

Guatemala



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BORDER MEASURES AND THE FIGHT AGAINST COUNTERFEITING IN THE REPUBLIC OF GUATEMALA: SOME NOTES OF REFLECTION ON ITS IMPORTANCE AND ACTIONS THAT CAN BE TAKEN IMMEDIATELY.

Border measures consist of actions aimed at preventing the country from importing goods that can deceive the consumer and, in some cases, even harm their health. The State of Guatemala, like many other States, in strict compliance with its constitutional mandates, must protect its people and for this reason, the subject matter of border measures and the sale of counterfeit goods in their countries must be of particular interest.

An adequate and functional system of border measures is aimed at protecting people's property, in particular, the intellectual property of people wanting to sell and market their products, free from imitations or counterfeits from other countries that want to take advantage of the prestige and recognition of others. Intellectual property, an extension of one's proprietary right, allows individuals to own their intellectual creations, expressed in a trademark, invention or any other way in which ideas can be embodied.

In Guatemala, the firm A.D. Sosa & Soto, through its specialized intellectual property unit – INNOVA IP – offers assistance to clients who may be interested in promoting actions to prevent the importation and marketing of counterfeit products into the country, including legal actions that may be initiated to attain the confiscation of goods at borders. Also, as part of this specialization, the firm is actively involved in business chambers and organizations that aim to disseminate information on the importance of understanding why the matter in question is important, and in turn generate proposals to improve the intellectual property protection system, hand in hand with the respective government authorities.

Across the border, a primary function of the State is to ensure that the products that will be placed on the Guatemalan market, for use or consumption, meet the quality, health and marketing requirements, which is achieved, in the great majority of cases, by complying with the originality requirement. Authenticity or originality increases the likelihood of concluding that a given product has followed the control standards for the appropriate production and marketing of the products, in compliance with applicable legal regulations, which consumers acknowledge through the brand itself, which identifies the product. In other words, the consumer, with the mere existence of the trademark, infers that the product has followed all the expected quality or health parameters. In such a competitive and specialized world, it is common to find illegal factories or production centers abroad, highly specialized, that use third-party and recognized

brands to deceive the public and cause consumers in our country to buy products with brands they recognize. When this happens, due to the degree of sophistication, the consumer can be easily deceived. In the course of such deception, the consumer's health may, therefore, be put at risk, if we refer to consumable products or products which, due to deficiencies, can have a harmful effect on people's integrity, e.g., auto parts. Therefore, and especially in times of COVID-19, should the State take action to prevent the importation of products that may harm consumers? The answer is obvious.

Therefore, if products that are placed in the country do not meet authenticity requirements, the State must act to protect the rights of consumers and those who have the legitimate right to produce or market legitimate products with trademarks of their own. This allows, as has been stated, that products meet the quality or health requirements that the consumer expects, and this prevents their health, in several cases, from being at risk. In this state mission, the State of Guatemala must still take actions to raise that level of protection, as a priority issue. If the State succeeds in increasing controls in this regard, we will have solved much of the marketing of counterfeit goods in the country, since it would only be left to control counterfeits carried out in the country itself.

The question now is, what have we done in Guatemala? What do we need to do? Guatemala, like many other countries, is part of a fairly comprehensive intellectual property protection system that dictates, inter alia, the need to implement border measures. Specifically, the regulation applicable to the measures originates from the agreement on Trade-Related Aspects of Intellectual Property Rights promoted by the World Trade Organization (TRIPS). Guatemala became part of TRIPS at the time it became a member of the World Trade Organization on 21 July 1995, and from there on, it begins a process of legislative adaptation, which results in the enforcement of Copyright and Related Rights Act, Decree 33-98 and, later, the Industrial Property Act, Decree 57-2000, which incorporated border measures into the Guatemalan legal system. The measures were also added to the Copyright and Related Rights Act through Decree 56-2000. We have a fairly acceptable and attractive legal framework for investors.

Having a regulation is, of course, an important step. However, Guatemala must take actions to ensure that regulations are effectively implemented, like many other countries, especially in Latin America. This is achieved, in part, through legislative amendments, such as allowing officials based on their own decisions, and without prior request, take actions to prevent the importation of counterfeit products, without incurring in accountability. However, while the changes are not achieved through legislative action, effectiveness can be achieved thru political will and the use of technology. With the necessary political will, through minimum regulation, computer systems or applications could be used on mobile devices which would allow civil servants or public employees at the borders and customs to keep a check on the trademarks registered with their logos (with indication of the products they protect) and indication of the lawyers responsible for ensuring the protection of the mark, if it is necessary to contact them so that they can rule on a possible wrongdoing. These systems could have the artificial intelligence necessary to be able, through a photograph, to evaluate the questioned product, and determine whether they are fake or not, which is currently determined through direct telephone consultations or through chats with company officials responsible for validating the authenticity. The possibility of innovation in this field can be limitless.

Innovations in government management can occur through regulations whose enacting process should not be complicated. All these efforts may be accompanied by seeking the physical and active presence of delegations or agencies of the Intellectual Property Registry itself or the Public Prosecutor's Office at border posts. The judicial agency, for its part, could enable specific courts to hear requests for border measures, with duly trained courts in the field. This would allow complaints to be received and acted upon immediately, or to provide useful information to customs employees to take actions. There are countries that have made progress in this regard with whom Guatemala maintains trade relations, such as the case of the Dominican Republic and that even, within the context of DR-CAFTA, could generate the respective collaborative tools that would allow us to improve our border action system, through the support of nearby countries that are willing to support us. The DRT Alliance can play a very important role in this regard, due to its members global presence. There are also international organizations, such as the International Chamber of Commerce - ICC, the International Trademark Association (INTA), and the American Bilateral Chambers of Commerce (AMCHAMS), through their specialized committees or units, that can provide valuable resources to guide us in the process or way to implement innovative actions to improve our border systems, which would not entail significant resources from governmental agencies.

Counterfeiting can be fought willingly, making the best use of our current legislation. If we stop counterfeiting at the country's entry points, we avoid incurring in more complex actions to stop the marketing of counterfeit products that have already entered the country. When products are brought in, in the vast majority, they become part of a distribution and sales chain that can be much more complicated to counteract. It may be more costly for the country, therefore, not having effective border measures.

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