

Unfair Competition Survey Report

**Prepared by the Policy Development Subcommittee of the Unfair Competition
Committee 2016/2017**

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This memo summarizes the results of the Unfair Competition Committee's survey conducted during the 2016-17 committee term regarding protection around the world for various acts of unfair competition. The survey investigated the extent to which countries protect against certain violations of unfair competition, which remedies they grant and where additional protections are needed. The countries surveyed and the survey respondents are listed in the Appendix.

Summary

All countries participating in the survey have some statutory or common law protection against acts that create confusion with the goods or activities of a competitor and against indications in the course of trade that are liable to mislead the public as to the nature or other characteristics of goods. To some extent, almost all of the countries protect against false allegations in the course of trade to discredit a competitor.

Some countries protect against a variety of other forms of unfair competition, including bribery, monopolies, unconscionable pestering of consumers and protection of marks that are well known in other countries. But because there is no clear, uniform definition of unfair competition, it is difficult to compare protection across countries and assess consistency.

Most countries provide basic remedies against unfair competition, and all provide at least injunctive relief against confusion, false allegations to discredit a competitor and false allegations about goods. Nevertheless, some countries – Ecuador, Japan, Nigeria and Peru – offer only a few of the potential remedies for unfair competition.

For countries with comprehensive national unfair competition acts (NUCAs), all but China and Vietnam reported satisfaction with their protection against unfair competition. China's law is not sufficiently specific, and similarly Vietnam seeks more detail in its NUCA.

Several countries without comprehensive NUCAs reported dissatisfaction with their protection against unfair competition: France, India, Israel, the Netherlands, Nigeria, Portugal, Thailand, and the UK. Without a dedicated act for unfair competition, the legal framework for protection is unclear and insufficiently stable, and may not cover all the relevant acts. In Israel and the UK, for example, plaintiffs generally must establish confusion to prevail, which leaves some unfair competition uncovered, and in Portugal, to prevail on an unfair competition claim, plaintiffs must show that the opposing party had criminal intent.

Finally, almost all countries surveyed permit the possibility of bringing an infringement case under a NUCA or other unfair competition law. The exceptions are Austria, Israel and Mexico, and Turkey, France, Japan and Chile have significant limitations on cumulation.

Existence of specific legislation on unfair competition

Of the 24 countries responding, 9 have some legislation regarding aspects of unfair competition (*e.g.*, on false advertising)¹ and 14 have a relatively comprehensive NUCA.² One country, India, has no legislation on the subject but does have strong unfair competition jurisprudence based in common law.

Protection against acts that create confusion with competitor

Questions 4A and 7A: *Does your NUCA or your national laws provide protection against acts that create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor?*

Among the countries surveyed, there is an almost even split between those countries whose law protects against acts that create confusion with the establishment, the goods, or the industrial or commercial activities of a competitor, and those whose law does not. Nearly all countries surveyed provide at least *some* statutory protection against such acts, even if such protection falls outside a comprehensive NUCA.

NUCAs that Protect Against Acts that Create Confusion

The NUCA of the following countries protects against acts that create confusion with the establishment, goods, or activities of a competitor: Austria, Canada, Chile, China, Ecuador, Germany, Japan, Peru, Russia, Spain, Sweden, the United States, and Vietnam.

In particular, Austria, Canada, Ecuador, Peru, Russia, Spain, Sweden, USA, and Vietnam all have comprehensive NUCAs that to some extent prohibit the use of a name or mark in a manner that is likely to cause confusion as to the source or origin of a party's goods, services, marks, or activities. As discussed in more detail below, many of these NUCAs specifically bar the use of a competitor's name or mark in such a way as to cause confusion. Notably, while many of the countries' NUCAs prohibit acts that are likely to cause confusion—and presumably include acts by a competitor—Russia's NUCA is narrowly tailored to prevent such acts only by a competitor. In addition, Austria and Germany's NUCAs specifically prohibit comparative advertising where such advertising is likely to cause confusion with a competitor's goods, services, marks, or activities.

A brief summary of the NUCAs of each country as they relate to acts that create confusion

Austria: The law permits some forms of comparative advertising, provided that such advertising is not aggressive, disparaging, or confusing with an earlier mark. However, the

¹ Brazil, France, Israel, Mexico, the Netherlands, Nigeria, Portugal, Thailand, the UK

² Austria, Canada, China, Chile, Ecuador, Germany, Japan, Peru, Russia, Spain, Sweden, Turkey, USA, Vietnam

NUCA prohibits any use of a name, company, or special designation of an enterprise in a manner that is likely to be confused with a name, company name, or special designation rightfully used by another party.

Canada: The Canadian Competition Act includes several provisions related to unfair competition, notably under the various false/misleading representations provisions. The Trade-Marks Act also bars advertising that causes confusion and passing off, though mainly focuses on intellectual property rights. Other legislation at the federal or provincial level deals with unfair competition as well (*e.g.*, product-specific legislation such as the Food and Drugs Act as well as consumer protection legislation in individual provinces and territories).

Chile: The NUCA defines “unfair competition” as any act that diverts clientele from one market agent to another by unfair means, and specifies nine acts considered to be unfair competition. These include conduct that exploits the goodwill of another in a way that causes consumers to confuse the goods, services, activities, or marks with those of a third party and the use of incorrect or false statements or claims on the goods or services offered.

China: The NUCA includes the following acts as “unfair methods” in business transactions: (1) feigning others’ registered trademarks; (2) using the same or a similar name, package, decoration, or famous commodities of another, which may cause consumer confusion; and (3) using the name of another enterprise or personal name in order to cause confusion.

Ecuador: The law prohibits conduct that has the purpose or effect of creating confusion with the activity, services, goods, or establishment of others. In particular, the use or imitation of others’ distinctive marks, labels, packaging, containers, or other means of identification is considered an act of unfair competition.

Germany: Under the NUCA, unfair competition occurs when, among other things, a person offers goods or services that are replicas of those of a competitor if it causes deception as to the origin of the goods or services. The law also prohibits marketing or comparative advertising that creates a risk of confusion with the goods or services of another, or with a competitor’s trademarks.

Japan: The law provides for the statutory grant of injunctive relief where a person uses a mark identical or similar to another's well-known or famous registered or unregistered trademark.

Peru: The law defines “acts of confusion” as acts that mislead others regarding the source or origin of a party’s goods or services.

Russia: The law prohibits acts that may cause confusion with the activities of a competitor, including (1) the unlawful use of identical or similar trademarks, brand names, or commercial designations and (2) the copying of a competitors’ packaging, label, name, or “brand style.”

Spain: The law prohibits acts of a competitor that suggest a connection or affiliation between the companies.

Sweden: The Trademarks Act prohibits the use of a symbol that is identical or similar to the trade symbol of another for identical or similar goods or services where the use creates a

likelihood of confusion. The Marketing Act prohibits the use in marketing of any imitations that are misleading or can be easily confused with another's known and distinctive products.

United States: The law prohibits the use by any person or entity of any words, names, symbols, devices, or marks that is likely to cause confusion or mistake as to the source or origin of a party's goods or services, or that causes confusion or mistake as to the origin, sponsorship or approval. The same provision governs trademark infringement and unfair competition, and many courts employ the same factors to evaluate unfair competition claims and trademark infringement claims.

Vietnam: The NUCA prohibits competitive activities that are likely to mislead consumers. In particular, the use of commercial indications to cause confusion is considered an act of unfair competition.

Countries Without NUCAs or Whose NUCAs Do Not Expressly Prohibit Acts that Create Confusion

By contrast, the following countries either do not have a comprehensive NUCA or their NUCA does not expressly protect against acts that create confusion with the establishment, goods, or activities of a competitor: Brazil, France, India, Israel, Mexico, Nigeria, Portugal, Thailand, The Netherlands/Benelux, Turkey, and the UK. As discussed in more detail below, most of these countries' laws still prohibit acts of unfair competition that create confusion among consumers, though such prohibitions derive from other statutes (e.g., IP laws and various commercial laws) or from common law court decisions.

A brief summary of the unfair competition laws of each country as they relate to acts that create confusion

Brazil: Brazilian IP Law defines "unfair competition" to include: (1) use of another's advertising expression or sign in a manner that causes confusion between the products or businesses, (2) use of another's commercial name, title, or insignia, or offers products with such references, and (3) use of a company's name on a third party's product.

France: Courts in France have held defendants liable for unfair competition where their conduct creates a likelihood of confusion. For example, a lingerie shop in Paris was found liable for unfair competition when it opened a shop under the same name as the plaintiff. In another case, unfair competition was found when defendant imitated plaintiff's perfume packaging.

India: Indian courts have often held that the act of using a trademark that is likely to cause confusion or deception in the minds of the consuming public as to its source/origin would amount to the common law tort of passing off. The principle of unfair competition in India extends to both products and businesses. No statutes specifically cover unfair competition.

Israel: The Commercial Torts Law and the Unjust Enrichment Act supplement trademark laws. The Commercial Torts Law prohibits a business from, among other things, causing the goods or services it sells to be mistaken for the goods or services of another.

Mexico: Various statutes prohibit acts of unfair competition that create confusion. For example, the Federal Code of Commerce prohibits acts of unfair competition that create confusion with the establishment, goods or industrial or commercial activity of another trader.

The Netherlands/Benelux: There is no specific NUCA. Instead, the Unfair Commercial Practices Directive and Misleading Comparative Advertising Directive both govern unfair competition. These laws prohibit misleading commercial practices—that is, practices that are likely to deceive the average consumer, or that, in connection with comparative advertising, create confusion with any products, trademarks, trade names, or other distinguishing marks of a competitor. In the Netherlands, the law on unfair competition is only applicable in a consumer-to-business relation and not in a business-to-business transaction. Therefore, it is unclear if a trader, who might be self-employed without employees, can rely on these articles.

Nigeria: There is no specific legislation dealing with unfair competition, but acts that are likely to create confusion are prohibited under the trademark laws, copyright laws, and common law of passing off.

Portugal: Unfair competition is defined as all acts of competition that contradict the rules and honest practices in any branch of economic activity, including acts that create confusion as to the company, establishment, products or services of competitors. It also includes unauthorized claims made to benefit from the credit or reputation of another person’s name, establishment or trade.

Thailand: While there is no specific NUCA in Thailand, various civil and criminal laws prohibit the sale of goods by deception, and prohibit businesses from engaging in acts that constitute destruction, damage, hindrance, obstruction, or limitation to the engagement in business by another business. Most of the unfair competition law is in tort law. The Trademark Act provides protection against passing off.

Turkey: The Turkish Commercial Code includes in its definition of “unfair competition” acts that create confusion with others’ businesses, products or activities.

UK: The law of “passing off” protects against acts that create confusion by any means with the establishment, the goods, or the industrial or commercial activities of a competitor. The tort of passing off has three elements: (1) the plaintiff has developed reputation and goodwill in the goods or services, (2) the defendant makes a misrepresentation to the public leading the public to believe that the goods or services offered by him are those of the plaintiff, and (3) plaintiff suffers, or is likely to suffer, damage by reason of that misrepresentation.

Protection from false allegations in the course of trade

Questions 4B and 7B: *Does your NUCA or your national laws provide protection against false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor?*

Most of the responding countries have laws that include provisions covering false allegations in the course of trade that discredit the establishment, the goods, or the industrial

or commercial activities of a competitor. They prohibit a person or entity from making a false or misleading statement tending to discredit a competitor's business, goods or services.

Countries with comprehensive NUCAs that explicitly cover false allegations are Austria, Canada, Chile, Ecuador, Germany, Japan, Mexico, Peru, Russia, Spain, the United States and Vietnam. Sweden's NUCA does not specifically mention false allegations, but its requirement that marketing be consistent with good marketing practice has been interpreted by courts to prohibit misleading statements.

In some responding countries without comprehensive legislation on unfair competition, malicious falsehood may be challenged and punished based on other provisions or regulations. In India, the common law protects against disparagement of goods, which is a false statement about a competitor's goods made to influence a purchasing decision. Israel's commercial torts law provides that a business shall not advertise something known to be false as to itself or to another business, and no one shall distribute an advertisement with a false description. Misleading advertising is prohibited in Portugal, Benelux/The Netherlands and Turkey. False allegations may be considered defamation in Thailand and the torts of malicious falsehoods and slander of goods protect claimants in the UK against harmful untrue statements about them, their goods or their business.

Even though China has a specific unfair competition law to protect from false allegations, the provisions are not comprehensive and penalty due to false allegations is not specifically provided. China's Anti-Unfair Competition Law provides that a manager shall not fabricate or spread false facts to damage the business reputation or commodity fame of the other competitor. But there is no specific article regarding a *penalty* against false allegations in the course of trade. The revision of the law is under discussion and a draft revision was published for public comments in late 2016. In the draft revision, there is a specific article providing such a penalty: an order to cease illegal activities and a fine between CNY 100,000 and CNY 3 million. Criminal liability may also be investigated under the proposed law. While this is still a draft version and subject to further discussion and revision, it appears that China realizes the negative influences of false allegations and the importance of adopting a serious penalty for false allegations.

French civil law does not prohibit false allegations specifically, and the case law cited in the survey response does not show that courts have found false allegations to violate the law. Nigeria does not have a provision or common law protecting against false allegations in trade.

It is worth discussing whether it is useful or necessary for a jurisdiction to have a specific law regarding unfair competition or whether a general law is sufficient when it includes articles in relation to false allegations. If more and more countries and jurisdictions have a specific unfair competition law or include specific articles in a general law providing serious penalties against false allegations or other unfair competition activities, intellectual property rights and other civil rights will have better chances of being protected.

Protection against indications liable to mislead the public as to goods

Questions 4C and 7C: *Does your NUCA or your national laws provide protection against indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods?*

Most countries with a comprehensive NUCA provide protection against indications that are misleading as to the nature and characteristics of goods: Austria, Canada, Chile, Ecuador, Germany, Japan, Peru, Russia, Spain, Sweden, the United States and Vietnam.

In most countries without comprehensive legislation with regard to unfair competition, misleading allegations as to goods are prohibited: Brazil, China, France, India, Israel, Mexico, Benelux/the Netherlands, Nigeria, Portugal, Thailand, Turkey and the UK.

Mexico's Federal Code of Commerce requires traders to refrain from misleading the public as to the nature of goods, and various other laws in Mexico support that prohibition. France's consumer code prohibits misleading allegations on the nature of goods, and the common law of India protects against false representations calculated to mislead and deceive, and also prohibits disparagement of goods. Israel prohibits deceit on the nature of goods, Portugal specifically prohibits false descriptions of the nature and quality of goods and Thailand and the UK protect against misleading the public as to the characteristics of goods. Benelux/the Netherlands prohibit the commercial practice of deceiving consumers about the nature and main characteristics of a product. Nigeria does not have a specific provision or common law protecting against false allegations about goods but its laws do cover those allegations. China's Anti-Unfair Competition Law provides that managers shall not "make a false propaganda" for the quality or composition of commodities and directs managers not to fake certificates of attestation on the qualifications of goods. Turkey's commercial code prohibits false or misleading declarations about a company's own goods.

Protection against any other acts of unfair competition

Questions 4D and 7D: *Does your NUCA or your national laws provide protection against any other acts of unfair competition? If yes, please state the acts concerned and identify and provide a summary of the relevant provisions of the NUCA.*

As the survey relied on the definition of unfair competition in article 10bis of the Paris Convention ("Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition"), responses from different countries unsurprisingly listed a broad range of unlawful behaviour as "other acts of unfair competition."³

³ This includes, for example, unfair commercial practices, the bribing of employees to neglect their duties and provide an advantage to his employer's competitor, abuse of judicial actions, inaccurate advertising claims, abuse of supplier relationships or imposing unfair terms on suppliers, bribery, monopolistic practices (including government interference, restricting access to commodities to certain suppliers, predatory pricing, unlawful bundling of products, impediments to free market access), inducement to breach contract, the misappropriation, disclosure or unlawful use of confidential information or trade secrets, misuse of another's goodwill or reputation, misuse of designations of an enterprise (including trademarks, trade names, packaging and other distinguishing

Unfair competition often acts as an umbrella term to cover any generally dishonest or undesirable behaviour in the marketplace. The absence of any clear definition means that certain countries define a particular activity as an act of unfair competition whereas another country may define it differently and deal with it under separate legislation. For example, many countries have specific legislation dealing with bribery and monopolistic practices and may not define or report these activities as unfair competition whereas other countries categorize them as unfair competition and report them as such. Finally, whereas some countries (especially those with specific national legislation dealing with unfair competition) may offer broader protection of intellectual property rights under the heading of unfair competition, unfair competition in other countries may be quite unrelated to intellectual property rights. This lack of uniformity means that meaningful comparisons between countries or finding a degree of uniformity between countries is sometimes difficult or downright impossible.

How a country categorizes and defines acts of unfair competition is also naturally dependent upon whether that country has any specific legislation dealing with unfair competition. For example, China lacks specific legislation dealing with unfair competition and reports “other acts of unfair competition” as including government abuse of power, monopolies, restricting free market access, restricting supply of products or commodities, bribery, theft of trade secrets and general malfeasance by company management. Whereas Japan, which has specific unfair competition legislation, is at the other end of the spectrum and includes, among other things, specific legislation forbidding the acquisition or holding of a right to use domain names that are identical or similar to another person's specific indication of goods, etc. (which means a name, trade name, trademark, mark, or any other indication of goods or services pertaining to a person's business), or use of any such domain names, for the purpose of acquiring an illicit gain or causing injury to another person. Therefore, “other acts of unfair competition” can range from the very broad to the highly specific depending on the presence or absence of legislation dealing with unfair competition.

Furthermore, the absence of a clear definition of what constitutes unfair competition often means that what falls under this label simply reflects the particular concerns of the country's legislators at that moment in time rather than any common global understanding of the term. For example, certain countries such as China and Mexico focus primarily on economic competition and the prohibition of monopolistic practices or free market access whereas other countries, notably Austria, Spain, Peru and Turkey, devote considerable legislative efforts to protecting customers from aggressive behavior or misleading or unclear marketing activities. Although this type of legislation does indirectly create a level playing field in terms of competition, it is essentially consumer protection legislation. Furthermore, anti-monopoly and consumer protection legislation is often primarily or wholly dependent on the willingness and ability of government authorities to enforce the legislation rather than relying on legal action between market players to regulate competition.

features), unconscionable pestering of customers or undue influence over customers, misleading advertising, failure to comply with advertising standards, unlawful comparative advertising (including the comparison of goods and services lacking comparable characteristics or the failure to compare representative features) and protection of marks that are well-known in the other countries.

However, there are of course some overlaps in terms of what is broadly considered unfair competition. The theft and use of trade secrets is almost universally prohibited under unfair competition law, and unfair commercial practices affecting consumers (especially coercive behaviour, bullying, harassment or misleading advertising) are commonly prohibited. The EU has also harmonised certain aspects of unfair competition such as misleading advertising, comparative advertising and unfair commercial practices and these are now part of the national laws of the EU member states. Austria in particular has broad legislation against unfair competition and specifically addresses practices likely to distort competition to the detriment of enterprises or the economic behaviour of customers and therefore seeks to protect both consumers and enterprises.

In South America, countries such as Peru have adopted a broad definition of unfair competition as an act that “results objectively, contrary to the requirements of entrepreneurial good faith, which must guide competition in a social market economy” and which does not require the violator to have an intention to carry out an act of unfair competition or the claimant to prove actual harm. Peruvian legislation includes a raft of examples of unfair competition, including undue exploitation of another person’s reputation (including the use of goods protected by intellectual property rules), undue comparison, acts violating entrepreneurial secrecy, acts violating rules, industrial sabotage, unfair competition carried out through advertising activity, acts against the principle of legality and acts against the principle of social appropriateness. Ecuador has somewhat similar broad protections.

In sum, certain countries or regions afford good examples of consistent and meaningful protection from unfair protection. This is welcome news for enterprises with a presence in those countries. However, the lack of uniformity and the absence of broader protection against unfair competition in countries such as China and Vietnam where large scale unfair competition exists is troubling. It would be advisable to agree on a more detailed definition of general acts of unfair competition in order to create some measure of globally consistent protection against unfair competition.

Remedies

Questions 5 and 8: *Does your NUCA provide for the grant of one or more of the following remedies against the acts mentioned above? Apart from any specific NUCA, does your national law provide for the grant of one or more of the following remedies against the acts mentioned above?*

The survey asked about remedies against three acts: (1) acts that cause confusion with a competitor, (2) false allegations to discredit a competitor and (3) misleading allegations regarding goods. Respondents indicated whether or not their country’s law provided the following remedies: injunction, penalty payments, damages, lost profits, disclosure of information, product recall, publication of correction, publication of judgment and reimbursement of legal costs.

Acts that Cause Confusion with a Competitor: All countries surveyed provide for injunctive relief against acts that cause confusion, and all countries allowed for penalty payments against those causing confusion, except for Austria, Japan, Nigeria, Peru, Spain and the UK. Peru is the only country that does not permit damages and lost profits for acts causing confusion. Ecuador, Japan, the Netherlands/Benelux, Nigeria, Peru, Turkey and Vietnam do not permit disclosure of information. Chile, China, Ecuador, Japan, Peru and Turkey do not allow product recall as a remedy. Ecuador, Mexico, Nigeria and Sweden do not allow requiring a defendant to publish a correction. Japan, Mexico, Nigeria and Vietnam do not allow publication of judgment, and Ecuador and Japan do not have reimbursement of costs.

Overall, remedies are strong in cases of acts that cause confusion. Countries typically provide for all named remedies when this violation occurs. Still, seven out of twenty-four countries lack the remedy of disclosure of information, while six lack product recall and six lack penalty payments.

A few countries stand out as not offering full remedies for acts that cause confusion. Ecuador only allows for injunctions, penalty payments, damages and publication of judgment. Japan only allows for injunctions, damages, lost profits and publication of correction. Nigeria only allows for injunctions, damages, lost profits, product recall and reimbursement of legal costs. Peru only allows for injunctions, publication of correction, publication of judgment and reimbursement of legal costs.

False Allegations to Discredit a Competitor: All countries surveyed provide for injunctive relief against false allegations to discredit a competitor. All allowed for penalty payments against those making false allegations, except for Japan, Nigeria, Peru, Spain and the UK. Peru is the only country that does not permit damages, and Ecuador, Peru and the UK do not provide for lost profits for such allegations. Several countries do not allow for disclosure of information for false allegations: Ecuador, Japan, the Netherlands/Benelux, Nigeria, Peru, Sweden, Turkey and Vietnam. As for product recall, Chile, China, Ecuador, Germany, Japan, Peru, Sweden and Turkey do not provide for that remedy.

Ecuador, Mexico, Nigeria and Sweden do not provide for publication of correction. Japan, Mexico, Nigeria, Sweden and Vietnam do not provide for publication of judgment. Ecuador, Japan and Vietnam do not provide for reimbursement of costs.

The remedies for false allegations that discredit a competitor are generally relatively strong. Most countries allow for injunctions, penalty payments, damages, lost profits, publication of correction, publication of judgment and reimbursement of costs. However, nine countries do not provide for product recall and eight countries do not provide the remedy of disclosure of information.

Again, a few countries stand out as not offering full remedies against false allegations to discredit. These are the same countries that lack the full complement of remedies listed for acts that cause confusion, and they offer the same limited list of remedies as for that violation: Ecuador only allows for injunctions, penalty payments, damages and publication of judgment. Japan only allows for injunctions, damages, lost profits and publication of correction. Nigeria only allows for injunctions, damages, lost profits, product recall and reimbursement of legal

costs. Peru only allows for injunctions, publication of correction, publication of judgment and reimbursement of legal costs.

Misleading Allegations Regarding Goods: All countries surveyed provide for injunctive relief against misleading allegations regarding goods, and all but Peru allow for damages. Most allow for penalty payments, save for Austria, Japan, Nigeria, Peru, Spain and the UK, and most allow for lost profits, save for Ecuador, Peru and the UK. Nine countries (Ecuador, Japan, the Netherlands/Benelux, Nigeria, Peru, Sweden, Turkey, the UK, Vietnam) do *not* allow for disclosure of information as a remedy here. All but four or five allow for product recall, publication of correction and publication of judgment. Just two countries – Ecuador and Japan – do not permit reimbursement of costs for misleading allegations regarding goods.

A few countries have only limited remedies available for this violation: Ecuador allows injunctive relief, penalty payments, damages, and publication of judgment, and marked product recall as yes/no. Japan allows just injunctive relief, damages, lost profits and publication of correction. Nigeria provides injunctive relief, damages, lost profits, product recall and reimbursement of costs. Peru only allows for injunctive relief, publication of correction, publication of judgment and reimbursement of costs.

Sufficiency of protection from NUCA against unfair competition

Question 6: *Do you feel your NUCA provides sufficient protection against unfair competition? If no, what gaps do you see in that protection that needs additional legislation, or a new interpretation of the existing legislation, or any other measure?*

The majority of the surveyed countries with a NUCA provide sufficient protection against unfair competition. In particular, respondents stated that Austria, Canada, Chile, Ecuador, Germany, Japan, Peru, Russia, Spain, Sweden and Turkey are satisfied with their NUCA. According to the surveys, those countries have the most protective legislative regulation against unfair competition.

In regard to China and Vietnam, although they have a NUCA, their law nonetheless does not provide satisfactory protection against unfair competition. In China's case, the law is not specific enough and it does not emphasize administrative responsibility. Furthermore, the Unfair Competition Law of China is not aimed at illegal acts of unfair competition. The protection of fields such as networking has also not been perfected. For example, the law does not protect electronic databases that do not embody originality. The survey response from Vietnam indicated that the NUCA needed to be more detailed for each act of unfair competition.

Sufficiency of protection from national law against unfair competition

Question 9: *Do you feel that your national law provides sufficient protection against unfair competition? If no, what gaps do you see in the available protection that need additional*

legislation, or a new interpretation of the existing law (whether legislation or case law), or any other measure?

In relation to the national laws providing protection against unfair competition, few countries feel that the protection afforded by their national law is sufficient. Out of 10 countries without comprehensive NUCAs, only the respondents from Brazil, Chile and Mexico feel their countries have laws with adequate protection against unfair competition.

In Brazil's case, article 195 of the Brazilian Industrial Property Law provides protection against various crimes of unfair competition and their civil and criminal liability. The country also has other legal instruments related to unfair competition. Chile and Mexico also report offering sufficient protection of unfair competition in their national laws.

In contrast to the countries mentioned above, respondents indicated that France, India, Israel, Nigeria, Portugal, Thailand and the UK do not have enough protection against unfair competition. In France, it would be helpful to have a dedicated act dealing with unfair competition cases and a clear legal framework instead of broad provisions. The law in India has gaps for concepts like the first sale doctrine, parallel imports and transborder reputation, and would be improved by a codified law to remove ambiguity and diversity of judicial opinion and to bring stability from a policy perspective. Further, the Indian law on unfair competition, though fairly established by judicial decisions, also needs to be codified.

As for Israel, plaintiffs there will rarely be successful in claims against defendants if confusion cannot be established. This condition allows businesses to act in an "unfair" manner. With the exception of extraordinary circumstances, companies are free to copy unregistered intellectual property rights, provided that they do it in a manner that prevents confusion. In relation to Nigeria, a generalized cause of action in "unfair competition" could benefit some claimants who lie outside the limits of passing off or trademark laws or other statutes.

In Portugal's case, unfair competition is classified as criminal behavior, which implies that it is necessary to prove that the opposing party had criminal intent, which is difficult to prove in court. In Thailand, a specific unfair competition law has not been introduced. And in the United Kingdom, the common law tort of passing off offers protection against unfair competition, but it is narrower in scope and more difficult to prove than the concept of unfair competition that is understood in continental Europe. This means that it is more difficult to establish passing off than it would be to establish unfair competition.

Ability to rely on NUCA or other unfair competition law in an infringement case

Question 10: *Is it possible to rely on a claim under your NUCA, or under the other laws that you have described above which target unfair competition, in the same case as an IP infringement claim (e.g., trade mark, design, patent or copyright infringement)?*

The vast majority of the countries in the survey allow cumulation of unfair competition protection with intellectual property rights. Those countries lacking a NUCA provide such protection with other national laws.

Cumulation is not possible, though, in Austria, Israel and Mexico. In Austria, claims under a registered intellectual property right must always be dealt with under the specific IP law provisions. The NUCA can only be applicable if there is no registered IP right. Israel does not have a NUCA at all. And in Mexico, unfair competition is regarded as an administrative infringement that can be invoked against anti-competitive behaviour.

Other limitations exist even where cumulation may be possible. Turkey has answered that cumulation is possible, but if the plaintiff has a registered IP right, the courts will not deal with unfair competition claims simultaneously. In France and Japan, one can simultaneously make an unfair competition claim and an infringement claim, but in order to obtain damages based on unfair competition in addition to IP infringement, additional damage must be proved. In Chile, damages under trademark infringement claims or unfair competition claims can not be cumulated.

In Sweden, the Patent and Market Court and the Patent and Market Court of Appeal came into being on September 1, 2016. The courts adjudicate all cases and matters relating to intellectual property law, competition law and marketing law. The Patent and Market Court only recently received its first case involving claims regarding trademark infringement under the Trademarks Act, as well as misleading advertising and illicit comparison under the Marketing Act. It is therefore too early to know the status of the cumulation of IP infringement claims and unfair competition claims in Sweden.

Appendix

This memo was written based on survey responses and additional assistance given by those listed below in relation to the listed countries.

Country	Respondents and additional contributors
Austria	Martina Grama, Baker & McKenzie Diwok Hermann Petsche Rechtsanwälte LLP & Co KG Barbara Kuchar, KWR Karasek Wietrzyk Rechtsanwälte GmbH
Brazil	Fellipe Zaltman, Trench Rossi Watanabe Cassiano Ricardo Golos Teixeira, Abreu, Merkl e Advogados Associados
Canada	Randall Marusyk, MBM Intellectual Property Law LLP Eva Warden and Fernando Robles-Pesqueira, Baker & McKenzie LLP
Chile	Juan Reyes, Baker & McKenzie
China	Yongbo Li, Unitalen Jimmy Huang, Zhonglun Law Firm Cindy Kang, Rouse & Co. International LLP Bessie Ye, Baker & McKenzie Fenxun Joint Operation
Ecuador	Roberto Zurita, Deiurecorp Asesoría Legal Corporativa & Tributaria
France	Franck Soutoul and Kamile Varekamp, Inlex IP Expertise Frédérique Fontaine, Baker & McKenzie SCP
Germany	Markus Hecht, Baker & McKenzie
India	Ankit Sahni, Ajay Sahni & Associates Shwetaree Majumder, Fidus Law Chambers
Israel	David Wolberg, Kuperschmit, Goldstein & Co.
Japan	Yongbo Li, Unitalen Daisuke Tatsuno, Baker & McKenzie
Mexico	Eryck Castillo, Uhthoff, Gómez Vega & Uhthoff, S.C.

	Fernando Robles-Pesqueira, Baker & McKenzie
Netherlands/Benelux	Gregor Vos, Brinkhof
Nigeria	Eben van Wyk, Spoor & Fisher
Peru	Luis Alonso Garcia, Baker & McKenzie
Portugal	Joana Alves Coelho, SGCR e Associados
Russia	Yuliya Prokhoda, Intels International Network Ukraine Inna Olar, Baker & McKenzie
Spain	Iván L. Sempere Massa, Padima Maria Dolores Garayalde, Baker & McKenzie
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