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SMUGGLING AND COUNTERFEITING

A Re-look at Strategies



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SMUGGLING AND COUNTERFEITING

A Re-look at Strategies

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1.1 Introduction:

1.1.1 As the world, grapples with a host of problems, ranging from inflation and recessions to war and violence, the menace of smuggling and counterfeiting lurks in the underbelly of the economy, often undetected but continuously eroding a substantial portion of the legitimate business of its victims and imposing an enormous economic and social cost on the citizens.

1.1.2 The recent high-profile cases detected by the enforcement agencies in India may have given us a moment to cheer but they have also raised uncomfortable questions about the proliferation of attempts to smuggle, not only life-threatening contrabands but also a wide range of products. Perhaps, it is also pertinent to realistically evaluate the success rate of such detections and also to comprehensively review the tools at our disposal for addressing the unique modus operandi adopted by smugglers and fraudsters. Before dwelling on the landscape of these economic offenses, it appears imperative to glance through some of the recent cases detected.

1.2 Recent cases of smuggling:

1.2.1 As recently as in the second week of October 2022, the smuggling of a highly valued consignment of bejeweled watches was thwarted at the Delhi Airport. The watches were studded with rare jewelry and were in excess of Rs 28 crores³. Such luxury items attract a Customs duty of 10 percent and an IGST of 18 percent. GST for domestic sales is 28 percent. Apart from the tax revenue loss such flagrant instances of smuggling of goods in commercial quantities also disrupt the domestic economy by vitiating the level playing field and are responsible for the creation of black money. Even a small amount of black money through a multiplier effect would become the source of multiple layers of black money, making inroads in multiple sectors. Such streams of finances flowing into various anti-national and anti-social activities also, cannot be ruled out. Another example from the same week pertains to a case booked by the Directorate of Revenue Intelligence. They intercepted a consignment of fruits from South Africa which was being used for secreting over 50 kilos of high-quality cocaine valued at more than Rs 502 crores in the grey market. Even more glaringly a passenger arrived at Mumbai International airport with 16 kgs of heroin in personal baggage, worth more than Rs 100 crores.⁴

1.2.2 ⁵The scale of attempted drug smuggling witnessed in recent times is unnerving for even the most seasoned enforcement officer. The major cases during the year 2021 included the seizure of around 3000 kg of heroin from Mundra port, 300 kg of heroin from

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³ Customs find 7 wristwatches on passenger, the most expensive valued at ₹27 cr, Hindustan Times, October, 6, 2022

⁴ Livemint, 8th October, 2022

⁵ Mid Sea Drug Bust: DRI & ICG interdict 218 kg Heroin, PIB, 20 May, 2022

Nhava Sheva, and 300 kg of cocaine from Tuticorin. And during the year 2022, the DRI seized 52 kg of Cocaine at Mundra Port, 205 kg of Heroin from Kandla Port, and 396 kg of Heroin at Pipavav Port. The huge seizures made during the last few years could be appreciated when as part of the iconic week of AKAM celebrations, the Ministry of Finance conducted a drug destruction day virtually. A total of around 44,000 kg of narcotics were destroyed at 14 locations across the country in a safe and non-hazardous manner through incineration approved by the State Pollution Control Boards.⁶

1.2.3 In a press release issued in this regard it was noted that the emerging trend of use of containers for the smuggling of large quantities of narcotics is worrying. The content of such containers is mis-declared by the traffickers to evade suspicion. The seizures made by Indian Customs also revealed that courier and postal cargo have emerged as the most favourite modes of drug smuggling. The ingenious concealment of drugs by traffickers poses a major challenge. Further, the use of the internet and cryptocurrencies make the tracking of financial trail extremely difficult. Besides, the long land border in the North Eastern region poses another major challenge, and this region witnesses the smuggling of synthetic drugs in large quantities.

1.2.4 Smuggling has impacted a wide range of sectors. Some of the goods and entities popular with smugglers are Gold, Foreign currency, Narcotic drugs, Electronic items, Fabric/Silk yarns, Diamonds, Indian currency, Watches/parts, Machinery, Vehicles/Vessels/Aircraft, Fake Indian currency, Wildlife, Tobacco products, etc.

1.3 Counterfeit and fake products:

1.3.1 Another area of utmost concern is the issue of counterfeiting and fake products. There is ample evidence to suggest the pervasiveness of fakes, counterfeits, and substandard components in the value chain of almost all goods. They not only create health hazards but also bring a bad name for the country's products on the world stage. The very recent case of a dengue patient being administered "fruit juice" instead of blood platelets in a private hospital in UP is a case not to be taken lightly.

1.3.2 The issue has been taken cognizance by the judiciary also in multiple judgments. In a recent judgement, in a matter of Sirona Hygiene Private Limited vs Parulben Navnath Chothani ... on 25 April, 2022 the Hon'ble High Court of Delhi noted as follows,

The Court has noticed in a number of cases that e-commerce platforms are being used for selling counterfeit and knockoff products. The present is a classic example of the same. The products of the Plaintiff are feminine hygiene products where the highest quality is expected to be adhered to. Under such circumstances the sale of counterfeit "SIRONA" or "SIROMA" branded products in identical containers, color combination would be nothing but a complete rip off for the consumers who may be purchasing these products under the impression that they originate from the Plaintiff. The Court has perused various website printouts from Meesho.com, Snapdeal.com and Amazon.in. It is noticed by the Court that the Plaintiff's products and the counterfeit "SIRONA" and "SIROMA" products are being promoted, offered for sale on the said platforms side by side. One such screenshot from the website Amazon.in is set out below:

⁶ Union Finance Minister Smt. Nirmala Sitharaman virtually witness destruction of drugs held at 6 sites, PIB, 8 June, 2022

1.3.3 It is often seen that fakes proliferating in the markets have been pushed into the market without much fear of legal consequences as in most occasions, on detection, the suppliers are often found to also be fake! Fakes with exact same brand name and same packaging are also being offered to gullible customers. Even food products are not insulated, as cases of adulteration and related medical catastrophes have also hogged headlines in the past, tarnishing the image of the Country.

1.3.4 It is pertinent to note that a report widely publicized, namely, '2020 Review of Notorious Markets for Counterfeiting and Piracy', issued by the Office of the US Trade Representative noted that four Indian marketplaces, including an e-Commerce site, are among a list of notorious markets for the sale of pirated and counterfeit goods. Although India aptly responded to the report in the Parliament, dated 12th February 2021⁷, that although the Government of India is under no obligation to take action on such reports, several initiatives have been taken up for strengthening enforcement against counterfeiting and for creating strong legal deterrence, *it may be an opportune time to look at the issue holistically.*

1.3.5 From the above it is evident that the problems of smuggling and counterfeiting are global in nature and are extremely grave and pervasive. The Government has not only recognized the gravity of the offenses but has also initiated steps to mitigate them. But given the spate of offenses in recent times its imperative to take stock of the countermeasures and also to have an open mind to incorporating novel strategies of identifying all the stakeholders, laying a comprehensive enforcement net, dispensing speedy justice, and integrating a coordinated response of all the stakeholders to minimize the menace of smuggling and counterfeiting, if not eradicating it completely.

2.1 Definition of Smuggling:

2.1.1 The World Customs Organization (WCO)⁸ has defined smuggling as,

“Customs offence consisting in the movement of goods across a Customs frontier in any clandestine manner, thereby evading Customs control.”

2.1.2 In the Indian context, the Customs Act, 1962 has provided for an ***inclusive definition*** of the term smuggling. Smuggling has been defined as

“any act or omission which will render such goods liable for confiscation under Sections 111 or 113 of the said Act”.

2.1.3 The provisions of the Customs Act, 1962 provide for confiscation of goods in the following conditions,

- a) imported/exported illegally or without following proper procedure as laid down,
- b) attempted to import/export illegally,
- c) goods that are misdeclared
- d) goods that are brought into the country in concealment
- e) goods that are prohibited under various laws

⁷ UNSTARRED QUESTION NO. 1353, Rajya Sabha, 12th February, 2021

⁸ <http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/facilitation/instruments-and-tools/tools/glossary-of-international-customs-terms/glossary-of-international-customs-terms.pdf?db=web>

- f) goods used to conceal smuggled goods;
- g) conveyances used for the carriage of smuggled goods;
- h) sale proceeds of smuggled goods;
- i) goods that are attempted to be exported/imported in contravention of any law

2.1.4 It is pertinent to note that the definition of smuggling in the Customs Act, of 1962 covers “goods” also defined in the same Act to mean the following,

"goods" includes –

- (a) vessels, aircrafts and vehicles;
- (b) stores;
- (c) baggage;
- (d) currency and negotiable instruments; and
- (e) any other kind of movable property;

2.1.5 However, the trafficking of human beings which is also a large-scale organized racket across the globe is covered under IPC under Section 370. Similarly, the smuggling of animals is covered under the Wildlife Protection Act, 1972, Prevention of Cruelty to Animals Act, 1960, etc.

2.2 Definition of Counterfeit goods:

2.2.1 It is also pertinent to understand the meaning of counterfeiting in the Indian legal context. **Counterfeit** is defined under Section 28, IPC as,

A person is said to "counterfeit" who causes one thing to resemble another thing, intending by means of that resemblance to practise deception, or knowing it to be likely that deception will thereby be practised.

1 Explanation 1.—It is not essential to counterfeiting that the imitation should be exact.

Explanation 2.—When a person causes one thing to resemble another thing, and the resemblance is such that a person might be deceived thereby, it shall be presumed, until the contrary is proved, that the person so causing the one thing to resemble the other thing intended by means of that resemblance to practise deception or knew it to be likely that deception would thereby be practised.

2.3 Other statutes:

2.3.1 Some other statutory provisions in India which are also attracted in cases relating to smuggling and counterfeiting are as follows,

- i. The Wildlife Protection Act,
- ii. Food Safety and Standards Act,
- iii. The Drugs and Cosmetics Act,
- iv. NDPS Act,
- v. Arms Act,
- vi. WMD Act,
- vii. Foreign Trade (Development and Regulation) Act,
- viii. The Antiquities and Art Treasures Act,
- ix. FEMA,
- x. SEZ Act, etc.

2.3.2 Additionally it may be noted that the Foreign Trade (Development and Regulation) Act, 1992 (FTDR) is the key statute providing for restriction/prohibition of import/ export of goods in order to protect local industry or agriculture or to promote domestic trade and commerce.

3.1 Smuggling: A genesis

3.1.1 Smuggling would feature among the oldest economic crimes in human history. The genesis of smuggling would coincide with the origin of organized trade and commerce. Similarly, the organization responsible for the collection of taxes for incoming and outgoing cargo from a country has also been historically responsible for addressing the concerns of smuggling.

3.1.2 In 13th-century England, wool smuggling became rampant soon after King Edward I created a national customs organization to collect duties on traded goods (Williams 1959). John Jacob Astor became America's first multi-millionaire and made his fortune smuggling illicit alcohol, violating America's first alcohol prohibition in the early 1800s (Andreas 2013). An empirical study of trade and related crimes has shown that prohibition and restriction on certain forms of trade often create economic incentives and opportunities for illicit trade activity and smuggling.⁹

3.1.3 Criminal entrepreneurs involved in illicit trade are opportunistic by nature and seek to exploit market and regulatory arbitrage opportunities for economic gain. Cross-border smuggling is a logistics-intensive process that can be viewed as a core competency for transnational criminal organizations involved in illicit trade activities (Basu 2013).

3.2 Border enforcement tries to balance facilitation of trade and enforcement:

3.2.1 Is it a hypothesis worth researching that the biggest challenge to completely eradicate illicit trade or smuggling pertains to the arduous task of the border regulators to maintain a fine balance between facilitation and expeditious clearance of genuine trade? It is, without doubt, a reality that, border management has moved away from a "hundred percent" physical examination to an assessment by risk management on the basis of data analytics and Artificial Intelligence. Most times reliance is placed on parameters of risk management, an elaborate intelligence network, profiling etc. But, it is worth examining whether this process has both high errors of exclusion as well as inclusion. This may be necessary because of the high number of detection of goods attempted to be smuggled.

3.2.2 It is seen that modern-day smugglers use novel, flexible, stealthy logistics methods, assets, and systems to smuggle illegal goods across national borders in order to avoid the risk of detection and apprehension. From a policy perspective, illicit trade tests the governance structures that regulate the global economy. Policymakers often underestimate how flexible, innovative and influential transnational criminal organizations have become.

⁹ Combating illicit trade and transnational smuggling: key challenges for customs and border control agencies, Gautam Basu, World Customs Journal

3.3 Illicit Trade report of World Customs Organization:

3.3.1 The World Customs Organization issues an annual report on Illicit Trade which collates data from member nations and provides a holistic view of trends on illicit trade witnessed and the preemptive measures taken by countries.

3.3.2 In the Illicit Trade Report of 2019 published in 2020¹⁰, the following broad areas have been highlighted as areas of concern. At the level of individual nations, the importance of separate sectors may be different.

- i. The important sectors affected by illicit trade are the following, *cultural heritage, Drugs, Environment, IPR health and safety, Revenue losing sectors, and Security related.*
- ii. In 2019, the WCO CEN recorded 227 cases involving the trafficking of cultural objects, comprised of 271 seizures, from 34 countries. 19 new countries reported cases in 2019 compared to 2018, including Chile, Peru, Afghanistan and Cuba. Customs officers identified and recovered 9,399 artefacts in 2019, a 59.5% decrease from the 22,462 artefacts recovered in 2018.
- iii. In 2019, 119 countries reported 36,264 drug trafficking cases made up of 40,017 individual seizures. The United States reported the most (47.8%) cases in 2019, submitting 17,369 cases. Drug seizures submitted to the WCO CEN are split into six broad categories: cannabis, cocaine, khat, new psychoactive substances (NPS), psychotropic substances, and opiates. 77 percent of the seizures involved Psychotropic substances (37.9 %), Cannabis (25.4 %) and Cocaine (15%). Across all countries, 74.5% of seizures occurred at import, 12% at export, 7.1% in transit and 6.2% internally.
- iv. Environmental crime is mainly trans-boundary, which places Customs at the centre of the mitigation effort. In 2019, 60 Customs administrations reported to the CEN 3,045 cases of environmental product trafficking. These cases account for 3,884 individual seizures of flora, fauna and waste. The trade in illicit environmental products reported to the CEN included 336 unique types of flora and fauna in 2019.
- v. In 2019, 50 countries reported 20,956 cases of IPR products trafficking to the WCO. These cases were made up of 37,615 distinct seizures of 47,563,639 pieces of IPR products weighing over 950,000 kilograms.
- vi. Reported cases and seizures of medical products trafficking increased from 2018 to 2019. The 7,247 cases reported by 59 countries in 2019 marked a 40.1% increase from the 5,172 cases reported by 70 countries in 2018.
- vii. The world of counterfeits is myriad and complex. Hong Kong launched Operation Skylark to unearth counterfeit in the music world. In November 2019, Hong Kong Customs conducted a three-day operation codenamed Skylark throughout the city against the use of infringing songs in karaoke systems by party room operators in their course of business.

¹⁰ <http://www.wcoomd.org/en/topics/enforcement-and-compliance/resources/publications.aspx>

- viii. Most conveyance methods were used to move multiple categories of illicit IPR products. Mail seizures, for example, were most often of accessories (22.1% of all mail seizures), toiletries/cosmetics (15.9%) and footwear (14.1%), while air seizures were 20.6% accessories, 16.2% toiletries/cosmetics, 12.5% clothing and 12.1% textiles other than clothing. Vessel seizures were most frequently of textiles other than clothing (20.9% of vessel seizures), vehicle seizures most frequently of clothing (28.2%), train seizures and pedestrian seizures most frequently of toiletries/cosmetics (22.2% and 29.1%, respectively).
- ix. Revenue risks in the Customs context include leakage through the smuggling of highly taxed goods. They also include commercial fraud activities such as undervaluation, misuse of origin and preferential duties, misclassification and drawback fraud. Excise duties are taxes on the sale or use of specific products and they are often imposed in order to limit or reduce the consumption of such products. Products subject to excise duties or taxes may vary from jurisdiction to jurisdiction, but in general **alcohol, tobacco and energy products (mineral oil and fuel)** are the main categories usually subject to these taxes.
- x. In 2019, 86 countries reported 26,285 cases comprised of 32,426 seizures of smuggled alcohol products, cigarettes, and other tobacco products.

4.1 Landscape of smuggling in India:

4.1.1 India has been plagued by the scourge of smuggling for a very long time. A huge populace, porous borders, insufficient enforcement apparatus, and a perceived lack of coordination among different agencies have led to multiple instances of apprehension of attempts of smuggling. Gold, Drugs, electronic goods, and foreign currency remain the main items smuggled. Data on the value of cases booked with respect to various goods smuggled are given below. The Directorate of Revenue Intelligence is the premier intelligence agency responsible for counter-smuggling operations.

4.1.2 The nature of items commonly smuggled is given in the list below.¹¹

Table 1

Sl. No.	Commodity	2017-18		2018-19		2019-20	
		All India	DRI	All India	DRI	All India	DRI
I	Gold	974	410.14	1,264.36	457.46	1,361.20	466.97
II	Foreign Currency	89.67	31.08	163.83	51.81	513.30	31.40
III	Narcotic Drugs	266.9	223.59	484.30	369.84	4,551.39	1,265.24
IV	Electronic Items	25.48	3.69	58.86	9.49	19.50	6.51

¹¹ https://dri.nic.in/writereaddata/dri_report_dat_1_12_20.pdf, Smuggling in India Report, 2019-20

Sl. No.	Commodity	2017-18		2018-19		2019-20	
		All India	DRI	All India	DRI	All India	DRI
V	Fabrics/ Silk Yarn etc.	524.58	406.81	121.84	5.53	165.53	0.06
VI	Diamonds	11.39	0.32	28.94	14.74	223.58	1.28
VII	Indian Currency	4.77	2.07	28.01	24.08	24.33	15.14
VIII	Watches / Parts	2.63	0.75	9.66	3.58	1.37	-
IX	Machinery / Parts	21.35	18.91	20.45	17.90	64.10	49.79
X	Veh. / Vess. / Air-crafts	23.88	5.19	27.03	10.48	55.80	15.67
XI	Indian Fake Currency	0.77	0.69	0.99	0.53	0.62	0.28

Source: Smuggling In India Report, 2019-20, DRI

4.2 A gold proclivity?

4.2.1 As per a report of DRI in FY 2019-20, 120 tonnes of gold were smuggled into India, which was about 15% to 17% of the nation's annual demand, according to the World Gold Council.

4.2.2 As a matter of fact, the economic reforms of the 1990s witnessed the repeal of the Gold (Control) Act, of 1968 that had prohibited the import of gold except for jewelry. The erstwhile statute led to the emergence of a notorious network of gold smugglers during the 1970s and 1980s. The economic reforms and liberalization led to the imposition of a modest specific duty of Rs 300 on 10 grams in 2011-12 (increased from Rs 200 in 2010-11) on the imported yellow metal, bringing gold smuggling almost to a grinding halt. Below is a chart depicting gold seizure by Indian Customs in terms of value and quantity from 2015-16 to 2018-19

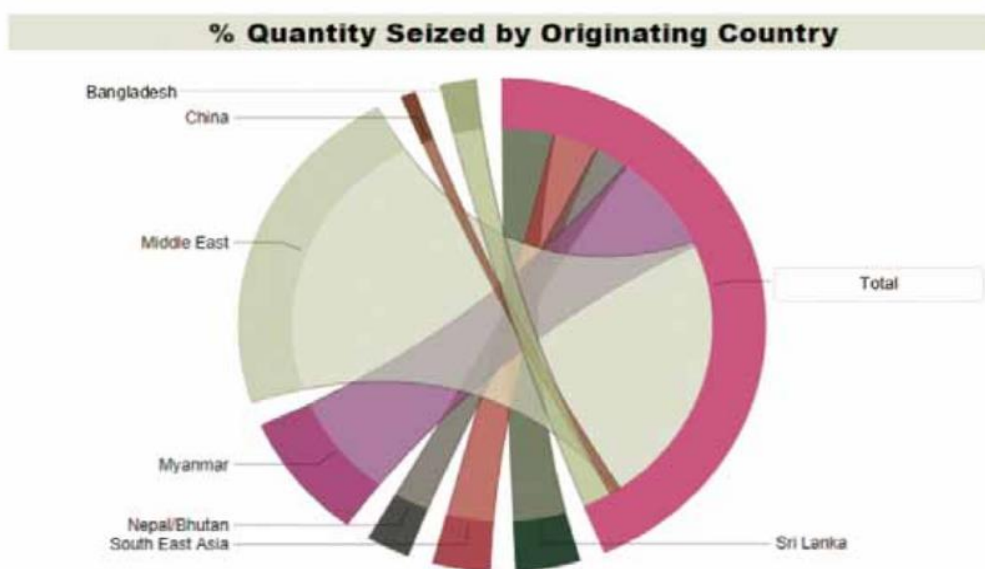
Chart 1



Source: Smuggling In India Report, 2019-20, DRI

4.2.3 According to the study conducted by IMPACT, most of the gold enters India through the UAE, which accounts for 75 percent of all the entries. The UAE, in turn, is the most favored destination for the duty rate was enhanced in 2013, essentially to rein in the spiraling current account deficits, when the rate was shifted from specific to ad valorem, and within a span of two months, the duty on gold increased nearly four-fold to 4 percent. At present, the import of gold attracts a Customs duty of 12.5 percent, GST of 3 percent, and an additional GST of 5 percent on the making of gold ornaments. Needless to say, the increase in the incidence of duty on imported gold, has incentivized the smuggling of the yellow metal.

Chord Diagram depicting the origin of gold intercepted by DRI in 2018-19 (By number of cases)



Source: Smuggling In India Report, 2019-20, DRI

4.2.4 Some estimates suggest that there is an illicit margin in excess of Rs 3 lakh per kg of smuggled gold. With the price of gold going past the mark of Rs 50,000 for 10 grams, the illicit trade has become all the more profitable. the illicit ASGM (Artisanal and Small-scale Gold Mining) gold coming from the conflict-prone Great Lake Region (ICGLR countries) of east and central Africa.

4.3 Is drugs the new gold?

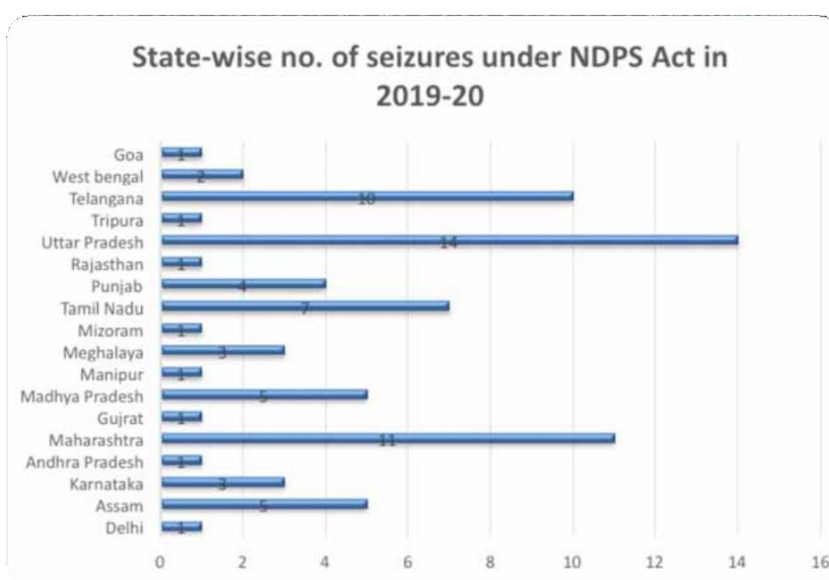
4.3.1 Another commodity that has given sleepless nights to policymakers and enforcement agencies is the smuggling of drugs. India for its vast landmass, vast population, and complex transport systems has emerged as not only a destination but also a transit point for drugs. Huge caches of drugs have been apprehended based on meticulous intelligence. But the quantum of seizures has raised a very uncomfortable question, What is the quantity that may have escaped detection, and how complex is the financial and criminal syndicate which is managing the entire supply chain?

4.3.2 As reported by DRI, there has been a significant increase in the global supply of drugs sourced from organic sources like Opium, Cannabis, and Cocaine as well as that sourced from synthetic sources. As a matter of fact, continuing innovation in the field of chemistry has led to more psychoactive substances being made available to circumvent

restrictions on controlled substances, as also reflected in the growing list of chemicals being put in the list of controlled substances over the years. Still many precursor chemicals and their variants are currently outside the international control regime of drug law enforcement. The demand for synthetic drugs in not-so-poor urban areas is also increasing as the consumption of certain drugs is labeled ‘recreational drugs’ by their consumers and suppliers to make it appear less serious crime. It can be logically inferred that India, with its vibrant chemical industry, continues to be at risk of becoming a source of synthetic drugs and psychoactive substances including precursors. A number of organized drug syndicates continue to make attempts to use this large industrial base and the technical expertise available in India.

4.3.3 It is imperative, therefore, for drug law enforcement agencies to keep abreast with changing trends in the illicit drug trade, and emerging patterns of substance abuse.

Chart 3: State wise seizures of Drugs



Source: Smuggling In India Report, 2019-20, DRI

Name of NDPS Substance	2019-20		2018-19	
	Quantity(Kgs)	No. of Cases	Quantity (Kgs)	No. of Cases
Alprazolam, Zolpidem	130	2	40 Kgs	2
Charas	68.114	2	339.42	3
Cocaine	1.108	2		
Ganja	34796.67	46	41239	49
Metamphetamine	142.96	5	125.66	6
Heroin	9.169	5	7.98	5
Mephedrone	57.69	2	12.33	2
Hashish	4.88	3	1.45	2
Opium	4008.751	2	1.93	1

Name of NDPS Substance	2019-20		2018-19	
	Quantity(Kgs)	No. of Cases	Quantity (Kgs)	No. of Cases
Ephedrine	549.79	2		
Tramadol	22.69	1	2766.74	2
Codeine			24500 Nos.	1
Ketamine			562.6	2
Khat Leaves			332.11	2
Methaqualone			34.69	2

Source: Smuggling In India Report, 2019-20, DRI

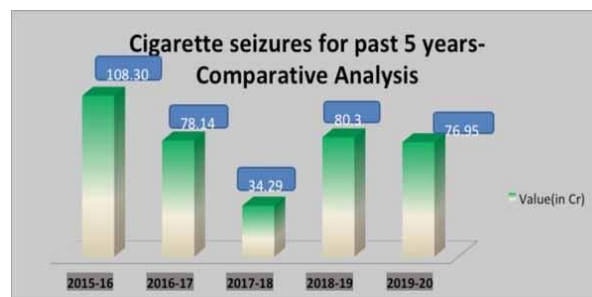
4.4 Smuggling of strategic and dual-use goods on the rise or is India a transit point?

4.4.1 Another area that is also prone to smuggling is the Strategic Trade Control goods which directly impinges on national security. Strategic Trade Control Enforcement refers to enforcing licensing provisions in the trade of strategic goods like WMDs or dual-use goods which have both military and civilian applications. Dual-use goods in the Indian context refer to goods that are part of the SCOMET (Special Chemicals, Organisms, Materials, Equipment, and Technology) list notified by DGFT and are subject to licensing regulation. India is a signatory of three of the four major export control regimes viz. Wassenaar Arrangement, Missile Technology Control Regime (MTCR) and the Australia Group and a responsible member of the International community, it is therefore imperative to make all possible efforts to ensure that its borders and trade are not used for proliferation and illegal trade in dual-use goods and technologies.

4.4.2 In the wake of this it may be noted that India has become a preferred trading route in the global supply chain leading to requirements for an extra vigil in goods transiting through Indian airports and sea ports. This became evident from two instances related to the enforcement of strategic trade controls detected by DRI and Indian Customs in 2019-20, *wherein substances and equipment controlled under the SCOMET List were being transported between two foreign countries, with India being used as a transit point.*

4.5 Smuggling of Tobacco products:

4.5.1 Another commodity that is widely smuggled is cigarettes. The huge duty incidence is the single most important reason for the smuggling of cigarettes. As a matter of fact, cigarette smuggling was one of the epicenters of the huge IGST refunds witnessed after the inception of GST. The common modus was the export of counterfeit cigarettes to non-descript destinations and the original cigarettes were diverted into the open market through several layers of dealers. Eventually, IGST refunds were issued, and when investigations started the exports were found to be mostly fly by night and the dealers were out rightly fake.



Source: Smuggling In India Report, 2019-20, DRI

4.5.2 The diversity of India poses a serious challenge to countering the menace of smuggling. As a matter of fact, India’s 15,106.7 km land border and 7516.6 km coastline have not only interested cartographers and explorers because of its sheer topographical diversity but have also encouraged unscrupulous elements to try and hoodwink the enforcement agencies. The above factor is acutely visible in the North East Region (NER) of India which comprises 8 states sharing approximately 99 percent of their borders with neighboring countries of Bangladesh, Nepal, Myanmar, China, and Bhutan. The NER is connected to the rest of the country only through the Siliguri corridor popularly known as the “Chicken’s neck”. Mostly known for its strategic importance, this corridor today is a hot spot for cross-border smuggling due to its proximate borders with Bangladesh, Bhutan, and Nepal. The NER shares a unique topography marked by rivers, dense forests, and hilly terrains with altitudes ranging from near sea-level to over 7,000 metres above MSL, which renders the porous borders vulnerable to several external and internal threats including insurgency, cross border smuggling and infiltration. In 2019- 20, DRI had effected 120 seizures of gold, narcotics, cigarettes, etc valued at Rs.246 Crores which were smuggled through the NER.

4.6 India’s wildlife is perennially threatened!

4.6.1 Smuggling of wildlife is also another area of grave concern. As per the World Customs Organization, poaching of elephants, rhinoceros, pangolins, tortoises, turtles, birds, and other wild fauna has been rising for the past sixteen years. A large part of this trade is meant for the international market. Seizure data show that most enforcement activities to combat international wildlife trafficking take place at ports of entry, rather than in domestic markets, and thus the Customs forms the front line of enforcement in many parts of the world.

4.6.3 Another form of smuggling is by way of misdeclarations to benefit from export/import-related schemes or to manage to pay a lower level of duty.

The export and import frauds can be broadly categorized as follows

1	Overvaluation of and undervaluation of goods
2	Misdeclaration and Misclassification
3	Misuse of IGST refund scheme
4	Misuse of Export Promotion Schemes – MEIS, SEIS, EPCG, Advance Authorisation, EOU/SEZ/EPZ, Drawback. Evasion of anti-dumping duty, safeguard duty Evasion of countervailing duty/IGST

4.7 How pervasive are counterfeiting and fake products?

4.7.1 If there's one thing that we know about the trade of counterfeit and pirated goods, it is that it continues to increase alarmingly.

4.7.2 The Organization for Economic Cooperation and Development (OECD) and the EUIPO jointly published a 2019 report, namely, "Illicit trade: trends in trade in counterfeit and pirated goods",¹² based on 2016 world seizure data of counterfeit and pirated goods that attempt to measure the scale of the problem. Based on their findings,

the international trade in counterfeit and pirated products could have amounted to as much as \$509 billion in 2016, estimated to be 3.3% of world trade – up from \$461 billion in 2013, representing 2.5% of world trade.

What is so significant about the growth in these numbers is that it occurred during a relative slowdown in overall world trade – the numbers are based only on global customs seizures and do not include counterfeit goods that were not seized. In addition, these amounts do not include domestically produced and consumed counterfeit goods, or pirated digital products distributed online.

4.7.3 Counterfeit components and parts continue to create health and safety risks that affect a wide range of industries. In the pharmaceutical industry, counterfeit products can cause huge damage to health and well-being. Within the pharmaceutical supply chain, from the initial raw materials to manufacturing and distribution, plenty of opportunities exist for providing fake or mislabelled materials and ingredients, leading to possibilities for creating counterfeit products.

4.7.4 In the automobile industry, the amount of counterfeit vehicle parts available is on the rise, as reported by the EUIPO in its 2018 report "The economic cost of IPR infringement in the tyres and batteries sectors". The report estimates that more than €2 billion is lost every year due to counterfeit tyres and batteries alone. The most common counterfeited vehicle parts worldwide include filters, brake pads, lights, wheel rims, and airbags.

4.7.5 Transnational criminal organizations continue to take advantage of the low-risk, high-reward of counterfeiting crimes. These organizations use their counterfeiting profits to expand their business into other related crimes, such as the smuggling of other contraband, money laundering, tax evasion, and corruption of government officials. In addition, e-commerce and social media sites have allowed a number of small retail counterfeiters without links to larger organizations to proliferate.

4.8 Counterfeiting in India and court cases:

4.8.1 The vast landmass and market of India have led to the proliferation of counterfeit brands across many sectors. These counterfeits not only impact the genuine businesses of the brands but also cause a dent in the revenue of the Government. The important functions performed while developing a counterfeit brand are false labeling, illegal usage of a trademark, charging a higher price, and the use of substandard parts to make a real brand.

¹² https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/trends_in_trade_in_counterfeit_and_pirated_goods/trends_in_trade_in_counterfeit_and_pirated_goods_en.pdf

4.8.2 There is a huge transaction cost related to fake products, one of which is an avoidable litigation cost. Some Court cases pertaining to counterfeiting products are as follows,

- i. Skechers: The US based sports footwear brand Skecher has filed a case in the Delhi high court against online retailing company “Flipkart” and four other online companies including Retail Net, Tech Connect, Unichem Logistics and Marco Wagon (Malviya, 2017). The Skechers with the permission of court-appointed official and raided stores of manufacturers of fake products in Delhi and Ahmadabad. In an official raid about 15,000 pairs of fake Skechers shoes were taken into custody. On the basis of evidence produced in court, the court fined monetary punishment on all those companies (Malviya, 2017).
- ii. Hawkins Cooker: A case was filed by Hawkins Cookers Ltd on Rakesh Kumar, Mukesh Kumar and Others in the court that the defendant were selling pressure cooker parts with “Hawkins” stamped on them. The court decided that this is a case of piracy, and said that this is the height of trademark act breaching. The court punished by fining and sending Rakesh Kumar to jail.
- iii. Hero Honda: This is a case between Hero Honda Motors Ltd and Shree Assuramji Scooters. The counterfeit Manufacturer Shree Assuramji Scooters were producing bike accessories and repairing items like bearing, clutches, breaks and was using name and trade mark of HERO HONDA. This illegal production of parts and accessories caused a huge monetary loss to the company and also devaluated the brand image (Warrier, 2017).
- iv. Adobe Systems Inc: Adobe Systems, Inc. filed a case in Delhi High Court against the counterfeit product producer Mr. Mahindra Saxena another ser. They were the selling pirated software and were using the trademark of the authorized software company to have huge profit (Warrier, 2017).
- v. Microsoft Corporation: This is case filed by Microsoft Corporation against Ms. Kiran and others in the Delhi High Court (Warrier, 2017). Microsoft claimed that the producer of counterfeit products have tried to counterfeit their brand and pushed it in the grey market. The defendants have no right to use this trade mark and trade name. This is not only the matter of breaching the Microsoft company trademarks or symbol but also a confirm case of counterfeiting and piracy of their products. It has not only caused the loss of income to the authorized Microsoft but also has also destroyed the image in the market through substandard product to the consumer. Hearing the case, the court punished the accused through the monitory punishment and ordered to recompense the loss caused to victim.
- vi. Lacoste: La Chemise Lacoste filed a case against R.H. Garments and Others company. On the basis o evidences, the court found that other companies are using their trademark LACOSTE, CHEMISE LACOSTE and their symbol CROCODILE without the permission of authorized brand owner. The court said that illegal manufacturing and selling of La Chemise Lacoste products, the brand image of genuine company is harmed and company has also suffered the financial loss (Warrier, 2017). The court ordered R H Garments to recompense the financial loss to La Chemise Lacoste and also said that the financial compensation is not suffecient to compensate the loss of brand image.

- vii. Chupchapplelo.com: The IT monitoring of Government agency found that an e-retail company chupchapplelo.com was selling the fake products of some international brands of apparel, footwear, accessories and perfumes of best lifestyle companies. The online e-retailer was selling international brands surreptitiously. The agencies confirmed that the brand sold on this website was infringing the trademark right of all those international brand (Khandelwal, 2017). After all legal procedure, a joint action was taken against the e-retail company chupchapplelo.com. Court in its decision said that online selling of counterfeit brands is damaging the reputation of the real brand in Indian and overseas market both. The court ordered to prevent such infringing activities under the IPR legislations in India. A Local Commissioner was appointed through court to watch over the search and seizure of the infringing goods (Khandelwal, 2017)

4.9 Sectors affected by Counterfeit products:

4.9.1 Market of Counterfeit Products captured by different Sectors¹³

- a) Drugs: According to some estimations of government agencies, there are 25% of drugs which are produced in India are fake, bogus and of inferior quality (Khan and Khar, 2015). As per the global counterfeit goods ranking, counterfeited drugs are at the top of the list with a market value of \$ 200 billion. India is a leading manufacturer and exporter of high-quality generic & patent drugs in the world. The European commission released TAXUD statistics shows that 75% of pirated drugs supplied in the world are from India. The estimation of all counterfeit and fake drugs producing and selling in India is 12 to 25 % (PSM 2013). India have high number of counterfeit and fake drugs manufacturer but also is a largest market counterfeit drugs trading (Verma, et al., 2014).
- b) Movies & Music: The famous “Bollywood” film industry of India is the largest producer of films in the world. Content theft or piracy in the film industry originates from „cam-cording“ in cinema halls. It is very common and known in every city, town and villages that pirated CD’s of Bollywood films and Music are rented and sold under the influencing shadow. The film Industry suffers losses around Rs 18000 crore (\$2.7 billion) and looses 60,000 jobs every year due to piracy of the original CD’s. According to KPMG-FICCI report on Indian media, the film Industry of India is expected to generate income Rs 226.3 billion by 2020 showing the growth of 10.5% per annum (Subramanian R, (2015) and piracy will also grow exponentially. To fight piracy, producers have started releasing the movies online within few days of its release with a hope that the low cost of high quality prints would attract people to buy the movies online.
- c) Software: The market of pirated software is next to the market of fake drugs. The market of pirated software in the world is of \$58.8 billion. The Nehru place in New Delhi is a centre of pirated software, where every next shop is engaged in developing and trading of pirated software. There are 1500 shops and retailers who are managing wide range of personal computer fake accessories and programming system at Nehru Place (Raj Y, 2013). The pirated market of India i.e., Nehru Place was announced as the „world’s largest market of pirated software“ by USTR.

¹³ A STUDY ON COUNTERFEIT BRANDS, CONSUMER ATTITUDE AND INITIATIVES TO STOP COUNTERFEITING IN INDIA, Ashok Kumar patel & Anurag Singh, AD VALOREM - Journal of Law: Volume 5: Issue II: April - June 2018: ISSN : 2348-5485

Earlier the pirated software market in India was of \$2.90 billion, now this market has reduced down to \$2.68 billion in 2015 (Phadnis 2016).

- d) Books: The rank of pirated books in the international fake product market is at 23rd with the estimated market value of \$600 million. There are many methods used by grey market to produce forged books in India. The pirating of trade titles, illegal photocopying of original book, illegal scanning of books and hosting the illegal copies on the website by the students are few of the methods. The reports of Confederation of Indian Industry (2011-2012) on the theme „Socio-Economic Impact of Piracy in Indian Market“, states that near about 20% books sold in market are pirated (Mohanty, 2014). Another report of Havoscope, states that the book publishers in India faced the loss of \$387,000 in 2011 only due to book piracy (Holistic, 2017).
- e) Automobiles: The auto market in India recorded the growth of 11% in the financial year 2014 to 2015, i.e., additional income of Rs 2340 billion. Usage of counterfeit auto parts in vehicles causes a great risk to the lives of vehicle driver and passengers. The 20% of road accident happens due to usage of counterfeit and fake auto parts. Counterfeit auto parts also reduce performance in terms of smooth operations and durability. The demand for counterfeit or fake auto parts is very high in India because of 20-30% less price than the original (Salomi V, 2013). Due to manufacturing of the counterfeit or fake products, the loss caused to the government of India was Rs 3,113 Cr and the losses to the industry was Rs 10,501 Cr in 2014 (Chauhan, 2016).

5.1 A Way forward for countering smuggling and counterfeiting: Understanding the economics of smuggling:

5.1.1 Countering internal demand:

- i. Smuggling thrives on the internal demand for smuggled goods. Other than pecuniary gains smuggled goods like drugs are addictive in nature and their demand from the users is self-sustaining. Besides, every important city has markets that cater to cheap electronics. Such markets thrive on smuggled goods. Given the internal domestic demand for such goods, it's important to regulate places that can be breeding grounds for the proliferation of such illegal goods. Most of the time jurisdiction dichotomies between enforcement agencies may discourage active surveillance of such places. For countering the spread of such markets it may be worthwhile to constitute an institution that specializes in this task with a specific mandate of regulating such markets.
- ii. Similarly for Drugs, there should be flying squads of Customs/NCB/Police, etc to check for drug use in hotels and restaurants. Even residential societies and condominiums should be instructed to have clear bye-laws as part of RWA agreements pertaining to the use/abuse of drugs and clear accountability at various levels.
- iii. All enforcement agencies maintain or keep some kind of dynamic database which is mostly used for profiling of offenders, it is important that such database should be

collated at a national level with access for each agency to have a more holistic approach towards enforcement and more all round cooperation.

- iv. For cultural heritage-related crimes several European countries have come up with specialised task forces. Similar organizations empowered for this purpose may be constituted also.

5.1.2 Specialization in border control

- i. Capacity enhancement in the border areas is imperative for more effective enforcement. Goods prone to smuggling require specialized knowledge and expertise for interception. A two-pronged approach of coordination with area experts like drug experts, wildlife experts, archaeology experts etc with Customs along with domain expertise among border officers would go a long way in effective interdiction.
- ii. Besides, for further effectiveness in border control there should be reliance on technology. Based on risk assessment goods and passengers coming from deemed risky destinations should be subject to profiling and technology-driven examination so that its not inconvenient and yet at the same time effective.
- iii. There should be further capacity building for canine squads for detecting drugs, etc under border enforcement agencies like Customs.

5.1.3 Technological upgradation

X-ray machines, container scanners, dual use goods detectors (like nuclear material detectors) etc should be deployed at busy ports and airports.

4. Dynamic risk assessment parameters

Risk assessment parameters should be dynamic and should be changed frequently to unsettle offenders. The capacity of ports to handle cargo should be incrementally increased so that surprise thorough checking of cargoes is not sacrificed for fear of delay of cargo clearance.

Intelligence organizations should share intelligence of the movement of contrabands and high-risk materials to pose a more formidable front to the offenders.

5.1.4 Increasing the capacity of ports to handle bigger and bulkier consignments with a reduced turnaround time.

The capacity of ports should be enhanced by leveraging technology so that a sizeable number of people are deployed for facilitation and for examination. India being a densely populated country with a complex terrain can become a nightmare to search for offending goods if they have already crossed the border. The best time and place to intercept any offending goods are at the border. The Bombay bomb blast of 1993 is an example of this regard.

5.1.5 Coordination among agencies to break the backbone of syndicates

Government should groom specialists to aid border agencies who are also deployed at major ports. Alternatively, there should be rigorous training for border agencies to develop expertise in the interdiction of goods that are prone to smuggling.

5.1.6 Blacklisting of offenders and easily accessible database

It is assumed that each government agency would have a separate database of offenders. Similarly, Customs also has a robust data base of risky profiles, offenders etc. It is imperative to have a process of sharing and taking action together or in coordination with other agencies to completely eradicate organized syndicates. Lack of coordination can sometimes leave unattended areas which may resurface as another attempt at the same offense.

5.1.7 Speedy delivery of justice

Eventually, the delivery of justice is the most effective way of deterring any offense. If justice is delayed there is a propensity for crimes to fester and perpetuate. But if justice is swift offenders would be dissuaded from such activities.

5.1.8 Zero tolerance policy

There should be a zero-tolerance policy for offenses related to certain goods which are extremely harmful from the point of view of national or social security like arms and ammunition, drugs, nuclear materials, etc. Such zero-tolerance policy should be widely publicized and should also get translated into speedy and very stringent punishments.

5.1.9 Confiscation of property should be included in punishment.

To create effective deterrence in the Government fight against smuggling a provision of confiscation of property etc valued in terms of loss of revenue or any other quantifiable economic or social loss should be incorporated in the relevant legislations.

5.1.10 Container scanners should be build and installed under Make in India initiative

Container scanners are capital-intensive investments. Container scanners, cargo scanners and even human scanners should be installed at the ports to thwart attempts of smuggling. They should be used on the basis of inputs from data analytics or Artificial intelligence so that genuine cargo and passengers are not inconvenienced.

5.1.11 Wide media coverage in the form of advertisements and small ad films.

There should be wide coverage of the impacts and adverse effects of smuggling by way of social media, advertisements, or caption campaigns. The internal demand for smuggled good has to be checked by an education campaign and strong regulation.

5.2 Countering Counterfeiting:

5.2.1 Strong legislation and quick redressal:

- i. It may be an opportune time to draft a comprehensive and all-inclusive law and policy on counterfeit goods. In this regard counterfeiting of different goods dealt with by multiple legislations may be considered for withdrawal or suitable amendment.
- ii. Presently the legal Framework to control Counterfeiting is an elaborate legal structure in the form of the following statutes,
 - The Drugs and Cosmetics Act, 1940 stipulates procedures to counter adulterated, spurious or misbranded drugs and their export from India.
 - The Copyright Act, 1957 subsists in literary, dramatic, musical and artistic works, and computer programs, to give statutory criminal remedies against copyright infringement.
 - The Patents Act, 1970 is harmonized with Article 27 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, which deals with patentable subject matter.
 - The Trademarks Act, 1999 recognizes the right of a registered trademark owner over unregistered trademark to take action for passing off.
 - The Designs Act, 2000 permits to use a design by a registered organization. This includes pattern, form, stuff or compositions of shape or colors useful to any item or object.
 - The IT Act, 2000 has passed to control the deceptive or illegal breaching actions which are conducted through the use of the high technology and updated computer system.
 - The Food Safety and Standards Act, 2006 was passed to give authorization to Government agencies to grab and take custody of misbranded and poor quality counterfeit products.
- iii. The menace of counterfeiting is so pervasive that it would require an uncomplicated uniform legal structure, dedicated redressal structure, and time-bound disposal. Such matters cannot be allowed to be clubbed in regular courts given the pendency.
- iv. Since counterfeiting directly impinges on the revenue and profitability of companies, there should be provisions of commensurate compensations and speedy settlements.

5.2.2 Regulation of raw material usage:

- i. Raw materials and component suppliers form a complex network of typically first-stage intermediaries that provide opportunities for counterfeit ingredients, parts, and components to enter the supply chain that can make up a company's larger final product. However, a network of numerous intermediary suppliers creates multiple opportunities for counterfeiters to integrate fakes into the supply chain or mask the true origin of a production input of a final product.

- ii. The counterfeit and fake industries cater to substandard raw materials like chemicals, parts etc which are used in the manufacturing of pharmaceuticals, agrochemicals, and consumer goods. Poor-quality counterfeit electrical components, software, and metals can find their way into cars, aircraft, appliances, and computers.
- iii. These inferior or adulterated components and parts may contain the classic counterfeits bearing trademark violations, logos, markings, and sometimes legitimate serial numbers lifted from the products of a respected manufacturer.
- iv. To counter the presence of counterfeit and fake products the following steps can be taken,
 - A robust Know your supplier/ know your customer program should be invariably put in place by the component manufacturer. It will address the risk of counterfeit infiltration into the supply chain. Such programmes should include ongoing customer/client monitoring and in-depth background checks for partners operating in problem markets and monitoring for unusual transactions. These should be implemented in clear contractual terms, alongside operational controls such as audits of documents, data and facilities, and regular inspection, testing and evaluation of sample raw materials, ingredients and components.
 - Carefully monitoring suspicious customer orders by suppliers of active ingredients and other essential components that have a limited number of suppliers.
 - Develop standards and guidelines for third-party accreditation mechanisms (eg, the US Federal Aviation Administration uses a voluntary industry distributor accreditation programme). Trusted supplier networks can then be built using suppliers that adopt these higher standards. Centralised reporting mechanisms, operated by third-party rating agencies or governments, should collect information on component supplier counterfeiting, including information on involved individuals as well as companies, with redress mechanisms to correct mistakes.
 - Deploy technologies, such as tracking and tracing, to complement monitoring and compliance efforts, basing them on open standards ensuring interoperability between systems and avoiding fragmentation across companies, sectors, and countries.
 - The classic fake billing seen under GST has thrived because of businesses not really caring to know about the real suppliers of parts. Most of the time unscrupulous elements supply fake bills with counterfeit products to make good transactions.

5.2.3 Regulation of Transporters:

- i. Transport operators continue to be an important component that provides critical services subject to abuse as part of counterfeiting supply chains. Sea and land transport remain the favoured means for transporting large volumes of counterfeits.
- ii. The OECD estimated in its 2017 publication “Mapping the real routes of trade in fake goods” that 63% of seized fakes were shipped by postal and express services,

constituting a growing challenge for law enforcement agencies. The OECD found that the transport modes by modes of seizures were:

- sea – 51%;
 - postal and express service – 23%;
 - air – 19%; and
 - road – 8%.
- iii. Historically, the system has relied greatly on Customs to identify suspicious behavior. In a vastly expanded global marketplace, enforcers, intermediaries, and rights holders must develop new solutions, as seen within other sectors.
- There should be more stringent norms for transporters in terms of verification and on-road checks. There should be a limited access database of registration details that can be easily verifiable. Such data should also integrate fast tag data to know the real-time location of a vehicle. This would weed out false and fabricated registrations.
 - Establishing contractual terms between transport operators and their clients that specifically call for the (infringing) client to bear the costs incurred from the detention of counterfeit shipments – effective due diligence will help identify when counterfeiting is a risk and assure that insurance is in place in the event of a claim.
 - Putting monitoring systems in place to flag shipments of counterfeit and pirated products. For instance, such systems as DHL’s IP rights control system include notices from rights holders and enforcement authorities (eg, through track and trace systems). These systems notify rights holders and enforcement agencies at shipment and delivery points when counterfeits are identified.
 - Establishing a provision that requires transport operators to supply electronic shipment information to customs administrations in advance of shipment arrivals – this provision would enable customs to perform risk assessment and target shipments for further examination. Such policies can also track counterfeit transport operators, including individuals and entities that initiate shipment and actual transport operators, to identify repeat offenders.
 - Expanding the authorised economic operator programme and other accreditation schemes to include an IP rights element – adopting higher standards would enable trusted shipper programmes and allow rights holders to ship their genuine goods through intermediaries that follow these recommendations.

5.2.4 Stakeholder participation:

- i. Government and Non-Government Organizations have taken many initiatives to stop counterfeiting through awareness creation (Campaigns) of Indian citizens and implementation of legal framework. The snapshot of campaigns to aware consumers and Indian legal framework to control counterfeiting is presented:
- ii. Campaigns to control Counterfeiting: Counterfeiting is termed as crime of the 21st century; it is affecting almost all economies and sectors. At the same time initiatives are also being taken to educate the consumers the Anti-Counterfeiting campaigns.

- “Jaago Grahak Jaago” was an awareness and information campaign developed by the Ministry of Consumer Affairs Government of India to educate the consumers against frauds of forged companies. This advertisement was printed in more than 160 news papers in February month of 2012. The campaign was telecasted on many TV channels (Dhruv and Shamim, 2016).
 - “Bhagidari” program was introduced to facilitate awareness amongst the consumers against the usage risk of pirated and counterfeited products. The campaign was initiated by the Delhi Government (Chandra, 2012).
 - A cultural youth festival “Hum Kishor Festival 2012” was organized by the Delhi Government under the theme “Fight Smuggling and Counterfeiting” to aware the Consumer of Delhi against counterfeiting.
 - HUL and TATA commemorated the „World IP Day“ and „World Anti-Counterfeiting Day“, to create awareness for the usage of genuine brands. The consumers were also educated against the risk of fake brands (Bhatt, 2016). • The Government of India initiated the Awareness campaign in many schools of New Delhi, through interactions, creative competition and rewards. The purpose of this campaign was to educate the students for not to use counterfeit products (Bhushan, 2015)
 - An interaction was facilitated between the consumers and Industry on information sharing and best practices to stop the counterfeiting in Mumbai.
- iii. But what is palpable is the fact that the campaigns have not carried on when they should have become more pervasive and popular with newer content. It is time to scale up this effort commensurate with the challenges of smuggling and counterfeiting underlining clearly the criminal element and how it’s the duty of each citizen to contribute towards its success.