, leading to the eventual delivery of suspected counterfeits without interdiction.

Courier companies have expressed frustration with current processes and practises. Internal targeting processes have yielded uneven levels of cooperation with national customs, and the intermediaries are also not privy to the outcomes from the information provided (i.e. leads to seizure or rights owner contacted).

Source: European Express Association (EEA).

It is clear that in most cases, customs and courier service have yet to develop a framework of cooperation that is highly effective. Courier companies have indicated their willingness to cooperate, but on terms that are cost-effective and do support trade facilitation. Projects that are underway in countries such as the United States have demonstrated that the use of advance commercial information is possible. In this case, under the legal authority from the Security and Accountability for Every Port Act (or SAFE Port Act) of 2006, CBP collects advance commercial information (key data elements) provided by express consignment carriers and importers. This information is automatically fed into CBP's Automated Targeting System. Using an electronic notification system, CBP can order that the high risk packages be put on hold and presented to CBP for inspection, reflecting the effectiveness of jointly coordinated computer systems that track parcels in the courier mode (DHS, 2017[51]).

Courier companies have noted that data can be provided in many circumstances, but may only be effective when it can be properly analysed by customs. Effective enforcement practices (such as the case noted above in the United States) require additional levels of operational integration. This requires customs to address gaps in investment in capabilities and IT infrastructure, so that their systems are compatible with express systems, thereby enabling customs to input data and risk assess parcels in advance of arrival, and to then track and trace these goods so that they can be inspected at selected points in the trade chain. In instances where integration and data sharing does take place, courier companies have expressed their willingness to cooperate, but in cases where they do, they have also noted that useful performance indicators are not shared with the private sector to assist these stakeholders in improving internal processes, such as understanding internal risks, and blacklisting clients that are repeat offenders.

3.6.3. Pre-arrival security screening: Pre-screening and advance shipment data

One example for fostering synergies between security and facilitation is air conveyance targeting (Box 3.8). The example also illustrates how industry collaboration can set the groundwork for the identification of risks from illicit trade. Given the constantly evolving risk from trade in small shipments, and the ever-increasing share of ecommerce, the use of pre-arrival data and information is a necessary requirement to enhance customs ability to interdict illicit products, and can serve as a base for further developing good practice.

Box 3.8. The case of air conveyance Targeting as a model for fostering synergies between security and trade facilitation

Recent events, including the attempted bombing of passenger and cargo planes with printer cartridges shipped in the air mode from Yemen using air courier companies *en-route* to the United States, highlight the pressing need to reform security screening systems used prior to the departure of goods in the courier mode. The changing security environment presented an important challenge to governments to ensure that goods face enhanced security screening prior to take-off.

In response, the United States initiated a pilot project, the Air Cargo Advanced Screening (ACAS) program, requiring all air cargo companies to submit advanced shipment data to US authorities prior to departure. This new requirement includes express and low-value shipment carriers to provide sufficient data and information for the Automated Targeting System (ATS). The ACAS uses pre-load cargo information to risk-assess for national security related threats, and aims at establishing a "trusted shipper" AEO style program to promote compliance and internalise risk assessment in intermediaries.

Similarly, the European Union undertook a Preloading Consignment Information for Secure Entry (EU PRECISE) exercise that is modelled from the U.ACAS system. PRECISE seeks to coordinate with 39 air cargo carriers, including courier firms that operate in air, to provide eight data elements in a pre-load setting to ensure the safety and security of the conveyance in question.

In Canada, the Pre-Load Air Cargo Targeting Pilot (PACT) exercise involved working with seven air carriers and two freight forwarders; it establishes an information sharing platform with yet undefined data elements. The deployment of the data exchange is for the purpose of pre-screening goods prior to departure to ensure the safety of conveyances.

In all three cases noted above, the establishment of data exchange, direct lines of electronic communication to courier companies and the "trusted shipper" tools that are deployed for these pilot projects can also be used to eventually identify and risk-assess both illicit trade and security risks. These systems can serve as points of departure for the development and adoption of secure information sharing and integrated targeting systems for small packages that can be used to risk-assess conveyances *en-route* and identify which cargoes will be inspected on arrival.

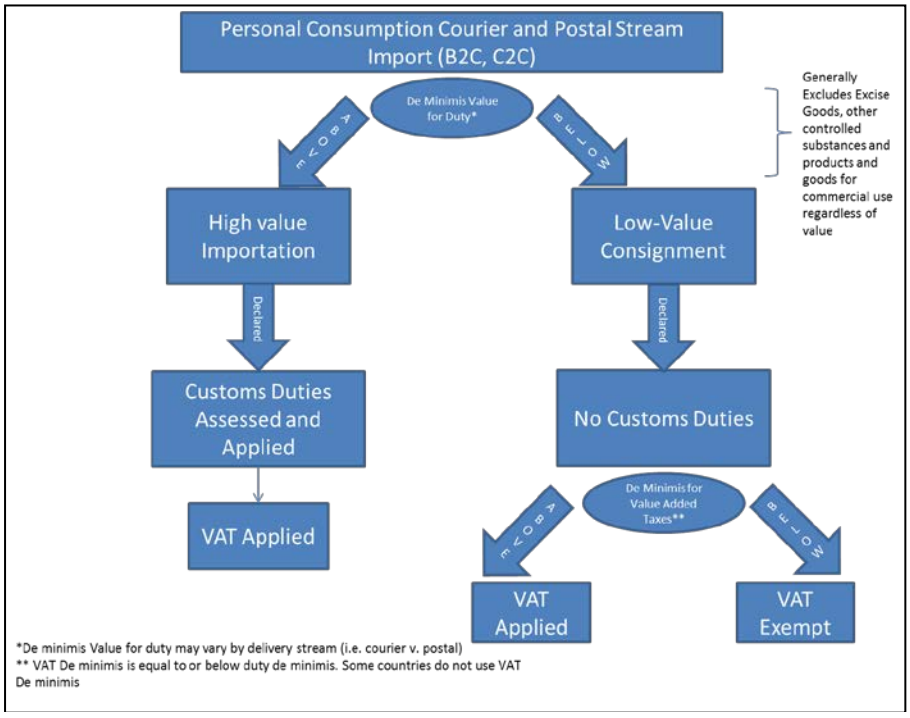
While only in the pilot and testing phases, the above cases indicate that there are practises that can be built upon to develop a fruitful degree of collaboration for targeting of goods related to e-commerce. The adoption of these systems would also require customs administrations to adopt more advanced risk assessment technologies and techniques, including data analytics, network and pattern recognition analysis and machine-based learning to adequately target high-risk shipments. With significant volume in packages and parcels, machine-based learning systems would be particularly well suited, as results of past screening and targeting can constantly evolve and enhance an administration's capacity to counter illicit trade.

Sources: (CBP, 2012[66]); (EC, 2016[61]); (CBSA, 2016[67]).

3.7. The institutional gaps resulting from *de minimis* thresholds and the low value shipment system

Governments have responded to the rapid and unprecedented growth in small parcels from courier and postal routes by treating them as "low value shipments", otherwise known as *de minimis* values "below which no duty or tax is charged and clearance procedures, including data requirements, are minimal." (ICC, 2016[68]) (Figure 3.12). The justification for this threshold is that the administrative process to assess value and administer compliance for shipments is lower than the expected gains to revenue (UNECE, 2016[69]). However, this approach may have negative implications for efforts to counter illicit trade by providing bad actors with a means to avoid surveillance; evidence and studies on the effects of using *de minimis* levels on illicit trade are mixed, and merit further analysis and review.

Figure 3.12. Illustration of differences between low value consignments and commercial (high value) imports



Notes: *De minimis value for duty may vary by delivery stream (i.e. courier vs postal); ** VAT de minimis is equal to or below duty de minimis. Some countries do not use VAT de minimis.

The 1999 Revised Kyoto Convention (RKC) of the World Customs Organisation (WCO) establishes that in response to growing volumes of e-commerce, governments should adopt transparent and nationally consistent *de minimis* levels (WCO, 1999[70]). As matters stand, the threshold values vary significantly from one country to the next, even in highly similar economies. Broadly, *de minimis* reflects competing national priorities of trade facilitation, revenue generation, and administrative control.

The use of *de minimis* can, if abused, create negative impact on the collection of national revenue, and can create distortions in the competitiveness of local businesses that must pay all duties and taxes on shipments imported. These can occur in the following ways:

- Fraud, through mis-declaration of *de minimis* and maintaining the declared value of products beneath the threshold for goods that do not fall within the low value categorisation;
- Fraud, by large scale commercial importers or re-sellers (who are not entitled to the use of *de minimis)* which abuse this scheme to import commercial goods in smaller shipment sizes;
- Distortions to competitiveness and a lack of neutrality among businesses, by undermining legitimate local retailers that import in the high value stream and compete with B2C goods imported via postal and courier without VAT or duties.

The impacts of the consequences above have in some instance been quantified. The European Union, for example, estimates that foregone VAT and non-compliance (including fraud) losses are as high as EUR 5 billion annually (EC, 2016[71]). These include avoidance schemes, under-valuation and mis-labelling on imports, and ignoring intra-EU sales rules.

Review of alternate models to de minimis to avoid fraud and distortions

In recognition of the risks from fraud, and distortions in competition, several countries are considering alternate solutions. The OECD's 2015 work on the Digital Economy has yielded four categories of collection models for taxation of low value shipments (OECD, 2015[72]):

- "**Traditional" border collection model:** collection of goods and services taxes (GST)[2] and customs duties for "high value" shipments. Customs is responsible for assessing the declared value and applying relevant GST and duties prior to release of the goods into the economy;
- **Vendor collection model:** the obligation to collect and remit GST falls on the seller of the goods, who is not a resident, but whose goods are sold and required to be registered for tax collection purposes in the destination economy;
- **Purchaser collection model:** the customer residing domestically must conduct a self-assessment of the value for duty and taxes, and remits the GST upon arrival of the goods;
- **Intermediary collection model**: the financial intermediary (e.g. bank or payment service provider), or transporter/logistics firm is required to remit the GST to the destination economy for the low-value goods;

Of the four cases above, the traditional collection model would likely have high levels of compliance and enforceability, but at high administrative costs, and it is not known to be an effective model for collection of taxes for large volumes of low value goods. An intermediary collection model for the postal bodies would similarly be difficult to implement, due to the fact postal bodies do not have adequate information to make duty and tax assessments. Similarly, intermediary-based models for banks and financial firms would also not be effective, as the information provided on transactions typically do not contain information relevant to the classification and assessment of taxes (Government of Australia, 2017[73]). A consumer-based model on the other hand would face significant compliance gaps and would be difficult to enforce. Of the economies and cases studied, it

appears governments are moving towards a vendor-based system to address the inequalities and gaps in the current institutional frameworks (Box 3.9 and Box 3.10).

Box 3.9. Australia Vendor Based Collection Model

In Australia, goods valued at AUD 1,000 or less are GST-free (with the exception of tobacco and alcohol), and include a large volume of B2C and C2C goods that are imported directly into the economy via e-commerce. The existing system raised concerns with respect to equality of treatment with domestic goods (tax neutrality) and higher reported levels of undervaluation fraud to escape taxes. In response, the Treasury Laws Amendment (GST Low Value Goods) was passed in 2017 and requires that all e-commerce vendors with business worth AUD 75,000, or more, annually must collect tax? revenues and remit these to the government on behalf of consumers as of July 1, 2018 (Government of Australia, 2017[73]). This system will require an accounting mechanism that will include electronic commercial declarations for these goods. Under the legislated model, "registered vendors, EDPs and redeliverers must provide the DIBP with details of their GST registration number and (where applicable) the ABN of the purchaser. This means that, although the legislation does not require that freight companies and express carriers collect this information and report it to the DIBP, in practice they will need to do so."

The additional data collection and information collected for the purpose of levying taxes provides an opportunity for customs and other relevant authorities (such as revenue agencies in cooperation with customs) to explore working with vendors to establish AEO style programs, and develop a "pooling" system to differentiate high-risk from low-risk goods in e-commerce. In addition, this program will be compatible with the existing "Green Lane" programme underway with New Zealand, offering ease of access to information on postal parcels.

The Australian programme is the first of its kind, and though without precedent, it is expected to collect an additional AUD 300 million in tax revenue over the first three years of its implementation, with anticipated compliance rising thereafter. However, compliance is only estimated to reach approximately 55%, due to the fact that vendor based tax registration is not legally enforceable outside of Australia.

Source: (Government of Australia, 2017[73])

Box 3.10. Reforms to VAT exemptions: Vendor based collection model in the European Union

The European Commission is set to remove the VAT exemption on imports of small consignments from non-EU countries. Small consignments imported into the EU that fall under the threshold of EUR 22 are currently exempt from VAT. 150 million parcels are imported free of VAT into the EU each year, leaving the "system open to massive fraud and abuse, creating major distortions against EU business" while "imported high-value goods such as smartphones and tablets are consistently undervalued or wrongly described in the importation paperwork in order to benefit from this VAT exemption."

In response to i) the complexity of the current VAT system, ii) a *de minimis* system tilted against domestic businesses and iii) the complexity of enforcement of *de minimis* to mitigate fraud and avoid revenue losses, the European Commission adopted a digital single market modernisation strategy in December 2016 governing cross-border e-commerce. The objectives of this initiative are to facilitate trade, combat fraud, ensure fair competition and provide equal treatment for online actors.

The EU reforms propose the creation of a new "One Stop Shop" for imports to pay VAT on an automated basis at the point of sale (i.e. vendor) for all goods imported from outside the single market, and travelling within the market. For large businesses, a deferred payment scheme will be enabled where a monthly declaration to customs will be transmitted by the transporter. In addition to boosting the revenue of EU member economies by up to EUR 7 billion annually, the steps are also intended to assist small to medium size enterprises to come into compliance with VAT.

Source: (EC, 2016[64])

3.8. Role of (vendor) web platforms and payment service providers

Sites such as Amazon, eBay, Alibaba, Zappos, and others are multi-billion-dollar retail platforms that rely on complex logistics systems that include warehouses, courier and postal operators, airports and sea-ports to facilitate the connections between vendors and customers (C2C, B2C and B2B). New emerging trends in online trade also include smaller e-commerce platforms, allowing micro, small and medium enterprises (MSMEs) to operate "e-boutiques" that provide increased access and visibility for their operations through service providers such as Shopify and WordPress. Increasingly, e-commerce is expanding to social media networks such as Instagram and Facebook where goods are both advertised and sold, in some instances, in peer to peer transactions. E-commerce platforms are benefitting from enhanced IT infrastructure, encrypted payment systems, and simplified transaction processes. Banks and payment service providers (PSPMs) (including PayPal, online credit cards, Apple Pay and Google Wallet) further support the financial transactions that underlie each physical exchange taking place. PSPMs have been instrumental to the success of e-commerce, providing a relatively safe and reliable system for the purchase of goods, revolutionising the way small scale financial transactions are conducted online.

E-commerce websites (online vendors) can either knowingly or unwittingly host illicit products. Counterfeits are a prime example of such goods, often purported to be the "genuine" products being sold at a steep discount, or "replicas". As noted in the 2016 OECD-EUIPO study, e-commerce can be exploited to facilitate the sale of counterfeits. Websites specialising in the sale of illicit products are known to thrive in environments where regulation and oversight are inadequate or infrequent, and when these sites are allowed to remain online for long enough to gain a foothold (and reputation) in the sale and delivery of products. Online marketplaces are also known to be used as hubs for wildlife trafficking as well; the recent report by the non-governmental agency TRAFFIC has shown that the illegal trade in wildlife products is flourishing online thanks to the use of online advertisements and marketplaces, which can, in some instances, be completely unregulated (TRAFFIC, 2015[60]).

A tool available to law enforcement to combat illicit e-commerce cybercrime is to enforce takedown requests, either at the request of police or the rights holder for counterfeit products. In the EU, US and China, once a takedown request is received by an ISP, the latter is required to remove the offending content (WIPO, 2016[74]). Recent evidence presented by members has suggested that takedown requests have been an effective method of tackling this problem, so long as the process to apply for such a request in the courts can be done in an effective and timely manner.

In instances where this takedown process can be automated, law enforcement can quickly dismantle violating websites before these are able to gain traffic or a reputation as a reliable website for illicit products.[3] However, gaps and issues remain. Law enforcement has not been able to remove certain sites due to the fact that these are hosted in other countries with whom such agreements do not exist. Law enforcement has reported that the challenges from e-commerce are constantly shifting in response to new enforcement efforts. For example, in response to website takedowns, sales are reported to have moved to other networks, such as social media sites that include Facebook and Instagram. This is increasingly a challenge as they represent an even more mobile target for law enforcement that can be set up with relative ease and, in some instances, shared privately among closed networks of users.[4]

Large e-commerce platforms that aggregate many different vendors such as eBay, Alibaba and Amazon can also pose an important challenge. Recent reports have found illicit products, in particular counterfeits and endangered wildlife species have been found with relative ease on platforms (Yilun Chen, 2016[75]) (TRAFFIC, 2015[76]). While generally e-commerce platforms do work with governments and respond to take down requests for individual vendors, the ease of setting up new vendor accounts on such platforms demonstrates there is a pressing need to enhance the vetting, detection and removal of such vendors in a more systematic fashion, or that a compliance system should be enforced. Lastly, the memoranda signed between international and non-governmental organisations with the larger e-commerce platforms such as Alibaba and Taobao can help with the prevention of sale of illegal wildlife products, and may serve as an important good practice of private sector engagement.

Customs administrations do not typically seek information directly from large e-commerce vendors or retailers for the provision of information on shipments. Instead, the shipment information is sent via the postal or courier company to the customs administration either in advance via electronic transmission, or at the point of arrival. Consequently, the description of these goods is only as accurate as the description relayed via the postal companies from the vendors themselves. This highlights the fact that at

present, there are no known "trusted vendors" or authorised economic operator programmes that distinguish or qualify one e-commerce vendor over another to provide advance information directly into customs' systems.

The use of the "Dark Web" for illicit trade

Risks from e-commerce are often further compounded by the use of encrypted communication technologies and crypto-currencies such as bitcoin and other payment systems that are virtually untraceable. The anonymised network configurations (i.e. dark web or dark net) that are used for the sale of illicit goods have made the uncovering of transaction details and "following the money" increasingly difficult for investigators Box 3.11 and Figure 3.13).

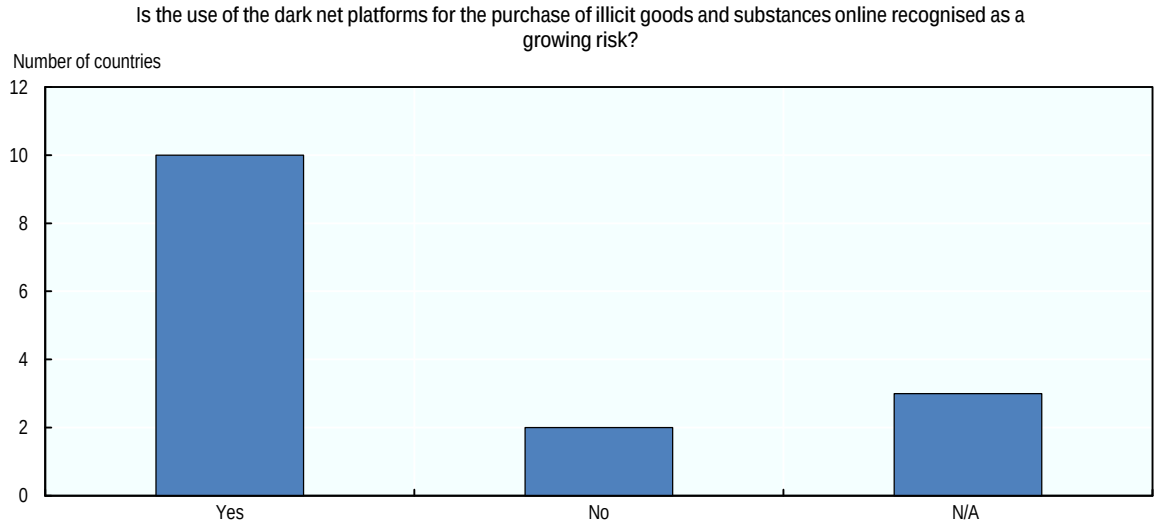
Box 3.11. Narcotics and the dark web: Are crypto-markets shedding light on a shadowy industry?

The sale of narcotics online is typically linked with the rise of the use of the "dark web", a term associated with the use of platforms that anonymises the identities of users and vendors. According to reports, the sale of narcotics via e-commerce remains a very limited and small market, but it is growing. In the United States, in 2014, 8% of drug users used e-commerce to acquire narcotics. In 2015, that figure nearly doubled to 15%, and the number of users accessing illicit narcotics via e-commerce and small packages is expected to continue to rise rapidly around the world. Synthetic drugs such as MDMA, and prescription drugs (including opioids) are prevalent on the web, but marijuana remained the most popular (Economist, 2016[77]).

The creation of "cryptomarkets" appears to have facilitated the diffusion of new drugs that can be delivered via postal mode around the world. These are used for both wholesale ("B2B") and consumer sales ("B2C") where the business is often a middle-level drug retailer who buys wholesale online. These sales pose an important new challenge for customs in enforcing existing laws and in tracking digital currency flows, money laundering and the sources of illicit narcotics. However, despite their "dark" nature, cryptomarkets can also offer opportunities to measure and analyse trends in drug abuse, sales and volumes, and can assist in devising new approaches to countering illicit trade. Through the use of special analytical tools, the number of transactions and value of online markets can still be observed and estimated, despite the anonymity of buyers and sellers (Judith and Decary-Hetu, 2016[78]).

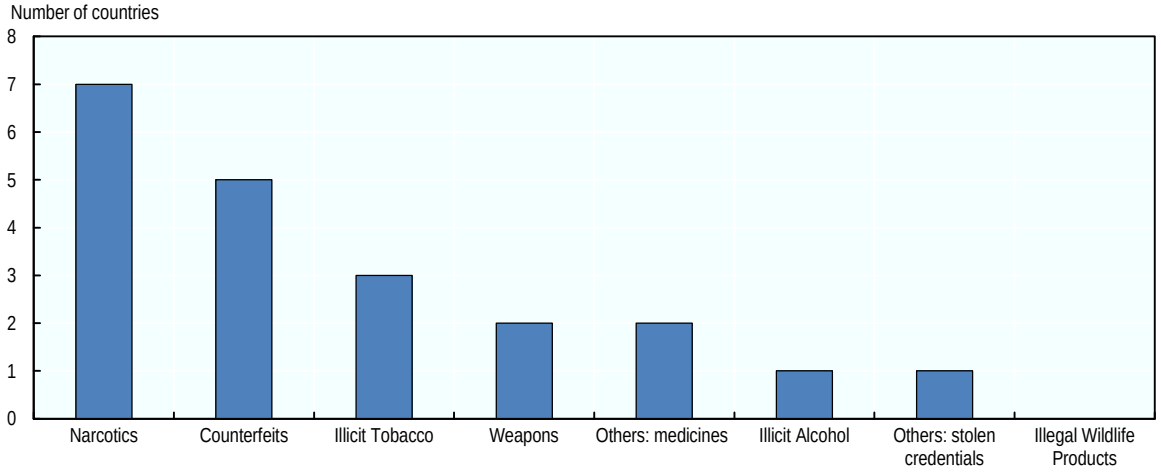
Sources: (Economist, 2016[77]); (Judith and Decary-Hetu, 2016[78])

Figure 3.13. Use of the dark web for sale of illicit goods



Note: Based on fifteen country responses to the 2016 OECD Survey (see Box 1.1).

Figure 3.14. Most common forms of illicit trade via the "dark web"



Notes: Based on fifteen country responses to the 2016 OECD Survey (see Box 1.1). The figures on the left scale correspond to the number of countries that mentioned the types of illicit goods most commonly seized when involving the “dark web”.

As the results above show, the “dark web” is used prominently for selling narcotics; that such products cannot be sold on the open market explains the high level of interest in such sales. Additional reports indicate that sales of weapons, explosives, and even human organs can be found on the dark web. Most prevalent in seizures are narcotics that are being shipped directly to the consumers, or to a middle-man in the destination economy.

3.9. Conclusions

The dynamic growth in the use of **postal and courier streams** as a delivery method for smuggling small packages containing prohibited or restricted goods has significantly impacted the institutional capacities of governments to effectively screen and interdict the goods. The sheer quantity presents a significant challenge for customs and law enforcement authorities. Capacity to target and interdict illicit trade on a granular scale without interfering with the legitimate flow of products is limited, as is capacity to carry out effective risk assessment analysis and product inspections.

The adoption of large-scale, cross-border e-commerce has shifted the way in which trade and the underlying transactions take place around the world in the new digitised global value chains. The role of the consumer as the sole principal importing agent is a new governance challenge that requires significantly more attention. The "democratisation of trade" brings many benefits to the global economy, but there are health, safety and security challenges that governments need to address. Whether from the massive importation of deadly synthetic opioids in North America, or from the sale of illegal wildlife products and counterfeits in Europe, it is clear that OECD member economies and others must continue to do more to address the growing challenges from e-commerce while continuing to facilitate the legitimate flow of merchandise. From a broader perspective, public policy and regulatory reforms are urgently needed. These must work on securing the trade chain from criminal networks, protecting sources of revenue, and enhancing facilitation of trade to guarantee the continued economic prosperity and sustainability of cross-border e-commerce.

Notes

[1] While postal services originate from state monopolies engineered to deliver letter mail and limited amounts of packages, logistics firms that operate courier services were originally specialised in the delivery or products and parcels to businesses from other businesses along the supply chain (B2B).

The same forces of change that have shifted the paradigm for postal services have also significantly affected courier companies; in some instances e-commerce represents a significant source of growth for in revenue for these companies. At the same time, the considerable rise in e-commerce has created vast economies of scale, pushing prices lower and lower in a highly competitive industry.

Much like the postal services sector, courier companies have responded to the shifting nature of trade and the rise in e-commerce. Logistics firms are constantly seeking new logistics solutions such as electronic/automated systems and other cost-reduction strategies that involve complex networks or just-in-time transport and delivery.

[2] Including VAT taxes.

[3] Discussions held with policy and cybercrime officials, and proceedings in meetings at WCO and OECD.

[4] In the EU the existing legislation provides IP rights holders with some options to apply for an injunction against intermediaries whose services are used by a third party to infringe an IPR (Article 11 Directive 2004/48/EC).. Whilst it is mainly used to block access to copyright infringing websites, there are also instances of access to trade mark infringing websites being blocked (see Cartier v BSkyB & ors [2014] EWHC 3354 (Ch)).

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4. Enforcement Challenges in Countering Illicit Trade in Free Trade Zones (FTZ)

This chapter examines the role of FTZs in facilitating illicit trade and other illicit activities. It offers policy based analysis and understanding of the challenges posed by FTZs, and examines the implications for the institutional capacities to counter illicit trade.

4.1. Overview and conclusions

The benefits that FTZs can provide to economies are at risk when zones are used for criminal purposes; it is therefore important that governments take action to combat illicit activities. The benefits are particularly important for developing economies that are seeking to attract foreign investment and promote ports as logistics and trade hubs; for these countries, zones can help to strengthen their presence in global value chains (Siroën, 2017[79]) .

The analysis in this chapter draws significantly on findings from discussions among law enforcement experts of the Task Force on Countering Illicit Trade (TF-CIT).[1] In this context, experts recognised the economic benefits of FTZs as they represent a valuable tool in certain economies for enhancing global trade integration, global value chains and economic growth. FTZs can have a "catalytic effect", attracting foreign direct investment, while boosting employment and providing other benefits. FTZs have also proven to be able to deliver tangible gains in terms of reduced clearance times for goods.

However, experts have also noted that the gains from reduced customs presence in FTZs can offer opportunities for illicit trade. There is a risk that, without additional transparency and oversight, the economic benefits from FTZs could be jeopardised. There is evidence from recent joint OECD-EUIPO research on counterfeit trade routes that counterfeit trade is often routed through economies that rely extensively on FTZs. In support of work on FTZs, customs administrations, multilateral law enforcement bodies and trade associations have provided information that highlights the growing body of evidence that certain FTZs are being used as routing, assembly and distribution hubs for illicit trade.

In addition to the significant participation from member countries and TF-CIT experts and stakeholders, the findings in this section also benefit from the 2016 OECD illicit trade survey (see Box 1.1 in Chapter one).

This chapter analyses the institutional capacities of governments to stop illicit trade both in domestic FTZs, and for goods arriving from foreign zones; it seeks to provide a global understanding of the legal and regulatory shortfalls that exist, and identify the policies and good practises (both international and national) that could be adopted to strengthen institutional capacity to combat the illicit trade.

Free Trade Zones facilitate trade by providing certain advantages to business with respect to tariffs, financing, ownership, taxes and other regulatory measures that would otherwise be applicable in the host country. The reduction in regulatory and legal burdens, "red-tape" and tariffs are key in this regard. Some FTZs have become major trade hubs and have attracted important foreign direct investment (FDI) (Yücer and Siroën, 2017[80]). However, the rapid multiplication in the number of FTZs and the continued lack of a common set of standards, framework or definition has led to important challenges with respect to trade facilitation and security. This chapter shows that illicit trade, and other forms of criminality, such as fraud and money laundering, are relying on the opaque nature of FTZs to further the interest of bad actors, by allowing them to carry out illicit business, at lower risk. Without further actions from governments to increase transparency and oversight in FTZs, criminal elements will continue to infiltrate some of these zones to exploit shortcomings in institutional law enforcement capacities.

4.1.1. Definition

FTZs are designated areas that lie outside the customs jurisdiction in the economies concerned and are not subject to customs duties and taxes that would otherwise apply to imported merchandise (OECD, 2008[2]). In addition FTZs often include exemptions from certain revenue regulations, labour laws and financial regulations (OECD, 2007[81]).

The scope and nature of FTZs vary across countries, depending on the regime and the types of activities allowed within such zones. FTZs can, for example, also be referred to as, among other things, free zones, free ports, special economic zones, export processing zones, single factory export processing zones. This report uses the term "free trade zone" to refer to a broad range of designated areas which receive preferential customs treatment.

Table 4.1. Zone Typologies and Descriptions known to be Special Economic Zones

Type of Zone	Objective	Description	Markets	Examples
Free Trade Zone (FTZ)	Support trade	Also known as commercial free zones, these are clearly delimited areas (fenced-in, duty free), offering warehousing, storage and other services aimed at boosting import-export	Domestic, Re-Export	Colon FTZ, Panama; Jebel Ali FTZ, UAE
Export Processing Zone (EPZ)	Export and manufacturing	Industrial clusters offering incentives and facilitation of manufacturing and other activities for export	Mostly Export	Chittagong EPZ, Bangladesh
Freeport	Integrated development	Large territories that provide broad incentives and benefits that can also include residents on the site.	Domestic, internal and export	Aqaba Special Economic Zone, Jordan
Single Factory EPZ	Export manufacture	Incentives are provided to a specific company or enterprise, rather than a geographic location	Export market	Mexico Maquiladoras

Source: (OECD, 2017[82]); (World Bank, 2008[83]).

According to the World Bank, the rationale for establishing zones vary among countries; they may be set-up to support broad economic reforms, and may reflect a component of a strategy to diversify exports while maintaining other trade barriers for the host economy, which may continue to value protectionism. FTZs can also provide sources of employment for countries, and may serve as "experimental laboratories" to test out new policies without broader national consequences (Box 4.1). Finally, as mentioned above, FTZs can be used to attract FDI (World Bank, 2008[83]). FTZs are also known to benefit economies through a "catalytic effect", creating backward and forward linkages between the FTZs and the rest of the economy, and enhancing integration into the global value chains, and other spill-overs (Yücer and Siroën, 2017[80])[2]. The zones are also known to facilitate greater labour mobility and education, infrastructure improvements, and enhanced competition (OECD, 2007[81]).

The most commonly identified regulatory exemption of FTZs is the indemnity or deferral from payment of duties and taxes. This can help to facilitate trade because they reduce costs and red tape for parties seeking to re-export the goods. Commercial trade activities permitted within FTZs vary; they can include manufacture, assembly, repackaging and re-labelling, and re-export (Daudpota, 2006[84]). For trade in physical goods, the benefits of FTZs for host economies are generally seen as i) increasing emphasis on export-oriented growth, ii) increasing emphasis on FDI-oriented growth and/or iii) helping to promote a country's integration into global value chains (OECD, 2007[85]). Other activities related to

trade in services, banking, and even gambling take place in certain zones. Other FTZs are known to be storage warehouses for high value goods. It is generally acknowledged that while goods passing through FTZs are exempt from many policies, goods that subsequently enter into the economy of the host country are taxed and regulated accordingly. Examples of exemptions in FTZs (Torres, 2007[86]) can include:

- Total exemption from import duties and taxes (often meaning no declaration is required or verified).
- Total exemption from direct taxes; exemptions from sales taxes and VAT.
- Exemption from national incorporation laws and regulations (including joint venture requirements and other FDI regulations.
- Exemption from certain labour laws and national standards.
- Exemption from financial reporting requirements.

Box 4.1. Impact of FTZs on the Western Balkans

A study completed by the OECD in 2017 on the impact of FTZs in the Western Balkans notes that these zones accounted for over EUR 2.2 billion of investment in Serbia, accounting for EUR 2.4 billion in turnover and employing 2,000 persons, while accounting for 17.8% of national exports in 2015. In the former Yugoslav Republic of Macedonia, FTZ exports accounted for 36.4% of all exports (OECD/EUIPO, 2017[21]).

Source: (OECD/EUIPO, 2017[21])

4.1.2. Free Trade Zones' impact on Global Trade

The use of FTZs has expanded considerably over the past 50 years.[3] In 1975 there were just 79 such FTZs; some estimates indicate that there may be over 3,500 currently, providing up to 68 million direct jobs and over USD 500 billion of direct trade-related value (UNEP, 2015[87]) (FATF, 2010[88]) (BASCAP, 2013[9]). In an analysis by Siroën, of the top 20 economies with export processing zones, 47% were located in Asia-Pacific, and another 24% in Latin America (Siroën, 2017[89]). Fewer than 10% of the zones are located in OECD economies. The United States, hosts more than 230 FTZs and the remaining OECD economies account for just 1% of the total number of FTZs known to be in operation. Of the OECD countries, just three countries host more than 10 FTZs (United States, Czech Republic, and Turkey); while eight do not have any FTZs at all. According to the OECD's 2016 illicit trade survey, FTZs are most commonly used to transfer and process products that are transported using maritime shipping, followed by air and rail shipping.

4.1.3. Conclusions and policy issues

The considerable number of criminal networks operating in FTZs highlights a clear and pressing need to address the risk of illicit trade in FTZs through a coordinated and coherent response by all economies affected by illicit trade. The harmful effects from counterfeits, tobacco smuggling, illegal wildlife trade, arms trafficking, illegal gambling, and numerous other forms of criminal activities that are taking place in FTZs need to be addressed through collective action to overcome the coordination failures associated with a lack of enforcement in FTZs.

There are presently no wide-reaching international frameworks that set out a series of rules or governing regulations for FTZs (including what activities may or may not take place and with what information or data sharing). Further domestic and international regulation is required in many FTZs. The absence of effective controls not only leads to diminished oversight, but also a misunderstanding among law enforcement of the risks of certain FTZs and the activities that take place therein.

Moreover, there are significant shortcomings in the management of zones that need to be addressed, including i) gaps in institutional capacities of relevant authorities to exercise oversight and conduct inspections in FTZs, ii) a lack of transparency, including inadequate availability of data and commercial information on activities within FTZs, iii) ineffective information sharing between customs administrations on goods departing FTZs and arriving in national territories and iv) low levels of effective private-public sector coordination on a broad level, including between zone operators, trade and logistics firms.

To address these issues, countries need to work together in the following areas to develop a common international framework or set of standards that enables greater transparency, and a subsequent mechanism to ensure compliance with these standards.

- *Definition*. There is no current consensus on an international legal framework for FTZs or the definition of an FTZ. The considerable growth of FTZs in size and number demonstrates a pressing need to include them in a formal and codified manner in international agreements. FTZs have so far not been addressed in international trade law within the WTO, for example.
- *Information*. This analysis identifies various useful forms of good practices that have been employed to mitigate known risks to pre-empt the exploitation of FTZs for the purposes of illicit trade by converging criminal networks. The use of restricted (high risk) goods lists, mandatory submission of electronic data, rapid free zone adjudication of violations and severe monetary fines for violations, as well as enhanced security screening, all represent good practises that should represent minimum requirements for FTZs.
- *Stakeholder cooperation*. Engaging the private sector is an invaluable step in ensuring more effective oversight of FTZs and enhancing institutional capacities. FTZ authorities (both private and publicly owned) should be encouraged to enter into voluntary codes of conduct. These can include guidelines for FTZ operators to promote better business practises and enhance supply chain security with certification style standards or other mechanisms that enable governments and business to distinguish "clean" FTZs from non-compliant zones that pose a significant risk for legitimate business. Governments can encourage the adoption of such codes by jointly committing to recognising such certification standards through memoranda and joint agreements, and by recognising that non-compliant zones pose a risk for illicit trade. At the same time, the development of FTZs must be accompanied by capacity building; governments and industry need to provide their expertise and guidance to provide support for this, which would include guidance on modernising zone infrastructure.
- *Zone management*. Government-led initiatives such as authorised economic operator (AEO) style certification schemes for FTZs may also be a useful model to ensure sounder operation of the zones. AEO certifications are already used for various operators in trade, and are considered an essential tool in trade facilitation. The AEO model could ensure higher rates of commercial compliance by

guaranteeing the rights or privileges of operating beyond customs control, covering, for example, accurate data recording and book-keeping, openness to customs audit and more stringent security standards for employees.

- *Enforcement (including customs).* While there are zones in OECD countries, the vast majority are in developing and middle-income economies. The debate on FTZ issues must therefore include a wide range of countries, including those that seek to benefit from the increased levels of FDI and export-oriented growth often attributed to FTZs. For example, FTZs may be used in developing economies to circumvent lengthy and inefficient customs practises that add red tape and delays to processes. To reduce over reliance on the FTZ model, customs authorities need to continue to improve the facilitation of trade through for example, expansion of automated processes that, for example, increase possibilities for electronic submission of data. In addition, each country should ensure that it has adequate numbers of enforcement officials with *ex officio* authority to supervise or control all FTZs within their customs territory. As a best practice, this authority should include, at minimum, the power to detain suspected counterfeits, and when legally endorsed, the power to destroy counterfeit goods.

4.2. Current International Regulatory Frameworks for FTZs

Zones are governed principally by agreements reached in the World Customs Organization (WCO) and the World Trade Organization (WTO). In the case of the WCO, zones are specifically addressed in an annex to the Revised Kyoto Convention (RKC); while zones are subject to general WTO rules, they are not specifically mentioned in key texts.

4.2.1. World Customs Organization

The RKC has historically been the principal instrument promoting international harmonisation of customs practices for import and export procedures. Annex D of the convention is a comprehensive framework that sets forth a proposed framework for the regulation of FTZs and other strategically valuable customs warehousing tools. According to Chapter 2 of the annex, FTZs are defined as "a part of the territory of a Contracting Party where any goods introduced are generally regarded, insofar as import duties and taxes are concerned, as being outside the Customs territory" (WCO, 2008[90])[4]. However, the annexes of the RKC are not part of the core text to which contracting parties are bound, and have only been signed by a few economies: of the 110 signatories that are party to the RKC, just 24 are contracting parties to this chapter, with 6 countries indicating certain reservations to the text. This is indicative of the global lack of acceptance of a common standard for zone organisation. Moreover, as indicated below, there are few compliance mechanisms that can be used to enforce provisions (such as binding dispute resolution mechanisms).

The RKC distinguishes FTZs from bonded warehouses, which share some of the same characteristics as zones. Bonded warehouses are intended to facilitate imports, while FTZs have traditionally focused on the transit or export of goods. In contrast to FTZs, bonded warehouses remain under customs control, and all goods are eventually declared after an authorised time period. Bonded warehouses facilitate imports by offering the option of duty deferral until goods leave the designated bonded space and enter into the domestic economy. FTZs offer a duty free space as well, but often permit additional activities like processing and manufacture. FTZs don't require as much customs control

because the goods are intended for processing, and eventual (re)-export. Table 4.2 illustrates the differences between warehouses and zones.

Table 4.2. Key differences between FTZs and bonded warehouses

	Customs (Bonded) Warehouse	Free Trade Zone
Payment of Security (bond) for goods	Yes	No
Relationship to Customs Territory	Inside Customs Control	Outside of Customs Territory
Permissible Cargo	Foreign Goods only	Foreign and Domestic Goods
Transfer of Ownership Authorised?	Yes	Yes
Customs Declaration Required?	Yes	No
Domestic Goods authorised entry?	No	Yes
Authorisation to Repack, group, sort (etc.) goods:	Yes	Yes
Authorisation to Manufacture	No	Yes (if approved)
Time Limits on goods to remain	No	Can be set by Customs (min 1 year)

Source: (WCO, 2008[91]).

As the table illustrates, the key differences are borne out in the different authorities over the zones. For example, while a bonded warehouse is considered a customs-controlled area, in the free trade zone, customs is only empowered, for example, to conduct inspections in FTZs for enforcement and security reasons.

4.2.2. World Trade Organization

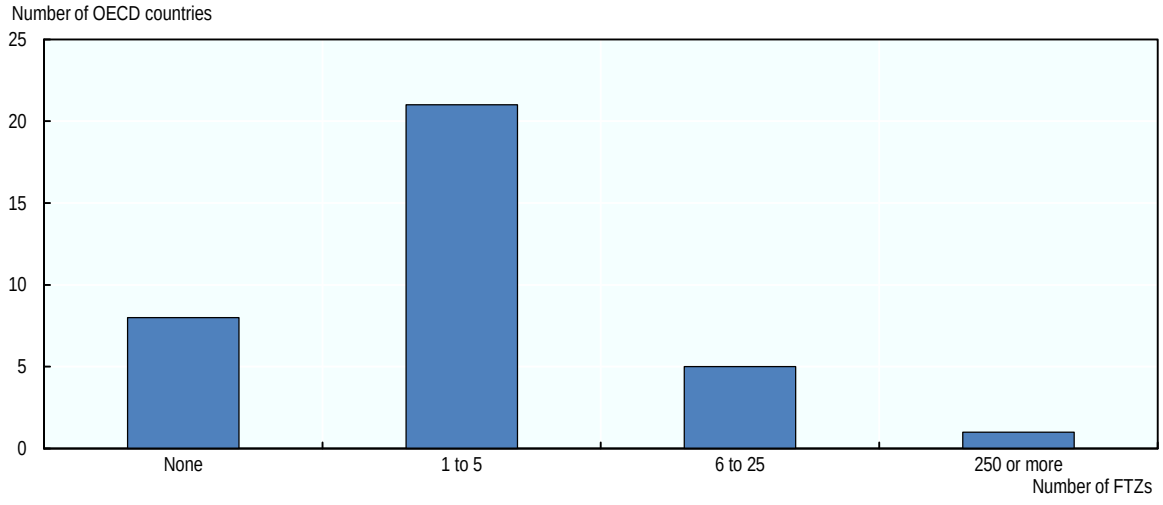
The WTO makes no specific mention of FTZs in its principal agreements, providing no definitions of FTZs or export processing zones. However, in some instances, WTO has made reference to FTZs as a potential risk for state subsidies, insofar that the "structure of some free-zone schemes exposes them to claims of providing export subsidies" under the WTO Agreement on Subsidies and Countervailing Measures (ASCM) (Torres, 2007[92]). In principle, however, there is no current indication that the status of agreements such as TRIPS and the enforcement of related WTO rules, are not applicable within FTZs, but no official WTO text has formally confirmed this.

4.3. National and Regional Legislative Frameworks for FTZs

4.3.1. OECD countries and FTZs

Certain OECD countries have legislated permission for implementation of FTZs while some other economies rely extensively on other instruments, such as bonded warehouses and duty deferral, to enable trusted traders and other economic operators to transfer, treat and re-export goods in a preferential environment that facilitated exports (Figure 4.1).

Figure 4.1. Number of FTZs in OECD countries



Source: OECD Country Survey (2016) (see Box 1.1).

Findings from the 2016 OECD TF-CIT survey and desk research indicate there are a total of 340 FTZs in OECD countries. Over two-thirds of these zones are located in the United States. Excluding the United States, which has 230 designated "Foreign-Trade Zones", there are on average four designated FTZs in every economy that uses this export model. Eight member countries do not have FTZs; countries such as Canada and Belgium prefer to use existing regulatory frameworks for customs bonded warehouses as an alternate solution to facilitate export-oriented trade, transit and duty deferral. Japan eliminated legal provisions for FTZs in recent years.

4.3.2. European Union

The European Union has established a series of defining terms under the Union Customs Code that establish the common requirements for FTZs. Under a 2008 revision to the code, the Modernised Customs Code enables the creation of FTZs in member states in order to minimise the administrative burden of customs regulations (EC, 2008[93]). Goods are considered to be outside the community if they are not imported into a member country and remain inside the FTZs; however these zones are specifically noted to be under the responsibility of customs and any activities taking place in these zones must be reported to customs in advance. The 2008 modernised code specifies that customs is granted the right to refuse or restrict certain activities in the zones for safety and security considerations or national laws. Furthermore, the code notes "Goods brought into a free zone shall be presented to customs and undergo the prescribed customs formalities (…) where they are brought into the free zone directly from outside the customs territory of the Community" (EC, 2008[93]).

The European Union also makes provision for type I and type II FTZs, depending on the ability to fence-off or secure the perimeter. In the latter, goods must be declared in a similar fashion to customs bonded warehouse, whereas in the former, no declaration is required, provided these are secured and not entering into the economy (EU, 2013[16]). Today, there are over 70 FTZs of type I and type II classification.

Entry into the EU market appears to have reduced several economies' reliance on FTZs. The Czech Republic, with exports accounting for over 80% of GDP, has seen reductions in total trade moving through its 11 FTZs (DOS, 2017[94]) Other EU members such as Hungary and the Slovak Republic have eliminated the legal provisions for FTZs entirely. However, for countries on the periphery of Europe, FTZs may still provide certain benefits (Box 4.2).

Box 4.2. Port of Rijeka free trade zone in Croatia

Due to its geographic location, the Croatian Port of Rijeka is an important entry and transit point into mainland Europe. Under EU law an area of this port is operated as a free zone. As noted, under EU law, the FTZ is a part of territory of the Republic of Croatia which is fenced-off, and where economic activities are carried out under certain restrictions and under customs authority. In Croatia, FTZs can be established in the area of a seaport, river port, airport and at any other area where conditions may justify their placement. This is done on the basis of approvals from the government. Authorised activities include storage, wholesale trade, and the refining of goods. The economic advantages of these FTZs include unlimited storage time, no customs bond requirements, and ease of transmission of electronic data directly to customs. Despite exemptions from duties, these zones are not exempt from taxes, including taxes on equipment and labour.

The activities in such zones are closely controlled by customs with stringent documentary requirements. All goods descriptions must be relayed automatically and electronically for customs, exclusively through a data interface with customs. When exiting the zones, exit declarations must also be made, and outgoing manifests and the like must also all be compliant with customs requirements. Measures including physical controls of goods are also common.

Source: Presentation of Croatia Customs to the OECD Task Force on Countering Illicit Trade, March 2017 (OECD, 2007[81]).

In a 2013 Report, the European Parliament noted that, in the absence of adequate checks and balances, FTZs are vulnerable to abuse from organised criminal networks and risk transforming these zones into hubs for illicit trade, and that, "Free Zones are sometimes feared to function like off-shore jurisdictions" (EP, 2013[95]). The report cites in particular the risks from organised crime and counterfeiters, taking advantage of lax regulation and oversight to conduct business and to "sanitise" shipments that would otherwise be flagged for irregularities, and the affixation of counterfeit trademarks to unfinished products.

Despite the gathering of additional evidence, the number of cases that directly links or implicates FTZs in the European Union remain relatively scarce. In a Europol/OHIM report published in 2015, FTZs are noted to have become significant enablers of counterfeiting activities; the report identifies counterfeiters as the primary "abusers" of FTZs (Europol/OHIM, 2015[53]). In an updated 2017 report, cases were mentioned that involved organised crime, including narcotics trafficking, illegal ivory trade, people smuggling and counterfeiting, in particular for counterfeit pharmaceuticals in transit via an FTZ in the United Arab Emirates (Europol/OHIM, 2015[53]). The report notes "the limited enforcement powers within FTZs remain especially challenging".

4.3.3. United States

Established under a 1934 law, US foreign-trade zones were created to provide tariff benefits and facilitate customs-entry procedures for the promotion of investment in US manufacturing, and distribution, and to boost employment and exports. The law lays out the framework to ensure "[a]ll zone activity is subject to public interest review" and goes on to state "[f]oreign-trade zone sites are subject to the laws and regulations of the United States as well as those of the states and communities in which they are located" (CBP, 2017[96]). Today, there are over 230 such zones (and 400 sub-zones) in 50 states, employing over 420,000, and accounting for over 10% of US exports, and 5% of US imports. Main industries operating in zones include automotive, pharmaceuticals, petroleum and electronics firms (NAFTZ, 2017[97]).

US laws permit the establishment of FTZs at or near ports, and are technically considered to be outside of the US customs territory (NAFTZ, 2017[98]). Goods are exempt from duties and taxes unless these are imported into the country thereafter. To obtain certification and authorisation to operate as an FTZ, a port or warehouse operator must provide documentation to the Customs and Border Protection (CBP) authority using electronic data interchange, while meeting other security requirements. The US laws establishing FTZs lay out the framework to ensure "[a]ll zone activity is subject to public interest review" and goes on to state "[f]oreign-trade zone sites are subject to the laws and regulations of the United States as well as those of the states and communities in which they are located" (CBP, 2017[96]).

Within such zones, the Customs and Border Protection (CBP) authority is responsible for enforcing all applicable laws and regulations, including those pertaining to intellectual property rights, wildlife, and food and drugs, on behalf of other agencies and government bodies (e.g. the Department of Justice, International Trade Commission and the Food and Drug Administration). US FTZs impose a relatively higher level of scrutiny and compliance burden on the importers and operators in such zones than outside the zones, and necessitate a more frequent level of interaction with authorities.

Before production or activities in a zone may commence, the following steps must be taken:

- A zone operator must file an application with the CBP describing the processes that would be put in place for ensuring that laws and regulations are followed.
- CBP must approve the application, conduct a physical review of the facilities, undertake background checks of key employees and review the activities to be conducted in the zone.
- Before activities commence an operator must identify variances in invoiced, received, and entered quantities on 214 admission and annual reconciliation filings.

All products arriving in zones must be accounted for electronically in advance to the CBP, which targets all suspect shipments. Similar to other countries' practices, the FTZ can only accept low-risk goods that for example do not pose health and safety risks, or goods imported on a regular basis. Furthermore, other agencies in addition to CBP have the authority to conduct reviews and audits for safety and compliance reasons.

The FTZ system in the United States is operated in a similar manner to AEO programmes for importers, insofar that it provides incentives to enhance compliance, in exchange for lower tariff burdens on a temporary or deferred basis. FTZs in the United States are different from other zones, as they are not off limits for enforcement actions. However,

the difference is motivated by the fact that a significant percent of the goods imported via FTZs are subsequently declared for importation into the US customs territory, exposing the country to greater risks from domestic illicit trade. The US zones offer a narrower and more clearly defined set of tax advantages than is the case for other zones.

4.3.4. Turkey

A free trade zone programme was established in Turkey in 1985 to promote export-oriented investment and production, as well as to accelerate foreign direct investment (FDI) and access to technology (Turkey Ministry of Economy, 2017[99]). Over 2,000 companies operate in zones, in over 18 FTZs across the country, accounting for over USD 19 billion annually in trade in 2016.

FTZs are afforded exemption from duties and VAT; manufacturing operations are permitted, as is transhipment of goods. FTZs are designed to treat goods as "non-imports" from a customs perspective. Authorities have identified illicit trade, illegal transfers of goods, and tax evasion as three principal risks associated with the use of FTZs.

The Turkish authorities have established the following systems, regulatory controls, and legislation to manage risks associated with illicit trade:

- **FTZ Computerised Implementation Program (SBBUP).** A centralised government-operated database collection system automatically produces reports on information provided on a mandatory basis for all zone transactions (covering both movements into and out of zones). Information collected includes warehouse stock data and information on persons employed in the FTZs. The system is maintained by the Ministry of Economy and information is shared with regional customs offices and other relevant authorities via a single window initiative.
- **Enhanced regulatory controls and sensitive goods circular.** Certain products known to be associated with illicit trade or tax evasion and recognised to pose risks to health, safety and security, are banned from entering or transiting Turkish FTZs, or are heavily controlled. A sensitive goods list was first published in 2005. The list was developed in an effort to pre-empt attempts to exploit FTZs. The sensitive goods circular (list) is confidential; it contains, however, goods such as scrap metal, which is subject to a full ban. Some sensitive goods are allowed, but under the payment of a bond or collateral that varies according to levels of risk.
- **Legislation governing FTZs:** Article 14 of the governing regulations of the Turkish Ministry of Economy establishes punitive consequences for wrongful or illegal activities in FTZs; these range from suspension of operational licenses for economic operators, to cancellation of rights to operate in FTZs. The use of sanctions under this article can be applied outside court, and in parallel to (and exclusive of) legal proceedings for the same offences, thereby permitting immediate action against non-compliant actors.
- **Empowering and clarifying customs authorities:** The Ministry of Customs and Commerce of Turkey has the legal authority to conduct inspections, audits and interventions throughout all FTZs and remains the principal law enforcement agency operating in FTZs on behalf of courts and police, acting on intelligence and international tip-offs.

Using the above mentioned systems has resulted in a number of interdictions of illicit products moving through these zones.

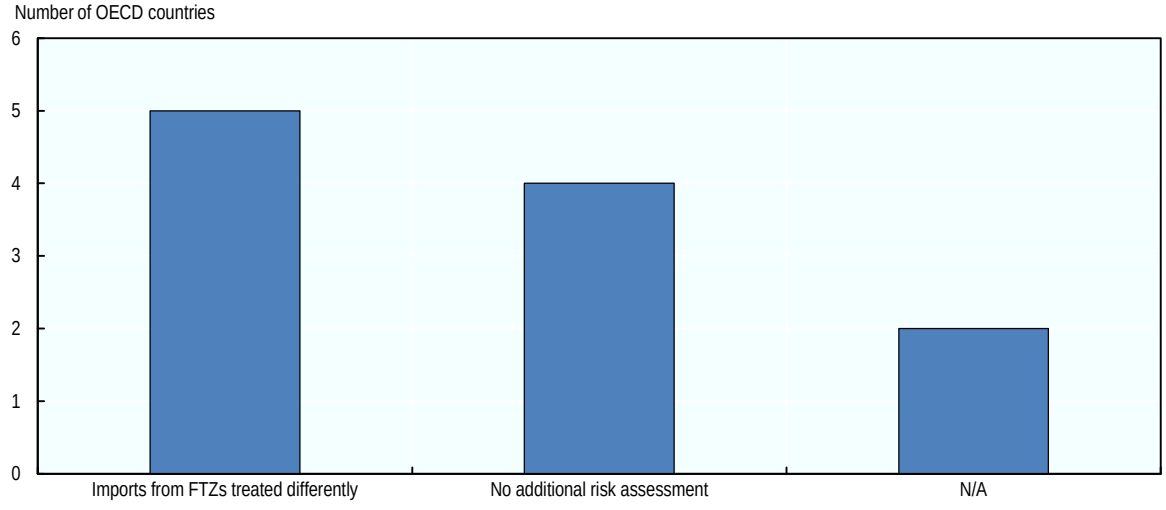
4.4. Industry-led initiatives

The World Free Zone Organization (WFZO) is a convening body for public and private sector entities that own, operate and manage FTZs, and all related economic zones for export processing. The WFZO is intended as a standard-setting organisation which aims to i) identify best practices among free zone operators, and ii) improve the current reputation and understanding of FTZs. The WFZO is presently working on the development of standards and codes of conduct (i.e. the "Safe Zone" programme). The programme relies on a FTZ certification system that could also serve as an AEO certification. The Safe Zone certification standard does not attempt to specifically define the parameters or definition of an FTZ, instead offering an "opt-in" programme for self-compliance.

4.5. Current Evidence on Illicit Trade in FTZs

The 2016 OECD TF-CIT survey on illicit trade solicited information on the greatest risks associated with FTZs, both domestic and international (Figure 4.2). In comparison to the earlier findings of the 2012 Financial Action Task force (FATF) study, the results seem to vary greatly from country to country. In terms of risk and risk-assessment of goods arriving from FTZs, several respondents indicated that imports are known to pose an elevated risk. In such instances, the provenance of goods from certain FTZs may then be targeted for examination. In discussions with customs administrations, this practice has been implemented for certain FTZs known to be associated with the export or transhipment of illicit goods that have been seized in the past.

Figure 4.2. FTZ experiences



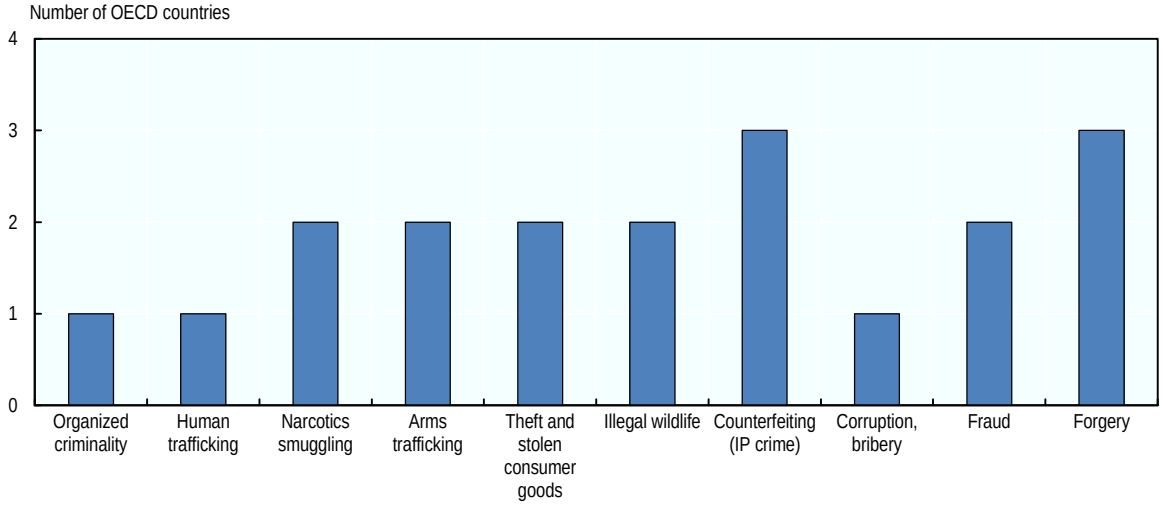
Source: OECD Country Survey (2016) (see Box 1.1).

Data on foreign and domestic FTZs was sought among OECD member countries. This survey question echoes the FATF questionnaire that was distributed in 2009; however the OECD questionnaire differentiated domestic zones from foreign ones. There is significant variance in the known risks from illicit trade between domestic FTZs and certain foreign

FTZs. In the case of domestic FTZs, there are no clear-cut indications of one particular form of illicit trade associated with these zones; instead they are dispersed across various categories of illicit trade. For foreign FTZs, the results are somewhat more homogenous. Respondents have indicated that the forms of illicit trade encountered focus on counterfeit products and illicit tobacco (Figure 4.3 and Figure 4.4). The FATF report from 2010 posed similar questions, but with different responses (Figure 4.5). However, the two surveys cannot be directly compared due to the differing membership among FATF countries, and the different forms of illicit trade identified.

Figure 4.3. Illicit trade in domestic FTZs

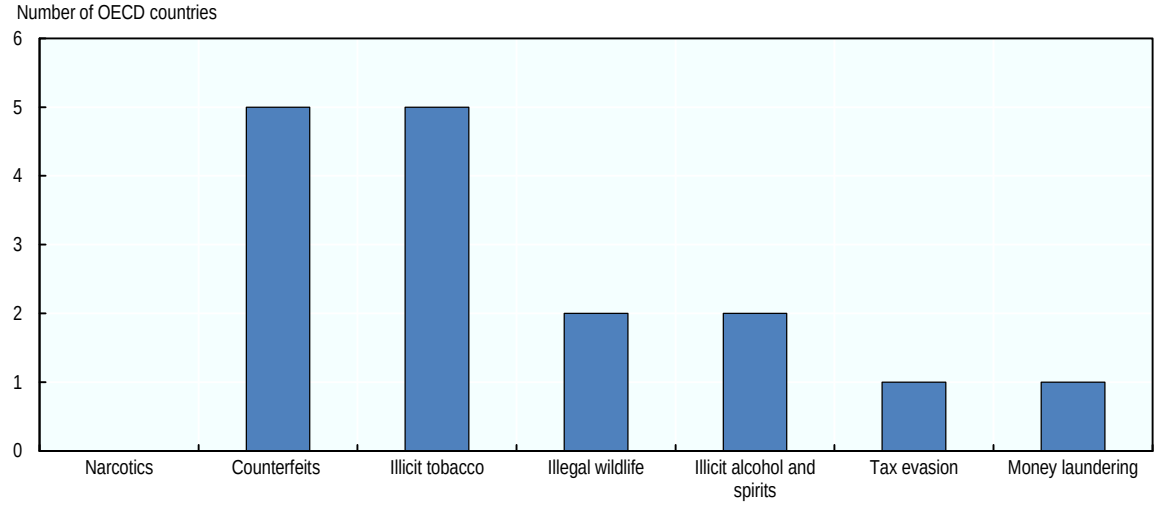
Commonly identified illicit trade in domestic FTZs (by country responses)



Source: OECD Country Survey (2016) (see Box 1.1).

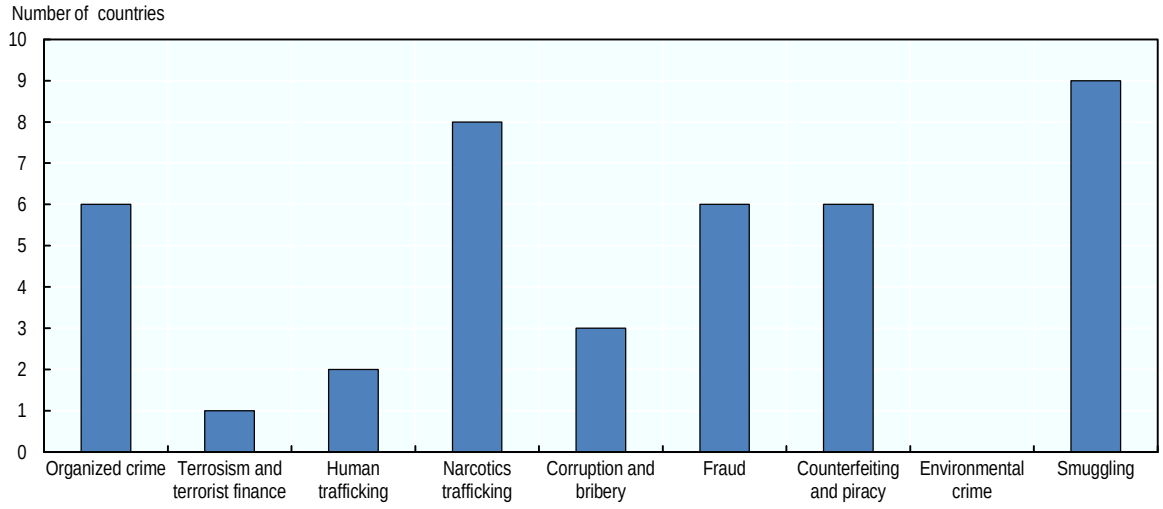
Figure 4.4. Illicit activities in foreign FTZs

Commonly identified illicit activities in foreign FTZs (by country responses).



Source: OECD Country Survey (2016) (see Box 1.1).

Figure 4.5. Commonly identified forms of criminality in FTZs



Source: (FATF, 2010[88]).

The FATF responses indicate that fraud; smuggling, counterfeiting offences and organised criminal activities were the most common recorded forms of illicit trade and activities undertaken in FTZs. The FATF report also provides a series of case studies to inform typologies of illicit trade in FTZs. These include bulk cash smuggling, trade-based money laundering, customs fraud, contraband tobacco smuggling, and other operations facilitated by the lack of adequate supervisory capacities in FTZs (FATF, 2010[88]).

Case studies by various international bodies and authorities have illustrated the problems concerning FTZs and illicit trade. The studies below indicate some examples and highlight case studies that have been established in recent years on the forms of illicit trade associated with FTZs.

4.5.1. Trade-based money laundering and FTZs

The FATF identifies FTZs as posing a high risk for money laundering and a threat to the integrity of global financial regulatory standards. In the report, informed by a member country questionnaire, FATF outlines the lack of adequate oversight, inadequate standards for business registration practices, and inadequate (or a lack of the) use of anti-money laundering practices in certain FTZs. The report also notes that inadequate documentary requirements for imports and exports can lead to the exploitation of such zones for fraudulent use and trade-based money laundering operations. The research conducted among various countries also points to the common interpretation that FTZs are either explicitly or implicitly perceived as outside the customs territory.

The report identifies, for example, the use of the Colon Free Trade Zone in Panama as playing an instrumental role in the laundering of billions of dollars in Colombian narcotics sales by trade-based money laundering schemes in Miami and other areas across the Americas. The absences of transparency regulations in the zone is attributed with the ability of criminal actors to syphon bulk amounts of cash directly into these zones for fraudulent purchases and sale of commodities that are then registered as legitimate transactions to “clean” the proceeds of crime. The report also identifies various other

cases, for example the use of FTZs in the Caribbean islands (such as Curacao) that are used to launder money from crime syndicates operating in Venezuela (FATF 2010). The report calls for:

- Enhancing awareness among relevant stakeholders including the private sector, customs and financial intelligence units on the risks from FTZs.
- Improving coordination between national and international authorities on the regulation of FTZs.
- Increasing transparency on the operations taking place in FTZs.

4.5.2. Tobacco and FTZs

FTZs can be used for the production and fraudulent smuggling of "illicit whites". FTZs identified in the United Arab Emirates, such as the Jebel Ali Free Trade Zone, have become well known sources of illicit whites to authorities. The FTZs are identified as strategic vulnerabilities to stop illicit trade as little information is known on the origin or destination of goods entering or exiting these zones.

Singapore customs has also identified illicit trade of tobacco via its FTZs. In 2014, Singapore Customs identified and seized several shipments of tobacco in? its Kepel and Changi FTZs. It notes that specific operations and enforcement mechanisms such as surprise audits and inspections within the FTZs have been effective in countering illicit trade in these zones (Singapore Customs, 2015[100]). However, a recent INTERPOL report highlights that the Singapore Free Trade Zone remains a regional and global transit hub for illicit tobacco (INTERPOL, 2014[8]).

A recent report published by the International Tax and Investment Center (ITIC) also provides evidence on the exploitation of FTZs by criminal networks specialising in illicit tobacco trade, particularly for unlicensed and duty-unpaid cigarettes ("illicit whites"). The research conducted by ITIC confirms the other notable positions cited above, that FTZs are exploited to hide origin and destination as transhipment hubs, that they are used as manufacturing bases for illicit goods (including tobacco) and are also a cause of "leakage" of undeclared and illicit products into the local and international economy (ITIC, 2013[101]).

Policy considerations are summarised as follows:

- Mandatory record keeping for FTZs to provide documentary evidence to foreign customs
- Adequate anti-money laundering legislation and suspicious transactions reporting
- Greater multilateral cooperation among partner enforcement agencies in economies that i) host FTZs and ii) receive goods from foreign FTZs.

4.5.3. Counterfeiting

In addition to the 2017 OECD report on counterfeit trade routes described in Box 4.3, the 2016 OECD-EUIPO Report on Counterfeiting and Piracy shows the market for fakes is supported by a series of global export hubs in and across Asia, many of which are identified as FTZs (OECD/EUIPO, 2017[35]). As indicated in the surveys, FTZs are a hub for the global supply chains for counterfeit products. Europol's recent Situation Report on Counterfeiting also identifies several instances of FTZs being involved directly in the transhipment and even production of counterfeit goods (OECD/EUIPO, 2017[35]) . FTZs are in some cases infiltrated by organised crime groups that tranship, label and obscure

the ports of origin of counterfeits. The report also looks ahead to future potential threats, such as the opening of new ports on the Mediterranean coast in Morocco that are being established as FTZs. FTZs such as this one are ideally located geographically to access European markets, and are noted by Europol to pose important future threats for counterfeits, due the known lax governance structures and oversight capacities within such FTZs.

Box 4.3. OECD/EUIPO Study on Mapping the Routes of Trade in Fake Goods and Free Trade Zones (2017)

The OECD EUIPO study on the trade routes for counterfeits identifies several Free Trade Zones as common transit points for the illicit trade in fakes around the world. Zones such as the Jebel Ali Free Trade Zone (JAFZA) have grown considerably in size. JAFZA today operates with over 7,000 companies registered within, and represents 32% of the United Arab Emirates' total foreign direct investment, offering employment for over 144,000 people. JAFZA includes benefits that include 0% corporate tax, 0% duties, 0% personal tax, no currency restrictions, the ability to operate a bank or financing company, and no capital controls, among various other benefits. The report notes that the characteristics of such zones make them attractive to businesses, but the same attributes can make them as attractive to counterfeiters as well. These include:

- The capacity to obscure the real origin of cargoes
- The ability to manipulate (i.e. manufacture, assemble, package) counterfeit products
- The light regulation of zone businesses.

The report further notes the economy of origin "deception" in FTZs may also help to undermine the targeting systems of customs administrations in their effort to detect counterfeit good. The report notes that counterfeit products can be imported into the zones with relative impunity, and subsequently manipulated or even manufactured with little to no oversight. Beneficial ownership is common, and the names and information of the persons registering these companies are not adequately checked The report concludes that additional analysis is required to link the data on counterfeits more effectively to the activities of counterfeiters, and that a dearth of existing information on transit points contributes to difficulties in computing the total value of counterfeits passing through FTZs.

Source: (OECD/EUIPO, 2017[35]).

A Business Action to Stop Counterfeiting and Piracy (BASCAP) report on FTZs and illicit trade notes that offences such as fraud, and smuggling of counterfeit products via FTZs are frequent and subject to significant gaps in oversight, regulation and law enforcement. The BASCAP report provides a series of case studies that involve the exploitation of FTZs in the Gulf, particularly in the United Arab Emirates. Rights holders have reported that various offences, including counterfeit pharmaceuticals and counterfeit clothing have been known to transit through FTZs such as the Jebel Ali Free Trade Zone and the Ras-Al-Khaimah free zone, with limited scope to interdict or stop such goods. Unclear delegation of authorities, laws and regulations have prevented the seizure of counterfeits or the prosecution of the offenders in various instances (BASCAP, 2013[9]). The report notes that the transit of counterfeits via FTZs, even in Europe, can fall within a

"grey zone". For instance, the European Court of Justice "confirmed that goods in transit [i.e. within an FTZ] could not be classified as counterfeit goods or pirated goods for the purposes of EU law" in the absence of evidence that these goods were to be put on the EU market (BASCAP, 2013[9]). The report presents a series of policy recommendation for Intellectual Property Rights (IPR) protection. These recommendations include a broadening of the international regulatory and legal frameworks for FTZs. This includes proposals that governments should:

- Empower national customs authorities to exercise their jurisdiction over FTZs.
- Promote WCO RKC provisions that include FTZ interpretations to be within the national legal framework for illicit trade.
- Provide model FTZ legislation and best practices.
- Develop systems of Authorized Economic Operator (AEO) for FTZs.
- Frame FTZs into international trade law (via WTO).
- Foster greater cooperation between customs authorities.

4.5.4. Risks to environment and health

Zone legislation reviewed for several OECD members, indicates that national laws for hazardous goods and other safety regulations still apply to FTZs. Such laws include health and safety regulations and other requirements (such as phyto-sanitary restrictions for plant and animal products). However, FTZs can leave important gaps in institutional capacities of governments to effectively enforce these controls if adequate resources are limited.

In many OECD countries, customs authorities are in charge of enforcing not only the collection of duties and taxes, but are also required to conduct various other verifications on behalf of other national authorities (such as health agencies and environmental bodies). If the customs authorities are not provided with the information to assess duties, it likely will not be privy to information to assess if these goods pose additional risks to health, safety and security. For example, if national legislation prevents the import of specific products deemed to pose a threat to the environment (such as ozone-depleting substances, hazardous goods, or invasive species), but such specific information is not reviewed by customs, then customs is unlikely to be in position to limit or impose regulations on the goods. There may therefore be important gaps in the ability of customs to enforce the ban or restriction of these goods into and out of the zones; moreover, there may be an elevated risk of unintended release into the national territory (Box 4.4).

Box 4.4. The 2015 Tianjin FTZ explosions

In July, 2015, an explosion in a factory at the Tianjin FTZ in China led to over 170 fatalities, and caused widespread damage to the port and surrounding industrial zones. The FTZ of Tianjin had been launched several months earlier in 2015, and attracted businesses by providing lower regulatory hurdles and greater flexibility for leases and other equipment. With growth rates of over 9.4%, Tianjin represented mainland China's fastest growing economic zone. The FTZ's growth was principally driven by the automotive and petrochemical industries.

The blast led to significant economic losses at local factories, crippling supply chains of several large multinational automotive firms' supply chains. The cause of the blast was attributed to the unlawful and unregulated storage of industrial chemicals on a large scale. The subsequent investigation revealed that several thousand tonnes of improperly stored ammonium nitrate and sodium nitrate alongside over 700 tonnes of cyanide (the latter volume representing over 70 times legal storage capacity limits) fuelled a local fire that created explosions that caused nearly USD 1 billion in damage. The investigations showed that the authorities and port officials had effectively stopped conducting documentary audits or inspections for health and safety requirements since the conversion of the port into an FTZ earlier that year. Over 120 officials were arrested after the investigation into the blast.

Sources: (Berhmingham, 2015[102]); (Yang, 2015[103]).

4.5.5. Arms and controlled goods

A recent report by Viski and Michel in the Strategic Trade Review published in 2016 highlights another important risk arising from the strategic trade control vulnerabilities of FTZs. The zones are seen as undermining anti-proliferation efforts. For example, the report highlights a case where controlled goods that were subject to an embargo were shipped to Iran from Germany via FTZs in the United Arab Emirates, using false declarations to avoid scrutiny. The report notes the trade in such goods includes products such as uranium enrichment machinery, weapons and small arms, and dual use goods. Goods shipped to high risk countries benefit from FTZs when they are used as transhipment points to avoid sanctions regimes and arms control agreements (Viski and Michel, 2016[104]).

The authors recommend:

- Greater multilateral attention in international fora (through bodies such as the WCO).
- Further security measures, to be adopted by customs administrations that play host to FTZs and receive goods from foreign FTZs.
- Amendments to the international legal framework, in particular to the WCO RKC to include binding section on FTZs, and to create common definitions of FTZs and typologies; sharing of best practices and efforts to better understand the risks of FTZs.

- Empowerment of customs via awareness raising and capacity building programs (including training) for developing countries on the risks and responses for FTZs to reduce proliferation.

4.5.6. Wildlife

No current case studies have confirmed the use of FTZs as a transhipment hub for wildlife products, and few results from the illicit trade surveys have indicated that wildlife trafficking is taking place in such zones. However, no reports or research has been pursued to determine the risks that FTZs might pose for such trafficking and environmental crime. Given the geographic location of various large FTZs, and the known routes of illegal wildlife trade, it is likely several such FTZs are being used to link supply markets in sub-Saharan Africa to demand hubs in and across Southeast Asia and in the Gulf. For example, the port of Hong Kong, which hosts numerous FTZs is known to be one of the largest transhipment points for illegal ivory to mainland China (Dubarry and Ametova, 2014[105]).

4.5.7. Illegal gambling and sports betting

A report on FTZs and gambling by the International Centre for Sport and Security (ICSS) notes the broader range of illicit activities carried out in FTZs. The use of FTZs in countries across Southeast Asia were noted in this regard as they have been known to foster illegal gambling operations (ICSS, 2017[106]). The lack of financial oversight of financial authorities in several of these zones has also led FTZs that operate casinos to become prime targets for money-laundering operations. The ICSS report highlights several instances of the abuse of FTZs by criminal networks to launder funds throughout Southeast Asia's casinos and betting centres located inside FTZs (see case study in Box 4.5).

Box 4.5. Study on illegal gambling and sports betting in FTZs (2017)

Free Trade Zone (FTZ) areas quickly evolved from their origin as trade-based and manufacturing-based areas (1st and 2nd generation) to service-based areas (3rd generation) from the late 1960s to the 1970s, thereby expanding the original focus on trade to include services such as banking, insurance, gambling and tourism. Since the early 2000s the global relevance of the betting and gambling industry within FTZs has experienced an exponential growth; an ever-increasing number of online betting and gambling operators, including key ones in global terms, are licensed in and operate from poorly regulated FTZ jurisdictions, primarily, but not exclusively, located in South Pacific Asia.

The report published by the International Center for Sport and Security (ICSS) shed some light upon concerns about the fast development of the betting and gambling industry in FTZs. The report highlights how this fast-paced growth has contributed to the creation of an opaque environment that is positioned to support an illicit global financial network. In this space, illegal enterprises operate in parallel to regulated enterprises in the banking and financing industries. The report notes that "the licit and the illicit worlds are so intertwined [and are] accessible to (and effectively manipulated by) transnational organised crime syndicates" thus, undermining any regulative responses by the concerned national governments. "During the last decade, as the relative weight of the gambling industry within these FTZs grew in parallel with the development of a mostly unregulated global online betting and gambling industry, many governments engaged in a race to attract foreign investment to develop their local gambling industries". Zones in the Philippines, South Korea, and Russia, are given as three major examples. The report highlights several key factors that have facilitated the abuse of FTZs in the gambling sector:

- Opacity of ownership (registration and beneficial ownership).
- Presence of parties with links to organised crime, which use gambling as a conduit for corruption.
- The use and abuse of cryptocurrencies, closely linked to fintech and widely accepted as payment methods in FTZs.

The report concludes that FTZs are an emerging threat with respect to illegal gambling and gaming. The combination of a lack of global betting regulation, illicit financial flows, transparency and accountability, coupled with government corruption and criminal high tech capabilities exploiting crypto-currencies, form a perfect storm that might help in consolidating a new style of multiple illicit offshore banking havens.

Source: (ICSS, 2017[106])

4.6. Conclusion and policy considerations

The considerable number of criminal networks operating in FTZs highlights a clear and pressing need to address the risk of illicit trade in FTZs through a coordinated and coherent response by all economies affected by illicit trade. The harmful effects from counterfeits, tobacco smuggling, illegal wildlife trade, arms trafficking, illegal gambling,

and numerous other forms of criminal activities all taking place across numerous FTZs must be addressed through collective action that aims to overcome the coordination failures associated with a lack of enforcement in FTZs. The policy recommendations noted above in this report address some of these issues. The adoption of several such measures, notably a common definition of FTZs, enhanced transparency measures, partnering with businesses and port operators, and implementing automated information exchanges with customs for FTZ operators, will enable governments to enhance their institutional capacities to counter illicit trade.

Policy considerations

- There is no current consensus on the international legal framework or definition of an FTZ. The considerable growth of FTZs in size and number demonstrates a pressing need to include these into the formal and codified international framework of international trade. FTZs have so far not been addressed in international trade law within the WTO. Governments should highlight the growing importance of FTZs in the global economy as a justification for why these should be included in international trade law.

- This study identifies various useful forms of good practices that have been employed to mitigate known risks to pre-empt the exploitation of FTZs for the purposes of illicit trade by converging criminal networks. The use of restricted (high risk) goods lists, mandatory submission of electronic data, rapid free zone adjudication of violations and severe monetary fines for violations, as well as enhanced security screening all represent good practises that should represent minimum requirements for FTZs.

- Engaging private sector is an invaluable step in ensuring greater regulation of FTZs and enhancing institutional capacities. FTZ authorities (both private and publicly owned) should be encouraged to enter into voluntary codes of conduct. These can include guidelines for FTZ operators to promote better business practises and enhance supply chain security with certification style standards or other mechanisms that enable governments and business to distinguish “clean” FTZs from non-compliant zones that pose a significant risk for legitimate business. Governments can encourage the adoption of such codes by jointly committing to recognising such certification standards through memoranda and joint agreements, and by recognising that non-compliant zones pose a risk for illicit trade. .

- Government-led initiatives such as Authorized Economic Operator (AEO) style certification schemes for FTZs may also be a useful model to ensure the sound operation of these zones on domestic territories. AEO certifications are used for various operators in the trade chain, and are considered an essential tool in trade facilitation. The AEO model ensures higher rates of commercial compliance by guaranteeing the rights or privileges of operating beyond customs control under certain conditions. These conditions can include accurate data recording and book-keeping, openness to customs audit and more stringent security standards for employees, financial reporting and other practices.

- While there are zones in OECD countries, the vast majority are in developing and middle-income economies. The debate on FTZ issues must therefore include a wide range of countries, including those that seek to benefit from the increased levels of FDI and export oriented growth often attributed to FTZs. For example, FTZs may be used in developing economies to circumvent lengthy and inefficient customs practices that add red tape and delays to processes. To mitigate over reliance on the FTZ model, customs must continue to build adequate facilitation measures (such as electronic submission and risk-assessment of records for Customs). Similar to trade facilitation measures, the development of FTZs must be accompanied by capacity building commitments from donor countries and industry contributions through expertise and guidance to modernise infrastructure for fast, effective and safe trade via FTZs.

Notes

[1] The Task Force met most recently in the context of an OECD-EUIPO Joint Experts Meeting on Enhancing Transparency in FTZs, in Alicante, Spain in September 2017; conference participants included public, private and non-governmental stakeholders.

[2] The evidence that suggests that FTZs are in fact an economic boon to the host economies is however somewhat mixed. FTZs can be considered to be an application of a "second-best" option from a policy perspective (Siroën, 2017[79]). In a 2017 analysis on Trade Performance in EPZs, it was demonstrated that these zones do not increase economic activities or integration into the global value chain in a significant manner. This finding suggests that globally, these zones are intended to offset internal barriers to trade, and often at the expense of other non-zone national businesses (Yücer and Siroën, 2017[80]).

[3] The Shannon Free Trade Zone in Ireland is recognised as the first modern Free Trade Zone, set up in 1959. The relative success of this zone has inspired replication among other zones, notably in Asia (Taipei in 1965, Korea in 1970, and Malaysia in 1971).

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Part Two: Survey of some enforcement practices in BRICS economies

5. Governance frameworks for combatting Counterfeiting in BRICS Economies: Overview

This chapter looks at the background of the current situation and presents an overview. It examines the governance frameworks for Intellectual Property enforcement and institutional capacities in BRICS economies, and presents key findings.

5.1. Background

Ensuring effective governance and enforcement of intellectual property frameworks is key to preserving innovation and growth across many economies and deterring criminal networks. Intellectual property (IP) frameworks include the protection and enforcement of trademarks that businesses secure to distinguish their products from those of competitors, the patents and design rights that inventors and developers obtain to protect the new processes and products that they develop, and the copyrights that authors are awarded to ensure that they benefit from the literary and artistic works that they create. Protection and enforcement of these rights is important for governments, which have worked together, through international organisations, to develop frameworks that balance, protect and enforce the interests of rights holders with those of other stakeholders within and across economies.

Despite these efforts, infringement of IP rights remains a significant problem globally, which has been exacerbated through the development of the Internet and e-commerce, which provides an important platform for facilitating trade in counterfeit and pirated products. In 2016, the magnitude and scope of counterfeiting and piracy worldwide was estimated by a joint OECD EUIPO report to represent USD 461 billion in 2013, up to 2.5% of world trade. A wide range of products are affected, from luxury and intermediate business items, to common consumer products. Counterfeit and pirated products originate from virtually all economies on all continents, with middle-income and emerging economies tending to be important players. The report highlights the governance challenges facing governments and the policies being pursued to address these challenges.

This report focuses on policy developments and governance issues, reviewing the effectiveness of the governance frameworks for IP related policies in five key non-OECD economies: Brazil, China, India, Russian Federation and South Africa (the BRICS), as a follow up to the joint OECD EUIPO report published in 2016. The five economies covered in this assessment are a diverse group with respect to their degree of involvement in counterfeit and pirated trade. The analysis in the OECD EUIPO (2016) report relied on seizures of physical goods that infringed trademarks, copyrights, design rights and patents. Consequently, in this report particular attention is paid to issues concerning infringement of trademarks, copyrights, design rights and, to a certain extent, patents.

Similarly to the joint OECD/EUIPO (2016) report, in the specific context of this report the term “counterfeiting” refers to infringements of trademarks, design rights or patents; the term piracy refers to infringements of copyrights. It should be noted that the WTO’s definition of piracy is more general, but it has a more restricted meaning in the context of the TRIPS agreement (WTO, 2017).

For each of these five economies, the report provides a factual, quantitative overview of the situation in the area of trade in counterfeit goods drawing on the 2016 EUIPO OECD work and related databases.

This is followed by a review of the governance frameworks for IP enforcement and institutional capacities, with sections on:

- **Legal and institutional setting:** presents an introduction of the regulatory frameworks that govern intellectual property and the institutions that were established to implement these legal frameworks.

- **Policies and programmes**: summarises the policies and programmes being pursued to enhance IPR protection; it includes information on awareness building and education, international co-operation, and co-operation with stakeholders.
- **Enforcement and outcomes**: assesses the tools that are being used to enforce IPRs, and the results of enforcement initiatives.
- **Programme review**: presents the self-assessments and outside reviews made of IPR protection.

The assessments are based largely on a review of existing literature. The report was discussed by participants in the High Level Risk Forum in March 2017, and governments from the BRICS countries were invited to comment on their respective sections.

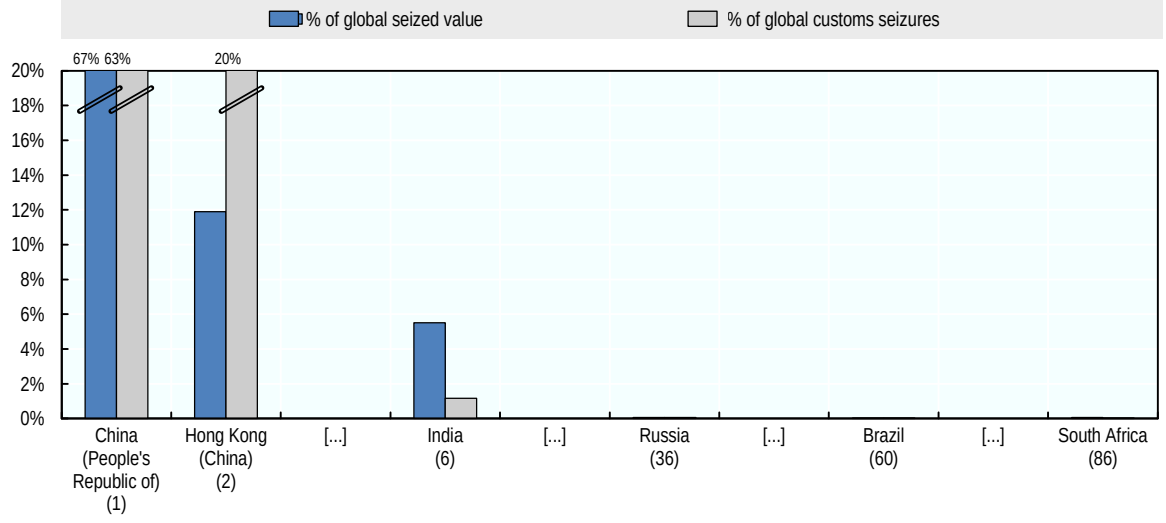
5.2. Overview

Following is i) a general quantitative overview of the current situation in trade in counterfeit and pirated products in the economies covered, and ii) a summary of key findings.

5.3. Trade in fakes in BRICS economies – current situation

The five economies covered in this assessment are involved in counterfeit and pirated goods to different extents. An analysis of the unified database of global custom seizures used in the OECD/EUIPO (2016) study of counterfeiting and piracy reveals that China is by far the largest source economy of counterfeit and pirated products in the world, both in terms of value and volume, far ahead of all other economies (see Figure 5.1). Between 2011 and 2013, some 67% of the total value of counterfeit and pirated world imports, and 63% of the number of global customs seizures originated in China. India ranked 6th, accounting for 6% of the total seized value of counterfeit and pirated goods worldwide, and 2% of the total number of customs seizures. Much further behind were Russia, Brazil and South Africa, respectively ranked 36th, 60th, and 86th, in terms of the relative share of total value of counterfeit and pirated goods worldwide.

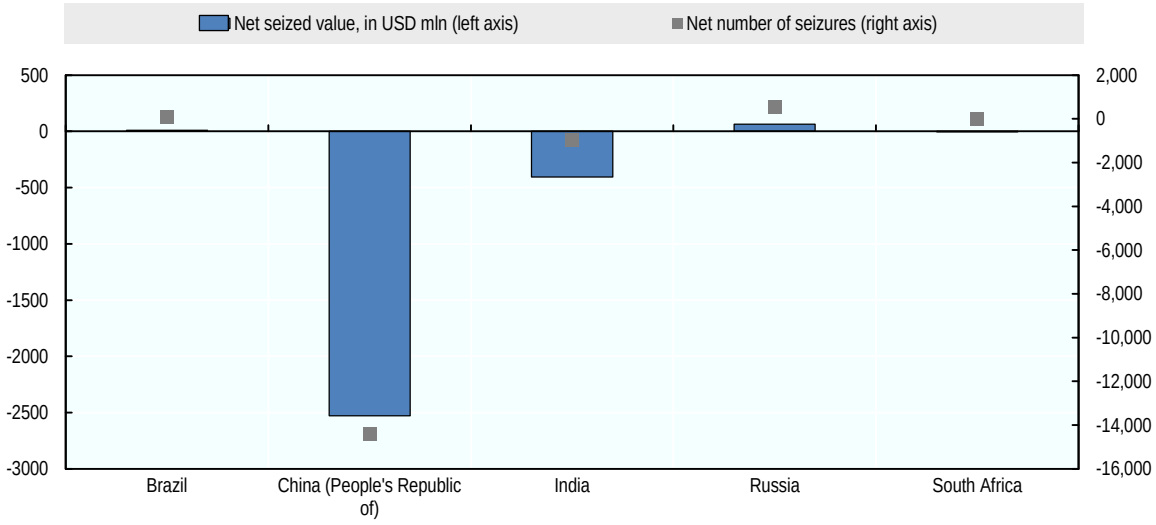
Figure 5.1. BRICS as source economies of counterfeit and pirated products, 2011-2013



The comparison of data on world imports of counterfeit and pirated products in source of BRICS economy to customs seizures data reported by BRICS customs authorities (see

Figure 5.2), shows that while China and – to a lesser extent – India are net exporters of counterfeit and pirated goods, Russia and Brazil are small net importers. This applies both to the value and volume of traded counterfeits.

Figure 5.2. Net trade balance of counterfeit and pirated goods by BRICS economies, 2011-2013



BRICS economies not only differ in terms of their degree of involvement in world trade of counterfeit and pirated products, but also in terms of the products involved and the countries where the counterfeit products sold. China is the world's largest exporter of counterfeit and pirated goods in a broad range of product categories. In contrast, the other BRICS economies are more narrowly involved in specific types of counterfeit goods.

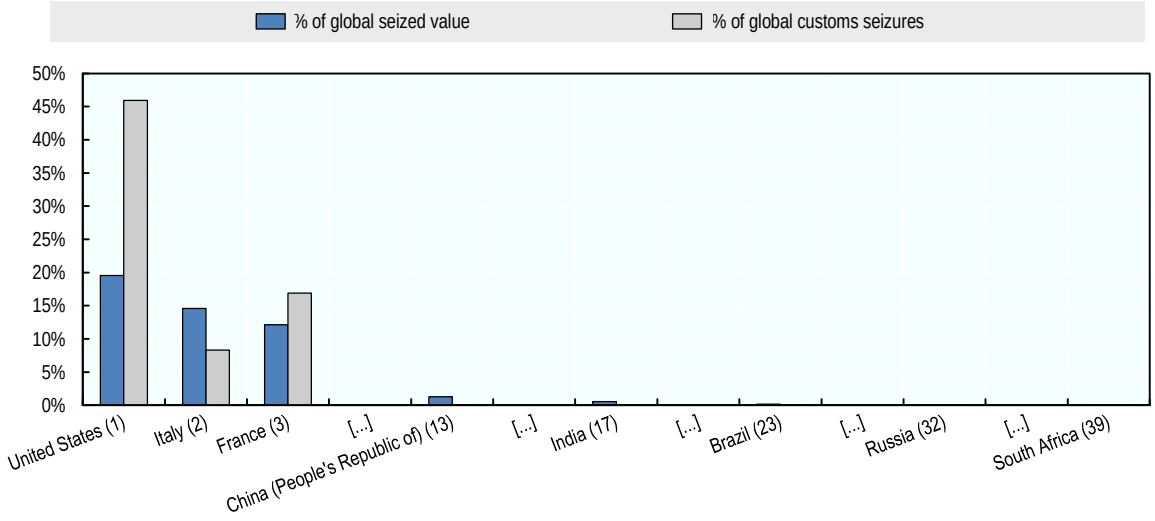
To illustrate this, Table A.1 in the Annex provides indices that reflect the relative value of seized counterfeit and pirated goods originating from each BRICS economy, by product category, as compared to the weighted world average. This is calculated across all source economies using their share in world exports as weight. The table shows that China exports more than seven times the weighted world average value of counterfeit and pirated goods in a wide range of product categories. These include: *i)* common consumer goods, such as footwear (HS 64), clothing (HS 61 and HS 62) and toys (HS 95), *ii)* luxury goods, such as upscale watches (HS 91), and *iii)* intermediate goods, such as machinery and mechanical appliances (HS 84) electronic and electrical equipment (HS 85). In contrast, India is a major source of fake pharmaceuticals (HS 30) and, to a lesser extent, of fake foodstuff (HS 2/21). It is also involved in fake luxury goods, such as articles of leather (HS 42) and perfumery and cosmetics (HS 33); the country's scale of involvement is, however, far less than China. The scope of counterfeit and pirated products shipped from Brazil, Russia and South Africa is narrower. Like India, Brazil and Russia are important source economies of fake counterfeit food items (HS 2/21); Russia is also an important exporter of fake plastic products (HS 39), which include fake labels.

With respect to the economies where counterfeits are sold, Table A2 in the Annex presents indices that reflect the relative value of seized counterfeit and pirated goods originating in each BRICS economy, by destination economy targeted, as compared to the weighted world average, which is calculated across all source economies using their share in world exports as weights.

These figures reveal that China ranks first in terms of the number of destinations (153 recorded in the database), and is the main source economy of counterfeit and pirated goods for the majority of them. In addition, a relatively high share of counterfeits is shipped to developed countries, such as Germany, the United States, and the Netherlands. India's counterfeits are shipped to a smaller number of economies (55 in the database), the focus is on Middle Eastern countries, such as Kuwait and Saudi Arabia, as well as developing African economies, such as Angola, Mauritius and the Democratic Republic of the Congo. By comparison, Brazil, Russia and South Africa ship counterfeits to a relatively small number of economies (10, 19, and 11, respectively), focusing more intensively on their neighbours or historical trade partners. Brazil is hence an important source of imported counterfeit goods for Argentina and Portugal; Russia, for Ukraine, Azerbaijan and Uzbekistan; and South Africa, for Mozambique and Angola.

BRICS economies are not only sources of counterfeit and pirated goods, but also victims of IPR infringements. Figure 5.3 illustrates this fact by showing that US brand owners accounted for the largest share of seized products between 2011 and 2013, but that, to a far lesser extent, the BRIC economies were also affected. More specifically, Chinese brands were the 13th most hit by counterfeiting and piracy, followed by Indian (17th), Brazilian (23rd), Russian (32nd) and South African brands (39th).

Figure 5.3. BRICS brands hit by global counterfeiting and piracy, 2011-2013



An interesting fact however is that, with the exception of Brazilian and Russian brands, the majority of products that infringe BRICS countries' brands originate from BRICS economies themselves. This is shown in Annex Table A3, which reports that 72% of the total seized value of products that infringed Chinese brands across the world between 2011 and 2013 came from China. This is also true for products infringing Indian and South African brands; some 77% and 100% among them originated in India and South Africa, respectively. On the other hand, the majority of the total seized value of counterfeit goods infringing Brazilian brands came from China (43%) and Uruguay (19%). Finally, almost the all products infringing Russian brands also originate from a neighbouring country, namely Ukraine (94%).

5.4. Governance frameworks for IP enforcement and institutional capacities in BRICS economies

A review of the IP situation in the five economies profiled reveals much has been done in recent years *i)* to enhance the role of IP in promoting innovation and *ii)* to strengthen measures to protect IP from infringement.

Despite the initial progress, the results of assessments made by trading partners and industry suggest there is scope for further action. The effectiveness of the Chinese IP regime, along with the regimes of the other four countries, are ranked low overall, with the Russian Federation the highest ranked of the five, achieving a score of only 13 out of 30 in an industry assessment of 38 countries. Moreover, the US government and the European Commission have identified four of the countries (Brazil, China, India and the Russian Federation) for close monitoring and they are supporting continuous engagement with them to develop effective actions for improving their performance in combatting counterfeiting and piracy. Weak enforcement of IP laws, the low risk of detection, combined with the high profitability of counterfeiting and piracy operations and relatively low penalties are key factors undermining effective IP protection and enforcement.

5.4.1. Legal and institutional settings

All five economies have legal frameworks to protect IP and use somewhat similar approaches to enforcement. In general, legal systems in the BRICS countries provide some de jure authority for parties whose IP rights have been infringed to seek to have the infringing acts stopped and the counterfeit and pirated goods confiscated and, eventually, destroyed. In addition, laws generally provide that compensation can be sought through civil actions. The level of compensation is generally based on lost profits, sales or forgone royalties. In two of the economies, China and the Russian Federation, rights holders can forego compensation based on actual damages, which can be difficult to calculate, and opt instead for "statutory damages", which is a sum that is assessed based simply on the fact that an infringement has taken place.

The *de facto* reality in BRICS countries is that parties often are unable to enforce effectively their IP rights in the courts or other government administrative fora, and often are left without effective remedies. This reality was accurately summarised in the 2014 WTO Trade Policy Review (China), *viz*., "[p]perhaps the more good news is that many challenges seem to stem from the application of laws, rules and regulations, rather than their content as such. The less good news however… is that much remains to be done in this area".[1]

As shown in Table 5.1, statutory damages range from up to USD 79 000 in the Russian Federation, to up to USD 462 000 in the case of trademark infringements in China. Criminal sanctions are also available in the five jurisdictions, for most types of infringements. In addition, infringers can be subject to government fines in all five economies, particularly in criminal cases, where it can be in lieu of, or in addition to, imprisonment. In the case of China, the scope of fines is greatest; such fines can be imposed in non-criminal cases for patent, copyright and trademark infringement.

Table 5.1. Selected features of IP regimes in Brazil, China, India, Russian Federation and South Africa, 2016

Item	Brazil	China	India	Russian Federation	South Africa
Statutory damages availability					
Patents?	x	≤ USD 140 000	x	≤ USD 72 000	x
Trademarks?	x	≤ USD 430 000	x	≤ USD 72 000	x
Copyright?	x	≤ USD 72 000	x	≤ USD 72 000	x
Administrative civil fines					
Patents?	x	≤ 4x illicit gain (1)	x	≤USD 570(2)	x
Trademarks?	x	≤ 5x illicit gain (3)	x	≤ USD 2 900(2)	x
Copyright?	x	< 5x illicit gain (3)	x	≤USD 570(2)	x
Criminal sanctions (imprisonment and/or fines)					
Imprisonment or deprivation of liberty, up to:					
Patents?	1 year	3 years	x	5 years (4)	x
Trademarks?	1 year	7 years (5)	3 years	6 years (4)	5 years (6)
Copyrights?	4 years (7)	7 years (5)	3 years (8)	6 years (4)	5 years (6)
Fines:					
Patents?	✓	x	x	< USD 4 300 (9)	x
Trademarks?	✓	x	< USD 2 900	< USD 14 000 (10)	< USD 650 (11)
Copyrights?	✓	x	< USD 2 900	< USD 7 200 (12)	< USD 650 (11)
Other features					
IP courts exist?	✓	✓	x	✓	x
Parallel imports allowed?	?(13)	- (14)	-(15)	x	✓

Notes: National currency amounts have been translated into USD, based on average exchange rates in 2016. (see, See www.irs.gov/individuals/international-taxpayers/yearly-average-currency-exchange-rates). (1) If the unlawful gain is not known, a fine ≤ USD 36 000 can be imposed. (2) Applicable to legal entities. (3) If the illicit revenue is less than USD 7 200, or is not known, a fine ≤ USD 36 000 can be imposed. (4) Applicable when a group of persons or organised group of infringers is involved. (5) Applicable to cases which are deemed to be serious in nature. (6) For repeat offenders; first offence is for up to 3 years. (7) Applicable to infringement which is commercial in nature. (8) Applicable for repeat offences and certain types of copyright infringement. (9) Applicable to groups; fine can also be calculated on the basis of an amount equal to up to 8 months wage or salary of a convicted person. (10) Applicable to groups; fine can also be calculated on the basis of an amount equal to up to 5 years wage or salary, or other income, of a convicted person. (11) For repeat offenders; first offence is up to $376. (12) Applicable to groups; fine can also be calculated on the basis of an amount equal to up to 3 years wage or salary, or other income, of a convicted person. (13) Situation under review. (14) Allowed for patented goods; no rules for trademarked and copyrighted materials. (15) Allowed for trademarked but not copyrighted materials. (16) Applicable to patents.

The remedies available in the five economies are lower than those in some other jurisdictions. In the United States, for example, statutory damages for trademark infringement can reach USD 2 million, while those applicable to copyright can reach USD 150 000, in cases where the infringement is wilful (Yeh, 2016). With respect to criminal sanctions, a first offence involving a trademark infringement can result in imprisonment for a period of up to 10 years and/or a fine of up to USD 5 million (in the case of organisations). Higher penalties apply for repeat offences and offences involving physical harm. In the case of copyright infringement, criminal sanctions include imprisonment for up to 5 years and/or fines up to USD 500,000 (for organisations).

Protection of IP rights holders from parallel imports differs in a number of other areas. The Russian Federation does not allow "parallel imports", which are products marketed by a rights holder, or with the rights holder's permission, in one country and imported into another country without the approval of the rights holder. China, India and South

Africa, on the other hand, allow parallel imports, in certain instances. It is not clear whether Brazil allows parallel imports as there are conflicting decisions in this area.

5.4.2. Policies and programmes

The country case studies show these economies are taking steps to promote and strengthen effective enforcement of IP rights.

In **Brazil**, the resources devoted to handling patent and trademark matters have been enhanced, and automated processes are being introduced to improve the handling and processing of applications. Attention is also being paid to raising public awareness of the negative effects of piracy. Campaigns have been carried out in movie theatres, magazines and on the Internet. The campaigns have sought to raise awareness of the importance of buying original products and the penalties arising from the purchase of pirated and counterfeit products.

In **China**, the government is focusing on educating businesses on the value of intellectual property, and enhancing the capacity of government offices to support business in this regard, while strengthening enforcement of IP rights. Annual plans are prepared, which contain detailed steps to be taken during the year concerned. During 2011-14, the leading area where actions were to be taken was enhancing IP protection (30% of the total), followed by improving IP management (21%) and raising the quality and use of IP (18%). Improving interagency co-operation has played an important goal in China, as reflected by the creation of an Inter-Ministerial Joint Conference for the Implementation of National Intellectual Property Strategy, in 2008, and the creation of a National Leading Group for Combatting IPR Infringement and Counterfeits, in 2011. Institutionally, an important step was taken in 2014, with the establishment of three specialised IP courts.

China has also been proactive in raising awareness of IP issues, and in providing training to businesses on the value of IP. Publicity programmes are developed on an annual basis, and special initiatives are carried out at key times during the year. The news media is encouraged to cover cases on IP infringement. Moreover, court cases are broadcast online, and information on the cases is publicised, where possible. Customs, the judiciary and the copyright office each publicise the most selected cases on an annual basis, focusing on the "top 10". Education and training are also a priority, supported by a series of 5-year plans which target businesses, the judiciary and enforcement officers.

In **India**, a new national IP strategy was published in May 2016, in which objectives in seven areas were established. Two campaigns, *Make in India* (2014) and *Startup India* (2016), were launched, each of which had an important IP component.

In the **Russian Federation**, laws to strengthen the economy's IP regime have been passed in recent years. Institutionally, an important step was taken in 2013, when a specialised IP court was created.

In **South Africa**, a new proposal was put forward in 2013. The main objectives of the proposal, which remain under review, include: the development of a framework that would empower all stakeholders, the improvement of IP enforcement, the promotion of research and development, the improvement of compliance with international treaties, the inclusion of public health considerations in IP laws, the strengthening of the climate for investment and the promotion of public education and awareness of IP.

International co-operation

All five economies were engaged in international activities to combat counterfeiting and piracy. This included participation in at least one INTERPOL operation during 2015-16, and participation in WIPO-administrated treaties and conventions. The Russian Federation, for example, has agreed to 20 of 25 active WIPO-administered instruments, followed by China (13), Brazil (10), India (8) and South Africa (5).

Co-operation with stakeholders

Co-operation with stakeholders can enhance the effectiveness of efforts to combat counterfeiting and piracy by, for example, improving the techniques and mechanisms for detecting infringement, and contributing to research and analysis on infringement, while contributing to policy development and implementation.

In **Brazil**, the National Council to Combat Piracy and Crimes against Intellectual Property includes representatives from the private sector, including rights holders and civil society.

In **China**, the Quality Brands Protection Committee, which comprises more than 200 multinational companies with subsidiaries in China, actively supports and assists law enforcement agencies in combatting counterfeiting, by organising meetings an training sessions. In addition, the committee is actively involved in advising the government on revisions of IP laws and regulations.

In **India**, the Federation of Indian Chambers of Commerce and Industry has an IPR division dedicated to addressing IP issues. The division is engaged in capacity building and training for law enforcement agencies.

In the **Russian Federation**, the Coalition for Intellectual Property Rights is a private-public partnership dedicated to advancing IP protection in the region. The focus is on public education, legislative action and legal reform, awareness and education.

5.4.3. Enforcement and outcomes

Enforcement efforts have been enhanced in a number of jurisdictions in recent years. In **Brazil**, the National Council to Combat Crimes against Intellectual Property, which was established in 2004, released its third plan for combatting counterfeiting in 2013, covering the period through 2016. In addition, a project was launched in 2013, to create a National Directory to Combat Trademark Counterfeiting, with the aim of facilitating co-operation between rights holder and government agencies.

In **China**, the destruction of counterfeit goods increased in 2014, as did the number of criminal cases prosecuted and concluded. Under "Operation Swordnet", which is an annual campaign focusing on online issues, some 1.9 million web shops and websites were checked for compliance; various administrative agencies investigated 440 cases, of which 66 cases were referred to the judiciary; fines of RMB 123 million (USD 18 million) were imposed.[2]

Efforts to intercept infringing imports and exports focused on areas involving health and safety, such as drugs, food and automobile parts. Risk analysis techniques were refined in 2014. A special 6-month operation was conducted to address infringements occurring in postal express channels.

In **India**, a system of state nodal officers and specialised IP cells within one State police organisations continues to develop initial efforts to tackle piracy. Another State is

considering a similar dedicated unit. India also continues to have challenges in the following areas of enforcement of IP rights: lack of a standalone trade secrets law; lack of an anti-camcording law; and lengthy delays in using the judicial system for IP cases.[3] Industries have become more proactive, with the Federation of Indian Chambers of Commerce and Industry developing a toolkit to assist law enforcement in their efforts to combat piracy.

In the **Russian Federation**, the customs service intercepted 9.4 million units of goods that were believed to have infringed intellectual property rights, in 2013; the goods were valued at RUB 5 billion (USD 72.0 million). During the year 1 188 administrative cases were opened by customs, most of which concerned trademarks.

In **South Africa**, recent efforts to improve enforcement include *i)* the training of magistrates, prosecutors and SAPS and SARS officials, *ii)* antipiracy campaigns carried out in various regions, *iii)* multimedia campaigns, *iv)* activities in main hotspots for counterfeit and pirated goods, *v)* sessions organised throughout the country with artists and *vi)* campaigns co-ordinated with the Departments of Arts and Culture, Communications, Home Affairs, Finance and Police. Efforts to improve compliance and convictions are focusing on strengthening interagency co-ordination, working with industry on the implementation of programmes and working with the National Consumer Commission on misleading advertising. However, statistics show that, despite these efforts, conviction and use of civil remedies are not good.

5.4.4. Programme review

Reviews of the IP regimes in the five economies were carried out in a number of contexts in recent years. These included: *i)*country self-assessments, *ii)* intergovernmental examinations at the World Trade Organisation, which were carried as part of the WTO's trade policy review process, and *iii)* reviews by other stakeholders.

The reviews all noted some progress had been made in enhancing the role of intellectual property in the economies reviewed in recent years, and the protection of rights holders. Despite progress, serious and longstanding concerns were raised, resulting in four of the economies being included on the most recent "watch" or "priority" IP lists by the European Union (European Commission) and the United States (Table 5.2). Each of the BRICS countries has been on the U.S. "watch" or "priority" IP list continuously or for a great majority of the past 25 years.

Table 5.2. Inclusion of Brazil, China, India and the Russian Federation on the European Commission and United States IP Watch lists.

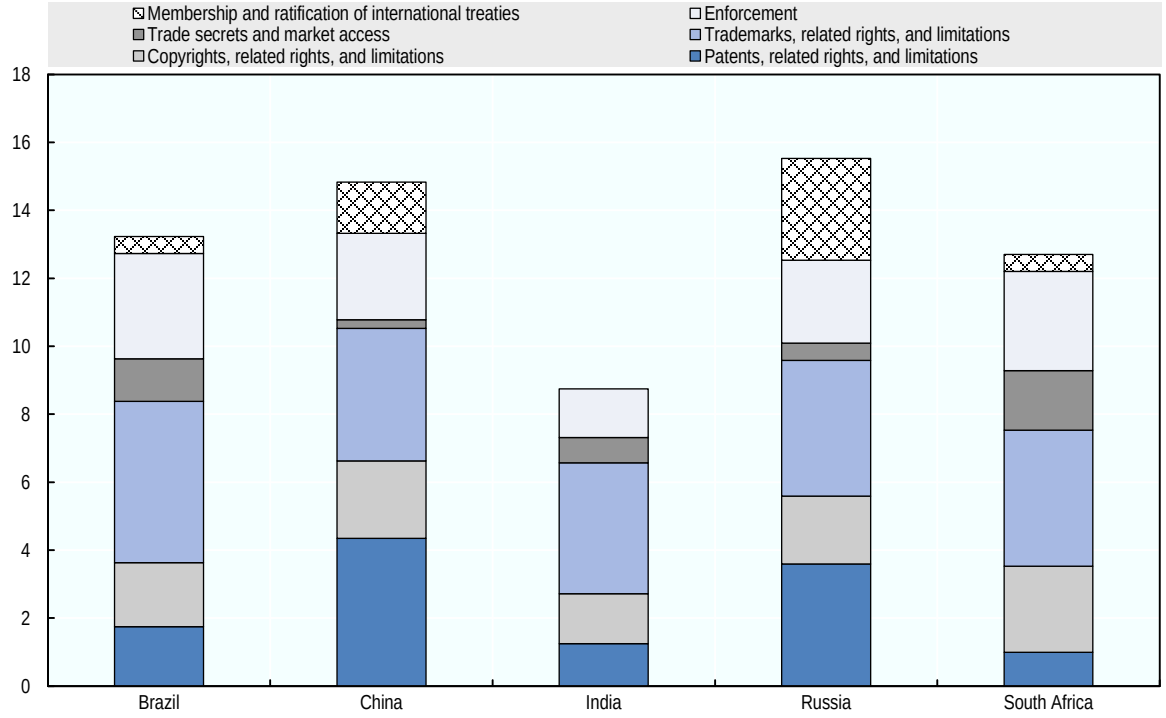
Economy	EC IP Priority List, 2015	US IP Watch List, 2017
Brazil	Priority 3 list	Watch List
China	Priority 1 list	Priority Watch List
India	Priority 2 list	Priority Watch List
Russian Federation	Priority 2 list	Priority Watch List

Sources: European Commission (2015; USTR (2017).

Evaluations of the economies were carried out by the Global Intellectual Property Center (GIPC), a business-led organisation which is associated with the US Chamber of Commerce. In 2017, the GIPC assessed the situation in 38 economies. The five economies covered in this report were ranked in the bottom half of the counties reviewed:

the Russian Federation achieved a score of 13.06 out of 30, which ranked it 20th overall; China ranked 22nd (12.64 points), South Africa ranked 26th (11.49 points), Brazil ranked 29th (10.41 points), and India ranked 37th (7.05 points) (Figure 5.4).

Figure 5.4. Global Intellectual Property Center Indices



Notes: GIPC scores the performance of countries against six categories of IP protection—patents (scored out of 8), copyrights (scored out of 6), trademarks (scored out of 7), trade secrets and market access (scored out of 3), enforcement (scored out of 7), and accession to international IP treaties (scored out of 4).
Source: GIPC (2017).

The reviews revealed a number of concerns that were common to the five countries, namely: *i)* the level of penalties for infringement, which were seen as too low to effectively deter counterfeiters and pirates and *ii)* the high level of infringing being produced and/or sold in the economy. The level of enforcement and/or efficiency of judicial proceedings were also mentioned in some instances, as was the open sale of infringing products on markets known for channelling such goods. The weaker handling of cases outside major cities was also mentioned as a concern for China and India.

In **Brazil**, at the time of its 2013 WTO review, the government noted considerable attention had been paid to improving the functioning of the patent office, with a view towards reducing the patent backlog. The government further asserted considerable progress had also been made in reducing trade in IP-infringing goods. In summarising the review, the chair stated that one of the main areas for possible improvement brought up by Members during the review included intellectual property, and that a number of Members posed several questions with respect to geographical indications, copyright protection, patents, compulsory licensing and enforcement. Concerns also were raised by assessments carried out by the European Union, United States and the GIPC. These included *i)* delays in processing patents, *ii)* the high level of production and sale of counterfeit and pirated products, *iii)* the slow speed, complexity and unpredictable nature

of judicial procedures, *iv)* the low level of penalties for infringement and *v)* the open sale of infringing products on markets known for channelling such goods.

In **China**, at the time of its 2014 WTO review, the government stated that it had continued to proactively strengthen enforcement of IP law. The government asserted that through highly aggressive enforcement, the scale of infringement in the economy had been reduced; moreover, penalties for infringement had been increased and efforts to enhance public awareness of IPR issues had been pursued. The 2014 annual government review provides further detail on the situation, in seven key areas.

In summarising the review, the chair noted that concerns had been raised about the enforcement of IPRs, the protection of trade secrets, and the adequacy and evenness of protection and enforcement. It was suggested that much had to be done to close loopholes in the legal framework and to reduce high levels of infringement in China.

Other concerns were raised by the European Union, United States and the GIPC. As they relate to counterfeiting, these included *i)* the registration of "bad faith" trademarks and the documentation requirements for trademark applicants, *ii)* the significant online distribution of counterfeit products and the cumbersome processes for removing infringing products, *iii)* the level of damages for infringement (which were seen as inadequate both in terms of compensation to rights holders and as a deterrent), (i*v)* the weaker handling of IP cases in smaller jurisdictions (i.e. outside large cities), *v)* inconsistent criminal prosecution of counterfeiters and *vi)* the open sale of infringing products on markets known for channelling such goods.

In **India**, during its 2015 WTO review, several trading partners commented favourably on the improvements that were being made in the economy's IP enforcement regime. In summarising the review, the chair noted that concerns had been raised about the protection of trade secrets and test data.

Assessments carried out by the European Union, United States and GIPC provided further insights. Favourable developments included the development of e-filing and other digital services, improvement in interdepartmental co-operation, greater IPR awareness among officials, the fair and deliberate court judgments, and the campaigns to boost the link between IP and development. General concerns included *i)* restrictive patentability criteria, combined with difficulties to enforce patents, *ii)* the delays and challenges in obtaining trademarks, *iii)* the high level and range of copyright infringement and the inadequate level of statutory damages, *iv)* the weak level of enforcement, particularly outside the Delhi area, *v)* the open sale of infringing products on a markets known for channelling such goods and *vi)* the weak application and enforcement of civil remedies and criminal penalties.

The situation in the **Russian Federation** was subject to its first WTO trade policy review in 2016. The assessments made by the European Union, United States and GIPC note the improvements that had been in the economy in recent years, including changes in the civil code, the establishment of an IP court, and a strengthening of the regulations governing online piracy. General concerns included *i)* the high level of online and physical counterfeiting and piracy, *ii)* cumbersome and slow investigations, *iii)* low penalties that did not deter infringement, *iv)* failure to move against large infringers, *v)* a general decline in IP enforcement in recent years, reflecting in part a reduction in policing resources and *vi)* the open sale of infringing products on markets known for channelling such goods.

In **South Africa**, The performance of the CIPC, which oversees IP matters, was evaluated in survey of stakeholders and customers. The respondents provided an average satisfaction rating of 6.30 out of 10. The main reasons for dissatisfaction were slow/inefficient service (28%), inadequate feedback (17%), and difficulties in contacting the CIPC (13%). On the other hand, respondents complimented the staff for being friendly and helpful; additionally, 3% of respondents felt the systems/processes were convenient. The assessment made by the GIPC raised concerns about the high levels of counterfeit and pirated goods in the economy, weak patent protection, and uncertainty over localisation requirements. On the other hand, the country was complimented on the IP framework that was in place and improving copyright protection.

5.4.5. Concluding remarks

While there is a general appreciation of progress towards more effective governance of IP enforcement frameworks, and increased recognition in the five economies studies of the importance of IP in enhancing innovation and economic growth, much more needs to be done to effectively combat infringements.

The following list includes some of the areas that could be explored, with a view towards more effectively combatting counterfeiting and piracy, based on what has been learned from the experience of the countries profiled in this report.

- The adequacy of enforcement could be examined. In this regard, the countries profiled have progressed initially in addressing the situation at borders, through efforts to begin building enhanced customs screening, collaboration with international partners, and joint actions. Policing actions co-ordinated with Interpol have also played an important role in combatting IP crime. More attention, however, might have to be paid to efforts to move against counterfeiters in the countries where it is taking place as well as campaigns to raise awareness of threat and risk, especially to public health and safety, in order to reduce demand. The level of resources devoted to enforcement bodies and the techniques employed by them could be reviewed, with a view towards enhancing the effectiveness of enforcement. International sharing of experiences on this front could help improve the situation significantly.
- The effectiveness of deterrents to counterfeiting could be explored. Evidence suggests counterfeiting is a highly profitable, low risk activity, and penalties are relatively low. Reviewing and raising the penalties could be examined. This would include the possibility of introducing or strengthening criminal sanctions forfeiture, and administrative fines. Facilitating the means for rights holders to recover damages could also be reviewed, as could options such as including the introduction of significant statutory damages which rights holders could pursue in lieu of seeking actual damages.
- In general, public reporting on IP infringement in the countries profiled could be stepped up. Consideration could be given to the preparation of annual reports, as has been done by China, providing detailed information on developments and actions taken on the legislative and enforcement fronts to combat counterfeiting and piracy. Such reports could provide assessments of what has been accomplished and what needs to be done to improve the situation.
- Internationally, accession and adherence to IP agreements by the countries covered in the report could be examined and, where possible, expanded. This could include broader participation in key WIPO agreements, and related

instruments. With respect to the WTO, ensuring notifications are made in a timely manner and the situation is thoroughly covered in trade policy reviews, could be pursued.

- Education and public awareness can be important in shaping the public's attitudes and actions regarding IP. The countries profiled have taken actions in this regard, but these efforts may need to be expanded. The efforts could include guidance to the public on what they can do to avoid counterfeit and pirated products; targeted campaigns, which have been pursued by some of the countries profiled, could be stepped up.

Notes

[1] See WTO (2014) at 5.38.

[2] See http://www.gx.xinhuanet.com/newscenter/2015-01/14/c_1113995974.htm

[3] See USTR (2017) at pp. 1, 11, 42-44.

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6. Governance frameworks for combatting counterfeiting in Brazil

This chapter looks at policy developments and governance issues, reviewing the effectiveness of the governance frameworks for IP related policies in Brazil. It begins with presentation of a factual, quantitative overview of the situation in Brazil of trade in counterfeit goods. This is followed by a review of the governance frameworks for IP enforcement and institutional capacities in Brazil, with sections on legal and institutional setting, policies and programmes to enhance IP protection, IP enforcement and outcomes, and reviews of relevant, IP-related programmes.

6.1. Current situation

Between 2011 and 2013, Brazil ranked 60th as a source economy for counterfeit and pirated products in the world, exporting a large range of fake products, including machinery and electrical equipment (HS 84 and 85); clothing and accessories (HS 61; HS 62 and HS 64); luxury items, such as watches (HS 91) and leather articles (HS 42); pharmaceuticals (HS 30); and foodstuff (HS 2 to 21) (see Figure 6.1). These counterfeit and pirated goods were largely shipped to the country's traditional large trade partners (e.g. the United States, Portugal and Argentina), as well as to Middle-East countries (e.g. Saudi Arabia and Qatar) and North-Eastern European countries (e.g. Netherlands, Germany and Denmark).

In addition to being a relative small source economy in international trade of counterfeit and pirated products, Brazil also appears to be a small destination economy, resulting in a small net trade surplus of fake items. However, its profile as destination economy is far less diversified than that of source economy. Over the period 2011 and 2013, Brazil's imports focused on luxury goods, such as watches (HS 91) and leather articles (HS 42), and intermediate and elaborated goods, such as bearings and computers (which are included in HS 84 and HS 85). The imports originated mostly from Hong Kong (China) and China (see Figure 6.2).

A particularity of the Brazilian economy as compared to the rest of the world is the conveyance methods used to ship counterfeit and pirated items inside and outside the territory. While parcel shipment is, on average, the conveyance method the most used for shipments of counterfeit and pirated products in the world, sea transports and air transports are the top conveyance methods used for both Brazilian exports and imports of such goods (see Figure 6.1 and Figure 6.2).

As a source economy of right holders whose IPR are infringed, Brazil ranked 23rd during the whole period 2011 – 2013. The most widely Brazilian brands that were counterfeited concerned footwear (HS 64) and glassware (HS 90); the counterfeits originated largely from China, Hong Kong (China) and Uruguay (see Figure 6.3). Exports of fake items were shipped to Brazil's traditional large trade partners, such as Paraguay, Portugal, Spain and Mexico. In contrast to India and China, the source of counterfeiting and piracy that affects adversely the Brazilian economy is not intra-national, but global.

Figure 6.1. Brazil as source economy of counterfeit and pirated goods, 2011-2013

The percentage of global customs seizures of counterfeit products in source from Brazil

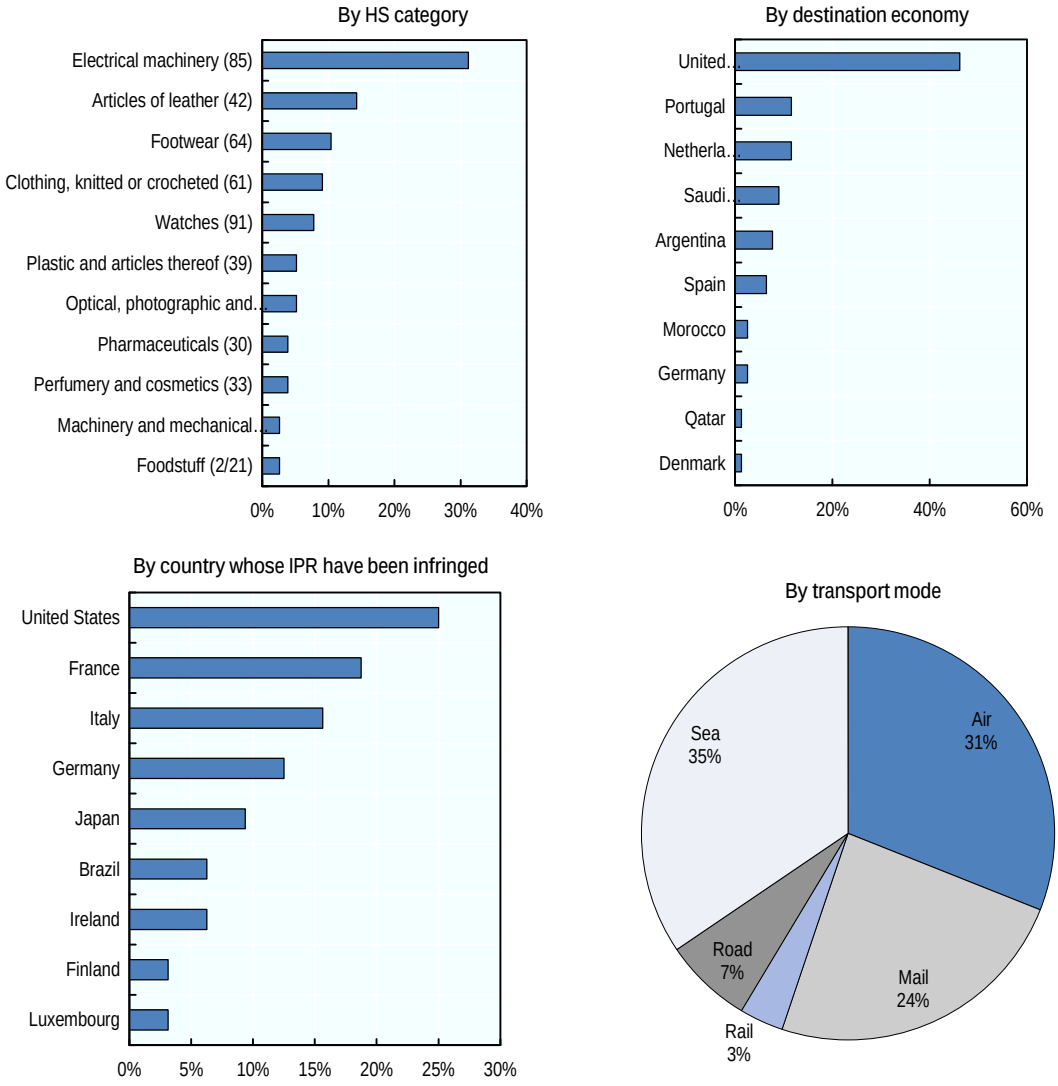


Figure 6.2. Brazil as destination economy of counterfeit and pirated products, 2011-2013

The percentage of customs seizures of counterfeit products shipped to Brazil

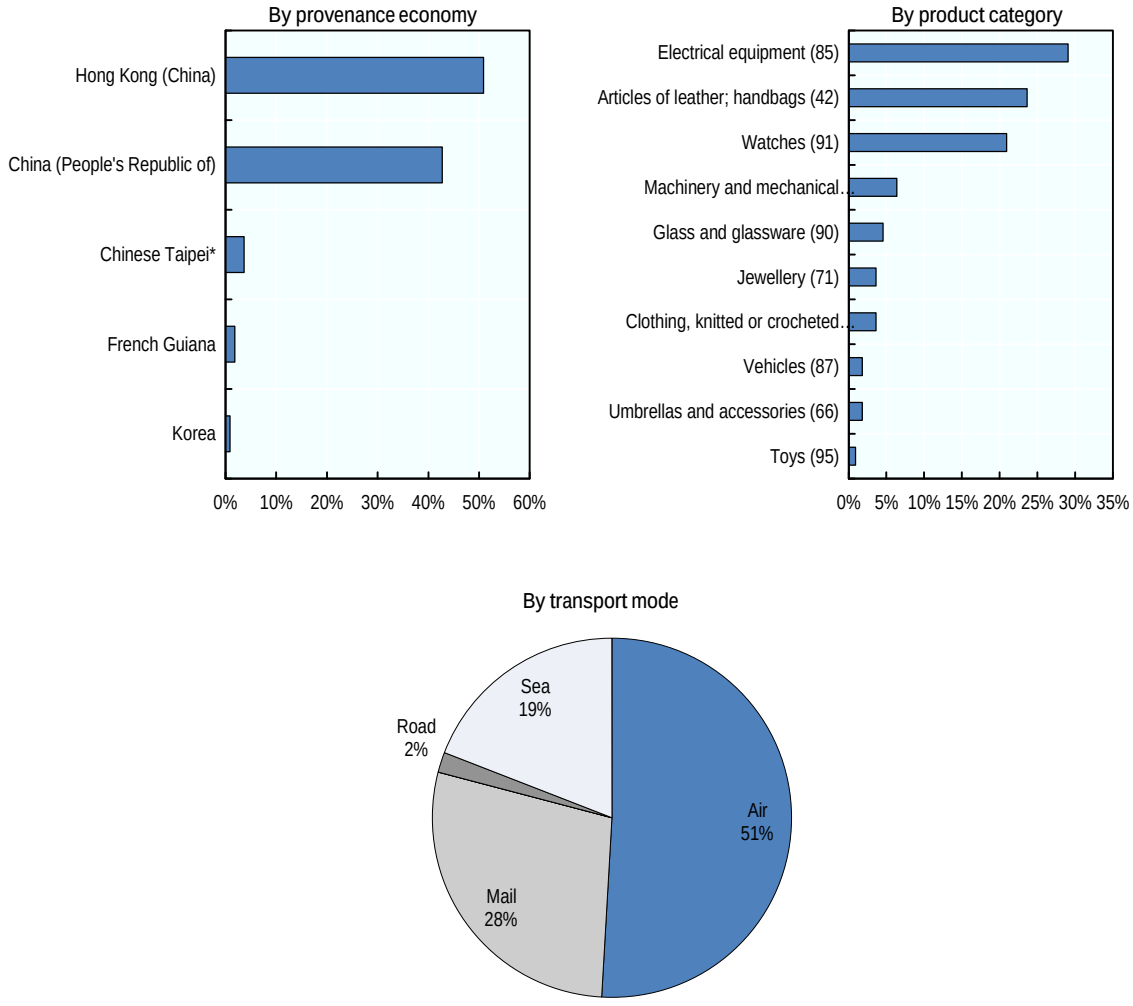
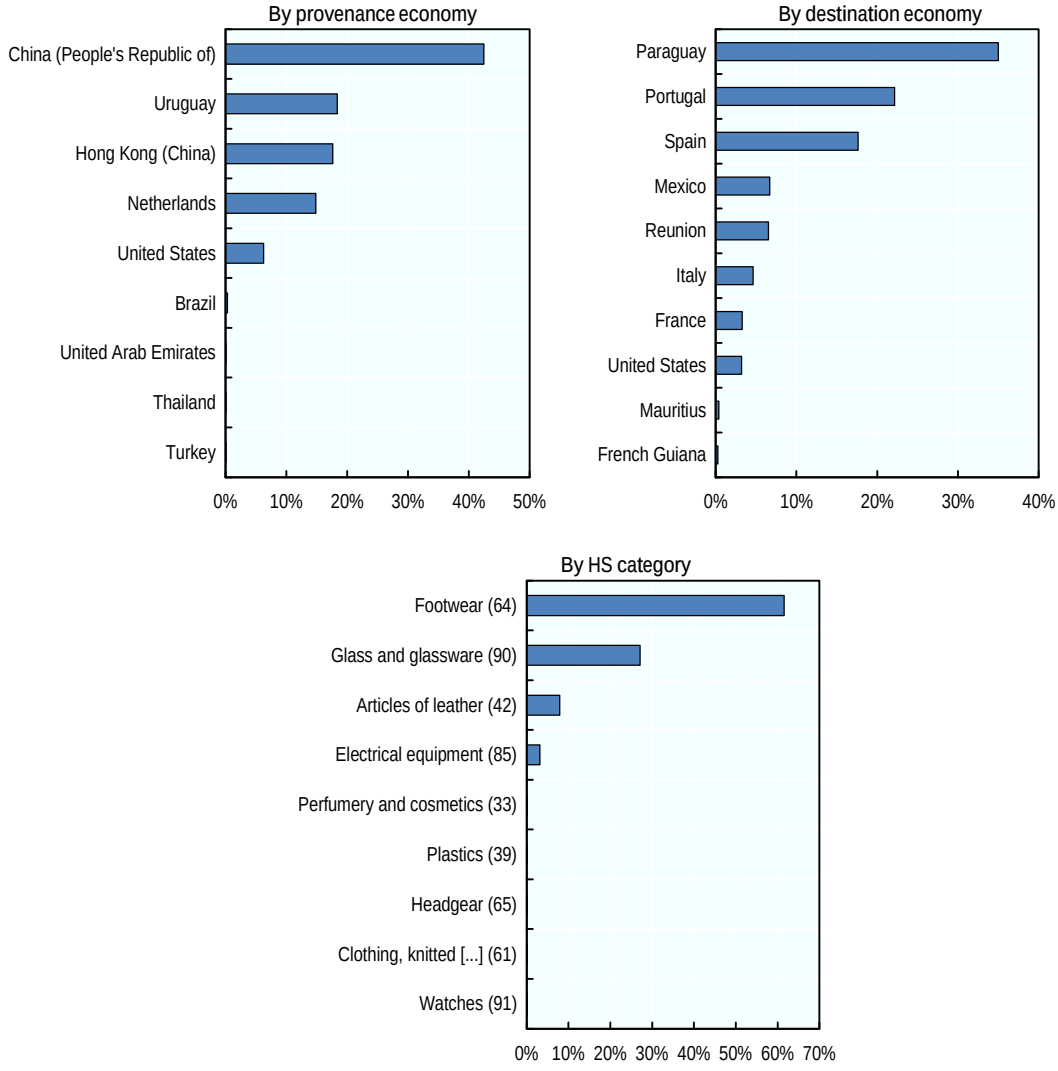


Figure 6.3. Brazil as economy of origin of right holders whose IPR have been infringed, 2011-2013

The percentage of global customs seizures of counterfeit products whose right holders are Brazilian residents.



6.2. Legal and institutional setting

The National Industrial Property Institute (INPI), which is an autonomous federal agency under the Ministry of Industry, Foreign Trade and Services, oversees patent and trademark issues. Copyright is overseen by the Department of Intellectual Property Rights of the Ministry of Culture, and it handles copyright policy matters. In addition to enforcing rules and registering patents and trademarks, the INPI is involved in advising on the economy's involvement in international treaties and agreements in these areas.

Concerning the legal framework, under the Industrial Property Law (WTO, 2013*a*):

- patents are protected for 20 years from the time of filing,
- industrial designs are protected for 10 years from the filing date, but may be extended for 3 successive 5-year periods,
- trademarks are protected for 10 years, which are renewable for successive 10-year periods.

Under Copyright Law, works are generally protected for the life of the author, plus 70 years; software, however, is protected for 50 years, starting with the 1rst of January that occurs after publication of the software, and does not include the life of the author[1].

According to Brazilian Laws and courts' current practice, parties whose rights have been infringed can request: cessation of infringing acts, destruction of infringing goods, other measures to prevent the continuation of the infringement, publication of the judgment (or notification) and damages (Mercosur IPR SME Helpdesk, 2015).

In the case of copyright infringement, rights holders can also request: the destruction of the means used to carry out the infringement, the seizure of machines and equipment used for the infringement (and their destruction if they can only serve unlawful purposes).

Except for in São Paulo and Rio de Janeiro, there are few courts specialised in intellectual property infringement. Litigation in Brazil is strongly formalist, which usually extends the length of proceedings. Based on Brazilian practitioners' experience, the average criminal case takes around three years, and the average civil case takes over four years. (Mercosur IPR SME Helpdesk, 2015)

Damages

Parties whose rights have been infringed are entitled to compensation in the form of damages and/or recovery of profits (WTO, 2013*a*). However, Non-resident claimants in civil litigation are required to pay a security deposit of between 10% and 20% of the damages claimed. (Mercosur IPR SME Helpdesk, 2015) The calculation of compensation for lost profits is subject to the following three criteria, the most favourable of which (to the rights holder) is used (WTO, 2000 and Clark, Modet & Co., 2012):

- the benefits the injured party would have gained if the infringement had not occurred;
- the benefits that have been gained by the infringer; or
- the remuneration the infringer would have paid to the patentee for the grant of a license which would have enabled lawful use of the asset.

In the case of copyright infringement, if it is impossible to establish the number of pirated works, the compensation calculation is based on 3,000 infringements (WTO, 2000 and Fekete, et al, 2016). Also, seized goods become the property of the rights holder; non-

authorised broadcasting and communication to the public may give rise to a daily fine, which may be doubled if abuses continue.

Other penalties

Criminal penalties may also be applicable to IP infringements, however criminal penalties have not had a strong deterrent effect. (Mercosur IPR SME Helpdesk, 2015). Criminal prosecution of offences against intellectual property must be pursued though a private criminal complaint (with some exceptions) by the right holder. (Mercosur IPR SME Helpdesk, 2015) In the case of patents, design rights and trademarks, infringers can be subject to a penalty of three months to one year imprisonment, or a fine, whereas those who engage in the import, export, sale, storage or offer of items for commercial purposes are subject to one to three months imprisonment, or a fine. In most cases, courts sentence offenders to a few months imprisonment or a fine. (Mercosur IPR SME Helpdesk, 2015)

In the case of copyright, infringements are punishable by three months to one year imprisonment, or a fine (Mercosur IPR SME Helpdesk, 2015). If the infringement is commercial in nature, the penalty is increased to one to four years imprisonment, plus a fine. Moreover, the offer of protected works by electronic means with commercial purposes entails a penalty of two to four years imprisonment, plus a fine.

Border measures

IPR holders cannot register their rights with customs officials. (Mercosur IPR SME Helpdesk, 2015) Customs officials can seize goods that violate trademarks if the trademark is known to them; the burden falls on rights holders to provide the customs officials with information about their IPR and a formal request to seize goods that infringe their IPR. (Mercosur IPR SME Helpdesk, 2015) *Ex officio* interventions by customs are authorised in a small number of cases, but are not supported by trademark registration, for which there are no provisions.

It is unclear whether or not parallel imports are permitted in Brazil as there have been a number of conflicting decisions on this matter recently. “Parallel” imports are genuine products that are not authorised by the right holder for distribution in a geographic market.

6.3. Policies and programmes

To address the growing backlog, the government has been improving the IP regime in recent years, focusing on improving the operational efficiency of INPI (INPI, 2017 and WTO, 2013*b*). The number of patent examiners has been increased, and efforts have been made to automate and upgrade systems. In this regard, the procedures related to the examination of patents are being harmonised, supported by a series of public consultations on guidelines during 2012-15. The speed of patent examination has also improved through the reduction in the number of administrative procedures. Moreover, a system for prioritising patent examinations has been introduced which includes provisions for accelerating consideration of applications that are disputed.

The National Council to Combat Piracy and Crimes against Intellectual Property (CNCP), which was established in 2004, is continuing to work to strengthen coordination among government agencies involved in the fight against piracy and counterfeiting (WTO, 2013*a*). In addition to government, representatives from the private sector, including right holders and civil society, are involved. The work of the council is seen as having

contributed to a decrease in the volume of commerce of items which violate intellectual property rights, reflecting the results not only of enforcement actions but also of a shift both in consumer awareness of the negative effects of piracy in Brazil and in the business strategies of companies to reflect consumer interests more effectively. The campaigns involving consumers have been carried out in movie theatres, magazines and on the Internet (WTO, 2013*d*). They have sought to raise awareness of the importance of buying original products and of the possible losses and damages arising from the purchase of pirated and counterfeit products.

In 2013, INPI and CNCP launched a project to create a National Directory to Combat Trademark Counterfeiting (INTA, 2014). The directory is a database containing trademark owners' technical and legal information. The main purpose of the database is to facilitate cooperation between trademark owners and the government agencies that combat infringement of intellectual property rights.

Also in 2013, Brazil released its third plan for combating counterfeiting, covering the period through 2016 (III Plano Nacional de Combate à Pirataria) (Oleveira Lawyers, 2013). The plan included the creation of an institute that would conduct research on the topic, and special efforts to combat counterfeiting and piracy associated with the 2014 FIFA World Cup, which Brazil hosted. The plan also included provisions for improving public education.

With respect to international co-operation, Brazil is a member of the World Intellectual Property Organization (WIPO) and a signatory to number of WIPO-managed intellectual property rights (IPRs) treaties (Table 6.1) (WTO, 2013*a*). In addition, it has been involved in a number of technical co-operation activities with WIPO, which has reportedly helped to enhance the patent examination processes used in the country (INPI, 2017). The economy has also entered into a number of multilateral and regional treaties on its own, or as a MERCOSUR party (WTO, 2013*a*). PROSUR, for example, is a project being carried out by industrial property offices in nine South American economies, namely Argentina, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Suriname and Uruguay. The purpose of the project, which was agreed in 2012, is to *i)* establish a forum for facilitating dialogue, *ii)* create a common portal in order to offer a set of services for the South American users, such as centralised search in interconnected databases, *iii)* establish linked databases, and *iv)* promote collaborative examination of patent applications. It is expected that the work carried out under the project will allow offices to reduce their backlogs and strengthen the quality of their examination. (Brazil WTO TPR Report by Brazil, 2013) Finally, as of mid-2017, Brazil was in the process of ratifying the Nagoya Protocol, which is a supplementary agreement to the Convention on Biological Diversity (INPI, 2017).

Table 6.1. WIPO and related IP instruments in force in Brazil, China, India, the Russian Federation and South Africa

Treaty/agreement/convention	Brazil	China	India	Russian Federation	South Africa
Berne Convention	✓	✓	✓	✓	✓
Brussels Convention				✓	
Budapest Treaty		✓	✓	✓	✓
Hague Agreement				✓	
Lisbon Agreement					
Locarno Agreement		✓		✓	
Madrid Agreement (Indications of source)	✓				
Madrid Agreement (Marks)		✓		✓	
Madrid Protocol		✓	✓	✓	
Marrakesh VIP Treaty	✓				
Nairobi Treaty	✓		✓	✓	
Nice Agreement		✓		✓	
Paris Convention	✓	✓	✓	✓	✓
Patent Cooperation Treaty	✓	✓	✓	✓	✓
Patent Law Treaty				✓	
Phonograms Convention	✓	✓	✓	✓	
Rome Convention	✓			✓	
Singapore Treaty				✓	
Strasbourg Agreement	✓	✓		✓	
Trademark Law Treaty				✓	
Vienna Agreement					
Washington Treaty					
WIPO Convention	✓	✓	✓	✓	✓
WIPO Copyright Treaty		✓		✓	
WIPO Performances and Phonograms Treaty		✓		✓	
Total	10	13	8	20	5

Note: This list does not include the Beijing Treaty on Audio-visual Performance, which is not yet in force.
Source: WIPO (2016), WIPO-Administered Treaties, http://www.wipo.int/treaties/en/ (accessed in June 2016).

The economy is actively engaged with INTERPOL in combatting IP crime, participating in Operation Jupiter VII in 2015, which moved against the production and sale of counterfeit goods.[2,3]

6.4. Enforcement and outcomes

During 2008-12, the CNCP carried out 23 strategic projects to fight IPR violations (WTO, 2013*a*). The intention was to strengthen activities by: *i)* further developing partnerships with the private sector and other governmental agencies; *ii)* structuring internal processes related to financial management, human resources, and communication; *iii)* structuring mechanisms for the search and exchange of information; *iv)* further developing educational campaigns and institutional marketing; *iv)* mobilising and articulating governmental agencies for enforcement; *v)* developing innovative solutions to hamper the commercialization of illegal goods; and *vi)* formulating and managing the policies to combat IPR violations.

In 2011, the Federal Police Department initiated 8,325 investigations related to the smuggling of goods, with 4,130 indictments. Some 555 piracy investigations were undertaken, with a similar number of indictments. Enforcement actions were also undertaken by the Federal Highway Police Department, which, between 2008 and 2010, apprehended 360,137 litres of illegal beverages, 22.2 million CD/DVD units, 7.85 million packets of cigarettes, 289,969 computers, 1.05 million units of other electronic

equipment, and 21.88 million units of medicines. The operations resulted in the arrest of 5,116 persons.

Assets valued at BRL 1.275 billion (USD 367 million) were seized in 2010. The goods with the highest gross share of seizure were electronics, cigarettes, sunglasses, and clothing. In 2010, more than 3,500 tons of goods, totalling BRL 353.66 million (USD 102 million) were destroyed.

6.5. Programme review

Brazil's IPR regime was reviewed by the WTO, in the context of the trade policy review of the economy that was carried out in 2013. The Brazilian government noted at the time that considerable attention had been paid to improving the functioning of the patent office, with a view toward reducing the growing backlog of patent applications (WTO, 2013*b*). In addition to increased human resources, new technologies were being introduced to enhance efficiency. The accomplishments of the CNCP were also mentioned. It has reportedly been instrumental in decreasing the volume of commerce of items which violate intellectual property rights, in certain areas and sectors. This is seen as reflecting not only enforcement efforts, but also a shift both in consumer awareness of the negative effects of piracy in Brazil and in the business strategies of companies, which have sought to diminish interest in counterfeit goods, by selling their products at lower prices.

In summarising the review, the chair stated that one of the main areas for possible improvement brought up by Members during the review included intellectual property, and that a number of Members posed several questions with respect to other IPR issues, including geographical indications, copyright protection, patents, compulsory licensing and enforcement.[4] A number of questions were raised on the role that ANVISA, Brazil's national health surveillance agency, plays in reviewing patent applications involving pharmaceuticals. The agency evaluates the impact of new pharmaceutical products or processes on public health, relying on the staff's specialised expertise. Its consent is necessary for the patent examination to proceed.

Further evaluation of Brazil's IP regime was carried out by the European Commission and the United States in 2015 and 2016-17 (EC, 2015, USTR, 2016*a* and USTR 2017). The Commission noted the success the National Council to Combat Piracy had had, to tackle widespread counterfeiting and piracy, in collaboration with the Brazilian Customs, the World Customs Organization, the sporting goods industry and the EU Delegation in the months prior to the FIFA World Cup (EC, 2015). It had resulted in impressive seizures of clothing and merchandise. While progress had been made improving patent and trademark registration, the increase in the number of applications had resulted in a continued significant backlog of cases. Recent reporting indicates that in 2016, the patent backlog dropped from 11 to 10 years, due a decrease in patent applications and an increase in decisions on allowance.[5] Moreover, local production and importation of counterfeit products remained a concern; reference was made to the Galeria Page market in São Paulo, which was a major sales point for counterfeits. This market was included in the US Notorious List of Physical Markets where counterfeit and pirated products are sold, in 2015 and 2016 (USTR, 2015 and USTR, 2016*b*). Digital piracy also remained a significant problem, and there were ongoing concerns with slow, complex and unpredictable judicial procedures (EC, 2015). As a result of concerns, Brazil was placed on the EC's Priority 3 list.

The US reviews indicated that while significant enforcement actions had been carried out and cases had been brought against operators of online piracy sites, the levels of counterfeiting and online piracy in the economy remained high; the United States had therefore kept Brazil on its 2016 and 2017 IP watch lists (USTR, 2016*a* and USTR, 2017). Increased enforcement in the tri-border area of Argentina, Brazil and Paraguay was seen as needed, as were stronger penalties for infringement. The impact of the CNCP was seen as having slipped in 2015 and 2016, and concerns remained over the long delays in patent and trademark pendency. Other concerns included i) the duplicative review of pharmaceutical patent applications which lacks transparency, exacerbates delays of patent registrations for medicine, and has usurped the INPI, ii) inadequate protection of data submitted in support of pharmaceutical patents and iii) actions to shorten the term of patents for certain pharmaceutical and agricultural chemical products. (USTR, 2016*a*) The National Sanitary Regulatory Agency's (ANVISA) duplicative review of pharmaceutical patent applications has been a longstanding concern because it lacks transparency, exacerbates delays of patent registrations for innovative medicines, and has prevented patent examination by National Institute of Industrial Property 67 (INPI). In April 2017, Brazil announced an agreement between INPI and ANVISA, which is intended to expedite the examination of pharmaceutical patent applications and redefines ANVISA's role in that process. (USTR, 2017)

The IP regime was also evaluated by the GIPC. It awarded Brazil a score of 13.23 out of 30 in its 2015 assessment, which ranks the economy 32nd, out of the 45 economies examined (Table 2.2) (GIPC, 2017). The score reflects an improvement over the 9.57 score awarded in 2012 (GIPC, 2012). Areas of strength identified were the 10 year minimum term for patent protection, the Basic framework for IP protection in place, and being of the signatory to the Patent Law Treaty. Key weaknesses included localisation requirements and forced technology sharing for biopharmaceutical production, patentability issues in the pharmaceutical area, significant regulatory barriers to the commercialisation of IP asset and the relatively high levels of estimated software piracy.

Table 6.2. IP scores for Brazil, 2016

Area	Score	Out of	Percentage
Patents, related rights, and limitations	1.75	8	22
Copyrights, related rights, and limitations	1.88	6	31
Trademarks, related rights, and limitations	4.75	7	68
Trade secrets and market access	1.25	3	42
Enforcement	3.10	7	44
Membership and ratification of international treaties	0.5	4	13
Total	13.23	35	38

Source: Global Intellectual Property Center, U.S Chamber of commerce (2017), International IP Index, http://www.theglobalipcenter.com/ipindex2017/ (accessed July 2017).

Notes

[1] Law 9609/98, Art. 2, 2nd paragraph provides: "The protection system for intellectual property of software is the same granted to literary works by the copyright laws and connected provisions in Brazil, under the terms of this Law. (…) (2) The tutelage of the rights associated to the software is assured for a period of fifty years, counting from January 1 of the year following its publication or, if this is unavailable, its creation." See *http://www.wipo.int/wipolex/en/text.jsp?file_id=125391*, accessed in June 2017.

[2] See *www.interpol.int/Member-countries/Americas/Brazil*, accessed in June 2016.

[3] See *www.interpol.int/News-and-media/News/2015/N2015-137*, accessed in June 2016.

[4] See WTO (2013c) at 1.3 – 6.6.

[5] See INPI statistics (2016) at p. 16: *http://www.inpi.gov.br/sobre/estatisticas/arquivos/publicacoes/boletim_jan-2017.pdf/view*, accessed in June 2017.

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7. Governance frameworks for combatting counterfeiting in China

This chapter looks at policy developments and governance issues, reviewing the effectiveness of the governance frameworks for IP related policies in China. It begins with presentation of a factual, quantitative overview of the situation in China of trade in counterfeit goods. This is followed by a review of the governance frameworks for IP enforcement and institutional capacities in China, with sections on legal and institutional setting, policies and programmes to enhance IP protection, IP enforcement and outcomes, and reviews of relevant, IP-related programmes.

7.1. Current situation

China is the largest source economy for counterfeit and pirated products worldwide, far exceeding all other economies combined. The range of products counterfeited is broad, with footwear (HS 34), leather articles (HS 42), and clothing (HS 61 and 62) being most common.

The scope of counterfeit and pirated goods exported from China also includes a large share of electronics and electrical equipment (HS 85), as well as luxury items, such as watches (HS 91), sunglasses (HS 90), perfumery and cosmetics (HS 33) and jewellery (HS 71).

These counterfeit products are shipped widely across the world (to 153 economies), including to a large number of high-income countries, with United Kingdom, United States, Germany and Belgium being the top destinations. In particular, American, Italian, Swiss, French and German brands are the main victims of counterfeit and pirated goods that originate in China.

By contrast, China is a small destination for counterfeit and pirated products. Only 42 cases of customs seizures referring to China as the destination economy were reported between 2011 and 2013. In addition, the scope of counterfeit and pirated products shipped to China is fundamentally different from the scope of counterfeit and pirated goods exported from China, with fake beverages (HS 22) being the top counterfeit product category imported over the period 2011-2013 (see Figure 7.2).

While China ships to almost all economies worldwide, the range of economies shipping counterfeit and pirated goods to China is small, and includes mostly neighbouring economies, such as Vietnam, Hong Kong (China) and Philippines. In addition, conveyance methods appear to be largely different with respect to Chinese exports and imports of fake items. Although more than 70% of the total number of global customs seizures originating in China concern postal shipments, sea transportation is the most commonly used transportation method for counterfeiters shipping to the Chinese economy.

China is a large net exporter of counterfeit and pirated products, but Chinese right holders are also victims of counterfeiting and piracy. This particularly concerns Chinese trademarks related to pharmaceuticals (HS 30), electronics (HS 85) and machinery (HS 84) (see Figure 7.3). The majority of internationally traded goods that infringe Chinese brands (72%) originate from China itself. This suggests the origin of counterfeiting and piracy that negatively affects the Chinese economy comes from China itself. The fake items infringing Chinese trademarks are sold in a small range of countries (26 reported in the database), which are mostly middle-income economies, such as Madagascar, El Salvador, Morocco or Mexico.

Figure 7.1. China as source economy of counterfeit and pirated products, 2011-2013

The percentage of global customs seizures in provenance from China

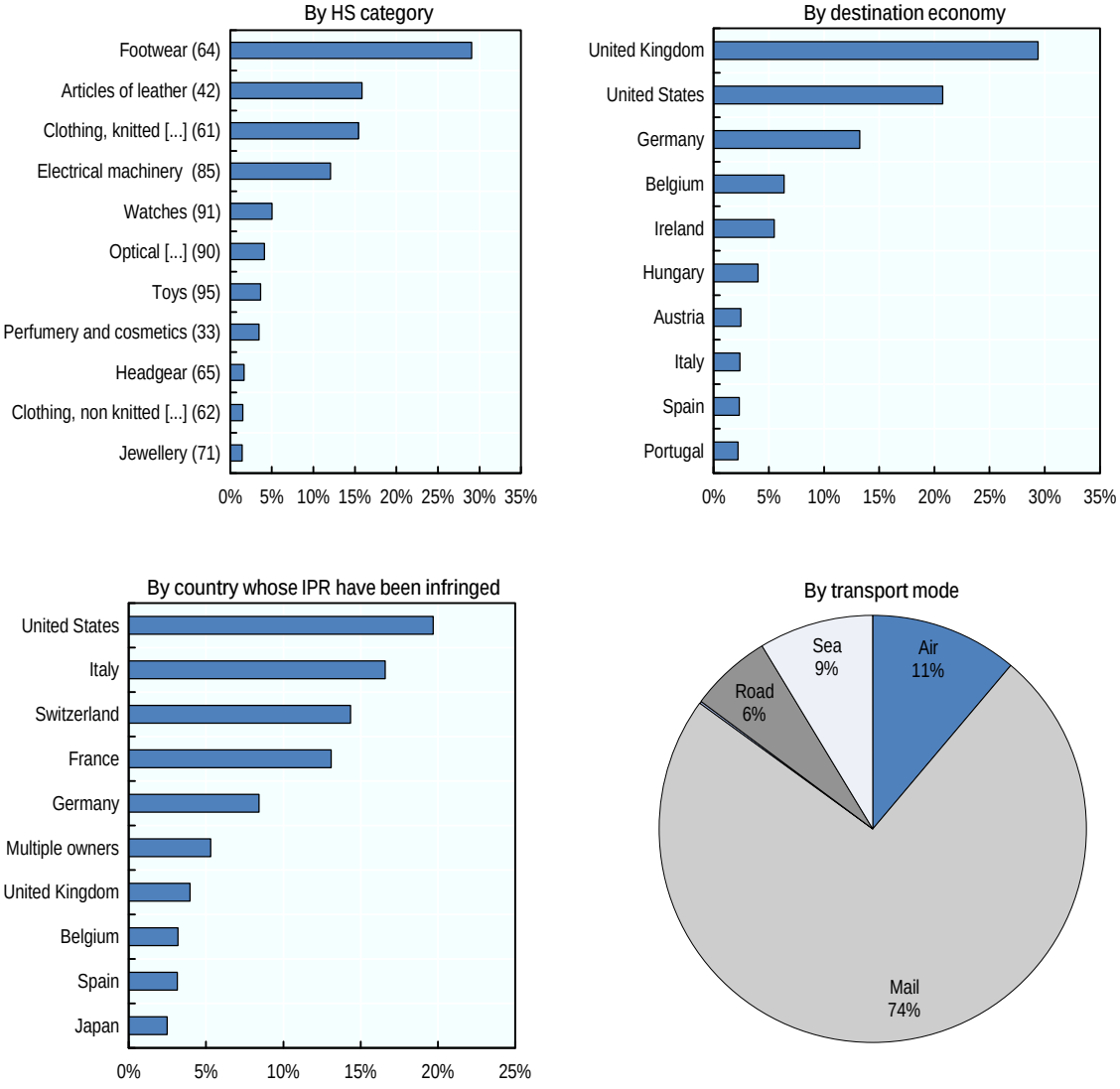
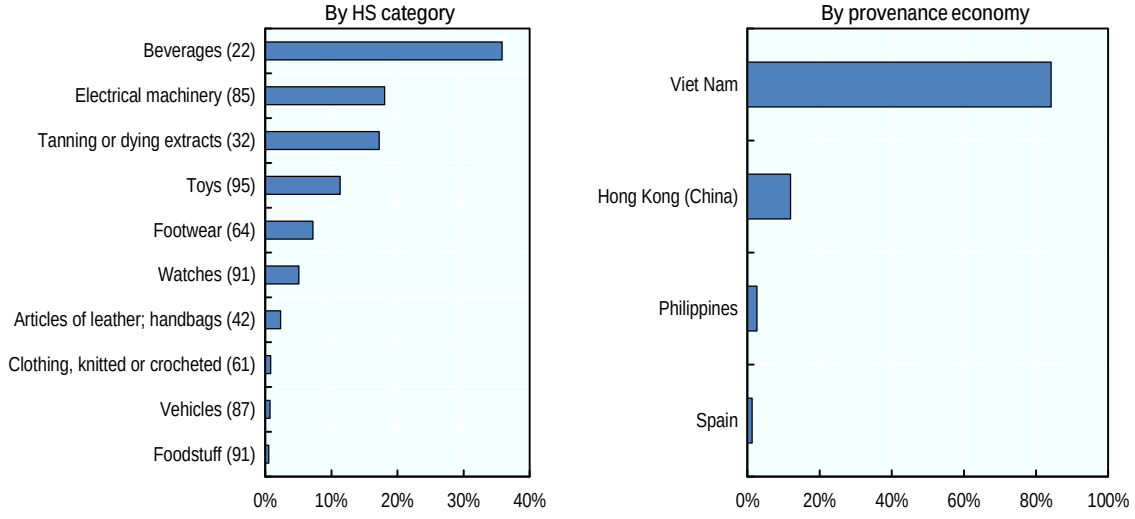


Figure 7.2. China as destination economy of counterfeit and pirated products, 2011-2013

The percentage of customs seizures of counterfeit products shipped to China



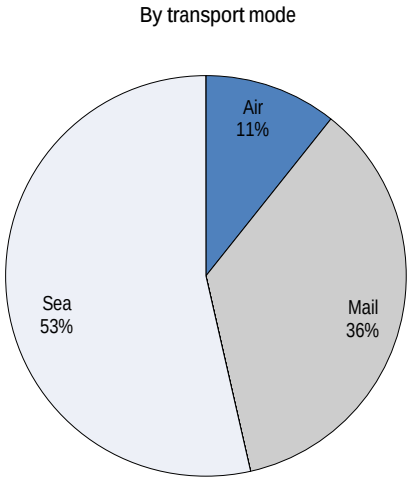
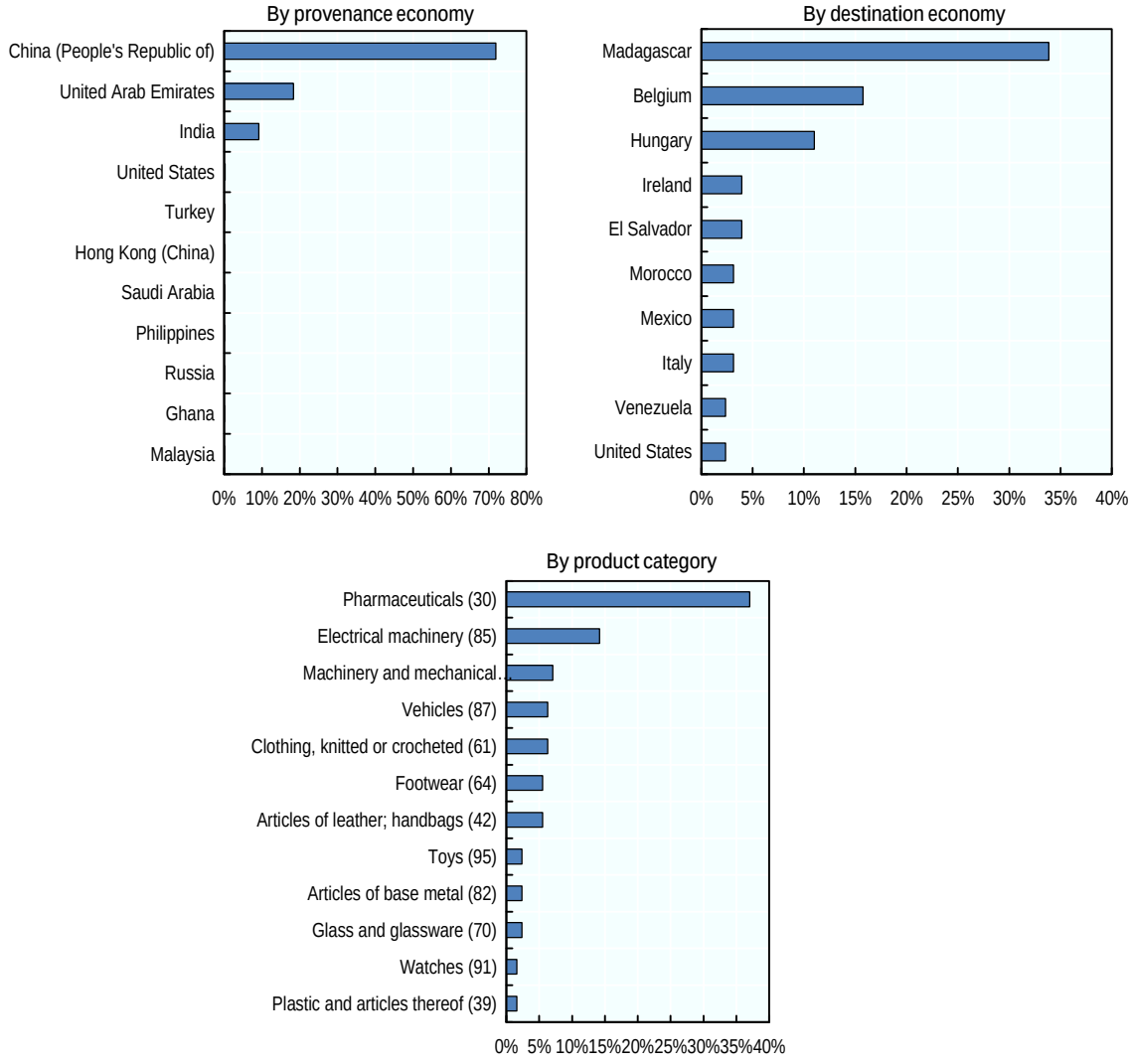


Figure 7.3. China as economy of origin of right holders whose IPR have been infringed, 2011-2013

The percentage of customs seizures of counterfeit products whose right holders are Chinese residents



7.2. Legal and institutional setting

In China, responsibility for intellectual property issues is overseen by a number of entities (WTO, 2014*a*).

- *Patents and design rights* -- The State Patent Office (SPO), which is under the State Intellectual Property Office (SIPO), which, in turn, is under the State Council, is responsible for receiving and processing patent applications and granting and invalidating patents; Local IPR administrative offices address disputes hearing and settling controversies with respect to patents . (WTO, 2014*a*).
- *Trademarks* -- The State Trademark Office (TMO), which is under the State Administration for Industry and Commerce (SAIC), is responsible for the

examination of applications, registration and administration of trademarks. Local enforcement authorities also have administration responsibilities. A Trademark Review and Adjudication Board is in charge of the settlement of disputes regarding determination of trademarks rights and reviewing TMO decisions (WTO, 2014*a*).

- *Copyrights* -- The National Copyright Administration of China (NCAC), under the State Council, administers copyright on a national scale. At the provincial level, copyright registration and administration is carried out by the respective local copyright administration offices (WTO, 2014*a*).

In November 2011, the State Council set up the National Leading Group for Combating IPR Infringement and Counterfeits with a view towards combating IPR infringement throughout the economy, in a unified manner (MOFCOM, 2013).

In August 2014, the National People's Congress issued a decision, to establish IPR courts in Beijing, Shanghai and Guangzhou (HG, 2014).[1] This pilot program made these courts operational later in the year; they have jurisdiction over technically complex IPR cases, and appeals of basic civil and administrative IPR related decisions. Subsequently, a number of IP tribunals were established.

7.3. Legal and regulatory framework

Trademarks, copyrights, patents and design are protected under three major laws and their implementing regulations. The Patent Law, adopted in 1984, was last revised in 2008. Under the law, invention patents are protected for 20 years from the filing date; utility model and designs, for 10 years from the filing date (WTO, 2014*a*). The Trademark Law, adopted in 1982, was last amended in 2013, and became effective in 2014. Principal changes included (Jones Day, 2013):

- strengthened protection against piracy,
- shortened trademark prosecution times,
- provision for multiple class trademark applications,
- strengthened well-known trademark protection,
- narrowed legal standing for oppositions and invalidation,
- streamlined trademark registration , if any opposition fails at the first level of adjudication at the Trademark Office,
- increased levels for fines, compensation, and statutory damages.

The Copyright Law, enacted in 1990, was last amended in 2010. Under the Copyright Law, the term of protection for natural persons is life plus 50 years; protection of a work of a legal entity or other organisation is 50 years, protection for cinematographic and photographic works and typographical designs is 50 and 10 years, respectively (WTO, 2014*a*). Revisions in the regulations for Protection of Computer Software, the Implementing Regulations of the Copyright Law and the Regulations on the Protection of the Right to Network Dissemination of Information were made in 2013, under which penalties for infringement were increased were made in 2013, under which penalties for infringement were increased (WTO, 2014*a*).

Patent infringement

Under the Patent Law,[2] rights holders are entitled to compensation for infringement, equal to the actual losses caused by the infringement. If it is hard to determine the actual losses, compensation can be based on the benefits enjoyed by the infringer or the

foregone royalties. If these are all hard to determine, the people's court may, on the basis of the factors such as the type of patent right, nature of the infringement, and seriousness of the case, determine the amount of compensation within the range of RMB 10 000 (USD 1 400) and RMB 1 000 000 (USD 140 000).[3]

In addition to civil liabilities, the unlawful gains of infringers are confiscated by the government and fines of not more than four times the unlawful gain can be imposed. In the absence of unlawful gains, a fine of not more than RMB 200,000 (USD 29 000) may be applied.[4]

Copyright infringement

Under the Copyright Law,[5] rights holders are entitled to compensation for infringement equal to the injury suffered by right holder. Damages include the appropriate fees paid by the right holder to stop the infringing act. If it is hard to determine the actual losses, compensation can be based on the unlawful income earned by the infringer, or, eventually, if this cannot be determined, an award of up to RMB 500 000 (USD 72 000).[6]

In addition, administrative fines can be applied for the infringing acts specified in Article 48 of the Copyright Law that are also harmful to the common interest of the society. These are specified in the Regulations for the Implementation of Copyright Law of the People's Republic of China.[7] Under the regulations, which were revised in 2013, the fines were increased. Where the illegal business revenue is at least RMB 50 000 (USD 7 200), the fine should exceed amount of the illegal revenue, but be less than five times that amount. In situations where there is no illegal business revenue or the amount is less than RMB 50 000 (USD 7 200), a fine not exceeding RMB 250 000 (USD 36 000) could be imposed, according to the seriousness of the matter.[8]

Under China’s Criminal Law, if the amount of illegal gains from infringement is large, or if there are other serious circumstances, infringers can be sentenced to fixed-term imprisonment of not more than three years or criminal detention. A fine may also be imposed in addition to, or instead of, imprisonment or detention. If the amount of illegal gains is particularly large or if there are other especially serious circumstances, infringers can, moreover, be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and be fined.[9]

Trademark infringement

Under the Trademark Law,[10] the amount of damages for infringement is equal to the actual losses that the right owner has suffered as a result of the infringement. Where the losses suffered by the right owner cannot be determined, the amount of damages for infringement would be the profits that the infringer has earned as a result of the infringement. Where neither of these can be determined, the amount of damages may be based on a reasonable multiple of the royalties for the trademark. If there is malicious infringement and an existence of serious circumstances, the amount may be more up to three times amounts concerned. Where an infringer maliciously infringes upon another party's exclusive right to use a trademark and falls under serious circumstances, the amount of damages may be trebled.[11]

Where the actual losses suffered by the right owner, the profits earned by the infringer, or the licensing royalties of trademark infringement cannot be determined, a People’s Court can award damages up to RMB 3 million (approximatively USD 430,000).[12]

In addition to the availability of damages through Chinese courts, the Trademark Law also authorises an administrative enforcement entity to confiscate and destroy infringing goods and tools specially used for the manufacture of the infringing goods and for counterfeiting the representations of the registered trademark, and impose a fine.[13] If the amount of illegal earnings is greater than RMB 50 000 (USD 7 200), a fine up to five times the amount of the illicit earnings may be imposed; if there is no illicit business revenue, or the total amount of illicit business revenue is less than RMB 50 000 (USD 7 200), a fine up to RMB 250 000 (USD 36 000) may be imposed. Moreover, if trademark infringement occurs more than 2 times within a period of five years or other serious circumstances, a severe punishment would be imposed.[14]

Under China's Criminal Law, if the circumstances are serious, infringers can, in addition to being fined, be sentenced to fixed-term imprisonment of not more than three years or criminal detention. If the circumstances are especially serious, a fixed-term imprisonment of not less than three years but not more than seven years can be imposed.

Trade in infringing products

Under the Customs Law, customs officials are to confiscate imports and exports of items that infringe intellectual property rights, and impose a fine.[15] Criminal sanctions are also possible. The fine for infringement, which is contained in complementary regulations, is set at not more than 30% of the value of the confiscated merchandise. Where it is necessary to declare the status of intellectual property rights, the consignee of imported goods or the consigner of exported goods, or their agent, who fails to truthfully declare this status, or fails to produce supporting documents demonstrating the lawful use of such right, may be fined up to RMB 50 000 (USD 7 200).[16]

"Parallel" imports of patented products (i.e., products that are not authorised for distribution in a geographic market) are permitted in China (WTO, 2014*a*). There are no rules affecting trade of such products in the case of trademarked and copyrighted items (WTO, 2014*a*)

7.4. Policies and programmes

Table 3.1 tracks the measures that China planned to take under its annual promotion plans during 2011-14. Enhancing protection of IP was the leading area where measures were to be taken, accounting for 30% of the total proposed over the four year period (SIPO, 2011, 2012, 2013 and 2014). This was followed by IP management (21%) and raising the quality and use of IP (18%). In 2014, measures proposed to enhance IP protection included:

- drafting and revising IP laws and regulations, enhance regional and departmental cooperation on trademark enforcement,
- refining IP protection in free trade zones,
- strengthening the investigation and handling of major IP cases by customs,
- improving IP dispute mediation and arbitration mechanisms,
- combatting online piracy (operation Sword Net) and online sale of counterfeit goods, and
- exploring the establishment of special IP courts.

Table 7.1. Measures planned to promote China's National Intellectual Property Strategy, by area, 2011-2014

Area	2011	2012	2013	2014	Total
Raising the quality of IP creation	24	9	6	7	79
Upgrading the effectiveness of IP utilisation		10	12	11	
Raising the effectiveness of IP protection	54	19	30	25	128
Improving IP management and public services	27	27	26	11	91
Promoting international co-operation	17	-	-	9	26
Promoting fundamental IP capabilities	15	-	-	8	23
Improving the design and implementation of IP strategies	15	-	4	8	27
Promoting strategic IP industries	-	17	-	-	17
Promoting IP culture and public awareness	-	8	6	-	14
Publicising IP work	24	-	-	-	24
Total	176	90	84	79	429

Source: SIPO (2011), Promotion Plan for the Implementation of the National Intellectual Property Strategy in 2011, State Intellectual Property Office; SIPO (2012), Promotion Plan for the Implementation of the National Intellectual Property Strategy in 2012, State Intellectual Property Office; SIPO (2013), Promotion Plan for the Implementation of the National Intellectual Property Strategy in 2013; State Intellectual Property Office; SIPO (2014), Promotion Plan for the Implementation of the National Intellectual Property Strategy in 2014, State Intellectual Property Office. Accessed at http://english.sipo.gov.cn/laws/, in May 2016.

A State Council document issued on 22 December 2015 identifies a number of actions that the economy intends to take to strengthen the IP regime, through the year 2020 (State Council, 2015); the actions are designed to substantially improve the creation, utilisation, protection, management and services of intellectual property. Actions include:

- improving interagency co-operation,
- facilitating simplified access to IP services,
- reinforcing efforts to tackle infringement of intellectual property rights, through improved legislation and strict law enforcement,
- increasing participation in joint enforcement efforts with international organisations and foreign governments,
- cracking down on intellectual property crime cases that involve industrial chains,
- including intentional infringement of intellectual property rights on the credit history of a person or an enterprise,
- improving laws to protect trade secrets,
- speeding up research on the protection of intellectual property in Internet venues, e-commerce and big data, and developing policies to address issues in this regard, and
- establishing a platform for trading intellectual property.

The liabilities of Internet service providers have been addressed by the courts in recent years (EIU, 2015). A December 2012 judicial interpretation elaborated on the concept of fault-based liability, indicating that an ISP may be liable for facilitating infringement where it knows or should know of infringing content on its servers.

Awareness and education

The Chinese government indicates it is proactively carrying out the public legal education on IPR across community and society (WTO, 2014*b*). It is promoting publicity and educational activities on special observance days such as the World Intellectual Property Day and the National Law System Publicity Day. News media is encouraged to cover cases on IPR infringement and counterfeiting activities in order to be responsive to concerns of the general public.

In support of its efforts, the Office of the National Leading Group on the Fight Against Infringement and Counterfeiting and the Central Publicity Department formulate annual publicity programmes (SIPO, 2015). Special initiatives were carried out at key times during the year, including on New Year's Day, the Spring Festival, World Consumer Rights Day and National IPR Publicity Week.

During the year, the NCAC enhanced its website, publicising copyright developments. Its Swordnet 2014 and Copyright Week resulted in it being awarded the Government Website Information Disclosure Column Award (SIPO, 2015). In reporting on the results of the Swordnet actions, the government typically highlights the top 10 cases that were handled.[17] The customs agency was also active on the awareness front, publishing an annual report on *Top Ten Cases of China's Customs Protection of Intellectual Property Rights* and a report on *China's Customs Protection of Intellectual Property Rights.* The Supreme People's Court raised awareness of its judicial actions, publishing a series of reports, including *China's Top Ten IPR Cases (2013), Top 10 Innovative IPR Cases and 50 Typical IPR Cases by China Courts (2013), Yearbook of China's Legal Protection for Intellectual Property Rights (2013)* and *Legal Protection for Intellectual Property Rights (2013).* The Supreme People's Procuratorate published related reports, including, *Judicial Protection of Intellectual Property Rights for a Procuratorate Perspective 2013* and *China's Top Ten Cases of IPR Judicial Protection 2013.*

Education and training were also enhanced in 2014, through continued implementation of the *12th Five-year Plan of Intellectual Property Right Talent Building* (SIPO, 2015). Two new national IPR training bases and 2 national IPR training bases for small and medium sized enterprises were approved. More than 6 000 IPR training sessions were organised for 600 000 persons. More focused training was carried out by SAIC on trademark matters and by NCAC on copyright matters. The General Administration of Customs (GAC) organised more than 50 sessions for over 2 000 law enforcement officers, import and export business representatives and IPR holders. In the judicial area, joint training with INTERPOL and the EU were launched and specialised training was carried out for some 300 IPR judges; related training was carried out procuratorates.

International co-operation

China participates in a number of multilateral organisations that are active in the IP area, including INTERPOL, WIPO, WTO, WCO and APEC (WTO, 2014*a*).[18] It is signatory to a number of key of international IP treaties (Table 2.1), with some exceptions, such as for example the 1991 International Convention for the Protection of New Varieties of Plants Convention (UPOV). Bilateral co-operation has been pursued with the United States, the European Union (along with co-operation with France, the Czech Republic, Germany, Romania and the United Kingdom), Australia, Japan, Korea, Thailand and the Russian Federation.

In 2014, China continued to strengthen and expand multilateral relations, establishing a WIPO China Office in Beijing and signing 29 bilateral co-operation agreements (SIPO, 2015). The economy co-operated with INTERPOL in a joint campaign (codenamed *Genuine Action*) to combat counterfeiting, which resulted in the solving of 1 544 cases involving RMB 210 million (USD 30 million) and the arrest of 2 224 persons; for this, the economy was awarded the *Best Regional Case Award* by INTERPOL. Moreover, it participated in Operation Pangea IX in 2016, which concerned counterfeit drugs.[19] It also assisted the United States, United Kingdom, Japan and Korea in investigations, and fugitive arrest in China, carried out a joint action with the United States involving airbags, and worked with the United Kingdom to crack down on trademark

infringements. In recognition of its operation to disrupt the production, distribution, and sale of illicit oncology medicines, it was awarded an IP champion's award by the US Chamber of Commerce.[20]

Co-operation with stakeholders

The Quality Brands Protection Committee, which was created in 2000, comprises more than 200 multinational corporations with subsidiaries in China (QBPC, 2014). The committee aims to *i)* strengthen Chinese IP laws and regulations, *ii)* encourage IP creation, utilisation, protection and management, *iii)* improve the IP protection system, *iv)* raise public awareness of IP protection and *v)* establish a long-standing and effective IPR protection system. The committee is aimed at supporting and assisting law-enforcement agencies in combating counterfeiting by organising meetings, forums, training sessions on topics of mutual interest. The committee carries out its work through 7 thematic committees, 3 task forces, and 22 industry working groups.

7.5. Enforcement and outcomes

Table 7.2 provides information on enforcement cases during 2010-13. Administrative law enforcement departments investigated 178 000 cases; 3 389 sites involved in the production and sale of counterfeit goods were destroyed, up 17% from the 2013 level. Authorities investigated 28 280 suspected criminal cases. Some 9 415 suspects were arrested and 18 789 were prosecuted. The number of cases prosecuted and concluded rose by 32% and 52%, respectively from their 2010 levels.

Table 7.2. Intellectual property enforcement in China, 2010-2013

	2010	2011	2012	2013
Cases dealt with by administrative actions				
Patents				
Number of disputes (patent infringement disputes)	1,095	1,286	2,232	..
Copyright				..
Number of disputes/administrative penalties	10,590	12,023	..	..
Imposition of fines (RMB million)	22,143	15,029	..	..
Cases transferred to judicial agencies	538	501	..	..
Businesses inspected	963,842	1,303,855	..	..
Illegal operation units banned	61,995	15,002	..	..
Underground dens detected	727	753	..	..
Trademarks				..
Number of disputes	56,034	79,021	66,227	..
Trademark infringements	48,548	68,836	59,085	..
Other	7,486	10,185	7,142	..
Cases transferred to judicial agencies	175	421	576	..
Value of fines (RMB million)	460.01	595.52	525.07	..
Cases handled by Customs at the border (shipments)	21,073	18,188	15,690	..
Value (RMB million)	44.7	233	60.6	..
Cases dealt with by courts	54,779	75,103	110,232	99,842
First instance civil IPR cases accepted	42,931	59,882	87,419	88,583
First instance civil IPR cases closed	41,718	58,201	83,850	88,286
Patent cases accepted	5,785	7,819	9,680	9,195
Patent cases closed	5,298	7,413	9,173	9,174
Trademark cases accepted	8,460	12,991	19,815	23,272
Trademark cases closed	8,153	12,627	19,079	22,358
Copyright cases accepted	24,719	35,185	53,848	51,351
Copyright cases closed	24,138	34,300	51,794	52,254
Technical contract cases accepted	670	557	746	949
Technical contract cases closed	694	573	710	908
Unfair competition cases accepted	1,131	1,137	1,123	1,302
Unfair competition cases closed	1,176	1,133	1,092	1,195
Other IPR cases accepted	2,166	2,193	2,207	2,514
Other IPR cases closed	2,259	2,155	2,002	2,397
Second instance civil IPR cases accepted	6,530	7,644	9,588	11,964
Second instance civil IPR cases closed	6,488	7,662	9,301	11,556

Note: ".." – Not available.
Source: Chinese authorities, as reported in WTO (2014a), Trade policy Review: Report by the Secretariat-China, WT/TPR/S/300/Rev.1, World Trade Organization, Geneva, October, www.wto.org/english/tratop_e/tpr_e/tpr_e.htm

A number of special campaigns were carried out in 2014. They included "Operation Sword Net", which has been carrying out focused actions to fight Internet IP infringements for a number of years (SIPO 2015, EIU, 2015 and Wong, 2015). The 2014 campaign focused on online pirated films and television programs, literature and online games. Other campaigns included "Campaign on Criminal Investigation" and "Crackdown on Counterfeiting", which focused on crimes that *i)* undermined rural life and local industries, *ii)* used the Internet and *iii)* involved movement of goods across regions and borders (SIPO, 2015).

Judicial proceedings

In 2014, People's Courts accepted 95 522 new civil cases, of which 62% involved copyright infringement; 22%, counterfeiting; and 10%, patent infringement (SIPO, 2015). The courts also supported administrative cases and more actively pursued criminal judgments. Virtually all the cases resulted in guilty verdicts (13 903 out of 13 904 were found guilty). Particular emphasis was placed on combating infringements involving drugs and food.

Administrative actions

SAIC pursued 67 500 counterfeiting cases, dismantling 1 007 sites and referring 355 suspected criminal cases to judicial departments. As indicated above, NCAC continued to crack down on Internet piracy. Under operation "Swordnet", some 440 cases were investigated and 750 websites were shut down. Nationwide, more than 1.2 million pirated publications were confiscated, fines totalling RMB 33.92 million (USD 4.9 million) were imposed, 188 piracy sites were destroyed and 80 cases were referred for possible criminal prosecution.

In 2015, the Swordnet campaign (i.e. Red shield new sword), which was carried out during July-November, focused on curbing online sales of counterfeit goods on e-commerce platforms (Chiu, 2016). The campaign aimed at *i)* inspecting operators of online stores, to ensure proper registration, *ii)* examining the situation with respect to commonly counterfeited goods, and goods where consumer complaints had been noted (such as home appliances) and *iii)* strengthening supervision over online operators to ensure their due diligence in key areas. Results were:

- 1.9 million web shops and websites were checked for compliance;
- 198,000 on-site inspections were performed;
- 75,000 unlawful product advertisements were removed;
- 12,554 rectifications (e.g. in relation to unlawful content or products) were ordered;
- 2,170 websites were marked for elimination;
- 1,134 web shops were closed down;
- 6,737 cases of illegal conduct were investigated, of which 78 cases were referred to the Public Security Bureau for criminal investigation;
- RMB 123 million (USD 18 million) was confiscated.

Border measures

At its 2014 policy review at the WTO, China reported it had strengthened inspection and quarantine of exported goods and actively launched campaigns of customs IPR protection (WTO, 2014*d*). In addition, China reported it had launched cross-border cooperation had intensified with economies concerned to crack down infringement of intellectual property rights, counterfeit and fake good and illegal criminal activities (WTO, 2014*d*).

During 2014, China, through its customs authority, enhanced efforts to intercept infringing imports and exports, focusing on areas involving health and safety, such as drugs, food and automobile parts; risk analysis techniques were refined (SIPO, 2015). A special six-month operation was conducted to address infringements occurring in postal express channels. Clothing, bags, watches, cosmetics, pharmaceuticals, food, electronics and appliances destined for Africa, Europe, Hong Kong, China and Southeast Asia were focused on. The operation resulted in the seizure of 9 421 batches involving nearly 86.7 million products.

7.6. Programme review

SIPO publishes an annual report on intellectual property highlighting key developments. The latest report, which is referenced throughout this section, covers 2014 (SIPO, 2015). This Chinese government report indicates that progress was made in several areas:

- *Approval and registration*. Breakthroughs in the IP approval and registration processes were noted, with steady increases in the number of IPRs for approval and registration and a significant improvement in the quality and efficiency of examinations.
- *Enforcement*. Law enforcement was tightened with the implementation of State Council arrangements; infringements were reduced and judicial efficiency was improved.
- *Mechanism and capacity building*. Steps were taken to improve IP protection, evaluation and judiciary mechanisms.
- *Publicity*. New initiatives were taken to enhance publicity of IP issues, through diverse and routine publicity in various forms and channels.
- *Education and training*. Education and training were improved, enhancing the capacities of personnel responsible for IP matters.
- *International co-operation*. New steps were taken to strengthen and expand multilateral and bilateral relations with international organisations and individual economies.

The IPR regime was also reviewed by the WTO, in the context of the trade policy review of China carried out in 2014. During the review, the government of China stated it had continued to proactively strengthen its enforcement of IPR law, pursuing an initiative to incorporate the outcomes of IPR protection against infringements and counterfeits into government performance evaluation systems at different administrative levels (WTO, 2014*b*). Although China's report suggested that counterfeiting had been effectively suppressed, the Secretariat Report noted that despite efforts made to combat infringement, enforcement of IPRs continued to be a major challenge.[21]

Economies commenting on the situation noted the efforts China had made to improve IPR protection (WTO, 2014*c*). In summarising the review, the chair noted that concerns had been raised about the enforcement of IPRs, the protection of trade secrets, and the adequacy and evenness of protection and enforcement. It was suggested that much had to be done to close loopholes in the legal framework and to reduce high levels of infringement in China.

Further review of the situation in China was carried out by the European Union and the United States in assessments published in 2015 and 2016-17, respectively (EC, 2015, USTR, 2016*a*, and USTR, 2017). In their assessments, jurisdictions noted both improvements and new concerns in China in recent years to improve its IPR environment; the economy nevertheless was alone as a "Priority 1 country" by the European Union and was placed on the "Priority Watch List" by the United States, indicating that further reforms were needed. The following areas were highlighted:[22]

- *Patents*: Concerns were expressed around the quality of invention patents, mainly concerning the search of prior art and the treatment of very simple technical solutions (EC, 2015). The wide use of utility models was seen as leading to "patent-thickets", which was hindering the patentability of new inventions. In the ICT sector, there were concerns Chinese companies were using technologies without paying adequate royalties. There was also concern Chinese authorities were imposing heavy fines and setting very low royalty rates for the

licensing of patents owned by foreign companies. Finally, concerns were expressed about the registration of chemical products.

Limiting the participation of foreign parties in standard setting has also raised concerns, as has the possibility patent holders might have to contribute and/or license proprietary technologies against their will (USTR, 2016*a*). There is also concern Chinese competition authorities may target for investigation those foreign firms which have IP of strategic interest to China. Finally, concerns were raised over developments in the pharmaceutical area, including *i)* changes in practice have severely restricted a patent applicant's ability to provide supplemental data in support of an application. As a result, China has, in some cases, denied pharmaceutical patent applications and invalidated existing patents, while the United States and other jurisdictions have generally granted patent protection in similar cases; *ii)* the need for effective protection against unfair commercial use of data submitted in pharmaceutical patent applications; *iii)* changes in the definition of "new drugs" to only those drugs for which marketing approval was first sought in China; inconsistent with the practice of the International Council for Harmonisation of Technical Requirements for Pharmaceuticals for Human Use; and iv) provisions, which resemble forced technology transfer industrial policies that provide regulatory incentives for companies to shift manufacturing capacity to China or participate in selected national projects and programs.

- *Trademarks*: Concerns were expressed about the registration of "bad faith" trademarks, the pre-emptive filing of another party's trademark (EC, 2015 and USTR, 2016*a*). Concerns were also expressed over onerous documentation requirements for bringing trademark oppositions, invalidations, and cancellations, difficulties in obtaining well-known mark status, from marks already registered in foreign jurisdictions, and changes in procedures that eliminate a party's ability to appeal an unfavourable decision (USTR, 2016*a*).

- *Trade secrets*: Concerns were expressed about the proceedings requiring the disclosure of business information when trying to enter the Chinese market, the difficulties in protecting such secrets, and the requirements needed to trigger *ex-officio* investigations (EC, 2015). Trade secret theft is a serious and growing problem. Remedies for trade secret theft can be exceedingly difficult to obtain under current Chinese Law. Id. Causes of the problem include a trade secret law that is part of China's Anti Unfair Competition Law (AUCL) that has limited application, limited injunctive relief and low damage awards, difficulties in pursuing criminal enforcement, which include the need to prove actual damages caused by the theft. Id. The U.S. urged China to consider drafting a stand-alone trade secrets law so that it can address a broader range of concerns than currently possible. (USTR, 2016*a*). *Enforcement*: Concerns were expressed that all documents submitted in administrative or judicial litigation needed to go through a cumbersome notarisation and legalisation process when originating from a foreign country (EC, 2015). Other problems included the difficulty in obtaining interim injunctions. Moreover, damages awarded for IPR infringement by the courts were seen as inadequate to compensate for losses or to deter infringement. The situation was seen as aggravated by the problem of insufficient reimbursement of enforcement costs, and by the difficulty to obtain criminal sanctions. There are serious concerns about the cooperation between different administrative and police entities concerning IPR

infringements (EC, 2015). While experiences in the courts in large cities were seen as good and improving, the lack of experience in other courts and continuing corruption were of concern. Finally, the lack of independence of the courts was noted; this was particularly problematic in areas involving strategic enterprises and state-owned enterprises.

- *Notorious markets:* The US 2016 and 2015 Notorious Markets List reported that China is the manufacturing hub of counterfeit products sold illicitly in markets around the world (USTR, 2016 *a* and *b*). The US assessment of Notorious Markets, where counterfeit and pirated products are sold, lists 21 online markets worldwide in 2016 (14 in 2015) and four of which were centred in China (two in 2015); six of the 19 physical markets listed were located in China in 2016 (five of the 15 in 2015). In 2014, less than 59 percent of articles sold online were genuine (USTR, 2015 and 2016*b*) of note, the economy's largest online retailer has taken actions in recent years to combat counterfeiting and piracy, resulting in its removal from the list, in 2012. However, during the 2015 and 2016 USTR reviews, commenters that rely on trademark protection widely criticized Taobao.com, Alibaba.com, and other Chinese e-commerce websites under the Alibaba Group for being used to sell large quantities of counterfeit goods. Alibaba Group reported that it added new enforcement features since 2014, however it is unclear what effect these procedures are having on the overall prevalence of counterfeit goods on the Chinese e-commerce websites. USTR reported that it was concerned by rights holders' reports that Alibaba Group's enforcement program was too slow, difficult to use, and lacked transparency. USTR did not relist Taobao or Alibaba, but encouraged them to enhance cooperation with all stakeholders to address ongoing complaints and gave suggestions for doing so (USTR, 2015 and 2016*b*).

- *Other*: Additional concerns included (USTR, 2016*a*):
  - Inappropriate provisions relating to competition in IP law;
  - Problems in obtaining protection for pharmaceutical products;
  - The invocation of security has led to measures starting in 2014 to require financial institutions operating in China to purchase an increasing share of ICT products, services, and technologies from suppliers, whose IPR are indigenously Chinese. These rules also would require foreign firms to conduct ICT-related research and development in China and to divulge proprietary IP as a condition for the sale of ICT products and services in China. China suspended the measures in 2015, however this has not resulted in the rebound in sales of non-Chinese ICT products and services to Chinese banks.
  - The significant use of unlicensed software by Chinese government agencies and state-owned enterprises. The commercial value of unlicensed software used by the Chinese government and state-owned enterprises was almost USD8.8 billion in 2013
  - Government conditions or incentives on technology transfer that could negatively impact foreign companies.

The private sector has also assessed the situation in China. The American Chamber of Commerce in the People's Republic of China, for example, carries out an annual survey in which the views of its members on the business climate are sought (AmCham, 2016).

In the IP area, the 2016 survey indicates that the respondents (of which there were 496) viewed patent, copyright and trademark laws and regulations as being effective, and only trade secret laws and regulations as being ineffective (AmCham, 2016) . While enforcement was viewed somewhat lower in terms of its effectiveness, some 90% of respondents believed that the situation had improved during the past 5 years. Moreover while many were concerned about IP seepage, the percentage of respondents holding this view was lower than in 2014. Despite this perceived progress, 77% of respondents felt that foreign businesses are less welcome than before in China. This view was most prevalent in companies in the Industrial & Resources and Technology & R&D Intensive sectors (AmCham, 2016).

The IP regime was also evaluated by the Global Intellectual Property Center (GIPC). It awarded China a score of 14.83 out of 35 in its 2016 assessment, which ranks the economy 27th, out of the 45 economies examined (Table 7.3) (GIPC, 2017).[23] The score reflects an improvement over the 9.13 score awarded in 2012 (GIPC, 2012). Areas of strength identified included new and proposed patent and copyright reform, growing expertise and awareness of the value of IP across different levels of government and enforcement agencies and the relatively strong public reporting of IP-related seizures by customs authorities. Areas of weakness included extremely high levels of IP infringement, critically low ability to secure adequate remedies for infringement, and the presence substantial barriers to market access and commercialization of IP, particularly for foreign companies.

Table 7.3. IP scores for China, 2016

Area	Score	Out of	Percentage
Patents, related rights, and limitations	4.35	8	54
Copyrights, related rights, and limitations	2.28	6	38
Trademarks, related rights, and limitations	3.90	7	56
Trade secrets and market access	0.25	3	8
Enforcement	2.55	7	36
Membership and ratification of international treaties	1.50	4	38
Total	14.83	35	42

Source: Global Intellectual Property Center, U.S Chamber of commerce (2017), International IP Index, http://www.theglobalipcenter.com/ipindex2017/ (accessed July 2017).

Notes

[1] See also *www.cpahkltd.com/EN/info.aspx?n=20150213103510080676*.

[2] See SIPO, *http://english.sipo.gov.cn/laws/lawsregulations/201101/t20110119_566244.html*, accessed in May 2016.

[3] Patent Law of the People's Republic of China, Chapter VII, Article 65.

[4] Patent Law of the People's Republic of China, Chapter VII, Article 63.

[5] See WIPO, *http://www.wipo.int/wipolex/en/text.jsp?file_id=186569*, accessed in July 2017.

[6] Copyright Law of the People's Republic of China, Article 48.

[7] See HFG Law & Intellectual Property, *http://www.hfgip.com/sites/default/files/law/implementing_regulations_of_copyright_law_2013_english.pdf*, accessed in May 2016.

[8] Implementing Regulations of Copyright Law 2013, Article 36.

[9] Criminal law of the People's Republic of China, Chapter III, Section 7, Article 217.

[10] See WIPO, *http://www.wipo.int/wipolex/en/details.jsp?id=13198*, accessed in May 2016.

[11] Trademark Law of the People's Republic of China, Article 63.

[12] Trademark Law of the People's Republic of China, Article 63.

[13] Where a seller with no knowledge of its infringing goods can prove the legality of acquiring such goods and point out the provider, the administrative authority shall order the seller to cease selling its goods and the latter may be ordered to stop selling the infringing goods.

[14] Trademark Law of the People's Republic of China, Article 60.

[15] See MOFCOM *http://english.mofcom.gov.cn/aarticle/policyrelease/internationalpolicy/200705/20070504715848.html*, accessed in May 2016.

[16] See General Administration of Customs of the People's Republic of China *http://english.customs.gov.cn/Statics/4440eff0-0440-4876-8f8a-9c8f16be4355.html*, accessed in May 2016.

[17] See *https://chinaipr.com/2015/02/17/top-10-internet-sword-action-piracy-cases-for-2014/* and *https://chinaipr.com/2014/01/09/top-10-internet-sword-piracy-cases-for-2013/*.

[18] See also *www.wco.org* and *www.interpol.org*.

[19] See *www.interpol.int/News-and-media/News/2016/N2016-076*, accessed in June 2016.

[20] See *www.uschamber.com/press-release/2014-intellectual-property-champions-awarded-2nd-annual-ip-champions-conference*.

[21] See WTO (2014*b*) at para. 29.

[22] See also USTR, 2017 for further information.

[23] Global Intellectual Property Center, U.S Chamber of commerce (2016), *International IP Index*, http://www.theglobalipcenter.com/gipcindex/ (accessed November 2016).

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8. Governance frameworks for combatting counterfeiting in India

This chapter looks at policy developments and governance issues, reviewing the effectiveness of the governance frameworks for IP related policies in India. It begins with presentation of a factual, quantitative overview of the situation in India of trade in counterfeit goods. This is followed by a review of the governance frameworks for IP enforcement and institutional capacities in India, with sections on legal and institutional setting, policies and programmes to enhance IP protection, IP enforcement and outcomes, and reviews of relevant, IP-related programmes.

8.1. Current situation

Over the period 2011-2013, India ranked sixth as source economy of counterfeit and pirated products in international trade, but it appeared to be the largest exporter of fake pharmaceuticals (HS 30) in the world. Correspondingly, fake pharmaceuticals (HS 30) is the largest product category concerned by shipments of counterfeit and pirated goods originating from India, far exceeding leather articles and handbags (HS 42) and clothing (HS 61), which rank 2nd and 3rd, respectively.

A closer review of the data suggests that a large share of fake pharmaceuticals (HS 30) exported from India are shipped to developing African economies, such as the Democratic Republic of the Congo, Kenya, Angola, Niger and Tanzania, which makes them the top destination economies of fake Indian products (Figure 8.1).

In contrast, counterfeit leather articles and handbags (HS 42) exported from India are mostly shipped to Middle-East countries, such as Saudi Arabia, Kuwait and Yemen. Western economies, including United States and United Kingdom, are Indian counterfeiters' main destination economies for both types of these latter products.

Like China, the majority of counterfeit and pirated products are exported from India through parcel shipments (67%). Note that this figure is slightly higher than the world average, which is 60% for the same period according to OECD (2016). Another interesting fact with respect to conveyance methods is that Indian counterfeiters use sea transport far more intensively than the world average (24% against 10%), but far less air transport (8% against 25%).

Between 2011 and 2013, only a few cases of global customs seizures reported India as a final destination economy. This implies that India is a net exporter of counterfeit and pirated products. In addition, the scope of counterfeit and pirated goods imported by India appears to be fundamentally different from that of fake products exported from India. Between 2011 and 2013, foodstuff (HS 2 to 21), footwear (HS 64) and electronics and electrical equipment (HS 85) were the products most affected by counterfeit and pirated imports in India (see Figure 8.2).

Little is known about the source of these fake imports, with China being the only explicitly reported source economy.

Indian rights holders are also victims of IPR infringement, India being the 17th source economy of right holders where IPR were infringed worldwide between 2011 and 2013. Infringements of Indian IPR during this period were observed in the pharmaceutical industry (see Figure 8.3).

In addition, almost 70% of the total number of global customs seizures related to Indian brands or patents originated from India itself. This implies that, as in the case of China, the source of counterfeiting and piracy that affects adversely the Indian economy is intra-national.

Figure 8.1. India as source economy of counterfeit and pirated products, 2011-2013

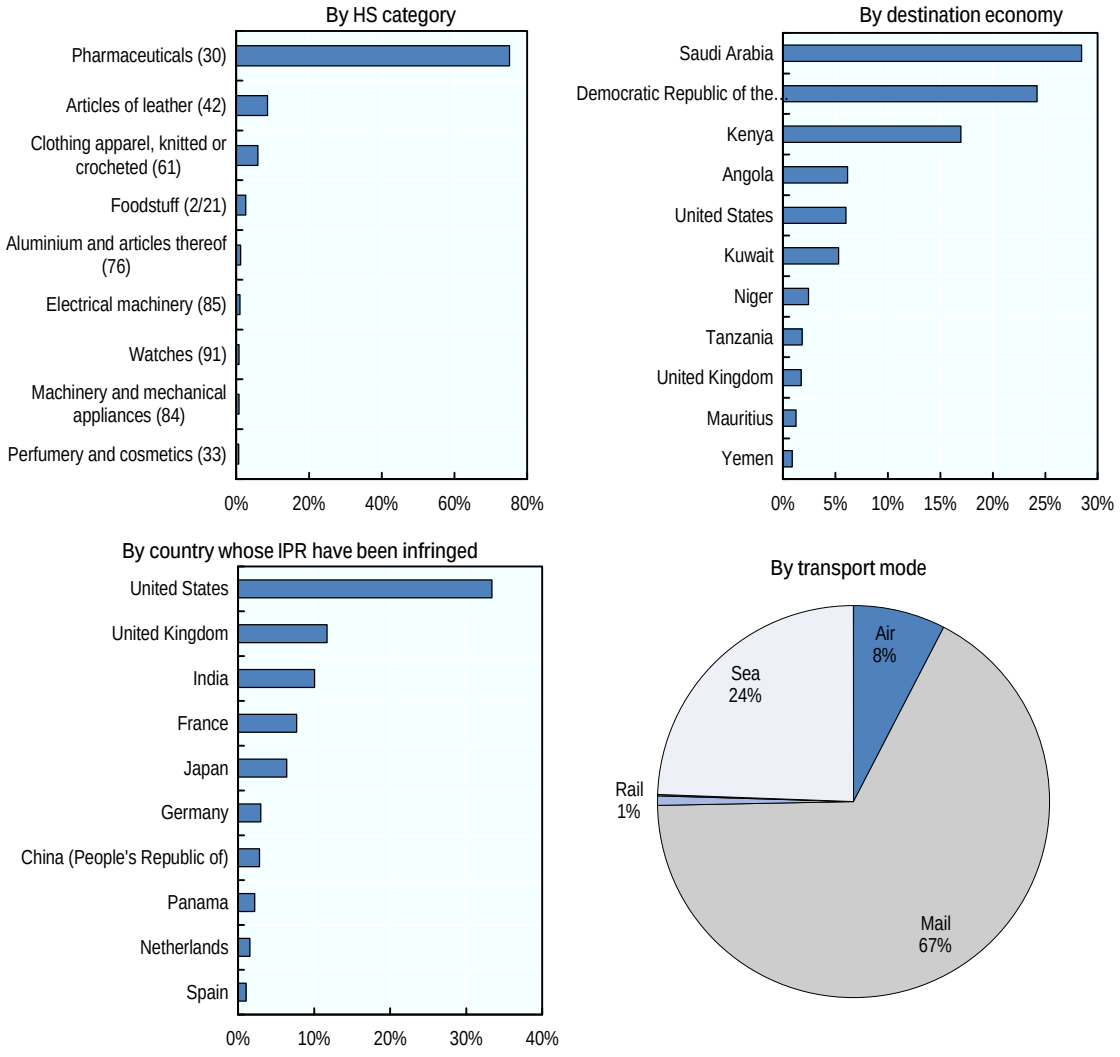


Figure 8.2. India as destination economy of counterfeit and pirated products, 2011-2013

The percentage of customs seizures of counterfeit products shipped to India

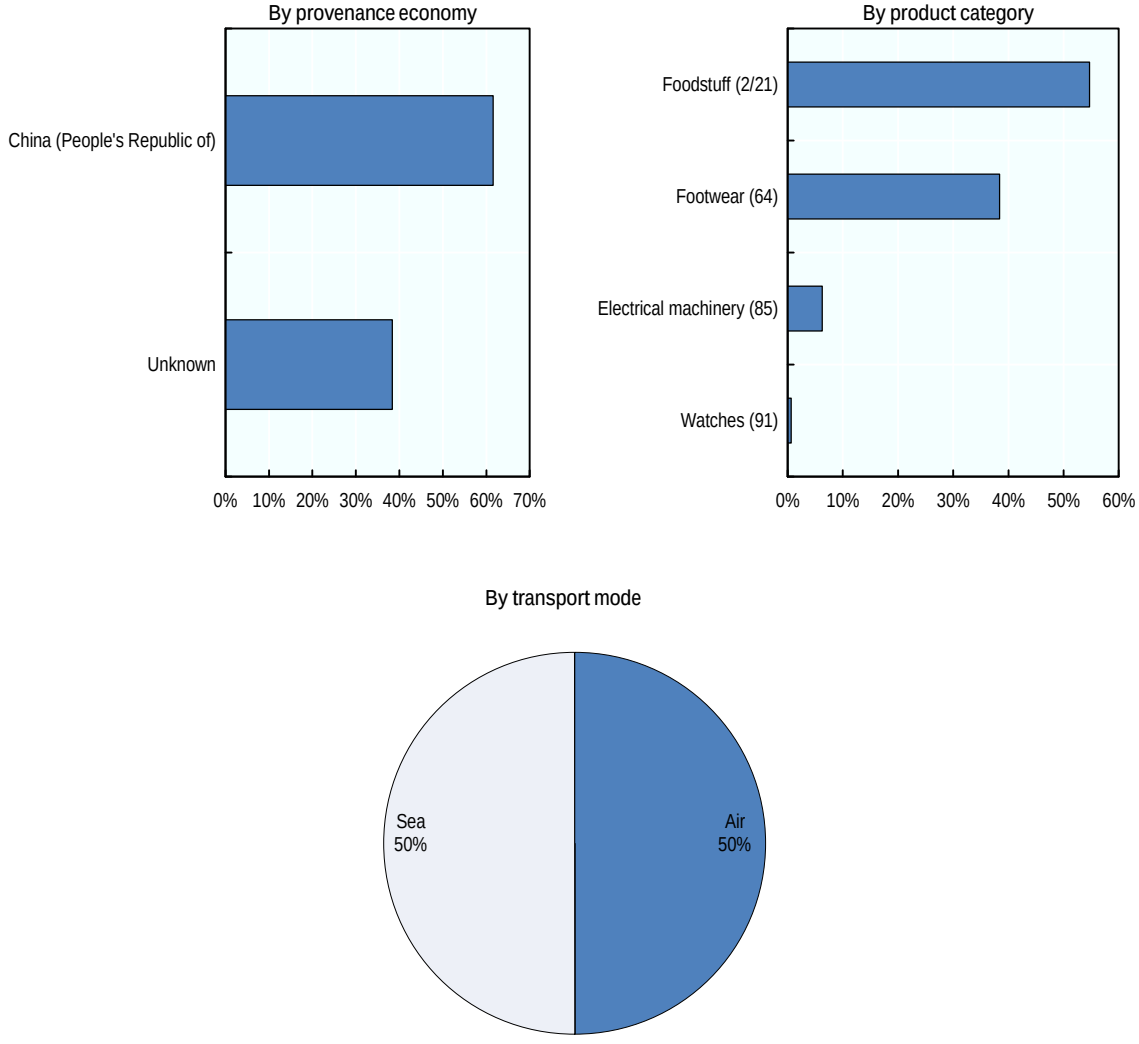
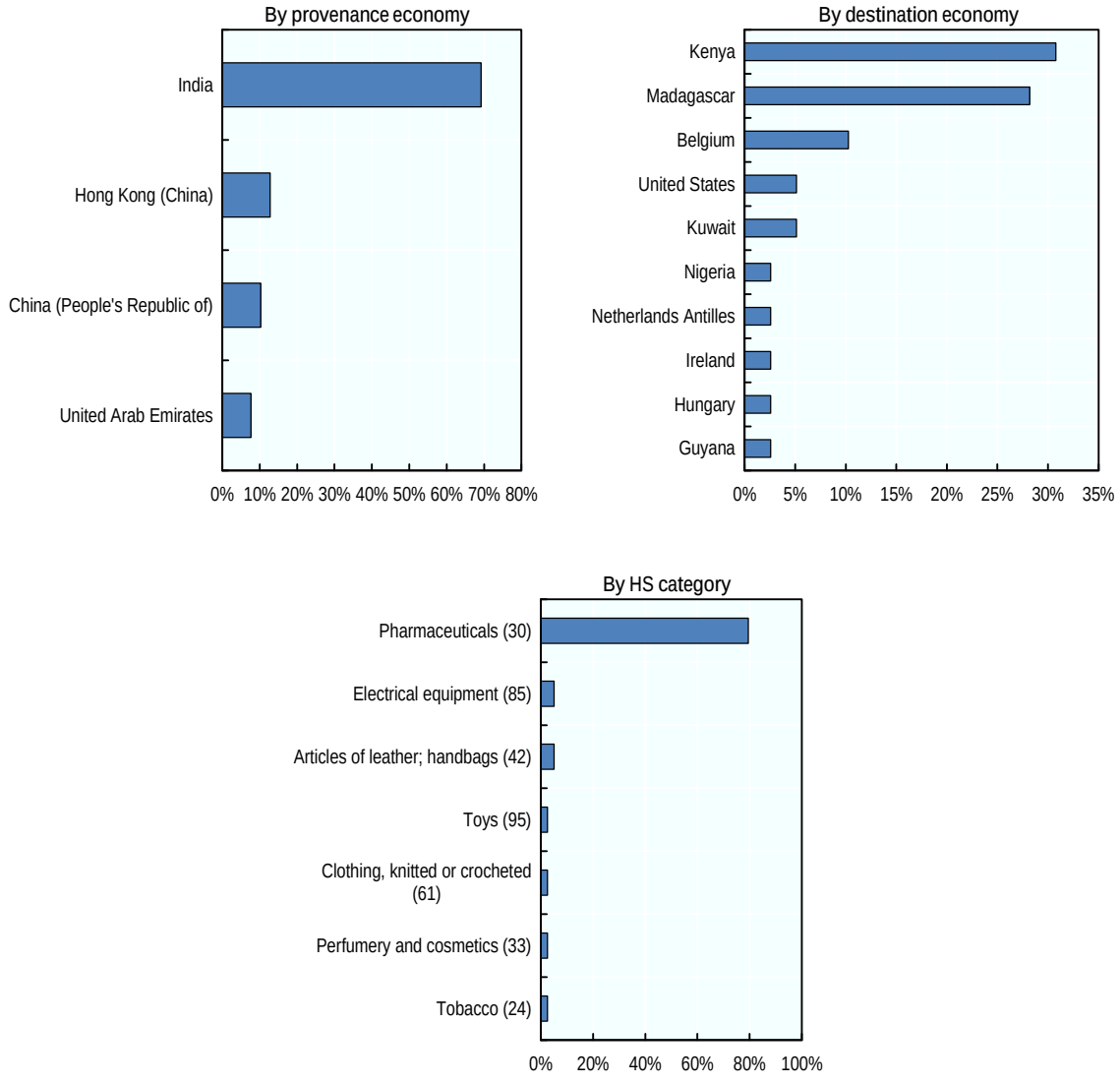


Figure 8.3. India as economy of origin of right holders whose IPR have been infringed, 2011-2013

The percentage of customs seizures of counterfeit products whose right holders are Indian residents



8.2. Legal and institutional setting

The Office of the Controller of General of Patents, Designs and Trademarks, which is in the Ministry of Commerce and Trade's Department of Industrial Policy and Promotion, is responsible for patent, trademark, copyright (since May 2016) and design matters.[1]

8.2.1. Legal and regulatory framework

Patents

Under the Patent Act, patents are protected for a period of 20 years from the filing date. In case of infringement, civil remedies include temporary and permanent injunctions, and

compensation in the form of damages or "account of profit" (which represent the profits earned by the infringer) (Rano, undated). Infringing articles that are imported could be subject to an injunction which bars their entry. Importantly, there is no assumption of patent validity in India.

Trademarks

Under the Trademark Act, trademarks are protected for a period of 10 years (renewable). In the case of infringement, injunctions can be sought, as can compensation, in the form of damages or account of profits; infringing goods are also subject to confiscation and destruction. Criminal penalties may also apply; offences are punishable with imprisonment of six months to three years, plus a fine of INR 50 000 to INR 200 000 (USD 710 to USD 2 900) (Dalia 2007).

Design rights

The Design Act protects design rights for a maximum of 10 years (renewable for a further 5 years) (CGPTD, undated). A party infringing the right is liable for every offence, to pay a sum of up to INR 25 000 (USD 360) to the rights holder, with a maximum of up to INR 50 000 (710) with respect to any one design. The rights holder can also bring a suit for the recovery of the damages for any infringement and for injunction against repetition of the same. The total sum recoverable could be up to INR 50 000 (USD 710).

Copyright

The Copyright Act, which was last amended in 2012, provides protection for 60 years. In the case of original literary, dramatic, musical and artistic works, the 60-year period is counted from the year following the death of the author (MHRD, undated). For other works, it is for 60 years following the publication of a work. Remedies for infringement include injunctions, damages and accounts of profit. In addition, all infringing copies of any work and all plates used or intended to be used for the production of such infringing copies become the property of the owner of the copyright.

Criminal penalties may also apply to parties which knowingly infringe or abet infringement (Table 8.1).

Table 8.1. Copyright criminal penalties in India

Persons who:	Are subject to both (except as noted)	
	A fine of:	Imprisonment of:
Knowingly infringe or abet infringement	INR 50,000 to 200,000 (1)	6 months to 2 years (1)
Commit subsequent infringement	INR 100,000 to 200,000(1)	1-3 years (1)
Knowingly uses an infringing copy of a computer programme	INR 50,000 to 200,000 (1)	7 days to 3 years (1)
Knowingly make, or have, plates for the purpose of making infringing copies	Unspecified	Up to 2 years
Circumvent an effective technological measure applied for the protecting the owner's rights	Unspecified	Up to 2 years
Remove/alter rights management information	Unspecified	Up to 2 years
Make false statements to authorities	Unspecified fine and/ or imprisonment of up to 1 year	
Publishes an infringing sound recording or video film	Unspecified	Up to 3 years

Note: (1)Lesser penalties may apply in cases in which the infringement has not been used or been made for gain.
Source: Indian Copyright Act of 1957, as amended in 2012, http://copyright.gov.in/Documents/CopyrightRules1957.pdf

Border measures

Rights holder can apply to customs for the suspension of any consignment that infringes its IP rights (OHIM*a*, 2014 and CEBC, 2007). If accepted, the application remains valid for five years or for the duration of the right. During this period, customs will suspend any suspect consignment of infringing goods based on the rights holder's application.

"Parallel" imports of products (i.e., products that are not authorised for distribution in a geographic market) are permitted for trademarked items in India (WTO, 2015*a*), provided the importer can demonstrate that the original product was legitimate and not counterfeit. Parallel imports of copyrighted material, however, are not permitted.

8.3. Policies and programmes

With a view to designing an IP policy that would stimulate innovation across sectors, the Department of Industrial Policy & Promotion, which is a part of the Ministry of Commerce & Industry, established an IPR Think Tank to prepare a national IP strategy. Following consultations with stakeholders, the think tank submitted its final report on 18 April 2015 (DIPP, 2015). Subsequently, in May 2016, a new National Intellectual Property Rights Policy was adopted (DIPP, 2016). Seven objectives were identified:

- *Objective 1. IPR awareness: Outreach and promotion* - To create public awareness about the economic, social and cultural benefits of IPRs among all sections of society. Six principal steps for attaining the objective were outlined, along with a number of sub-steps.
- *Objective 2. Generation of IPRs* - To stimulate the generation of IPRs. Thirty steps were outlined, along with sub-steps.
- *Objective 3. Legal and legislative framework* - To have strong and effective IPR laws, which balance the interests of rights owners with larger public interest. Nine steps were outlined, along with sub-steps.

- *Objective 4. Administration and management* - To modernise and strengthen service-oriented IPR administration. Twenty-one principal steps were outlined, along with sub-steps.
- *Objective 5. Commercialisation of IPRs* - Get value for IPRs through commercialization. Thirteen steps were outlined, along with sub-steps.
- *Objective 6. Enforcement and Adjudication* - To strengthen the enforcement and adjudicatory mechanisms for combating IPR infringements. Ten steps were outlined, along with sub-steps.
- *Objective 7. Human capital development* - To strengthen and expand human resources, institutions and capacities for teaching, training, research and skill building in IPRs. Eleven steps were outlined.

Institutionally, the Department of Industrial Policy & Promotion in the Ministry of Commerce & Industry was given responsibility for monitoring the activities of other government bodies with IP mandates; it was also charged with coordinating, guiding and overseeing implementation and future development of IPRs (DIPP, 2016). The situation is set to be reviewed every five years, in consultation with stakeholders (The Hindu, 2016). In light of the IP Policy, DIPP has also set up a Cell for Intellectual Property Promotion and Management (CIPAM).

In January 2016, the government launched a "Startup India" initiative to foster entrepreneurship and promote innovation by creating an environment that is conducive for growth.[2] Promoting IP is one of the key elements of the action programme. In the action plan, start-ups will be provided with assistance in filing patents, through the following measures:

- fast-tracking of start-up patent applications,
- assistance in the filing of IP applications, through a panel of facilitators,
- assumption by the government of facilitation cost, and
- rebate of 80% of cost for filing application.

IP is also a key area supporting the related "Make in India" initiative that was launched in 2014.[3]

International co-operation

In addition to the WTO and WCO, India is active in the WIPO and has signed on to a number of WIPO-administered instruments (Table 2.1). It has worked actively worked with a number of international partners, engaging in bilateral cooperation arrangement with Australia, Germany, Switzerland, Japan, France, United Kingdom, European Union and the United States.[4] Moreover, it worked with Brazil, China, the Russian Federation and South Africa to develop a *BRICS Intellectual Property Offices Cooperation Roadmap*, in 2013.[5]

The economy is actively engaged with INTERPOL in its activities to combat IP crime.[6] It participated, for example, in Operation Pangea IX in 2016, which concerned counterfeit drugs.[7]

Co-operation with stakeholders

The Federation of Indian Chambers of Commerce and Industry[8] has an IPR Division which is dedicated to addressing issues pertaining to protection of IP.[9] It has taken an important role in raising awareness of IP at the national level. The division is also

engaged in capacity building and training in industry and enforcement agencies, including the police and customs departments. In addition, it advises the judiciary on the quality and speedy adjudication of IP matters. Key activities include:

- Designing, developing and enforcing of IP policy through close collaboration with ministries and government agencies.
- Aligning and engaging with all the stakeholders from conceptualisation to commercialisation of innovation in India.
- Serving as a catalyst for positive changes to tangible solutions to IPR challenges faced by industry.
- Advising on the best practices for exercising, protecting and administering IP rights for rights holders.
- Serving as a global trade facilitator and knowledge partner, assisting and advising both established organisations and the emerging SMEs by developing sectoral insights into IPR issues and strategies.
- Providing inputs to government on effective protection of national interests in international fora.
- Reviewing existing IP regulations/legislation and amendments which have a direct bearing on Indian industry.

8.4. Enforcement and outcomes

Enforcement of intellectual property rights is carried out by state authorities in India (WTO, 2015*a*). The IP Policy calls for a system of state nodal officers and specialised IP cells within the state police to bolstered efforts to tackle piracy. In order to promote this objective, the first IP Enforcement unit was set up in June 2016 by the State of Telangana; the State of Maharashtra is also considering a similar dedicated unit. Border enforcement is carried out by the Customs Department, which can seize and hold goods. During 2012 through September 2014, customs recorded a total of 77 infringements [valued at INR 135 million (USD 1.9 million)], all of which concerned trademark violations (Table 8.2).

Table 8.2. IPR customs infringements in India, 2012-2014

Year	Number of cases	Value (in millions of INR)
2012	47	100.37
2013	19	20.42
2014 (Jan-Sep)	11	14.29

Source: Indian authorities, as reported in WTO (2015), Trade Policy Review: Report by Secretariat – India, WT/TPR/S/313/Rev.1, World Trade Organization, Geneva, www.wto.org/english/tratop_e/tpr_e/tpr_

Industries have become more proactive in enforcement in recent years (WTO, 2015*a*). CIPAM has started anti-piracy and enforcement training sessions with state police and in the past year conducted several such training sessions. Also, the music and film industries, through the Film Federation of India, Motion Picture Association, and Indian Music Industry Association, co-operate and collaborate with the police in the design and implementation of anti-piracy programmes.

8.5. Programme review

India's IPR regime was reviewed by the WTO, in the context of the trade policy review of the economy that was carried out in 2015. A number of delegations commented on the improvements that had been in India's IP regime (WTO, 2015*b*). In summarising the

review, the chair noted that concerns had been raised about the protection of trade secrets and test data.

One concern that was raised was the considerable degree of legal uncertainty that existed, notably when it came to protecting test data submitted for regulatory approval of pharmaceuticals and agricultural chemicals.

Reviews were also carried out by the European Commission and the United States, in 2015 and 2016-17, respectively (EC, 2015, USTR, 2016*a* and USTR, 2017). The EC noted the improvements that had been made, which included *i)* India joining the international trade mark system's Madrid Protocol in 2013, *ii)* the creation of comprehensive e-filing services, *iii)* customs services' enforcement, *iv)* co-operation between various enforcement departments, and *v)* improved IPR awareness amongst officials (EC, 2015). The Indian Patent Office had also taken actions in recent years by digitising operations and hiring additional patent and trademark examiners. However, much remained to be done, resulting in the Commission putting the economy on its Priority 2 IP list.

In its assessments, the United States noted the progress India had made to improve the IP environment, and the good reputation of Indian courts in rendering fair and deliberate judgments to domestic and foreign litigants alike (USTR, 2016*a* and USTR 2017). The United States also noted, however, that India has not addressed long-standing and systemic deficiencies in its IPR regime and had endorsed problematic policies that may lead to backsliding in the future. (USTR, 2016). The promotion of IP in programmes such as "Make in India" and "Start-up India" were noted, as were improvement in court procedures and expansion in the capacity of the economy to process trademarks and patents, through an expansion in the number of examiners, which should help to reduce the significant delays new applicants face and cut down the backlog of pending applications. Significant concerns remained and new concerns were raised; India's proposed Patent Rule Amendments would introduce incentives to pressure patent applicants to localize manufacturing in India and require the submission of sensitive business information to India's Patent Office. Furthermore, the unpredictable application of Section 3(d) of the Patents Act has led to additional rejections of patent applications for pharmaceutical products. India's introduction of issuance guidelines on the patentability of computer-related inventions has also created unpredictability in patent applications. The overall level of IP enforcement, however, was viewed as deficient and the economy remained on the US IP Priority Watch List for 2016 and 2017.

EC and US concerns included:[10]

- *Patents*: Restrictive patentability criteria combined with difficulties to enforce patents granted, were of concern, as was the broad criteria applicable for granting compulsory licenses or for the revocation of patents (EC, 2015). This affected in particular pharmaceuticals, chemicals, agriculture and software but was also relevant for other sectors where local innovation was being promoted. The large patent backlog was also of concern. Proposed modifications in patent rules were seen as pressuring companies to localise manufacturing in India and requiring the submission of sensitive business information to the patent office (USTR, 2016*a*). Difficulties in securing and enforcing patents in biopharmaceuticals, agricultural chemicals, software and green technology were raised as concerns. Also of concern was the apparent absence of an effective system for protecting undisclosed test and other data generated to obtain marketing approval for pharmaceutical and agricultural chemical products against unfair commercial use

and unauthorised disclosure (EC, 2015). The standards for compulsory licensing were also questioned, as were deficiencies in the process for approving generic pharmaceuticals. The grounds and procedures for challenging patents through pre-grant and post-grant actions were questioned, as was the burden of annual reporting requirements.

- *Trademarks*: Delays and challenges in obtaining trademarks were noted. The United States continued to receive stakeholder concerns about difficulty obtaining a trademark and significant delays in cancellation and opposition proceedings at the administrative level (USTR, 2016*a*).
- *Sanctions*: The adequacy of sanctions to deter infringement was questioned (EC, 2015). In the copyright area, inadequate protection for technological protection measures and lack of enforcement against circumvention technologies, devices, and services were noted.
- *ICT*: Foreign ICT patent holders noted challenges in getting Indian ICT companies, in particular telecom equipment vendors, to pay due royalties (EC, 2015). Court decisions and injunctions were reportedly difficult to obtain.
- *Enforcement*: Enforcement mechanisms reportedly needed to be strengthened, in particular in areas outside the Delhi region (EC, 2015). The US 2015 list of notorious markets where counterfeit and pirated products are sold listed 1 physical Indian market (out of 15) (USTR, 2015).[11]
- *Counterfeit products*: Exports of counterfeit medicines and related products to the EU market were of particular concern; a significant volume was being shipped in small postal consignments, which made detection difficult (EC, 2015). Similar concerns affected Indian exports of counterfeit products to the US market, particularly in the pharmaceuticals area, which can pose a health and safety risk to consumers. Studies suggest that up to 20% of drugs sold in the Indian market are counterfeit (USTR, 2015). A 2012 study by FICCI and others found that counterfeiting and piracy in India costs industry as much as USD 10 billion per year. (WTO 2015*a*) Nearly 30% of auto components and 26% of computer hardware sold in India are allegedly counterfeit (WTO, 2015*a*)
- *International co-operation*: India often opposes multilateral efforts to address piracy and counterfeiting at the WTO, WCO, and WIPO. (EC, 2015). The European Commission noted that it is important for India to participate in IPR enforcement discussions in these fora. Id. Moreover, it was noted that the same concerns existed for the international climate change (United Nations Framework Convention on Climate Change) negotiations, where India is pushing for measures with other countries which would weaken IPR protection in that area such as patentability exclusions and systematic compulsory licensing (EC, 2015). The economy, it was noted, had yet to join a number of important WIPO treaties (USTR, 2016*a*).

The IP regime was also evaluated by the Global Intellectual Property Center (GIPC).[12] It awarded India a score of 8.75 out of 35 in its 2016 assessment, which ranks the economy 43, out of the 45 economies examined (GIPC, 2017) (Table 8.3).

The score reflects an improvement over the 6.24 score awarded in 2012 (GIPC, 2012). Areas of strength identified included statements in support of the need for a strong IP environment and the existence of *ex officio* powers for customs. Areas of weakness included patentability standards, which were outside international norms, the lack of regulatory data protection and patent term restoration, the scope of compulsory licensing,

the requirements for notice and takedown of copyright-infringing content, poor application and enforcement of civil remedies and criminal penalties, and lack of participation in many international IP treaties.

Table 8.3. IP scores for India, 2016

Area	Score	Out of	Percentage
Patents, related rights, and limitations	1.25	8	16
Copyrights, related rights, and limitations	1.47	6	25
Trademarks, related rights, and limitations	3.85	7	55
Trade secrets and market access	0.75	3	25
Enforcement	1.43	7	20
Membership and ratification of international treaties	0	4	0
Total	8.75	35	25

Source: Global Intellectual Property Center, U.S Chamber of commerce (2017), International IP Index, http://www.theglobalipcenter.com/ipindex2017/ (accessed July 2017).

Notes

[1] See *http://ipindia.nic.in/*, accessed in May 2016.

[2] See *http://startupindia.gov.in/actionplan.php*, accessed in May 2016.

[3] See *www.makeinindia.com/about*, *http://pib.nic.in/newsite/PrintRelease.aspx?relid=123202* and *www.makeinindia.com/policy/intellectual-property-facts*, accessed in May 2016. dalia

[4] See *www.ipindia.nic.in/ipr-bilaterals.htm* , accessed in April 2017.

[5] See *www.ip-watch.org/weblog/wp-content/uploads/2013/11/SIGNED-BRICS-IP-OFFICES-COOPERATION-ROADMAP.pdf*, accessed in June 2016.

[6] See *www.interpol.int/Member-countries/Asia-South-Pacific/India*, accessed in June 2016.

[7] See *www.interpol.int/News-and-media/News/2016/N2016-076*, accessed in June 2016.

[8] The Confederation of Indian Industry has similar objectives and carries out similar activities.

[9] See *www.ficciipcourse.in/index.php?option=com_content&view=article&id=67&Itemid=150*, accessed in May 2016.

[10] See also USTR (2017) for further information.

[11] See also USTR, 2016*b*.

[12] The GIPC is an affiliate of the US Chamber of Commerce which aims at promoting innovation and creativity globally by advocating strong IP rights and norms.

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9. Governance frameworks for combatting counterfeiting in the Russian Federation

This chapter looks at policy developments and governance issues, reviewing the effectiveness of the governance frameworks for IP related policies in the Russian Federation. It begins with presentation of a factual, quantitative overview of the situation in the Russian Federation of trade in counterfeit goods. This is followed by a review of the governance frameworks for IP enforcement and institutional capacities in the Russian Federation with sections on legal and institutional setting, policies and programmes to enhance IP protection, IP enforcement and outcomes, and reviews of relevant, IP-related programmes.

Note by Turkey:

The information in this document with reference to "Cyprus" relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the "Cyprus issue".

Note by all the European Union Member States of the OECD and the European Union:

The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

9.1. Current situation

Over the period 2011 – 2013, Russia ranked 36th as a source economy for counterfeit and pirated products in the world. A close look at the data suggests that the largest share of counterfeit products that originate in Russia concerned luxury products, with high-value French and Italian brands of perfume and cosmetics (HS 33), leather articles and handbags (HS 42) and clothing (HS 61 and HS 62) being the top types of shipped to foreign markets by Russian counterfeiters (see Figure 9.1).

The fake items were shipped largely from Russia to neighbouring countries in the north-east of Europe, including Germany, Latvia, Belgium, Netherlands and Ukraine. The main conveyance methods for shipments of counterfeit products were road transport and postal shipments, which represented 45% and 31% of the total number of global customs seizures referring to Russia as source economy, respectively. Note that the use of road transports by Russian counterfeiters is far more intensive than the world average, which was 9% over the same period according to OECD (2016).

In contrast to the other BRICS economies, Russia is a net importer of counterfeit and pirated products. The scope of counterfeit and pirated products imported by Russia is large, with leather articles (HS 42), toys (HS 95) and clothing (HS 61) being the top product categories concerned by counterfeit imports in Russia (see Figure 9.2).

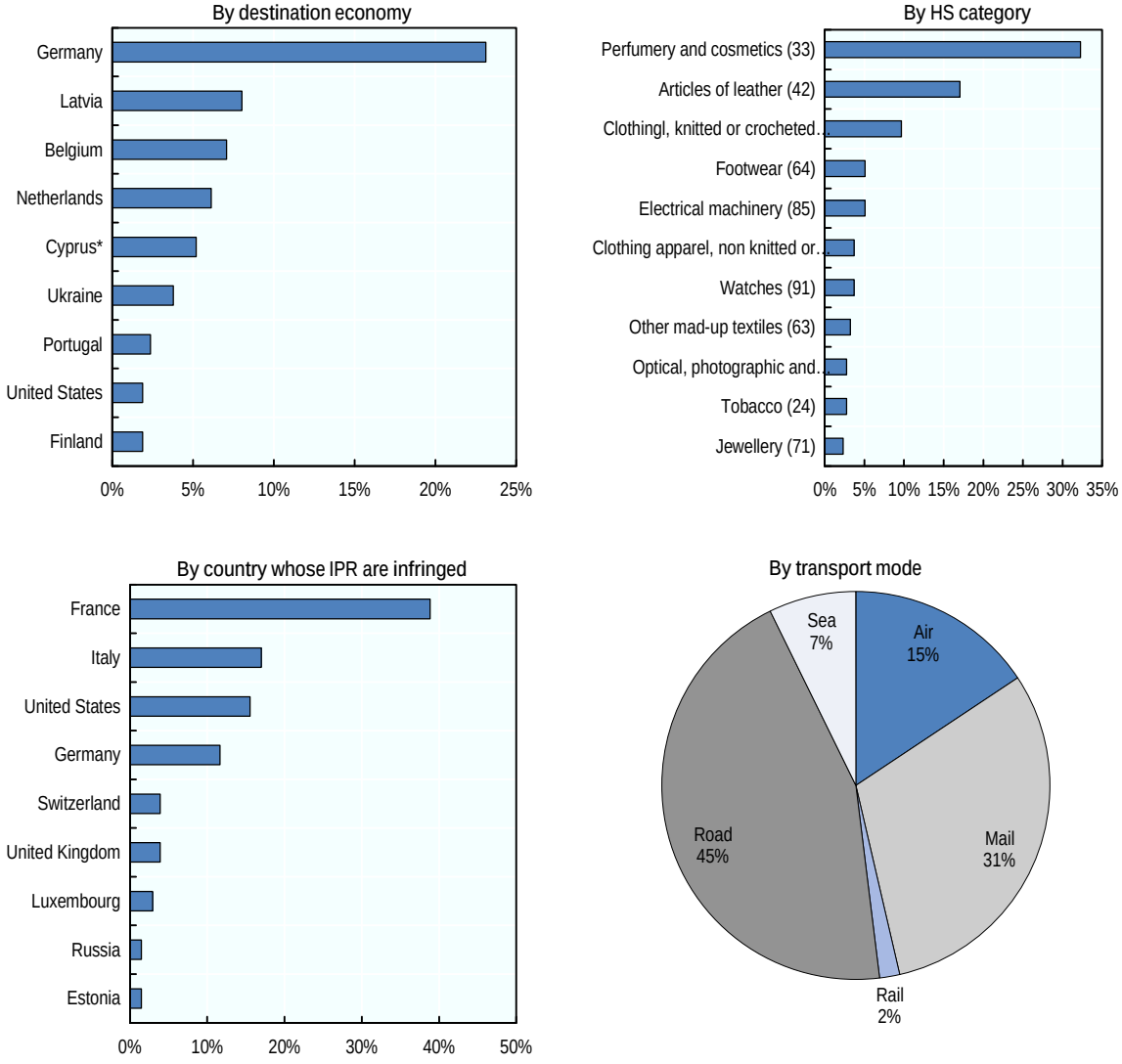
Those fake items were imported mostly from China, Turkey, and two neighbouring countries (Ukraine and Azerbaijan). Road transport appears to be the major conveyance method used by counterfeiters targeting the Russian economy.

Russian foodstuffs (HS 2 to 21), toys (HS 95) and paper (HS 48) industries are also particularly affected by global counterfeiting and piracy (see Figure 9.3).

The main source economy for products infringing Russian IPR is Ukraine, followed by China, Russia itself and Turkey, while the main destination economy for those products is, by far, Russia itself. The demand for products infringing Russian brands comes essentially from Russia, while the products originate from neighbouring countries.

Figure 9.1. Russia as source economy of counterfeit and pirated products, 2011-2013

The percentage of global customs seizures in provenance from Russia



Note: *For Cyprus:

Note by Turkey: The information in this document with reference to "Cyprus" relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the "Cyprus issue".

Note by all the European Union member states of the OECD and the European Commission: The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

Figure 9.2. Russia as destination economy of counterfeit and pirated goods, 2011-2013

The percentage of customs seizures of counterfeit products shipped to Russia

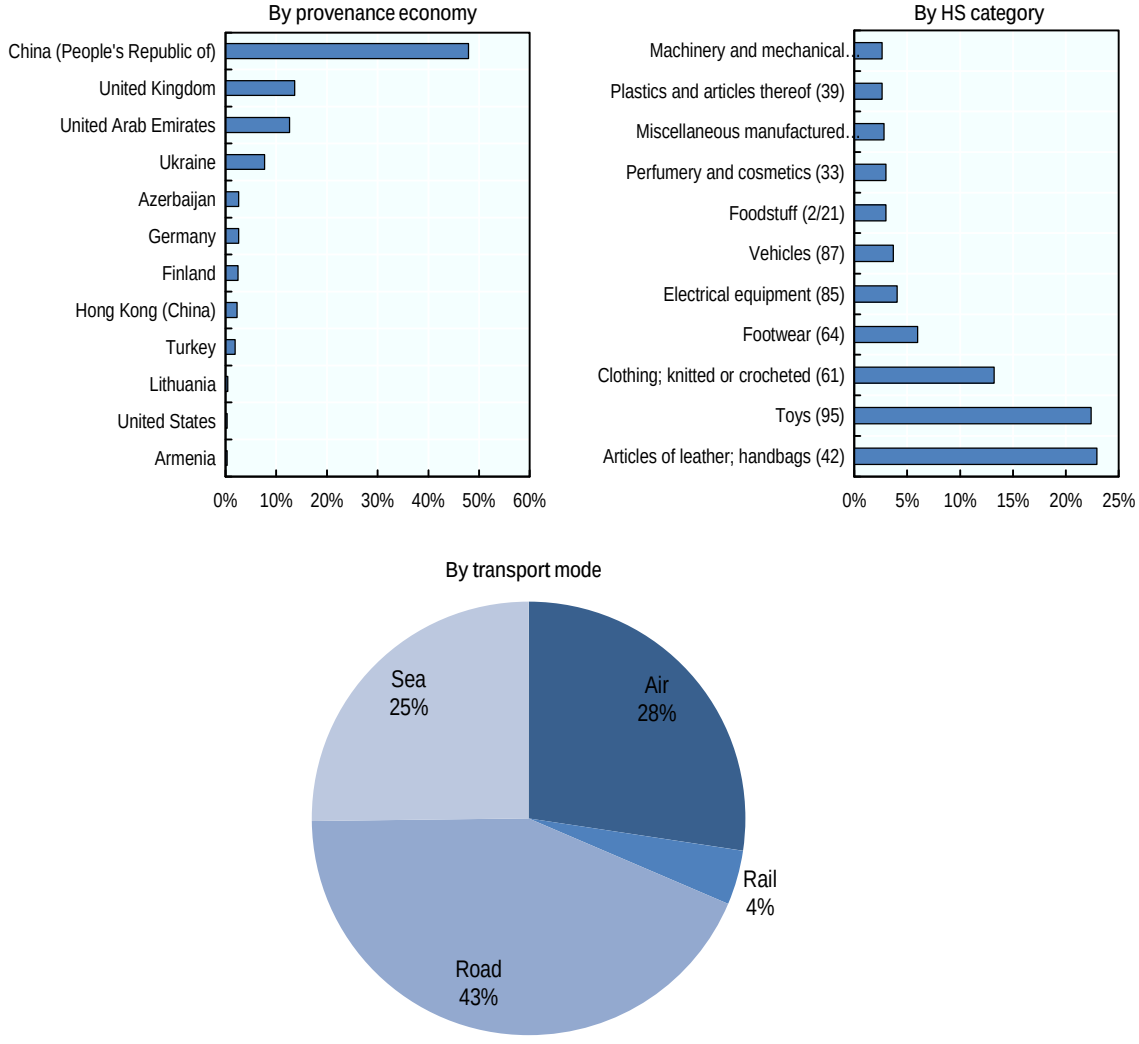
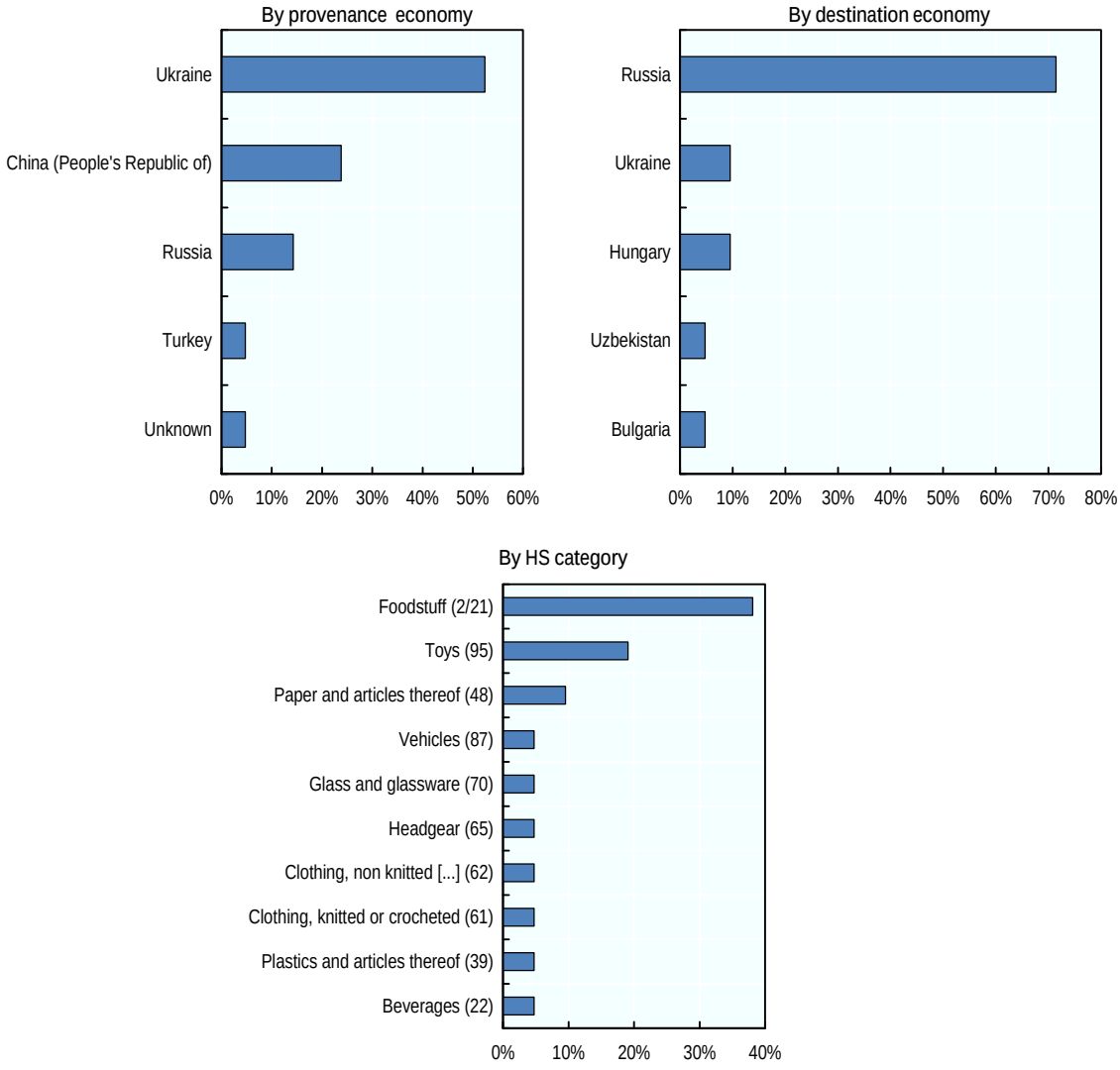


Figure 9.3. Russia as economy of origin of right holders whose IPR have been infringed, 2011-2013

The percentage of customs seizures of counterfeit products whose right holders are Russian residents



9.2. Legal and institutional setting

The Federal Institute of Industrial Property (Rospatent), which is under the Ministry of Economic Development, is responsible for overseeing legal protection and exploitation of intellectual property in Russia.[1]

The Federal Service for Industrial Property, which is a government-supported research institute, supports Rospatent, by carrying out preparatory work for the implementation of Rospatent legal actions.[2]

Other governmental bodies playing a role include the Ministry of Interior, the Prosecutor´s Office, the Federal Antimonopoly Service, the Federal Customs Service and the Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communication (the Roskomnadzor) (OHIM, 2014*b*).

Also, the Ministry of Mass Communication, together with the Ministry of Culture, have responsibility for Internet regulation, including laws governing e-commerce and the liability of Internet service providers, hosting services and other services for infringement (OHIM, 2014*b*). For copyright cases, the arbitrage courts retain general jurisdiction, except for cases falling with the exclusive jurisdiction of the Moscow city court in relation to the online enforcement measures adopted.

9.3. Legal and regulatory framework and enforcement

Terms of protection

Invention, utility model and design rights are protected for periods of 20, 10 and 5 years, respectively; design rates can be renewed, in five-year increments, for up to 25 years (Thomson Reuters, 2015). In the case of patents involving certain products (including medicines, pesticides and agro-chemical products), the protection can be extended for up to five years at the request of the rights holder, to take into account the time required for a patented product to be approved for use. Trademark protection is for 10 years (renewable). Copyright protection is as follows:

- For the author's lifetime plus 70 years; in case of anonymous or pseudonymous works, 70 years after publication; in the case of a work published within 70 years from the author's death, 70 years from the date of first publication.
- For performances, the lifetime of the performer, but not less than 50 years from the performance or the date of its fixation or broadcasting. For phonograms, 50 years after its fixation, or, in the case of a phonogram which is made available to the public within this period, 50 years after the publication. For broadcasts, 50 years after broadcasting. For contents of databases, 50 years after completion of the database, or, in the case of a database which is made available to the public within this period, 50 years after the publication. For works first published after they have entered the public domain, 25 years after the first publication.

Judicial proceedings

A specialised IP Rights Court was established in 2013. within the system of commercial (*arbitrazh*) courts of Russian Federation. (OHIM, 2014b at 5) The IP Court has jurisdiction to adjudicate cases related to protection of industrial property as a court of first instance and cassation instance (similar to an appellate court). For copyright cases, the *arbitrazh* courts retain general jurisdiction, except for cases falling with the exclusive jurisdiction of the Moscow city court in relation to the online enforcement measures adopted in 2013.

Online measures

Online copyright issues are addressed in a 2013 law pertaining to protection of intellectual property rights in information and telecommunications networks (Article19, undated). The law provides for temporary injunctive relief and establishes intermediary liability. In addition to seeking injunctive relief, the law enables rights holders to file a notice with intermediaries who must then choose between taking “appropriate and necessary measures” to remove the allegedly infringing material, or face being stripped of their immunity from liability. The law was amended in 2014, expanding the scope from video content, to music, literature, games and software (Malloy and Golovatsky, 2015). Under the new rules, when the operator of an offending website voluntarily removes

infringing materials within 24 hours of receipt of a violation notice, liabilities for the infringement can be avoided.

Remedies for infringement – Civil and administrative actions

Under Russia's Civil Code, rights holders can obtain (Thomson Reuters, 2015):

- injunctions (including preliminary),
- damages or statutory monetary compensation,
- delivery up and destruction of the infringing goods,
- destruction of tools mainly used or intended for the production of infringing goods,
- publication of the infringement judgment.

Statutory compensation, in the case of trademark, copyright and patent infringement, can range from RUB 10 000 to RUB 5 million (USD 140 to USD 72 000); Biriulin and Bogdanov, 2016, Cotter, 2014 and Savitsky, 2013). Such compensation would be sought when, for example, damages could not be documented.

Border measures can be taken to intercept goods that infringe copyrights or trademarks; *ex officio* action is possible in these instances (WTO, 2012). Such interdictions do not apply to natural persons when the items are for personal use.

Administrative fines can also be applied, as follows (Rospatent, 2017):

- Trademark:
  - individuals: fines of RUB 5 000 to 10 000 (USD 72 to 140), plus confiscation of the infringing products and the equipment used to produce them;
  - legal entities: fines of RUB 100 000 to 200 000 (USD 1 400 to 2 900), plus confiscation of the infringing products and the equipment used to produce them;
  - officers: fines of RUB 10 000 to 50 000 (USD 140 to 720), plus confiscation of the infringing products and the equipment used to produce them.
- Copyright
  - individuals: fines of RUB 1 500 to 2 000 (USD 22 to 29), plus confiscation of the infringing products and the equipment used to produce them;
  - legal entities: fines of RUB 30 000 to 40 000 (USD 430 to 570), plus confiscation of the infringing products and the equipment used to produce them;
  - officers: fines of RUB 10 000 to 20 000 (USD 140 to 290), plus confiscation of the infringing products and the equipment used to produce them.
- Patent
  - individuals: fines of RUB 1 500 to 2 000 (USD 22 to 29)
  - legal entities: fines of RUB 30 000 to 40 000 (USD 430 to 570),
  - officers: fines of RUB 10 000 to 20 000 (USD 140 to 290).

Remedies for infringement – Criminal sanctions

IP infringement may also be subject to criminal prosecution, when conditions warrant. In the case of trademark infringement, this could occur when there are repeated violations, or when damages exceed RUB 250,000 (USD 3 600); the ceiling was reduced in 2015, from RUB 1.5 million (USD 22 000) (Biriulin and Bogdanov, 2016).

- *Patent and design infringement*. A fine is an amount of up to RUB 200 000 (USD 2 900), or is the amount of a wage/salary, or any other income of the convicted

person for a period of up to 18 months, or by obligatory labour for a term of up to 480 hours, or by compulsory works for a term of up to two years, or by deprivation of liberty for the same term (WTO, 2012).

If carried out by group of persons or an organised group the penalties would be a fine in an amount of RUB 100 000 to 300 000 (USD 1 400 TO 4 300), or in the amount of the wage or salary, or any other income of the convicted person for a period of up to eight months, or by arrest for a term of from one to two years, or by compulsory labour for a term of up to five years, or by deprivation of liberty for a term of up to five years.

- *Copyright infringement*. In cases of plagiarism a fine in an amount of up to RUB 200 000 (USD 3 100) or in the amount of the wage or another income of the convicted person for a period of up to 18 months, or with obligatory work for a period of up to 480 hours, or by corrective labour for a term of up to one year, or with arrest for a period of up to six months (WTO, 2012).

  Other forms of copyright infringement would be subject to a fine in the amount of up to RUB 200 000 (USD 2 900), or in the amount of a wage/salary or other income of the convicted person for a period of up to 18 months, or by obligatory labour for a term of up to 480 hours, or by corrective labour for a term of up to two years, or by compulsory labour for a term of up to two years, or by deprivation of liberty for the same term. The sanctions would apply when the infringement was carried out on a large scale (i.e. the value of infringement exceeded RUB 100 000 (USD 1 400).

  If the infringement has been committed by a group of persons or by an organised group or by a person with the use of his official position, the penalties would be compulsory labour for a term of up to five years, or deprivation of liberty for a term of up to six years, accompanied by a fine in the amount of up to RUB 500 000 (USD 7 200) or in the amount of a wage/salary or other income of the convicted person for a period of up to three years. The sanctions would apply when the infringement was carried out on an especially large scale [i.e. the value of infringement exceeded RUB 1million (USD 14 000)].
- *Trademark infringement.* Penalties for infringement include: a fine of RUB 100 000 – 300 000 (USD 1 400 – 4 300) or up to two years' salary or other income of the convicted person; compulsory community service for up to 480 hours; corrective or disciplinary work for up to two years; or imprisonment for up to two years, with a fine of up to RUB 80 000 (USD 1 100) or up to six months' salary or other income of the convicted person (Biriulin and Bogdanov, 2016).

  Illegal use of special marking in respect to a trademark which is not registered in the Russian Federation, or the name of the place of origin of goods, if this deed has been committed repeatedly or has inflicted sizable damage are subject to penalties as follows: up to RUB 120 000 (USD 1 700), or in the amount of the wage or salary, or any other income of the convicted person for a period of up to one year; compulsory community service for up to 360 hours; or corrective labour for a term of up to one year (WTO, 2012).

  If committed by an organised group, the same crime is punishable by a fine of RUB 500 000 to RUB 1 million (USD 7 200 to 14 000) or between three and five years' salary or other income; or compulsory labour disciplinary work for up to five years; or imprisonment for up to six years and, optionally, a fine of up to RUB 500 000 (USD 7 200) or up to three years' salary or other income.

9.4. Policies and programmes

Anti-counterfeiting initiative

Pursuant to a 2015 Presidential decree, the Russian Federation established a State Committee Against the Illicit Trafficking of Industrial Products, the main purpose of which is to co-ordinate the anti-counterfeiting activities of federal, regional and local authorities. Responsibilities include monitoring and assessing developments, developing countermeasures, and exploring needed legislation. The committee has thus far prepared a strategic plan for combatting counterfeiting through 2020, drafted 10 laws and 3 resolutions to address issues, continued to monitor developments, and signed joint declarations with Belarus and Armenia (declaration with Kazakhstan and Kyrgyzstan are expected to follow). Moreover, an international agreement is being prepared for countering trade in counterfeit products in the Eurasian Economic Community. Also of note was the introduction of a marking system in 2016, which was designed to ensure the traceability of goods, from production or importation until the sale to consumers; the system is being introduced in stages.

International co-operation

The Russian Federation is active in WIPO, subscribing to 20 WIPO-administered instruments (Table 2.1). In addition, Rospatent's annual report for 2015 describes activities that were carried out with a number of international organisations, including ones in Europe, Eurasia, the Asia-Pacific area (APEC) and the BRICS; bilateral activities were also carried out, with a wide range of economies.[3]

The economy is actively engaged with INTERPOL in its activities to combat IP crime.[4] It participated, for example, in Operation Opson V in 2015/16, which targeted counterfeit food and drink and Operation Pangea IX in 2016, which concerned counterfeit drugs. [5, 6]

Co-operation with stakeholders

Founded in 1999, the Coalition for Intellectual Property Rights is a private-public partnership dedicated to advancing intellectual property rights protection, enforcement and reform in Russia, Ukraine, Kazakhstan, Belarus, and in other economies of Eurasia.[7] The focus is on public education, legislative action and legal reform.

9.5. Enforcement and outcomes

With respect to border measures, in 2013, the customs service of the Russian Federation intercepted 9.4 million units of goods that were believed to have infringed intellectual property rights.[8] In 2016 this The goods were valued at RUB 5 billion (USD 72 million). During the year 1 188 administrative cases opened by customs, most of which concerned trademarks.

9.6. Programme evaluation

The European Commission and the United States evaluated the Russian IP regime in 2015 and 2016-17, respectively (EC, 2015, USTR, 2016*a* and USTR, 2017). The Commission noted that progress had been made in the past 2-3 years, notably in amendments to Russia's civil code, a step towards internationally accepted practices (EC, 2015). An IP court had been established; although it did not cover copyright and related matters, it represented an important vehicle for treating other first instance cases, and

appeals. The effects of recent improvements in the system had yet to be felt. In the meantime, markets for counterfeit and pirated goods, both physical and online, were seen as continuing to flourish. Enforcement was in general seen to be slow; moreover EU businesses reporting to the Commission noted that IPR crime investigations were inefficient and cumbersome, and penalties were not high enough to provide a sufficient deterrent to parties engaged in counterfeiting and piracy. In addition, it was noted that Russia's criminal code does not provide for corporate entities to be held criminally liable. High thresholds for applying criminal procedures, an apparent reluctance by enforcement authorities to take action against large infringers and inadequate IPR economic crime police staffing have reportedly led to a significant decrease in the filing of cases in recent years. As a result, the economy was included on the EC's IP Priority 2 list (EC, 2015).

In its review, the United States noted the significant challenges facing the Russian government in the IP area; it retained the economy's inclusion on its Priority Watch List, for 2016 and 2017 (USTR, 2016*a* and USTR, 2017). In general, IPR enforcement was seen as having declined over the past several years, reflecting, in part, a reduction in the staff resources allocated to IP matters. Although copyright legislation was evolving, , its efficacy and the possible need for further modification remain uncertain; two of the 14 sites that the US had included on its List of Notorious Online Markets in 2105 were Russian (USTR, 2015 and 2016). Counterfeit products also remained problematic as fake goods continued to be manufactured and sold in Russia, as well as being transhipped through the economy (from, for example, China). The fake products included seeds, agricultural chemicals, electronics, ICT, auto parts, consumer goods and machinery (USTR, 2016). Moreover, counterfeit pharmaceuticals were continuing to be manufactured in Russia and sold through online pharmacies. Proper implementation of regulations to protect against the unauthorised disclosure of sensitive information that is provided to government authorities on pharmaceutical products was also a concern.

The IP regime was also evaluated by the Global Intellectual Property Center (GIPC). It awarded the Russian Federation a score of 15.53 out of 35 in its 2016 assessment, which ranks the economy 23rd, out of the 45 economies examined (Table 9.1) (GIPC, 2017).[9] The score reflects an improvement over the 11.17 score awarded in 2012 (GIPC, 2012). Areas of strength identified included legal reform efforts passed in areas of copyright, trade secrets, and biopharmaceutical-related IP rights, the level of participation in international treatments, and a new specialist IP Court in place since 2013. Areas of weakness included increasingly punitive localisation requirements, failure to implement regulatory data protection, limited DRM legislation, high levels of online and physical piracy, and poor application of civil remedies and criminal sanctions.

Table 9.1. IP scores for the Russian Federation, 2016

Area	Score	Out of	Percentage
Patents, related rights, and limitations	3.60	8	45
Copyrights, related rights, and limitations	1.99	6	33
Trademarks, related rights, and limitations	4	7	57
Trade secrets and market access	0.5	3	17
Enforcement	2.44	7	35
Membership and ratification of international treaties	3	4	75
Total	15.53	35	44

Source: Global Intellectual Property Center, U.S Chamber of commerce (2017), International IP Index, http://www.theglobalipcenter.com/ipindex/ (accessed July 2017).

Notes

[1] See *www.rupto.ru/about?lang=en*, accessed in May 2016.

[2] See *http://www1.fips.ru/wps/wcm/connect/content_en/en/about_fips/*, accessed in May 2016.

[3] See *www.rupto.ru/about/reports/2015_3?lang=en*, accessed in June 2016.

[4] See *www.interpol.int/Member-countries/Europe/Russia*, accessed in June 2016.

[5] See *www.interpol.int/News-and-media/News/2016/N2016-039*, accessed in June 2016.

[6] See *www.interpol.int/News-and-media/News/2016/N2016-076*, accessed in June 2016.

[7] See *www.cipr.org/*, accessed in May 2016.

[8] See *http://eng.customs.ru/index.php?option=com_content&view=article&id=1922:representatives-of-russian-and-chinese-customs-services-held-a-session-devoted-to-the-protection-of-intellectual-property-rights&catid=32:news-cat&Itemid=1858&Itemid=1858*.

[9] Global Intellectual Property Center, U.S Chamber of commerce (2016), *International IP Index*, http://www.theglobalipcenter.com/gipcindex/ (accessed November 2016).

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10. Governance frameworks for combatting counterfeiting in South Africa

This chapter looks at policy developments and governance issues, reviewing the effectiveness of the governance frameworks for IP related policies in South Africa. It begins with presentation of a factual, quantitative overview of the situation in South Africa of trade in counterfeit goods. This is followed by a review of the governance frameworks for IP enforcement and institutional capacities in South Africa, with sections on legal and institutional setting, policies and programmes to enhance IP protection, IP enforcement and outcomes, and reviews of relevant, IP-related programmes.

10.1. Current situation

South Africa is a small source of counterfeit and pirated products in international trade, ranking 86th in the world over the period 2011 – 2013. Counterfeit American and British brands of clothes (HS 61), electronics and electrical equipment (HS 85), and perfume and cosmetics (HS 33) appear however particularly affected by counterfeiting that originates from South Africa (see Figure 10.1).

These fake items are, for the most part, shipped to South Africa's traditional large trading partners, such as Belgium, Angola and the United States.

South Africa is also a minor destination economy for internationally traded counterfeit goods. Between 2011 and 2013, only a few cases of global customs seizures referred to South Africa as final destination. China, Hong Kong (China) and Turkey were the only three source economies explicitly mentioned by customs authorities (see Figure 10.2).

Product categories associated with important safety and health risks, such as pharmaceuticals (HS 30) and foodstuffs (HS 2 to 21), are the leading fakes imported into the country.

Figure 10.1. South Africa as source economy of counterfeit and pirated products, 2011-2013

The percentage of global customs seizures in provenance from South Africa

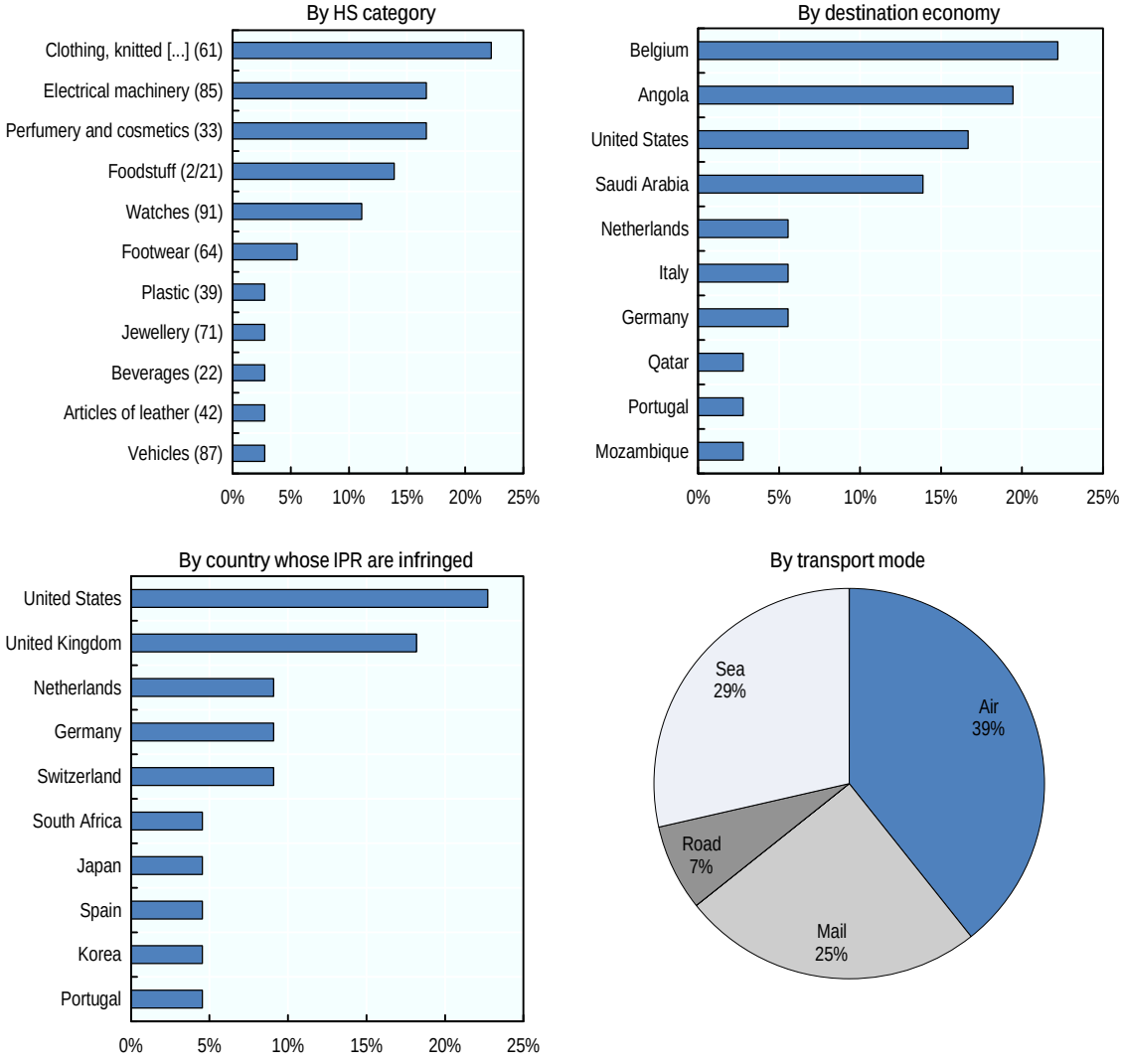
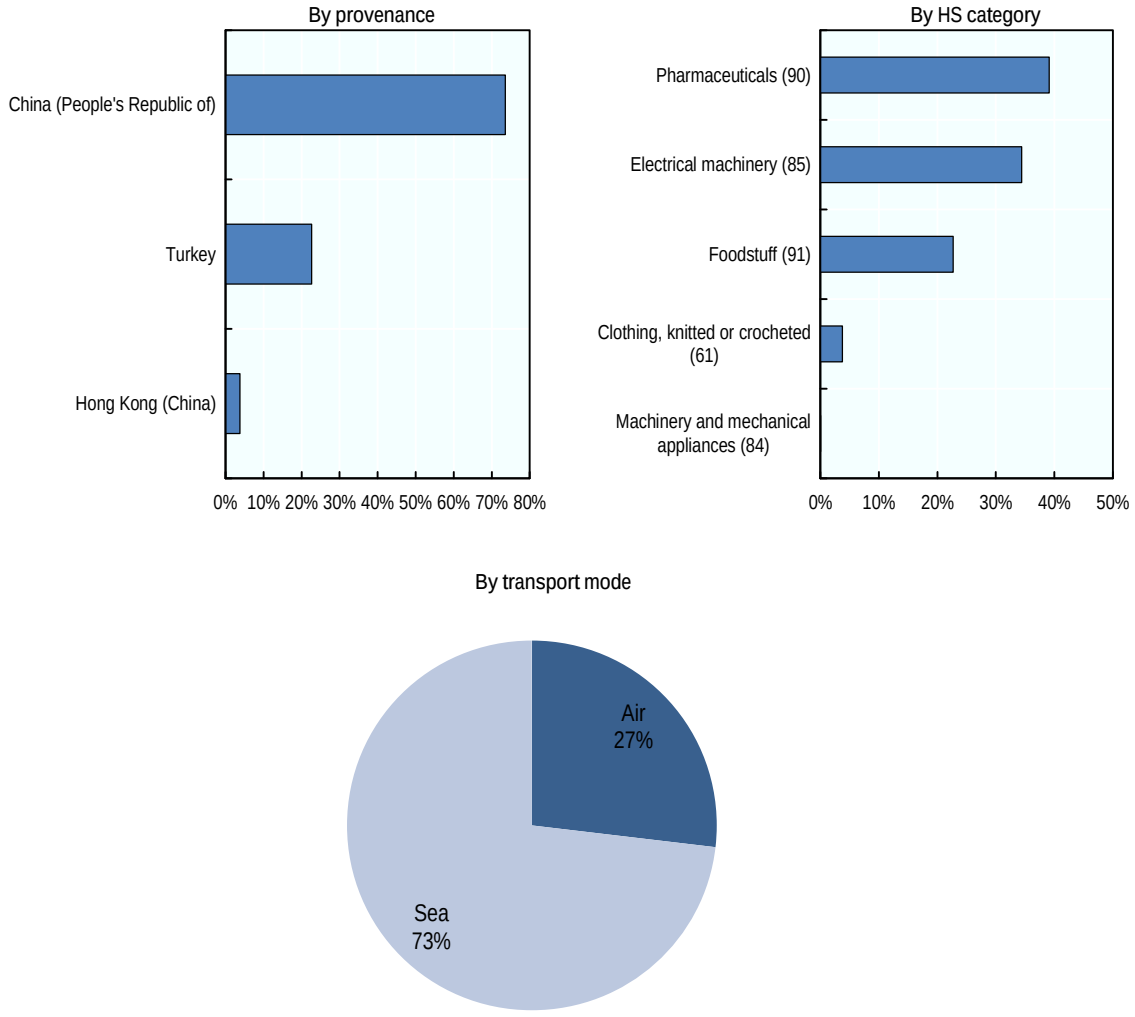


Figure 10.2. South Africa as destination economy of counterfeit and pirated products, 2011-2013

The percentage of customs seizures of counterfeit products shipped to South Africa



10.2. Legal and institutional setting

In South Africa, the IP regime, covering patents, trademarks, designs and copyrights, is administered by the Companies and Intellectual Property Commission (CIPC) (WTO, 2016). It functions as an organ of the state within the public administration, but as an institution outside the public service, with ties to the Department of Trade and Industry.

Its mission is to (CIPC, 2015):

- provide easy, accessible and value-adding registration services for business entities, intellectual property rights holders and regulated practitioners;
- maintain and disclose secure, accurate, credible and relevant information regarding business entities, business rescue practitioners, corporate conduct and reputation, intellectual property rights and indigenous cultural expression;
- increase awareness and knowledge of company and intellectual property laws, inclusive of the compliance obligations and opportunities for business entities and intellectual property rights holders to drive growth and sustainability, as well as the knowledge of the actual and potential impact of these laws in promoting the broader policy objectives of government; and
- take the necessary steps to visibly, effectively and efficiently monitor and enforce compliance with the laws that CIPC administers.

Responsibilities include:[1]

- the registration of IPRs;
- the promotion of education and awareness of IPR law;
- the promotion of compliance and enforcement of IPR law;
- administration of IPR treaties and agreements, and
- support for IPR policy development.

10.3. Legal and regulatory framework

Trademarks, copyrights, patents and design are protected under five principal laws:

Trademarks

The Trade Marks Act of 1993 provides protection for an initial period of 10 years, with renewal possibilities. In the case of infringement, the courts can:[2]

- interdict the infringement;
- order a removal of the infringing mark from all material and, where the infringing mark is inseparable or incapable of being removed from the material, order that all such material be delivered up to the rights holder;
- award damages; and
- in lieu of damages, at the option of the rights holder, award a reasonable royalty which would have been payable by a licensee for the use of the trade mark concerned.

The Counterfeit Goods Act of 1997 complements the Trade Marks Act and the Copyright Act (see below), providing more elaborated measures that could be taken to protect rights holders from trade in counterfeit products (Khader, Mohamed, 2015).[3] The Act stipulates that counterfeit goods, may not:

- be in the possession or under the control of any person in the course of business for the purpose of dealing in those goods;
- be manufactured, produced or made except for the private and domestic use of the person by whom the goods were manufactured, produced or made;
- be sold, hired out, bartered or exchanged, or be offered or exposed for sale hiring out, barter or exchange;
- be exhibited in public for purposes of trade;

- be distributed for purposes of trade, or for any other purpose to such an extent that the owner of an intellectual property right in respect of any particular protected goods suffers prejudice;
- be imported into or through or exported from or through the country except if so imported or exported for the private and domestic use of the importer or exporter, respectively;
- in any other manner be disposed of in the course of trade.[4]

A person who performs or engages in any prohibited act or conduct will be guilty of an offence if

- at the time of the act or conduct, the person knew or had reason to suspect that the goods involved, were counterfeit goods; or
- the person failed to take all reasonable steps in order to avoid any prohibited act.

At the request of a rights holder or acting on their own initiative, inspectors are empowered to enter and search premises where counterfeiting activities are taking place. When acting on the authority of and in accordance with a warrant, an inspector may seize and detain counterfeit goods, documentation and the tools used to manufacture the goods.[5] In such instances counterfeit goods, documentation and the tools used to manufacture the goods could be seized. Under the Act the court could order that:

- goods found to be counterfeit be delivered up to the owner of the relevant IP right;
- the accused party disclose the source from which the counterfeit goods were obtained, as well as the identity of the persons involved in the import, export, manufacture, production or distribution of the goods and their channels of distribution; and
- following a conviction of dealing in counterfeit goods the counterfeit goods and their packaging is destroyed, along with the tools used by the infringer to manufacture the goods.

Other available measures that could be taken include:

- issuance of cease and desist orders; and
- civil litigation against the perpetrator.

Where criminal actions prosecuted, accused parties could be subject, in the case of a first offence, to a fine not exceeding ZAR 5 000 (USD 330) or to imprisonment for up to 3 years, or both, for each article to which the offence relates. Subsequent infringement could result in a fine of up to ZAR 10 000 (USD 650), or imprisonment of up to five years, or both, for each article infringed.

The act also contains border measure provisions. Under these provisions, rights holders can request customs to seize and detain copyright- and trademark- infringing products. If approved, customs officials can take action if there are reasonable grounds for doing so.

Copyright

The Copyright Act, which was enacted in 1978 and then amended in 2002, provides non-transferable *moral rights* during the lifetime of the author[6], *economic rights* for 50 years following the death of the author and *related rights* for 50 years from the end of the year in which a work was first published or made available to the public (WTO, 2016). Under the Act,[7] fines and/or imprisonment could result (as per the Counterfeit Goods Act of 1997—see above).

Patents

The Patents Act of 1978, as amended in 2005, provides protection for a period of 20 years (WTO, 2016). The act does not cover parallel imports; however the Medicines and related Substances Act does have provisions enabling parallel imports, but they have never been used.

Design rights

Design rights are protected under the Designs Act of 1993 (WTO, 2016).[8] Aesthetic designs are protected for a period of 15 years, while functional designs are protected for 10 years.

10.4. Policies and programmes

The main legislative development in recent years was the passage of Intellectual Property Laws Amendment Act of 2013, which provides for protection of indigenous knowledge as a form of intellectual property (WTO, 2016).[9] The law effectively amends the trademark, copyright, patent and design rights laws in this regard.

A draft IP policy was published in 2013, for public comment.[10] The main objectives of the proposal include: the development of a framework that would empower all stakeholders, the improvement of IP enforcement, the promotion of research and development, the improvement of compliance with international treaties, the inclusion of public health considerations in IP laws, the strengthening of the climate for investment and the promotion of public education and awareness of IP. Action on the proposals has been delayed as stakeholder concerns are being addressed.[11]

In its annual performance plan for 2016/2017 to 2018/2019, the CIPC describes a number of initiatives it intends to take to enhance its IP regime (CIPC, 2016).With respect to education and awareness, initiatives include:

- Outreach to primary schools, high schools and institutions of higher learning and research. In collaboration with relevant institutions, the aim is to include IP as part of the school curriculum;
- Outreach to assist small businesses, including artists;
- Advocacy and outreach on regulatory and oversight functions relating the collecting societies;
- Development of educational materials and tools for targeted audiences;
- Promotion of the IP trade portal as a platform to commercialise IP;
- Promotion of education and awareness with all relevant stakeholders; and
- Outreach to the public using various media platforms (radio, TV, magazines etc.).

Copyright and IP enforcement will continue with anti-piracy and counterfeiting campaigns, in collaboration with other relevant government agencies. With respect to piracy, the focus will be on raising awareness and knowledge sharing on copyright enforcement with Artists' Governance Bodies (AGBs). Internet enforcement and social media campaigns on counterfeit and pirated goods will also be a focus.

With respect to international co-operation, South Africa participates in a number of multilateral organisations that are active in the IP area, including INTERPOL, WIPO, WTO and WCO. It is signatory to a number of key of international IP treaties (Table 1.3). The country is actively engaged with INTERPOL in combatting IP crime, participating in Operation Pangea IX in 2016, which focused on online sales of fake medicines and

products.[12] Moreover, South Africa resolvers to work closely with partners in the context of its participation in BRICS initiatives (CIPC, 2016).

10.5. Enforcement and outcomes

While South Africa is a minor source of, and destination for, counterfeit and pirated products, government officials are concerned that it is a top destination for a range of products, including clothing, spare parts for vehicles, tobacco and liquor (DTI, 2014). As indicated above, the CIPC oversees many aspects of South Africa's IP regime. It co-ordinates with the South African Revenue Services (SARS, which oversees customs matters) and the South African Police Services (SAPS), on enforcement.

Recent efforts to improve enforcement include *i)* the training of magistrates, prosecutors and SAPS and SARS officials, *ii)* antipiracy campaigns carried out in various regions, *iii)* multimedia campaigns, *iv)* activities in main hotspots for counterfeit and pirated goods, *v)* sessions organised throughout the country with artists and *vi)* campaigns co-ordinated with the Departments of Arts and Culture, Communications, Home Affairs, Finance and Police (DTI, 2014). Efforts to improve compliance and convictions are focusing on strengthening interagency co-ordination, working with industry on the implementation of programmes[13] and working with the National Consumer Commission on misleading advertising. The South African Federation Against Copyright Theft (SAFACT), for example, works with the government to support enforcement of anti-piracy in the country.[14] As shown in Table 10.1, the number of cases and convictions fluctuated during 2011-16, peaking, in the case of trademark convictions, in 2014/15.

Table 10.1. South Africa: Cases, arrests and convictions, 2011/12 to 2015/16

Item	2011/12	2012/13	2013/14	2014/15	2015/16
Counterfeit Goods Act:					
Cases received	308	305	355	272	242
Arrests/first appearances	288	211	262	217	142
Convictions	119	107	246	417	134
Copyright Act:					
Cases received	..	..	..	..	163
Arrests/first appearances	..	..	..	..	152
Convictions	..	..	..	..	74

Source: South African Police Service, annual reports, 2011/12 to 2015/16 (SAPS, 2012; SAPS, 2013; SAPS,2014; SAP, 2015; SAPS 2016).

With respect to imports of counterfeit products, SARS reported 25 seizures of counterfeit clothing involving 495 436 items worth ZAR 8.7 million in 2015/16 (USD 570 000) (SARS, 2016). Efforts on the anti-counterfeiting front were recognised in 2012, when the Global Anti-Counterfeiting Group (GACG) awarded SARS a Global Ant-Counterfeiting High Commendation Award in recognition of the agency's exceptional work in the international campaign to protect IPR and combat the illicit trade in counterfeit goods (South Africa Embassy, 2012).

10.6. Programme review

The performance of the CIPC was evaluated in survey of stakeholders and customers (CIPC, 2015). The respondents provided an average satisfaction rating of 6.30 out of 10. At an overall level, stakeholders were less satisfied with the CIPC than customers, giving

the CIPC an average rating of 4.70 out of 10. The main reasons for dissatisfaction were slow/inefficient service (28%), inadequate feedback (17%), and difficulties in contacting the CIPC (13%). On the other hand, respondents complimented the staff for being friendly and helpful, and 3% of respondents felt that the systems/processes were convenient. Service excellence and communication received the lowest satisfaction ratings among both customers and stakeholders. The three most urgent improvement areas in terms of the CIPC's *communication* were identified as: *i)* communicating information on CIPC developments, campaigns and events more effectively; *ii)* making it easier to get in touch with the CIPC; and *iii)* improving the CIPC's response rate to queries and requests.

With respect to *services*, the three most urgent areas for improvement were to: *i)* consistently provide quality service; *ii)* handle client queries and requests to their satisfaction; and *iii)* decrease the number of service-related problems experienced by clients. The CIPC was seen as performing well with respect to *i)* the systems and processes being used, *ii)* the reputation, leadership and vision of the organisation, and *iii)* the CIPC's mediums of communication.

The IP regime was also evaluated by the Global Intellectual Property Center (GIPC). It awarded South Africa a score of 12.70 out of 35 in its 2016 assessment, which ranks the country 33rd, out of the 45 countries examined (Table 10.2) (GIPC, 2017). Areas of strength identified included the basic IP framework in place and improving copyright protection. Areas of weakness included high levels of counterfeit and pirated goods in the economy, weak patent protection, and uncertainty over localisation requirements.

Table 10.2. IP scores for South Africa, 2015

Area	Score	Out of	Percentage
Patents, related rights, and limitations	1	8	13
Copyrights, related rights, and limitations	2.53	6	42
Trademarks, related rights, and limitations	4	7	57
Trade secrets and market access	1.75	3	58
Enforcement	2.92	7	42
Membership and ratification of international treaties	0.50	4	13
Total	12.70	35	36

Source: Global Intellectual Property Center, U.S Chamber of commerce (2017), International IP Index, http://www.theglobalipcenter.com/ipindex2017/ (accessed July 2017).

Notes

1 See *www.cipc.co.za*.

2 See *www.cipro.gov.za/legislation%20forms/trade%20marks/Trademark%20Act.pdf*.

3 See also *www.cipro.gov.za/legislation%20forms/counterfeit%20goods/Counterfeit%20Act.pdf*.

4 Counterfeit Goods Act 37 of 1997, § 2(1).

5 Counterfeit Goods Act 37 of 1997.

6 Copyright Act No. 98 of 1978 as amended in 2002.

7 See *www.nlsa.ac.za/downloads/Copyright%20Act.pdf*.

8 See *www.cipro.gov.za/legislation%20forms/designs%20act/Design%20Act.pdf*.

9 See *www.gov.za/sites/www.gov.za/files/37148_gon996_act28-2013.pdf*.

10 See *www.ip-watch.org/weblog/wp-content/uploads/2013/09/SA-IP-Policy-Sept-2013-36816_gen918.pdf*.

11 See *www.vonseidels.com/update-on-ip-developments-in-south-africa/*.

12 See *www.interpol.int/News-and-media/News/2016/N2016-076*.

13 See *www.saf-act.co.za*.

14 See *www.saf-act.co.za*.

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Annex A. Additional Tables

Table A.1. Relative indices of counterfeit and pirated traded goods in provenance of BRICS economies by product category, 2011-2013

HS code	Brazil	China (People's Republic of)	India	Russia	South Africa
2/21	1.69		7.58	1.25	0.01
22		0.65		0.14	0.02
24	0.00	4.57		0.05	
27		1.1			
29		2.65	0.02		
30	0.00	5.64	32.16	0.00	
32		4.96	0.29	0.00	
33	0.02	7.25	6.01	0.01	1.74
34		2.43			
35		2.08			
36		1.03			
38		2.75			
39	0.01	5.99	0.03	1.32	0.00
40		2.68			
41		0.89			
42	0	7.59	11.27	0.01	0.00
44		1.95			
46		1.18			
48		6.49	4.63	0.07	
49		3.13			
51		1.00			
52		0.46			
54		1.73			
55		1.00			
56		1.22			
57		0.82			
58		1.50			
59		0.88			
60		1.94			
61	0.00	7.59	1.75	0.27	0.00
62	0.04	6.53	0.87	0.02	
63		5.24	0.19	0.00	
64	0.03	7.97	1.50	0.01	0.00
65		6.16	17.27	0.00	
66		2.46			
67		2.00			
68		0.81			

Table A.1. Relative indices of counterfeit and pirated traded goods in provenance of BRICS economies by product category, 2011-2013 *(continued)*

HS code	Brazil	China (People's Republic of)	India	Russia	South Africa
69		1.78			
70		2.28		0.15	
71		5.89	0.02	0.00	0.00
72		1.93			
73		2.03	0.01		
76		1.39	1.17		
79		1.20			
82	0.12	4.93	0.23	0.10	
83		3.60			
84	0.01	6.83	0.39	0.00	
85	0.01	7.68	0.15	0.00	0.00
87		6.24	1.67	0.04	0.34
88		0.38			
89		1.47			
90	0.01	6.53	0.07	0.00	
91	0.00	6.87	0.02	0.00	0.00
92		1.79			
93		1.50			
94		5.95	0.19		
95		7.32	0.17	0.02	
96		4.74	1.18		
97		0.96			
99		1.02			

Note: The weighted world average value of seized counterfeit and pirated goods by product category across source economies is set at 1. The weights used are the share of each economy in world's export for the overall period 2011-2013. For a complete list of HS codes, see Table 17.

Table A.2. Relative indices of counterfeit and pirated traded goods in provenance in BRICS economies by destination economy, 2011-2013

Destination economy\provenance economy	Brazil	China (People's Republic of)	India	Russia	South Africa
Albania		0.84			
Algeria		1.34			
Angola		0.59	2.59		1.36
Argentina	1.27	1.35			
Australia		2.69	0.14		
Austria		4.89	5.19	0.03	
Azerbaijan				1.00	
Bahamas		0.99			
Bahrain		0.56			
Bangladesh		1.00			
Barbados		1.00			
Belgium		6.22	1.60	0.02	0.05
Belize		0.8	1.02		
Benin		1.00			
Bolivia		1.31			
Bosnia and Herzegovina		1.11			
Brazil		0.85			
Brunei Darussalam		1.00			
Bulgaria		2.71	0.04		0.01
Burkina Faso		1.27			
Cambodia		1.00			
Cameroon		1.38	1.25		
Canada		2.22	0.12		
Chile		1.59			
China (People's Republic of)		1.39			
Colombia		1.97	0.45		
Comoros		1.00			
Congo		0.07			
Costa Rica		0.04			
Cote d'Ivoire		1.15			
Croatia		2.37			
Cyprus* **		3.31	1.07	0.24	
Czech Republic		4.46	3.40		
Democratic Republic of the Congo		1.53	2.94		
Denmark	0.08	4.23	0.61		
Dominican Republic		0.17	2.86		
Ecuador		1.38			
Egypt		1.00			
El Salvador		0.9			
Estonia		3.1	4.37	0.44	
Finland		1.97	0.05	0.49	

Table A.2. Relative indices of counterfeit and pirated traded goods in provenance in BRICS economies by destination economy, 2011-2013 *(continued)*

Destination economy\provenance economy	Brazil	China (People's Republic of)	India	Russia	South Africa
Former Yugoslav Republic of Macedonia		1.47			
France		4.63	0.11		
French Guiana		1.24			
Gabon		0.7			
Gambia		1.00			
Georgia		0.07			
Germany	0.00	7.34	1.28	0.05	0.00
Ghana		1.14			
Greece		1.26			
Guadeloupe		1.20			
Guatemala		1.36			
Guinea		1.36			
Guyana		0.93	1.00		
Haiti		0.02	1.04		
Honduras		1.29			
Hong Kong (China)		1.28			
Hungary		3.28			
Iceland		1.40			
India		1.00			
Indonesia		0.93			
Iraq		1.00			
Ireland		4.22	0.00		
Israel		1.07			
Italy		5.98	0.02	0.00	0.00
Jamaica		0.18	1.00		
Japan		3.04	0.00		
Jordan		1.61			
Kenya		0.02	1.00		
Korea		1.70			
Kosovo		0.77			
Kuwait		2.45	9.66		
Lao People's Democratic Republic		1.00			
Latvia		2.86	1.39	0.15	
Lebanon		1.24			
Libya		1.04			
Lithuania		3.13	1.26	0.04	
Luxembourg		2.12	0.01		
Madagascar		1.11	1.00		
Malaysia		1.00			
Maldives		1.00			
Mali		0.00			

Table A.2. Relative indices of counterfeit and pirated traded goods in provenance in BRICS economies by destination economy, 2011-2013 *(continued)*

Destination economy\provenance economy	Brazil	China (People's Republic of)	India	Russia	South Africa
Malta		3.60			
Martinique		1.04			
Mauritania		1.24			
Mauritius		0.92	6.76		
Mexico		2.62	0.05		
Montenegro		1.35			
Morocco	0.04	4.52			
Mozambique					1.00
Netherlands		2.21			
Netherlands Antilles	0.02	6.48	0.61	0.07	0.00
New Zealand			0.41		
Nicaragua		1.55			
Niger		1.00			
Nigeria		0.67	1.00		
Norway		2.03			
Pakistan		1.00			
Panama		1.23			
Papua New Guinea		1.00			
Paraguay		1.97			
Peru		0.68			
Poland		4.42	0.17		
Portugal	1.22	4.29	0.01	0.01	0.00
Puerto Rico		1.21			
Qatar	0.04	5.43	0.98		0.03
Reunion		1.78			
Romania		2.26	0.09		
Russia		3.83		0.00	
San Marino		1.47			
Saudi Arabia	0.15	7.29	13.28	0.00	0.00
Senegal		1.56	0.01		
Serbia		2.19		0.03	
Singapore		1.00			
Slovak Republic		2.14	0.01		
Slovenia		3.30	0.16		
Somalia			0.34		
South Africa		1.27			
Spain	0.00	5.59	0.04		
Sudan			0.45		
Suriname			1.00		
Sweden		2.73	0.17		
Switzerland		1.90			
Tanzania		0.00	1.15		

Table A.2. Relative indices of counterfeit and pirated traded goods in provenance in BRICS economies by destination economy, 2011-2013 *(continued)*

Destination economy\provenance economy	Brazil	China (People's Republic of)	India	Russia	South Africa
Thailand		1.11			
Togo		1.08			
Trinidad and Tobago		1.02			
Tunisia		1.16			
Turkey		1.55		0.41	
Turks and Caicos Islands		1			
Uganda		1.31			
Ukraine		1.97	1.82	3.67	
United Arab Emirates		1.41	2.13		
United Kingdom		4.41	2.72		
United States	0	7.13	1.12	0	0
Uruguay		1.91	3.87		
Uzbekistan				1	
Venezuela		1.67			
Viet Nam		1.17			
Yemen		3.87	0.38		
Zimbabwe		0.75			

Notes: *Note by Turkey: The information in this document with reference to "Cyprus" relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the "Cyprus issue".

** Note by all the European Union member states of the OECD and the European Commission: The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

Table A.3. Source economies of products that infringe brands from BRICS countries, 2011-2013

In % of the global seized value by customs authorities

Provenance\Country IPR owner	Brazil	China (People's Republic of)	India	Russia	South Africa	All BRICS
Brazil	0.35%	.	.	.	.	0.03%
China (People's Republic of)	42.47%	71.87%	22.43%	4.75%	.	54.87%
Ghana	.	0.00%	.	.	.	0.00%
Hong Kong (China)	17.63%	0.08%	0.12%	.	.	1.45%
India	.	9.21%	77.41%	.	.	26.56%
Malaysia	.	0.00%	.	.	.	0.00%
Unknown	.	.	.	0.25%	.	0.00%
Netherlands	14.83%	.	.	.	.	1.15%
Philippines	.	0.01%	.	.	.	0.01%
Russia	.	0.00%	.	1.28%	.	0.02%
Saudi Arabia	.	0.04%	.	.	.	0.03%
South Africa	.	.	.	.	100.00%	0.46%
Thailand	0.03%	.	.	.	.	0.00%
Turkey	0.01%	0.14%	.	0.11%	.	0.09%
Ukraine	.	.	.	93.61%	.	1.60%
United Arab Emirates	0.03%	18.38%	0.04%	.	.	11.65%
United States	6.26%	0.27%	.	.	.	0.66%
Uruguay	18.39%	.	.	.	.	1.43%

Table A.4. Industries by Harmonised System (HS) codes

HS code	Description
1	Live animals.
2	Meat and edible meat offal.
3	Fish and crustaceans, molluscs and other aquatic invertebrates.
4	Dairy produce; birds' eggs; natural honey; edible products of animal origin, not elsewhere specified or included.
5	Products of animal origin, not elsewhere specified or included.
6	Live trees and other plants; bulbs, roots and the like; cut flowers and ornamental foliage.
7	Edible vegetables and certain roots and tubers.
8	Edible fruit and nuts; peel of citrus fruit or melons.
9	Coffee, tea, mate and spices.
10	Cereals.
11	Products of the milling industry; malt; starches; inulin; wheat gluten.
12	Oil seeds and oleaginous fruits; miscellaneous grains, seeds and fruit; industrial or medicinal plants; straw and fodder.
13	Lac; gums, resins and other vegetable saps and extracts.
14	Vegetable plaiting materials; vegetable products not elsewhere specified or included.
15	Animal or vegetable fats and oils and their cleavage products; prepared edible fats; animal or vegetable waxes.
16	Preparations of meat, of fish or of crustaceans, molluscs or other aquatic invertebrates.
17	Sugars and sugar confectionery.
18	Cocoa and cocoa preparations.
19	Preparations of cereals, flour, starch or milk; pastry cooks' products.
20	Preparations of vegetables, fruit, nuts or other parts of plants.
21	Miscellaneous edible preparations.
22	Beverages, spirits and vinegar.
23	Residues and waste from the food industries; prepared animal fodder.
24	Tobacco and manufactured tobacco substitutes.
25	Salt; sulphur; earths and stone; plastering materials, lime and cement.
26	Ores, slag and ash.
27	Mineral fuels, mineral oils and products of their distillation; bituminous substances; mineral waxes.
28	Inorganic chemicals; organic or inorganic compounds of precious metals, of rare-earth metals.
29	Organic chemicals.
30	Pharmaceutical products.
31	Fertilisers.
32	Tanning or dyeing extracts; tannins and their derivatives; dyes, pigments and other colouring matter; paints.
33	Essential oils and resinoids; perfumery, cosmetic or toilet preparations.
35	Albuminoidal substances; modified starches; glues; enzymes.
36	Explosives; pyrotechnic products; matches; pyrophoric alloys; certain combustible preparations.
37	Photographic or cinematographic goods.
38	Miscellaneous chemical products.
39	Plastics and articles thereof.
40	Rubber and articles thereof.
41	Raw hides and skins (other than furskins) and leather.
42	Articles of leather; saddlery and harness; travel goods, handbags and similar containers; articles of animal gut.
43	Furskins and artificial fur; manufactures thereof.
44	Wood and articles of wood; wood charcoal.
45	Cork and articles of cork.

Table A.4. Industries by Harmonised System (HS) codes *(continued)*

HS code	Description
46	Manufactures of straw, of esparto or of other plaiting materials; basketware and wickerwork.
47	Pulp of wood or of other fibrous cellulosic material; recovered (waste and scrap) paper or paperboard.
48	Paper and paperboard; articles of paper pulp, of paper or of paperboard.
49	Printed books, newspapers, pictures and other products of the printing industry; manuscripts, typescripts and plans.
50	Silk.
51	Wool, fine or coarse animal hair; horsehair yarn and woven fabric.
52	Cotton.
53	Other vegetable textile fibres; paper yarn and woven fabrics of paper yarn.
54	Man-made filaments.
55	Man-made staple fibres.
56	Wadding, felt and nonwovens; special yarns; twine, cordage, ropes and cables and articles thereof.
57	Carpets and other textile floor coverings.
58	Special woven fabrics; tufted textile fabrics; lace; tapestries; trimmings; embroidery.
59	Impregnated, coated, covered or laminated textile fabrics; textile articles of a kind suitable for industrial use.
60	Knitted or crocheted fabrics.
61	Articles of apparel and clothing accessories knitted or crocheted.
62	Articles of apparel and clothing accessories not knitted or crocheted.
63	Other made up textile articles; sets; worn clothing and worn textile articles; rags.
64	Footwear, gaiters and the like; parts of such articles.
65	Headgear and parts thereof.
66	Umbrellas, sun umbrellas, walking-sticks, seat-sticks, whips, riding-crops and parts thereof.
67	Prepared feathers and down and articles made of feathers or of down; artificial flowers; articles of human hair.
68	Articles of stone, plaster, cement, asbestos, mica or similar materials.
69	Ceramic products.
70	Glass and glassware.
71	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation, jewellery; coin.
72	Iron and steel.
73	Articles of iron or steel.
74	Copper and articles thereof.
75	Nickel and articles thereof.
76	Aluminium and articles thereof.
77	(Reserved for possible future use in the Harmonised System)
78	Lead and articles thereof.
79	Zinc and articles thereof.
80	Tin and articles thereof.
81	Other base metals; cermets; articles thereof.
82	Tools, implements, cutlery, spoons and forks, of base metal; parts thereof of base metal.
83	Miscellaneous articles of base metal.
84	Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof.
85	Electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles
86	Railway or tramway locomotives, rolling-stock and parts thereat railway or tramway track fixtures and fittings and parts thereof; mechanical (including electro-mechanical) traffic signalling equipment of all kinds.

Table A.4. Industries by Harmonised System (HS) codes *(end)*

HS code	Description
87	Vehicles other than railway or tramway rolling-stock, and parts and accessories thereof.
88	Aircraft, spacecraft, and parts thereof.
89	Ships, boats and floating structures.
90	Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; parts and accessories thereof.
91	Clocks and watches and parts thereof.
92	Musical instruments; parts and accessories of such articles.
93	Arms and ammunition; parts and accessories thereof.
94	Furniture; bedding, mattresses, mattress supports, cushions and similar stuffed furnishings; lamps and lighting fittings, not elsewhere specified or included; illuminated signs, illuminated name plates and the like; prefabricated buildings.
95	Toys, games and sports requisites; parts and accessories thereof.
96	Miscellaneous manufactured articles.

Annex B. Example of CN 22 and CN 23 Forms

CUSTOMS DECLARATION / DÉCLARATION EN DOUANE — **CN 22**

May be opened officially / Peut être ouvert d'office

Great Britain\Grande-Bretagne — **Important! See instructions on the back**

☐ Gift\Cadeau ☐ Documents ☐ Commercial sample\Echantillon commercial ☐ Other\Autre — *Tick one or more boxes*

Quantity and detailed description of contents (1) Quantité et description détaillée du contenu	Weight (*in kg*)(2) Poids	Value (3) Valeur
For commercial items only If known, HS tariff number (4) and country of origin of goods (5) *N°tarifaire du SH et pays d'origine des marchandises (si connus)*	Total Weight Poids total (*in kg*) (6)	Total Value (7) Valeur totale

I, the undersigned, whose name and address are given on the item, certify that the particulars given in this declaration are correct and that this item does not contain any dangerous article or articles prohibited by legislation or by postal or customs regulations

Date and sender's signature (8)

Great Britain Grande-Bretagne

CUSTOMS DECLARATION — **CN 23**

Important! See instructions on the back

From / De — Name; Business; Street; Postcode; City; Country

Sender's Customs reference (if any) Référence en douane de l'expéditeur (si elle existe)

No. of item (barcode, if any) / **DÉCLARATION EN DOUANE** N° de l'envoi (code à barres, s'il existe)

May be opened officially / **Peut être ouvert d'office**

To / A — Name; Business; Street; Postcode; City; Country

Importer's reference (if any) (tax code/VAT No./importer code) (optional) Référence de l'importateur (si elle existe (code fiscal/N° de TVA/code de l'importateur) (facultatif)

Importer's telephone/fax/e-mail (if known) N° de telephone/fax/e-mail de l'importateur (si connus)

Detailed description of contents (1) Description détaillée du contenu	Quantity (2) Quantité	Net Weight (3) Poids Net (in kg)	Value (5) Valeur	*For commercial items only* *Pour les envois commerciaux seulement* HS tariff number (7) N° tarifaire du SH	Country of origin of goods (8) Pays d'origine des marchandises
		Total gross weight (4) Poids brut total	Total value (6) Valeur totale	Postal charges/Fees (9) Frais de port/Frais	

Category of item (10) Catégorie de l'envoi

☐ Gift Cadeau ☐ Documents ☐ Commercial sample Echantillon commercial ☐ Returned goods Retour de marchandise ☐ Other Autre — Explanation: Explication:

Office of origin/Date of posting Bureau d'origine/Date de dépôt

Comments (11): (e.g.: goods subject to quarantine, sanitary/phytosanitary inspection or other restrictions)
Observations: (p. ex. Marchandise soumise à la quarantaine/à des contrôles sanitaires, phytosanitaires ou à d'autres restrictions)

I certify that the particulars given in this customs declaration are correct and that this item does not contain any dangerous article or articles prohibited by legislation or by postal or customs regulations

Date and sender's signature (15)

☐ Licence (12) Licence	☐ Certificate (13) Certificat	☐ Invoice (14) Facture
No(s). of licence(s)	No(s). of certificate(s)	No. of invoice

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