

INTA Suggested Modifications to the OECD Draft Guidance to Counter Illicit Trade

Introduction:

The International Trademark Association (INTA) thanks the Organization for Economic Cooperation and Development (OECD) for the opportunity to provide comments on the *Draft Guidance to Counter Illicit Trade: Enhancing Transparency in the Free Trade Zones* (hereinafter, “the Guidelines”).

With over three thousand Free Trade Zones globally, regulation of these zones are imperative to the protection of Intellectual Property Rights (IPR). Although Free Trade Zones help improve economic growth for the host country by increasing foreign investment, employment, and innovation, Free Trade Zones have also become increasingly vulnerable to a wide range of abuses by criminal actors due to relaxed oversight and softened controls in these areas. Particularly, many Free Trade Zones have been used by criminal groups to transship counterfeit goods globally, either by shipping in whole counterfeit goods, or counterfeit parts for assembly in the zones. On behalf of our global membership, INTA would like to offer some recommendations to the Draft Guidance to Counter Illicit Trade through the online public consultation.

INTA is a membership association of more than 7,200 trademark owners and professionals from more than 191 countries. INTA’s total membership collectively contribute almost US \$12 trillion to global GDP annually. The Association’s member organizations represent some 31,000 trademark professionals and include brand owners from major corporations as well as small- and medium-sized enterprises, law firms and nonprofits. INTA undertakes advocacy work throughout the world to advance trademarks and related rights, and offers educational programs and informational and legal resources of global interest. INTA’s key objective is to support trademarks and related intellectual property (IP) to foster consumer trust, economic growth, and innovation.

INTA appreciates your serious consideration of its recommendations for the *Draft Guidance to Counter Illicit Trade: Enhancing Transparency in the Free Trade Zones* and applauds the OECD’s efforts in this initiative. This document was drafted by the INTA Anticounterfeiting Committee and staff. Please do not hesitate to contact Manager, Anticounterfeiting, Maysa Razavi at mravazi@inta.org or Senior Coordinator, Anticounterfeiting, Tiffany Pho at tpho@inta.org if you have any questions or concerns.

Recommended Changes to the Draft Guidance to Counter Illicit Trade

Having Regard to Article 5 b) of the Convention on the Organisation for Economic Cooperation and Development of 14 December 1960;

INTA Comments: INTA would like to suggest that Articles 2(c) and 12(a) be included in this introductory paragraph in addition to Article 5 (b). Article 2(c) mandates that Members agree to “pursue policies designed to achieve economic growth and internal and external financial stability and to avoid developments which might endanger the economies or those of other countries.” Article 12(a) addresses the ability of the organization to “address communications to non-member States or organisations.” The inclusion of these two articles would clearly lay out the OECD’s ability to include member and non-member states in the Guidelines.

Having Regard to the FATF Recommendations and the WTO Agreement on Trade Related Aspects of Intellectual Property Rights;

INTA Comments: INTA would like to suggest that the relevant sections of the Financial Action Task Force Recommendations and the WTO Agreement on Trade Related Aspects of Intellectual Property Rights be quotes in this section for completeness and specificity, as was done in the section above.

RECOGNISING that illicit trade operates in the shadow of the global economy, with increasingly sophisticated traffickers dealing in a range of prohibited and counterfeited goods and services, **which often directly harm consumers due to the health and safety associated with counterfeit products** ;

INTA Comments: INTA would like to suggest that language on the health and safety risks associated with the counterfeit goods be included in this section as the harm to consumers is a priority that should be addressed when recognizing the global impact of counterfeit goods.

RECOGNISING that illicit trade and criminal networks are a growing security concern globally, and their convergence presents threats to communities, **marketplaces** and societies as a whole, enabling lucrative criminal enterprise terrorism financing, and creating greater instability and violence around the world;

INTA Comments: INTA would like to suggest that **marketplaces** be added to the list of areas that illicit trade impacts as legitimate marketplaces suffer due to the proliferation of illicit trade and counterfeit products.

RECOGNISING that various existing international standards are in place to prohibit or regulate different sectors of illicit trade, including the trafficking of humans, narcotics, counterfeits, endangered and illegally harvested species of fauna and flora, antiquities and conventional arms; and promote the implementation **and compliance** of legal, regulatory and operational measures to combat the proceeds of illicit trade;

INTA Comments: INTA would like to suggest that language be included on the compliance of safety, consumer protection and pharmaceutical regulations in the Free Trade Zones. Many illicit and counterfeit goods such as medicines, machinery and tobacco products are assembled in these zones, allowing the criminal actors to intentionally use the zones to circumvent specific industry regulatory requirements resulting in illicit goods leaving the zones for trade.

CONSIDERING the lack of a multilateral set of **harmonized** guidance that provides governments with **efficient** tools to **detect**, deter and reduce illicit trade regardless the commodity, cutting across different illicit markets;

INTA Comments: INTA would like to suggest that the word “efficient” be added to this section. There are currently legal provisions that governments may use as tools to reduce illicit trade, however, these legal provisions may not be the most efficient or easily applied enforcement related tools.

RECOGNISING the need to enact proactive measures to reduce the supply and deter the demand for illicit goods and services across a range of illicit markets;

RECOGNISING that Free Trade Zones (FTZ) have proliferated in number, can stimulate legitimate economic growth and play a central role in business for many countries and leading manufacturers;

INTA Comments: INTA agrees that the number of Free Trade Zones have increased in number in the last year, significantly in Europe and around the globe.

RECOGNISING that standards, oversight and regulations governing FTZs have not in all cases kept up with the growth in number of economic operators and volume of trade in goods and services;

RECOGNISING that in some FTZ customs and law enforcement authorities do not have timely physical access to the premises to review/monitor activities conducted in FTZ, and face difficulty to obtain information on the activities of economic operators established within, as well as information pertaining to the ownership of goods that transit through or are produced or assembled within; even where relevant international standards require and entitle them to be able to;

ACKNOWLEDGING that criminal entrepreneurs take advantage of inadequate oversight and the lack of transparency and control in FTZ to commit trade fraud, IPR infringement, smuggle contraband, facilitate the proliferation of weapons and launder the proceeds of crime;

NOTING the opportunity to hold to account FTZ authorities that are complicit with, or negligent in the oversight of, economic operators that conduct or enable illicit trade that is harmful to persons, businesses, consumers, markets and the environment;

On the proposal of the Public Governance Committee:

I. Recommends that Members and non-Members, having adhered to the Guidance Recommendation (hereafter “Adherents”), promote transparency, and reduce and deter the abuse of Free Trade Zones as conduits for illicit trade.

INTA Comments: INTA would like to suggest that the use of the word “Recommendation” when referring to this set of Guidelines be changed to “Guidance” as the word “Guidance” is used in the title of this document, for consistency.

To this effect, Adherents should:

1. Take measures to encourage FTZ and FTZ administrators to comply with the “Code of Conduct for Clean Free Trade Zones” set out below. Such measures include, but are not limited to:

The conduct of strict control of consignments arriving from or leaving the zones, or that are suspected of having transited through, FTZ that do not comply with the “Code of Conduct for Clean Free Trade Zones”.

INTA Comments: INTA would like to suggest that Section 1 include language on products leaving the zones, as it is common practice for counterfeiters to assemble counterfeit products in the zones for export. Additionally, INTA would like to suggest that the administrators of FTZ be included in the list of parties that should adhere to the Guidelines. As FTZs are often created under private/public partnerships within the government, and later granted to administrators to regulate, these administrators should also be held responsible for adhering to these Guidelines.

2. Ensure that the legal framework for FTZ established in their territory, or that are otherwise governed under their administrative control:

Provides for the right of competent customs and other law enforcement authorities to require data, documents and/or samples related to the production and movement of goods and carry out ex officio or ex parte checks at any time on goods produced, passing by, in transit or stored, and services provided or activities conducted within FTZ;

Allows for customs and other law enforcement authorities to take appropriate actions and measures in the execution of their authorities, including inspecting and securing merchandise and documentation, temporarily closing down business, totally or partially specifically designed for or related with illicit trade,

Empowers customs and other law enforcement authorities to examine merchandise and obtain samples for its analysis before or at the time of admission to a FTZ, or at any time thereafter, if the examination is considered necessary to facilitate the proper administration of any law, regulation, or instruction which Customs is authorized to enforce, and adopt the necessary measures to have the merchandise suspended or blocked until confirmation.

Empowers customs authorities to impose measures, prohibitions or restrictions on the activities carried out within FTZ, having regard to the nature of the goods in question, their respect of intellectual property laws, or the requirements of customs supervision, or security and safety requirements.

Empowers customs authorities to prohibit persons who do not provide the necessary assurance of compliance with customs provisions from carrying out an activity in a FTZ;

INTA Comments: INTA welcomes this provision as the necessary assurances of compliance would ensure that all actors are acting according to the relevant customs provisions.

Prohibits persons convicted of illegal activities, legal or natural, or repeat offenders or their administrators from operating within the FTZ;

INTA Comments: INTA would like to suggest that repeat offenders and administrators be included in the list of bad actors as some counterfeiters are known to be bad actors, however, not all have been convicted of illegal activity.

Ensures that the perimeter and entry and exit points of the area of FTZ are subject to daily customs supervision.

INTA Comments: INTA believes that the Adherents should be obligated to provide daily supervision in the Free Trade Zones as this is a practice that could greatly curb the amount of illegal activity in the zones. In many countries, law enforcement and customs authorities have access to regulate the Free Trade Zones by law, however they are not specifically placed within the zones. INTA believes this kind of oversight is a relatively easy way to monitor illegal activity in the zones.

Ensures that goods, persons and means of transport entering and leaving the FTZ are subject to controls.

Ensures that the economic operators that are allowed to operate within FTZ are physically located within the FTZ, and that they communicate to the customs authorities the identity of the clients in their operations. Where the client acts as an agent or representative, then the economic operator should also communicate the identity of the principal (i.e. the person who ultimately owns or controls the agent), to the customs authorities.

INTA Comments: INTA welcomes this initiatives as the identifying information may be valuable to many right holders to track and detect infringers, particularly, if this information is digitized and easily accessible. Based on this information, right holders would be able to share their concerns about certain

shipments brought into the zones to the customs officers and work together to have the shipments examined.

3. Require FTZ authorities to make available aggregated statistical data on goods entering and leaving the Free Trade Zone on the basis of their tariff classification, and information that identifies the owner(s) of goods.

INTA Comments: INTA would like to suggest that sender and receiver information also be made available to the rights holders so that the rights holders may appropriately act on both sender and receiver. Providing this information to the right holder would not be particularly burdensome, as the information is already included in the customs documents. Rights holders and authorities could then use this information to learn more about illicit trade routes and would be particularly helpful when looking at goods in transit.

4. Promote adoption of this guidance and of the Code of Conduct in their bilateral and multilateral trade agreements.

5. Make greater use of international agreements that include provisions for mutual International legal assistance in order to combat illicit trade conducted through FTZ.

When entering into new agreements that include such provisions, including multilateral and bilateral trade agreements, Adherents should specifically refer to the need to combat illicit trade and counterfeiting conducted through FTZ that have not adopted the Code of Conduct for Free Trade Zones.

INTA Comments: INTA would like to suggest that the Adherents shall also refer to the need to combat counterfeiting, and not just illicit trade when entering into new agreements. As mentioned previously, Free Trade Zones are often abused by counterfeiters due to the relaxed regulations in the zones.

When administering such agreements, designate the competent authorities and their points of contacts in order to facilitate the communication between and among the responsible authorities of the parties to the agreement in question.

6. Encourage international cooperation in the exchange of law enforcement information, and consult with appropriate authorities, such as law enforcement and governmental authorities that create the FTZs, and affected industries in investigations and other legal proceedings concerning specific cases of misuse of FTZ related to illicit trade. This includes such means as:

Sharing financial and administrative information, ex officio or upon request, to support the provision of evidence in judicial proceedings, or to ensure and further the effective supervision and control of and the prevention of the misuse of FTZ.

Making better use of the current arrangements for Customs to Customs cooperation, as required through Customs Mutual Assistance Agreements, for the sharing of information and other necessary communication at the technical level.

Cooperation and assistance in the development and implementation of policies and practices to counter illicit trade in FTZs, including technical assistance to share and develop improved systems for record keeping by FTZ authorities and economic operators.

INTA Comments: INTA would like to suggest that specific examples of the relevant authorities be listed as the bodies that should be consulted in international cooperations. INTA would also like to suggest the formation of a cooperative technology platform to properly share the information gathered by the FTZ authorities and operators.

7. Promote awareness amongst the business community (e.g. major intermediaries including shipping agents, freight forwarders, customs brokers and logistics companies) to understand the major risks related to FTZ.

8. Foster public **and** private partnerships to counter illicit trade emanating from FTZ that have not adopted the Code of Conduct for **Clean Compliant** Free Trade Zones. This includes reinforcing efforts to encourage the business community that makes use of FTZs, or that finances operators within FTZ, to refrain from doing business in FTZ that are not certified for compliance with the Code of Conduct for **Compliant** Free Trade Zones.

INTA Comments: INTA would like to suggest the use of the term “compliant” for consistency versus “Clean.”

9. Monitor the activities of FTZ and publish annual indicators that help to evaluate their use to favour illicit trade.

Such evaluation should be based on relevant enforcement statistics, including customs detentions and **detailed** seizures of **illicit and counterfeit** goods originating, or in provenance from **each FTZ, or in transit through each FTZ** and orders to disrupt services performed within **each FTZ**.

INTA Comments: INTA welcomes this provisions and would like to suggest that the statistics provided be as **detailed as possible** from each FTZ, including specific reference to the number and the category or type of counterfeit products detained. This information would be of great use to many law enforcement authorities and right holders.

10. Conduct targeted operations with respect to shipments **arriving to**, originating from, **or passing through** FTZ that do not adopt, or are not certified as in compliance with, the Code of Conduct for **Clean Compliant** Free Trade Zones.

INTA Comments: INTA would like to suggest the additional language covering shipments **arriving to and passing through the FTZs**.

II: Recommends that Adherents ensure the following Code of Conduct for **Compliant** Free Trade Zones and monitor their compliance.

Compliant Free Trade Zones are those that:

1. Provide unconditional access to the customs and law enforcement agencies of the jurisdiction where they are established to carry-out unobstructed, ex officio or **ex parte- requested** enforcement checks of operators in support of investigations of violations of applicable law.

2. Notify customs authorities in advance of any industrial, commercial or service activity taking place in the FTZ.

INTA Comments: INTA would like to clarify if “industrial, commercial or service activity” includes **the practice of assembling counterfeit and illicit goods within the zones for export**.

3. Prohibit operators and persons who do not provide the necessary assurance of compliance with the applicable customs provisions from carrying out an activity in the FTZ.

4. Ensure that economic operators active in the FTZ maintain detailed digital records of all shipments of goods entering and leaving the zone, as well as all goods and services produced or assembled within it, sufficient to know what is inside the zone at any given time. The digital records shall:

Document sales and purchase operations of **all** goods and services **within entering and exiting**, the FTZ, and be provided to the competent customs authority or law enforcement body upon its request.

INTA Comment: In order to be consistent with the language in the paragraph above, INTA would like to suggest that language be added requiring the documents include shipments entering and leaving the zones.

Maintain a complete and accurate record of all commercial transactions to enable full accountability of materials used in production and assembling processes that may be reconciled with the volume and value of their commercial transactions entering, in transit and leaving the zone. These records should be:

- i. Maintained for a period of a least four years, unless legal proceedings are in progress so that no time limitation should affect for the applicable period.
- ii. Made available in a timely manner to the FTZ authority and competent public authorities upon request.
- iii. Maintained in a format as required by the customs or other competent authority, such that it can be used for risk profiling by the competent enforcement authority.

5. Transmit in a timely manner to custom and/or law enforcement authorities, on simple request by the competent custom or law enforcement authority in the jurisdiction where the zone is established, any information contained in the digital records.

Ensure that economic operators active benefiting from in the FTZ are required to grant access to their detailed digital records upon request of the FTZ authority, the customs and/or law enforcement authorities or any other competent judicial or public authority in the jurisdiction where the zone is established.

Appoint a dedicated point of contact with the necessary skills and resources to respond effectively to such requests for information from the above mentioned authorities, and to lead due diligence and compliance verifications on companies and persons operating within FTZ or benefiting from FTZ.

INTA Comments: INTA would like to suggest that the dedicated point of contact be a representative who is elected and works for the FTZ operator.

6. Deter cash payments for any commercial or financial transaction of the economic operators active in the FTZ or benefiting from FTZ, occurring inside or originating from the FTZ, and for large cash transactions, document the details and report to the customs authority.

Commission an internationally accredited, independent third party verification firm to carry out certification that the zone has implemented the Code of Conduct. Such certification shall be performed at least once a year. The accreditation firm should be changed every 3 years.

Make public the results of the certification through publication on the OECD website.