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ILLICIT TRADE AND THE WAY FORWARD: A CONSUMER LAW PERSPECTIVE

Prof. (Dr.) Ashok R. Patil*

1. Introduction

As per a 2019 OECD Report, India was among the top provenance economies for counterfeit and pirated goods traded worldwide between 2014 and 2016.¹ The problem of fake or spurious goods in India is so widespread that around 20% of road accidents in India occur due to fake auto parts.² The importance of knowledge and intellectual property in economic processes is on the rise. Hence, the intensity of counterfeiting and piracy, which pose a significant risk for knowledge-based, open and globalized economies, has also aggravated.³

This paper starts by exploring what illicit trade means and considers its consequences. It then examines the existing legal framework in India to deal with various forms of illicit trade. Further, it analyses the lacunae in the law, and discusses some case laws which acknowledge the impact of counterfeiting on consumers. Next, it provides an overview of some foreign jurisdictions' legal and enforcement provisions related to anti-counterfeiting. The paper then examines the impact of the COVID-19 pandemic on illicit trade. Finally, the paper puts forth recommendations

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¹ OECD/EUIPO (2019), Trends in Trade in Counterfeit and Pirated Goods, Illicit Trade, OECD Publishing, Paris/European Union Intellectual Property Office. <https://doi.org/10.1787/g2g9f533-en>.

²FICCI CASCADE Newsletter, May 2019.

³ Illicit trade, OECD, <https://www.oecd.org/gov/illicit-trade/> (last visited Feb 12, 2022).

regarding measures that can be taken to curb and prevent the spread of illicit trade, including amending the law, generating awareness among children and other consumers, etc.

2. Meaning and Forms of Illicit Trade

Illicit trade can take various forms, such as smuggling, counterfeiting, tax evasion, trafficking of humans and wildlife etc. The Black's Law Dictionary defines counterfeit as "to unlawfully forge, copy, or imitate an item, or other officially issued items of value (such as a postage stamp or a food stamp), or to possess such an item without authorization and with the intent to deceive or defraud by presenting the item as genuine. Counterfeiting includes producing or selling an item that displays a reproduction of a genuine trademark, usually to deceive buyers into thinking they are purchasing genuine merchandise."⁴ Further, Section 2(43) of the Consumer Protection Act, 2019 (CPA) defines spurious goods as **goods which are falsely claimed to be genuine.**

3. Impact of Illicit Trade

Apart from the harmful impact that illicit trade has on consumers, it also amounts to a major violation of the original brand's intellectual property rights and deprives a State of significant amounts of revenue through taxes on goods. This loss of revenue translates into reduced spending on welfare measures, including healthcare and education.⁵

There are significant economic, health, and safety consequences resulting from the use and sale of counterfeit products in the country. Small businesses often tend to suffer because of having bought counterfeit

⁴ BRYAN A GARNER, BLACK'S LAW DICTIONARY (8th ed. 2009).

⁵ SS Rana & Co., Anti-Counterfeiting, SS RANA & Co. (Feb 7, 2022), <https://ssrana.in/litigation/anti-counterfeiting-laws-india/>.

equipment and having to bear costs, including breakage and business downtime, which affects livelihoods.

According to a study by the FICCI Committee against Smuggling and Counterfeiting Activities Destroying the Economy (CASCADE), seven key sectors were found to have been most vulnerable in the country – automotive parts, alcohol, computer hardware, personal goods, packaged foods, mobile phones and tobacco products.⁶

There are far-reaching consequences of counterfeit products in these sectors. Faulty and counterfeit automotive parts impair the functioning of vehicles, which contributes to around 20% of road accidents in the country.⁷ There is considerable harm to human life and causes significant wastage of fuel each year. Illicitly produced local alcohol accounted for about half the consumption in India. Widespread counterfeiting in the personal goods and packaged food sector is particularly worrying since consumption of non-standard items may cause serious health problems to consumers. Counterfeit mobile phones mean reduced technical quality and threat to personal safety because fake batteries in phones have been known to cause explosions as a result of overheating and often emit higher radiation. The use of counterfeit tobacco products reduces legitimate revenue to the government, increases the risk to the public by encouraging organised crime networks, and tends to affect public health strategies.⁸

The severity of consequences caused due to counterfeit and illicit products becomes especially evident from the spate of recent instances surrounding the consumption of hooch across the country. Seven people died in Bihar

⁶ COUNTERFEITING, PIRACY AND SMUGGLING IN INDIA - EFFECTS AND POTENTIAL SOLUTIONS (2013), <https://iccwbo.org/publication/counterfeiting-piracy-and-smuggling-in-india-effects-and-potential-solutions-2013/> (last visited Feb 12, 2022).

⁷ Id.

⁸ Id.

in January 2022 in a suspected case of consumption of spurious alcohol. Just a week before this incident, eleven people had died in Nalanda district because of illicit liquor consumption.⁹ Such incidents also took place in Mandi district of Himachal Pradesh in January 2022. Investigations reported the presence of methyl alcohol in the spurious liquor.¹⁰ Unfortunately, India is no stranger to such terrible incidents. In 2019, about 154 people had died, and more than 200 had been hospitalized due to consumption of illicit alcohol in Assam. Such alcohol is often made by adding other liquids like methanol to increase the quantity of liquid and its potency.¹¹

4. Legal Framework in India

India offers several types of remedies, including civil, criminal and administrative remedies under various laws, to tackle counterfeiting and smuggling of goods.

4.1. Consumer Law

Manufacturing spurious goods or offering them for sale also qualifies as an unfair trade practice under Section 2(47) of the CPA. Under Sections 10-18 of the CPA, the Central Consumer Protection Authority (CCPA) is empowered to deal with matters of unfair trade practices and order inquiry/investigation into the same. Under Section 20 of the CPA, the CCPA can order the recall of such goods, reimbursement to the consumer etc. Search and seizure can be conducted with respect to such goods under

⁹ Amarnath Tewary, Seven die in Bihar in suspected hooch tragedy, *THE HINDU* (Jan. 10, 2022) <https://www.thehindu.com/news/national/other-states/seven-die-in-bihar-in-suspected-hooch-tragedy/article38299249.ece>.

¹⁰ Himachal Pradesh Spurious Liquor Death Case: Four More IPS Officers Join SIT, *NEWS18* <https://www.news18.com/news/lifestyle/himachal-pradesh-spurious-liquor-death-case-four-more-ips-officers-join-sit-4683851.html>.

¹¹ Swati Gupta, Jack Guy & Hira Humayun, Toxic moonshine kills 154 people and leaves hundreds hospitalized in India, *CNN* (Feb. 25, 2019) <https://edition.cnn.com/2019/02/24/asia/india-alcohol-poisoning/index.html>.

Section 22. A consumer can also approach the Consumer Disputes Redressal Commissions, which can grant any of the reliefs mentioned in Section 39 of the CPA.

Additionally, the Consumer Protection (E-Commerce) Rules, 2020 enacted under the 2019 Act also impose duties and requirements on e-commerce entities to not engage in any unfair trade practices, and to display the detailed information of the seller/importer of goods on their platforms, in an attempt to curb spurious goods. These Rules also obligate e-commerce entities and sellers to accept the return of spurious goods and refund the underlying purchase amount within a maximum period of 14 days.

Further, faced with the swelling malpractice of spurious goods invading households across all products, the government has sought to curtail this menace by introducing a penal regime in this regard under the 2019 Act.¹² Section 91 of the CPA imposes criminal liability in the form of imprisonment and fine, for manufacturing, storing, selling, and importing spurious goods. It is stated to be a cognizable (i.e. the concerned person can be arrested without a warrant) and non-bailable offence. This indicates the strict approach of the legislature towards counterfeit/fake/spurious goods. Moreover, the courts also have the power to suspend or cancel the license of persons violating the such provisions under the CPA.

4.2. Other Laws

Examples of other statutes dealing with fake and counterfeit goods include the Trademarks Act 1999, the Copyright Act 1957, the Patents Act 1970,

¹² Sarthak Sarin, The new consumer protection act decoded: What will be its impact on the e-commerce sector?, CNBC TV18 (Nov. 6, 2018) <https://www.cnbc18.com/views/the-new-consumer-protection-act-decoded-what-will-be-its-impact-on-the-e-commerce-sector-4646791.htm>.

the Designs Act, the Geographical Indications Act 1999, the Drugs and Cosmetics Act 1940, the Food Safety and Standards Act 2006, the Indian Penal Code (IPC) 1860, the Information Technology Act 2000, Bureau of Indian Standards Act, 2006 and the Customs Act 1962. Customs officers are empowered to inspect any premises, conveyance, x-ray any person and effect search and seizure in cases where they have reasons to believe that the goods are of a contraband nature. To further enforce the same, certain Indian state governments have also formed Special Intellectual Property Cells, which deal with offenses relating to infringement of IPR, over and above the ability to file a suit in any court of original jurisdiction.

4.3. Lacunae in the Law and Suggestions to Amend

The Consumer Protection Act, 2019, and the allied Rules and Regulations provide for both civil and criminal liability with respect to spurious goods and cover both offline and online scenarios. However, they do not adequately address the issue of counterfeit/fake/spurious goods. A major problem with Section 91 of the CPA is the requirement of the spurious good causing injury or death of the consumer. Thus, involvement in any one of the aforementioned activities relating to spurious goods is not sufficient by itself to invoke liability under the Act. This results in a restricted scope of the statutory provision and places a higher burden on the consumers for them to get justice. Moreover, this requirement to prove injury to or death of the consumer as a result of the spurious goods should be removed. Any dealing or involvement with spurious goods should be sufficient to trigger criminal liability for the person involved, and there should be no requirement to prove any kind of harm arising from such goods. The authorities should not wait for harm to occur before taking any action against the concerned persons. This is because such goods violate

the consumers' right to safety and to make an informed choice, among others.

Moreover, the penal provisions provided in the applicable laws in India currently, such as Copyright Act 1957 and the Trade Marks Act 1999, are not adequate. The legal framework should be strengthened, and stringent enforcement of the same should be ensured to fight back illegal trade operators. Besides the imposition of fines, there should be strict measures that create a fear of law amongst those indulging in illicit trade and causes the society at large to realise the seriousness of the crime. The Trademarks Act of 1999 provides for a penalty of 6 months to 3 years of imprisonment in addition to a fine of minimum INR 50,000 for selling goods and services with or applying false trademarks or descriptions. A fine of such a paltry amount does not serve as a deterrent for criminals indulging in illicit trade. Laws should be enacted to impose prohibitive minimum "floor" penalties as well as more stringent action in deserving cases; further, seizures of suspected goods should be implemented as an interim measure without waiting for cases to be decided in court. Hence, it is recommended that like in the Customs Act, the monetary fine under the Trade Marks Act and Copyright Act may be extended up to the value of the offending goods along with imprisonment of up to 7 years. IP infringement should be made a non-bailable offence. This will go a long way in disincentivizing people from participating in illicit trade.

Lack of awareness of laws, rules, and regulation is another major cause in boosting the smuggled, fake, and counterfeit goods market. This is because a lack of such awareness on the part of the consumers result in failure to report or file a complaint against persons involved in manufacturing, stocking, selling etc., of spurious goods. Further, even the judiciary lacks sensitivity with respect to the violation of intellectual

property laws and acts. Judges (especially in the lower rungs of the judiciary) often fail to prioritise intellectual property-related crimes due to an incomplete understanding of the existing law. Only a few courts like the Delhi High Court are known for appropriately understanding and resolving such matters and creating jurisprudence on these subjects. Additionally, unawareness on the part of the enforcement agencies results in poor investigation and prosecution of these cases, thereby leading to the acquittal of the accused persons. Hence, the lack of awareness is definitely one of the gravest problems in this area. Thus, capacity building of the judiciary and other enforcement agencies would increase sensitivity towards such crimes and help expedite such cases that come to light.

5. Indian Judicial Approach

Various Courts have delivered several judgments on illicit trade and the use of counterfeit products. However, given the consumer law-centric focus of the report, this section seeks to provide a brief insight into the impact that such use of counterfeit products can have on consumers, as recognised and acknowledged by judicial authorities.

- a. *Godrej Consumer Products Ltd. v Vijay Sav and Ors.* 2020 SCC Online Bom 6251

Here, the plaintiff was an established and well-reputed company that manufactured several consumer products, including soaps, detergents, hand sanitizers and aerosols, among other products. It had argued that its widespread popularity as a brand made its trademark GODREJ a 'well-known trademark'. It further claimed that in 2000, it had adopted the trademark 'PROTEKT' in relation to its liquid hand wash soaps and had been using the same even for hand sanitizers since 2009. The plaintiff

also claimed that in light of the COVID-19 pandemic, it had introduced a complete hygiene range under the 'Protekt' brand.

As per the plaintiff, in August 2020, it found out that the Defendants had been manufacturing, marketing, stocking and selling hand sanitizers with the plaintiff's trademark in secret. The counterfeit products were found to be of very inferior quality.

Here, the judge stated that he even found it difficult to distinguish between authentic and counterfeit products. He went on to say that such counterfeiters were going to fool the public. In light of the pandemic, the vast demand for such hygiene products and their need to prevent the spread of the virus, it was even more concerning that such counterfeit products could have been bought by the public, only to lead to disastrous consequences for public health. The judge also remarked how alarming it was that the counterfeit products contained only 5.73% of alcohol when it should have been 70-80% as per prevailing guidelines. Thus, the judge acknowledged how the defendant's actions endangered the consumers' health and safety.

b. *Hindustan Lever Ltd. & Anr. v Satish Kumar* 2012 SCC OnLine Del 1378

The plaintiff argued in the present case that the defendant was engaged in counterfeiting fast-moving consumer goods such as shampoos and creams, which used the plaintiff's trademark. It claimed that the defendant manufactured and sold spurious personal care products and that the product packaging of the counterfeit goods was of poor quality printing and sealing. Moreover, it claimed that the defendant had, in some instances, used discarded containers of the plaintiff's products.

The court granted a decree of permanent injunction against the defendants and imposed punitive damages on the defendants. One reason

for such imposition by the court was that the defendant did not understand the severe consequences that such counterfeit products could have on the public. It also stated that such tendency of counterfeiters ought to be taken seriously note of and that punitive damages should be imposed to deter such instances in the future.

c. *Casio Keisanki Kabushiki Kaisha v Rakesh Sethi and Ors.* 2011 SCC OnLine Del 3063

The plaintiff company manufactured several products, including calculators and had a registered trademark for the same. It was alleged that an investigation confirmed that the defendants were selling inferior quality calculators under the plaintiff's trademark CASIO. It was also claimed that several essential features were missing from the calculators. The court held, this amounted to trademark infringement and said that purchasers of the products would assume that they were genuine products sold by the plaintiff. If the quality of the products is found to be inferior by the consumers, despite its goodwill, it would cause immense damage to the reputation of the brand and compromise its business interests. It also emphasised that it was in the consumers' interest that they did not buy a counterfeit product under a mistaken belief.

d. *Smithkline & French Laboratories Ltd. and Anr. v Mohd. Mateen and Anr.* 2014 SCC OnLine Del 1582

This case involved the sale of counterfeit products of the plaintiff. i.e. IODEX. The plaintiff claimed that IODEX was widely known within the country and that due to its high standards of effectiveness in relieving pain, it was the 'best-known product' in the pain-balm category. It also claimed that as a result, the mark IODEX had earned significant goodwill and reputation in the market. It was claimed that there had been complaints about counterfeit IODEX products in the pharmaceutical

market since 2005, and that it was found that Defendant No. 1 was manufacturing and distributing fake medicinal preparations under the IODEX mark.

The court here held the defendants' conduct to be dishonest, unethical and unlawful. It said that these acts were solely motivated to earn easy and illegal profits by tarnishing the plaintiff's goodwill. The court also acknowledged the need for punitive damages in such cases to discourage parties from deception and to secure the interests of the public. It recognised that the counterfeit goods and trademark infringement not only caused financial harm to the plaintiff but also deceived members of the public, and caused risk to the health of unassuming consumers.

6. Overview of Foreign Frameworks on tackling Counterfeit Products

United States of America

The anti-counterfeiting enforcement finds origin in two federal statutes – The Lanham Act (15 USC Section 1051) and the Trademark Counterfeiting Act 1984 (18 USC Section 2320). Together, these two statutes provide civil and criminal remedies for trademark infringement and counterfeiting. Other state legislations also impose both civil and criminal liability for counterfeiting. Criminal penalties for intentional trafficking of counterfeit goods include up to 10 years imprisonment and a fine of up to \$5 million in case of repeat offences. Companies may be subject to penalties up to \$ 5 million and up to \$15 million in case of repeat offenders. If the counterfeiter recklessly or knowingly causes or attempts to cause serious bodily harm or death, there may be enhanced penalties, including life imprisonment.¹³

¹³ Kristina Montanaro Schrader, Maia T Woodhouse & Christopher B Burkett, Procedures and strategies for anti-counterfeiting: United States, *WORLD TRADEMARK REVIEW* (May

In the USA, US Customs and Border Protection (CBP) is the primary agency that deals with counterfeit goods at the US borders. It maintains its online database of recorded IP rights to identify counterfeit products and seize them. Moreover, agents with the US Immigration and Customs Enforcement (ICE) Homeland Security Investigations (HSI) and the National Intellectual Property Rights Coordination Centre also work with enforcement authorities to bring down counterfeiters and reduce the threat to consumers.¹⁴ Often, these counterfeit operations lead to the trafficking of counterfeit goods across borders and are also investigated by Border Enforcement Security Task Forces (BESTs).¹⁵

United Kingdom

The legal framework in the United Kingdom on anti-counterfeiting originates in national laws as well as European Union legislation. The principal statute governing trademarks is the Trade Marks Act 1994. This Act provides both civil and criminal remedies in case of trademark infringement. Under section 10 of the Act, civil remedies include permanent injunctions, damages, destruction of counterfeit goods, and costs in favour of the trademark owner. Under section 92 of the Act, criminal remedies include six months' imprisonment, a fine of 5000 pounds, or both. The maximum duration of imprisonment is ten years. Other statutes dealing with counterfeiting are The Fraud Act 2006 and the Proceeds of Crime Act 2002. Under the former, making a false representation dishonestly with an intention to make a gain or cause loss

11, 2021) <https://www.worldtrademarkreview.com/global-guide/anti-counterfeiting-and-online-brand-enforcement/2021/article/procedures-and-strategies-anti-counterfeiting-united-states>.

¹⁴ U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE), Counterfeit Goods: A Danger to Public Safety, <https://www.ice.gov/features/dangers-counterfeit-items> (last visited Feb. 7, 2022.)

¹⁵ Id.

to another and to make or supply articles used in fraud is made a criminal offence. Under the latter legislation, assets obtained through crime can be confiscated.¹⁶

Recognising the increasing sale of counterfeit goods online, the UK government works with national agencies, and collaborates with international anti-counterfeiting agencies to reduce such instances. Agencies such as the Anti-Counterfeiting Group (AGC), the National Markets Group, the UK Intellectual Property Office (UKIPO) and the UK police work together to tackle counterfeiting operations.¹⁷

7. Impact of the Covid-19 Pandemic

7.1. The Current Situation

The COVID-19 pandemic has heightened the dangers posed by illicit trade. This is due to the high demand for life-saving drugs, medical equipment and vaccines, but a very limited supply of these goods. Hence, criminals have gotten a fresh opportunity to exploit the worldwide vaccination campaign and take advantage of unsuspecting people. Recently, in Mexico and Poland, fake/counterfeit versions of Pfizer's Covid-19 vaccine were found to have been sold for about \$1,000 a dose.¹⁸ The vials had different lot numbers than those sent to the state, and a wrong expiration date. There have been similar instances in India too. Odisha's drug enforcement agency arrested a man on charges of trying to sell fake Covid-19 vaccines. Recently, Interpol has also issued a global alert to law enforcement agencies across its 194 member countries, warning them to

¹⁶ STA Law Firm, UK: Counterfeit Goods and Piracy In The United Kingdom, MONDAQ (Mar. 3, 2020) <https://www.mondaq.com/uk/trademark/899758/counterfeit-goods-and-piracy-in-the-united-kingdom>.

¹⁷ Id.

¹⁸ Jared S Hopkins, Pfizer Identifies Fake covid-19 shots abroad as criminals exploit vaccine demand, LIVEMINT (Apr. 21, 2021) <https://www.livemint.com/companies/news/pfizer-identifies-fake-covid-19-shots-abroad-as-criminals-exploit-vaccine-demand-11619024998051.html>.

prepare for the organised crime networks targeting Covid-19 vaccines, both physically and online.¹⁹ Counterfeiters are replicating the vaccine packaging while putting inactive or even harmful contents inside the vial. **A police raid in November 2020 in South Africa busted an operation and seized a large quantity of counterfeit N95 safety masks and illicit and unregistered COVID-19 vaccines.** As per the US Customs and Border Protection report, most counterfeit goods seized in 2020 in relation to COVID-19 were from China and were destined for markets in the USA, Africa, and Europe. The pace and ease of infiltration of legitimate supply chains with counterfeit PPE and medical products triggered a global response by authorities. In Vietnam, authorities started investigating and seizing counterfeit masks and hand sanitisers as early as February 2020, and by March 2020, special task forces were created to tackle the illicit online sale of medicine and medical products.²⁰

7.2. Suggested Measures

Although people may not be physically harmed, strict action should be taken to curb such instances. This is because falsified vaccines will erode the trust in our pharmaceutical and healthcare systems. Hence, imposition of criminal liability against the concerned persons in such cases should not have harm/injury to the victims as a prerequisite.

Law enforcement and drug makers should cooperate and collaborate to combat criminal activity related to Covid-19 vaccines. The USA and Mexico, among others, have also taken down websites fraudulently

¹⁹ Jeevan Prakash Sharma, Beware, Fake Covid-19 Vaccines Ready To Hit The Market: Anti-Counterfeit Body, OUTLOOK INDIA (Dec. 10, 2020) <https://www.outlookindia.com/website/story/india-news-fake-covid-19-vaccines-a-big-threat-anti-counterfeit-body/366784>.

²⁰ Rouse, COVID-19: The perfect storm for counterfeiters, LEXOLOGY (Jan. 21, 2021) <https://www.lexology.com/library/detail.aspx?g=1891fe55-e964-43df-b224-0663a8e95ea1>.

claiming to sell vaccine shots or claiming an affiliation with vaccine makers. These fake websites also sought consumers' personal information for identity-fraud schemes.²¹

Bodies like Authentication Solution Providers' Association (ASPA) that tackle the counterfeiting of products in India and abroad should be contacted. For export, most large companies have already implemented serialization and traceability as per Directorate General of Foreign Trade (DGFT) guidelines. However, for the domestic market, there is no regulation governing serialization, traceability or anti-counterfeiting in general. Hence, the Drugs Controller General of India (DCGI) and Ministry of Health and Family Welfare should also look into these measures.²²

Further, technology-based solutions can be adopted to counter the problems. Brands should put in place a comprehensive anti-counterfeiting system that starts with adopting physical authentication and traceability solutions to reduce tampering chances and secure supply chain integrity. A contingency plan should also be drawn up to alert customers, suppliers, the authorities, and the public if falsified products are discovered in the supply chain.

Countries should focus on more stringent implementation and enforcement of IP law and ensure criminal law sanctions for violators. Consumers should be made aware through campaigns and guidelines on how to distinguish between real and fake vaccines and medicines, on the basis of certain easily identifiable marks. There should be international cooperation between countries to discourage and make the smuggling and illicit trade of goods across national borders difficult. International and

²¹ HOPKINS, *supra* note 18.

²² *Id.*

regional organisations such as the World Trade Organisation and the United Nations can help countries in this regard.

8. Role of Consumers and the Need for Consumer Awareness

Consumers and consumer protection organizations play a significant role in dealing with illicit (counterfeit and smuggled) products, since they are the ones who are at the risk of ultimately purchasing and consuming such goods. Hence, there is a dire need to promote and increase consumer awareness in this area.

Educating consumers is one of the most effective tools that can be used to help curb counterfeiters by tackling the demand side of the equation. Raising awareness about the adverse effects of purchasing counterfeit, pirated, and smuggled goods is of paramount importance in this regard. This is crucial, as it has been found that 65% of the consumers buy counterfeit goods knowingly (FICCI 2019) due to a perceived skewed risk-reward ratio, thereby creating a demand for them.²³ Hence, it is crucial to bring about a change in consumers' mindset and encourage them to buy genuine products. Seminars and sessions should be organised for this purpose. Awareness campaigns should focus on explaining to the consumers how to differentiate spurious products from genuine ones. Further, they should be taught about the importance of demanding a copy of the bill from the seller for every purchase. This is expected to reduce the problem by 80%.²⁴

Consumers should also be made aware of the harmful consequences of buying illegal products vis-à-vis genuine ones. If they are made to understand that buying such goods could result in serious health hazards, cause environmental damage and contribute to severe national and

²³ FICCI CASCADE Newsletter, May 2019.

²⁴ Id.

international problems through the terrorist organisations that such activities often fund, the demand for such illicit goods could be reduced drastically. Thus, they should be urged to be more vigilant towards the issue of counterfeiting and smuggling. Once consumers become more aware of the matter and look at it seriously, the problem could be addressed effectively to a large extent.

9. Role of Children as Future Consumers

India has a young population profile and is the youngest nation in the world. India has the largest adolescent population in the world - about 253 million, and every fifth person is between 10 to 19 years.²⁵ The youth of India being the country's future, it becomes imperative to understand the power of the consumers of tomorrow. With children becoming key stakeholders for advocating socially responsible behaviour, it is important to raise their awareness on the issue of illicit trade during their formative years and through them, influence the society as a whole. An idea planted in their minds can become an instrument of change for tomorrow.

To achieve this, it is imperative that basic knowledge about counterfeiting, smuggling, and illicit trade and its harmful effects is incorporated in the educational curriculum of middle and senior school as a chapter in the textbooks of social sciences. This will definitely be an excellent initiative to address the growing menace of illicit trade. The points which should be included in this chapter may be as follows-

- i. What is illicit trade
- ii. Causes of illicit trade

²⁵ Vishwanathan, Children in India, UNICEF, <https://www.unicef.org/india/children-in-india>.

- iii. Magnitude of illicit trade
- iv. Adverse effects of fake and spurious goods
- v. Examples of harmful items like food, medicine, electronic goods, cosmetics, toys etc.
- vi. Linkage between sale proceeds of illicit trade and job loss, organized crime (terrorism and insurgency), research and development.
- vii. Role of consumers such as asking for the bill while making any purchase
- viii. Redressal of consumer grievance available through consumer courts
- ix. Conclusion- Towards building a prosperous nation

10. Role of the Industry and the Government

Given the increasing threat of illicit trade in counterfeit and smuggled goods, both in terms of value and magnitude, all stakeholders should collaborate and work together to fight it. What is required is an orchestrated strategy involving cooperation and innovation from the government, industry, enforcement systems etc., working closely to mitigate this challenge. There should be different strategic action plans for addressing (i) smuggling, (ii) counterfeiting and (iii) smuggling of counterfeit goods. A multidisciplinary approach should be adopted to encounter this challenge.

Both public and private sector decision-makers need a firmer understanding of the problem, the nature of its economic impact and a clearer comprehension of the conditions that enabled it. There should be a strong will within the **government** to make this a national priority and to eliminate this evil. There should be better coordination between the different government departments to ensure a seamless flow of information so that the time taken for decision-making is reduced. The government must maintain a balance in the taxation policy since a higher

tax rate for goods results in evasion, and the availability of such products increases in the illicit market. Further, FICCI's Recommendations to Combat Illicit Trade should be implemented by the government.

To identify strategies and opportunities for joint action between **enforcement agencies** and industry to combat and curb illicit trade, interactive sessions and stakeholder consultations with the police, Customs and Directorate of Revenue Intelligence, etc. should be organised. This will facilitate a broader exchange and ensure a multifaceted perspective to understand the risks of illicit trade and search for remedial measures. Police officials should be made to understand the relevant laws and procedures in tackling counterfeiters and smugglers, through regular workshops. A national and regularized system of capacity building for police officers on the negative impact of economic offences should be in place. The investigating officers should have specialized training on technical issues so that they are able to understand technical evidence and do justice with the investigation. Tailor-made training programmes will be helpful in this regard. There should be interstate coordination between enforcement agencies. There is also a need for tools and collaborative programs to support customs in intelligence, capacity building and training.

More proactive and dedicated actions are needed to be taken by the affected **industry**. The industry needs to segment itself by speaking to the right set of authorities for specific problems, appraising state-level officials, checking implementation requirements, and strengthening the KYC process for on-boarding any seller on an ecommerce platform.

International cooperation in facilitating exchange of information and intelligence should be promoted. The need to share best practices between different countries is essential, since unscrupulous elements often exploit

the gap between governance and technology to violate international agreements. Bilateral and multilateral engagements between nations would ensure greater difficulty in the movement of smuggled and counterfeit products between nations. Better intelligence methods need to be developed through the training of more specialised enforcement units equipped with state-of-the-art technology. Integrated actions at the international level are required in identifying, investigating and prosecuting people involved in illicit trade. Punitive action should be employed to disincentivize and deter illegitimate operators.

A high-level national security strategy should be developed along with a National Intelligence Fusion Centre with representatives from the police, customs, law enforcement and intelligence units, among others. Offences related to counterfeiting and smuggling should be considered a national crime. The **judiciary** should also play a proactive role in this matter. Judicial officials should be made aware of IP laws and amendments.

An **umbrella body** should be set up, i.e. a multi-agency centre at the Prime Minister's office and the Cabinet Secretariat, to share intelligence, enhance cooperation, liaison with national and international bodies etc. This could be done by establishing a new setup or revamping existing ones such as the Central Economic Intelligence Bureau. It would have a centralized body, a Planning and Policy Wing with Judges, Secretaries in Ministries and Economists as members, and an Operation and Execution Wing with representatives from the enforcement agencies.

The focus should be on **consumers** who need to be made aware of the detrimental impact of such spurious goods. A well-defined multimedia strategy should be designed using various platforms like Twitter, Facebook, advertisements in cinema halls, SMS, etc. Finances available under the Consumer Welfare Fund of the government could be allocated

for effective consumer awareness on the hazardous impact of smuggled, contraband and counterfeit products. Children should also be made aware of the issue of illicit trade. For this, the causes, ill-effects and magnitude of illicit trade should be incorporated in the educational curriculum at the school level.

However, industry collaboration, use of the right technology, deterrent rules, and stringent enforcement alone cannot solve the problem and can only have limited success. Ultimately, it is the proper **policy framework** that can deliver optimal results in this area. Thus, the government must take effective measures to enable a healthy environment and frame policies that discourage the growth of illicit trade in India.

11. Need for Awareness among the General Public

FICCI's CASCADE should actively work with the Ministry of Consumer Affairs at the National and State levels to include the public in the fight against illicit trade. This is essential since consumer demand represents the demand side of the illicit trade equation. Awareness of health and safety concerns of counterfeit lifestyle items, medicines, etc., and the linkages between profits from such activities and terrorism can help mobilise powerful public sentiment and action against smuggling and counterfeiting.

Hence, CASCADE should reach out to consumers and generate awareness on the hazardous impact of smuggled, contraband and counterfeit products amongst consumers and citizens. It should also undertake research and propose legal reforms, organise regular workshops for the guidance of its members, share the best practices followed globally for combating illicit trade and provide knowledge and support to the industry members. To that end, CASCADE should work closely with the industry, consumers, media,

legal experts, enforcement agencies, right holders, consumer organizations and government.

CASCADE should also formulate a multimedia strategy using various platforms such as Facebook, Twitter, advertisements in cinema halls, hoardings, mass SMS, etc. It can take inspiration from efforts made in other jurisdictions, such as the ‘STOPfakes’ initiative of the US government, which, in its fight against counterfeiting and smuggling, looks at raising awareness amongst the public and industry. CASCADE can also collaborate and coordinate with international agencies such as the World Intellectual Property Organisation (WIPO), WCO and the INTERPOL to maintain databases on counterfeiting and smuggling, undertake targeted public awareness campaigns, and the sharing of technology.

The American National Standards Institute issued a guide titled “Best Practices in the Fight against Global Counterfeiting” in 2011 based on its interactions through conferences, workshops and interviews. CASCADE should prepare similar guides about best practices to detect fake products. It can hold seminars to ‘engage all stakeholders and sensitise them to fight against counterfeiting and smuggling’, and organise industry-specific consumer awareness campaigns against counterfeiting and smuggling, in collaboration with prominent industry players. It can coordinate with other bodies like ASPA, which is also affiliated with global associations such as the International Hologram Manufacturers Association, Counterfeit Intelligence Bureau and INTERPOL.

The “Make in India” campaign already has a dedicated marketing setup and enjoys a high degree of awareness and recognition amongst the public. This channel can be simultaneously used by CASCADE to aggressively spread consumer awareness on the importance of promoting the

manufacture and sale of authentic goods in the country. Given that small businesses and consumers are also part of the counterfeiting fight, small, simple and clear messages outlining universal basic steps should be used by CASCADE.

In order to attract attention and drive home the point, case studies on actual incidences, including ones with more terrible consequences, should be compiled and disseminated by CASCADE to spread more targeted consumer awareness. To increase awareness, CASCADE can also run targeted campaigns customised for different sectors including FMCG, automotive, electronics, fashion and apparel, which bear the brunt of counterfeit and smuggled products. It can also organise national and international conferences and webinars to generate awareness, find tangible solutions and chalk out a sustainable road map to thwart the evil impact of illicit trade.

Finally, CASCADE can use the internet to spread consumer awareness. Online shopping websites are now a key channel used by counterfeits. A robust consumer awareness programme should necessarily include an “online” element. Online forums that can be used to this end include:

- Online courses, along with certifications, on various counterfeiting elements;
- Online campaigns using popular social media such as Twitter and Facebook;
- Industry and geography-specific websites that allow consumers to remain updated on the latest trends in counterfeiting share case studies and provide information on identification and reporting.

12. Conclusion

India lacks adequate laws and awareness among its people to deal with illicit trade. Implementation of the recommendations discussed in this

paper can be expected to help India tackle and fight with the menace of illicit trade effectively and efficiently. Hence, it is advised that all stakeholders come together and collaborate among themselves to achieve this. This should be our way forward. Only then illicit trade be curbed and limited, especially in light of the challenges posed by the pandemic.