

Consolidated Text

Anti-Counterfeiting Trade Agreement

Informal Predecisional/Deliberative Draft:

1 July 2010

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CHAPTER ONE INITIAL PROVISIONS AND DEFINITIONS

[¹: Section A: Initial Provisions

ARTICLE 1.1: RELATION TO OTHER AGREEMENTS

Nothing in this Agreement shall derogate from [NZ/Sing/EU: any existing rights and] any obligation of a Party with respect to any other Party under existing agreements, including the WTO Agreement of Trade-Related Aspects of Intellectual Property Rights.

ARTICLE 1.2: NATURE AND SCOPE OF OBLIGATIONS²

1. Each Party shall give effect to the provisions of this Agreement. A Party may implement in its domestic law more extensive [AUS/EU/CH/NZ/CAN: ~~protection and~~] enforcement of intellectual property rights than is required by this Agreement, provided that such [AUS/EU/CH/NZ/CAN: ~~protection and~~] enforcement does not contravene the provisions of this Agreement. Each Party shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.

2. Nothing in this Agreement creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and enforcement of law in general.

ARTICLE 1.3: RELATION TO STANDARDS CONCERNING AVAILABILITY AND SCOPE OF INTELLECTUAL PROPERTY RIGHTS

1. This Agreement shall be without prejudice to provisions governing the availability, acquisition, scope, and maintenance of intellectual property rights contained in a Party's law.

2. It is understood that this Agreement does not create any obligation on a Party to apply measures where a right in intellectual property is not protected under the laws and regulations of that Party.

[AUS/CAN/SING/NZ: 3. No Party shall be obliged to apply this section to any goods that

¹ This Section has been proposed as an initial discussion draft by the US, to receive detailed reactions at the next Round.

² Negotiator's Note: Provisions on transitional arrangements (i.e., entry into force) and application to prior acts will be included in Chapter 6.

do not infringe an intellectual property right held within the territory of that Party]

ARTICLE 1.4: PRIVACY AND DISCLOSURE OF INFORMATION

Nothing in this Agreement shall require any Party to disclose information the disclosure of which would be contrary to its law or its international agreements, including laws protecting right of privacy or confidential information the disclosure of which would prejudice law enforcement or the legitimate commercial interests of particular enterprises, public or private, or otherwise be contrary to public interest.³

AUS⁴

[AUS/NZ/Sing/CAN: ARTICLE 1.X:

1. The enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

2. Parties may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

3. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.] [J/Mex/Kor/US: delete this provision] [EU: include some principles of this provision in the Preamble]⁵

Section B⁶: General Definitions

[Can: *Canada reserves its position on all elements proposed in this section, pending discussion of them in negotiations*]

ARTICLE 1.X: DEFINITIONS

³ Subject to confirmation by the US and NZ delegations.

⁴ Subject to confirmation by AUS for deleting the paragraph (original wording: When a Party provides written information pursuant to a request or requirements under this Agreement, the Party receiving the information shall not disclose or use the information for a purpose other than that for which it was requested or required, except with the prior consent of the Party providing the information [Mex: unless a judicial order warrants it.)

⁵ Not a legal issue ; decision by HoD to include or not.

⁶ Section B of the Initial Provisions is still to be discussed.

For purposes of this Agreement, unless otherwise specified:

days means calendar days;

[MX: In the "days" definition it is established that it would natural days. However, in Article 2.13 there is a footnote which stipulates that "days" refer to working days. Therefore, it is suggested to make clear the initial definition or delete such definition and establish with footnotes if it refers to natural or working days, where appropriate.]

intellectual property refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II of the Agreement on Trade-Related Aspects of Intellectual Property Rights.

[MX: The definition of "intellectual property" refers to the figures listed in TRIPs; however, said wording is not clear enough since words such as "intellectual property right" and "copyrights and related rights and trademarks" are used in all the text. Therefore, it is suggested to define "intellectual property" in Article 1 and use the same wording in all the text in order to be uniformity.]

Council means the ACTA Oversight Council established under Chapter Five;

measure includes any law, regulation, procedure, requirement, or practice;

person means either a natural person or a juridical person;

right holder includes a federation or an association having the legal standing and authority to assert rights in intellectual property, and also includes a person that exclusively has any one or more of the intellectual property rights encompassed in a given intellectual property;

territory means customs territory of a Party and all free trade zones of that Party;

TRIPS Agreement means the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, contained in Annex 1C to the WTO Agreement;⁷

WTO means the World Trade Organization; and

WTO Agreement means the *Marrakesh Agreement Establishing the World Trade Organization*, done on April 15, 1994.

⁷ For greater certainty, "TRIPS Agreement" includes any waiver in force between the Parties of any provision of the TRIPS Agreement granted by WTO Members in accordance with the WTO Agreement.

CHAPTER TWO

LEGAL FRAMEWORK FOR ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

[General Obligations⁸

ARTICLE 2.X: GENERAL OBLIGATIONS WITH RESPECT TO ENFORCEMENT

1. Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

2. Procedures adopted, maintained, or applied to implement this Chapter shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

Option 1: [Mex/US/J/NZ/Sing/CAN: 3. In respect of civil remedies and criminal penalties for enforcement of intellectual property rights, each Party shall take into account, as appropriate, the need for proportionality between the seriousness of the infringement, the interests of third parties and the applicable remedies or penalties.]

Option 2: [EU/CH/Mor: 3. In respect of measures, procedures and remedies adopted, maintained or applied to implement this Chapter, each Party shall ensure the need for proportionality in relation to the infringement.]

4. [US: Notwithstanding the other provisions of this Agreement, the Parties may limit the remedies available against a government's unauthorized use of intellectual property covered under this Agreement, or against such unauthorized use by a third party that was authorized by a government, to payment of remuneration. Such remuneration shall be adequate to compensate for the injury the right holder has suffered, taking into account the economic value of the use.]⁹

5. [MX/Aus/Sing/NZ/US/Can: define scope of the intellectual property rights covered in the Agreement] [EU/CH: the scope of intellectual property rights will be defined at the start of each chapter.]

[Aus/US/NZ/Can/Sing: This Agreement shall apply [NZ/Can/Sing: only] [Kor: at least] to trademark counterfeiting and copyright piracy unless otherwise specified. The Section on the Digital Environment shall apply only to copyright and related rights.]

⁸ This Section has been proposed as an initial discussion draft by the US, to receive detailed reactions at the next Round. [One additional thought is to include language from TRIPS 41 and 48]

⁹ Delegations need more time for further consultations.

6. [EU: Each Party shall ensure that the rights of the [EU/CH: defendants and] third parties shall be duly protected and guaranteed.]

Section 1: Civil Enforcement

ARTICLE 2.1: AVAILABILITY OF CIVIL PROCEDURES

1. [Can/US/NZ/Sing/AUS: In the context of this section, e] [E]ach Party shall make available to right holders civil judicial procedures concerning the enforcement of any [J/CH/EU: intellectual property right] [Sing/Can/NZ/Aus/US/Mex: copyrights and related rights and trademarks].

2. To the extent that any civil remedy can be ordered as a result of administrative procedures on the merits of a case, each Party shall provide that such procedures conform to principles equivalent in substance to those set out in this section.

ARTICLE 2.X: INJUNCTIONS

[EU/SING: 1.]In civil judicial proceedings concerning the enforcement of [Can/NZ/Aus/US/Sing/Mex: copyright or related rights and trademarks] [J/EU: intellectual property rights], each Party shall provide that its judicial authorities shall have the authority [Can/AUS: subject to any statutory limitations under its domestic law] [US/Kor/J/EU/CH/Mex: ~~subject to any statutory limitations under its domestic law~~] to issue an order to a party to desist from an infringement, including an order to prevent infringing goods from entering into the channels of commerce.

[EU/CH: 2. The Parties [NZ/Mor/Mex: may] shall also ensure that right holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right.¹⁰¹¹

ARTICLE 2.2: DAMAGES

1. Each Party shall provide that in civil judicial proceedings, its judicial authorities shall have the authority to order the infringer who knowingly or with reasonable grounds to know, engaged in infringing activity of [intellectual property rights] [copyright or related rights, or trademarks], to pay the right holder damages adequate to compensate for the injury the right holder has suffered as a result of the infringement.

In determining the amount of damages [US: for copyrights and related rights

[EU: ¹⁰ The conditions and procedures relating to such injunction will be left to each Party's legal system.]

¹¹ US, NZ, CAN, AUS, Mex, J, oppose paragraph 2. The US and J are considering its placement

infringements and trademarks counterfeiting], its judicial authorities shall have the authority to consider, *inter alia*, any legitimate measure of value submitted by the right holder, which may include the lost profits, the value of the infringed good or service, measured by the market price, the suggested retail price.

2. [At least] in cases [EU/CH: of intellectual property rights] [of copyright or related rights infringement and trademark counterfeiting], each Party shall provide that in civil judicial proceedings, its judicial authorities shall have the authority to order the infringer to pay the right holder the profits of the infringer that are attributable to the infringement [Kor: which may be presumed to be the amount of the damages].

3. [US: At least with respect to works, phonograms, and performances protected by copyrights or related rights, and in cases of trademark counterfeiting, e] [E]ach Party shall also establish or maintain a system that provides for:

- a) pre-established damages, or
- b) presumptions for determining the amount of damages¹² sufficient to compensate the right holder for the harm caused by the infringement, or
- c) at least for copyright, additional damages.

4. Where a party provides one of the options described in paragraph 2 (a) or 2 (b), that Party shall ensure that a right holder has the right to choose that option as an alternative to the remedies referred to in paragraph 1.

5. Each Party shall provide that its judicial authorities, where appropriate, shall have the authority to order, at the conclusion of civil judicial proceedings concerning infringement of [intellectual property rights] [copyright or related rights, or trademarks], that the prevailing party be awarded payment by the losing party of court costs or fees and appropriate attorney's fees or any other expenses as provided for under that Party's domestic law.

ARTICLE 2.3: OTHER REMEDIES

1. With respect to goods that have been found to be [US/Aus/Can/Sing/Kor/NZ/Mex: pirated or counterfeited] [J/EU/CH: infringing an intellectual property right], each Party shall provide that in civil judicial proceedings, at the right holder's request, its judicial authorities shall have the authority to order that such goods be destroyed, except in exceptional circumstances, without compensation of any sort.

2. Each Party shall further provide that its judicial authorities shall have the authority to order that materials and implements the predominant use of which has been in the manufacture or creation of [J/EU: infringing] [US/Aus/Can/Sing/NZ/Mex: pirated

¹² See footnote 11 to be kept

or counterfeit] goods be, without undue delay and without compensation of any sort, destroyed or disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements.

[EU/CH/Aus/CAN: 3. The judicial authorities shall have the authority to order that those remedies be carried out at the expense of the infringer.]

ARTICLE 2.4: INFORMATION RELATED TO INFRINGEMENT

Without prejudice to its domestic law that governs the protection of confidentiality of information sources, the processing of personal data, or privilege, each Party shall provide that in civil judicial proceedings concerning the enforcement of [J/CH/EU: intellectual property rights] [Can/NZ/Aus/Sing/US/Mex: copyright or related rights and trademarks], its judicial authorities shall have the authority upon a justified request of the right holder, to order the infringer, or in the alternative, the alleged infringer to provide, at least for the purpose of collecting evidence, relevant information as provided in its applicable laws and regulations that the infringer or alleged infringer possesses or controls, to the right holder or to the judicial authorities. Such information may include information regarding any person or persons involved in any aspect of the infringement and regarding the means of production or distribution channel of such goods or services, including the identification of third persons involved in the production and distribution of the infringing goods or services or in their channels of distribution.

ARTICLE 2.5: PROVISIONAL MEASURES

[EU/CH/J: Each Party shall provide that its judicial authorities shall have the authority, at the request of the applicant, to issue a provisional measure intended to prevent any imminent infringement of an intellectual property right [Can/Aus/Mex: copyright or related rights or trademark]. Such provisional measures may also be issued under certain conditions, in relation to an intermediary whose services are being used by a third party to infringe an [intellectual property right] [copyright or related rights or trademark].

Each Party shall [J: may] also provide that provisional measures may be issued, even before the commencement of the proceedings on the merits, to preserve relevant evidence in respect to the alleged infringement.]

1. Each Party shall provide its judicial authorities with the authority to act expeditiously on requests for provisional measures *inaudita altera parte* and to make a decision without undue delay.

2. [US/J/NZ/MX/Aus: In civil judicial proceedings concerning copyright or related rights infringement and trademark counterfeiting]¹³, each Party shall provide that its

¹³ EU raises issue of scope of this provision

judicial authorities shall have the authority to order the seizure or other taking into custody of suspected infringing goods, materials, and implements relevant to the act of infringement and, at least for trademark counterfeiting, [J: documents] [EU: documentary evidence], either originals or copies thereof, relevant to the infringement.

[US/J/EU/Can: 3. Each Party shall provide that its authorities have the authority to require the plaintiff, with respect to provisional measures, to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the plaintiff's right is being infringed or that such infringement is imminent, and to order the plaintiff to provide a security or equivalent assurance sufficient to protect the defendant [EU/CH: , ensuring compensation for any prejudice suffered when the measure is revoked or lapses due to any reason,] [Kor/NZ/J: ~~ensuring compensation for any prejudice suffered when the measure is revoked or lapses due to any reason,~~] and to prevent abuse. Such security or equivalent assurance shall not unreasonably deter recourse to such procedures.

Section 2: Border Measures¹⁴[Japan:¹⁵]

[EU/CH: ARTICLE 2.X: SCOPE OF THE BORDER MEASURES

1. This section sets out the conditions for action by the competent authorities when goods are suspected of infringing intellectual property rights, within the meaning of this agreement, when they are imported, exported, in-transit or in other situations where the goods are under customs supervision.

2. For the purposes of this section, "goods infringing an intellectual property right" means goods infringing any of the intellectual property rights covered by TRIPS¹⁶. However, Parties may decide to exclude from the scope of this section, certain rights other than trade marks, copyrights and GIs when [not protected exclusively by copyright and trade mark systems and] [protected by [non-product- or sector-specific] [registration] *sui generis* systems.]]

[US/Sing/Aus/NZ/J/Can: Parties shall provide for the provisions related to border

¹⁴ Where a Party has dismantled substantially all controls over movement of goods across its border with another Party with which it forms part of a customs union, it shall not be required to apply the provisions of this Section at that border.

[¹⁵J: Each Party shall implement the obligations in respect of importation and exportation set out in this Section so as to be applied to shipments of goods consigned to [a local party/a party in the territory] but destined for outside the territory of the Party].

[¹⁶ Aus/KOR/CH/J: The provisions of this section shall also apply to confusingly similar trademark goods [J: , which means any goods, including packaging, bearing without authorization a trademark that is similar to the trademark validly registered in respect of such or similar goods where there exists a likelihood of confusion on the part of the public between the trademark borne and the trademark validly registered, and that thereby infringes the rights of the owner of the trademark in question under the law of the country in which the procedures set out in this Section are invoked.]]

measures to be applied [US/Sing/J: at least] in cases of trade mark counterfeiting and copyright piracy. [US/Sing/J: Parties may provide for such provisions to be applied in other cases of infringement of intellectual property rights.]]

ARTICLE 2.X: *DE MINIMIS* PROVISION

Parties may exclude from the application of this Section small quantities of goods of a non-commercial nature contained in travelers' personal luggage [NZ/Aus/Can/Sing/Kor/J: or sent in small consignments¹⁷].

ARTICLE 2.X: PROVISION OF INFORMATION FROM RIGHT HOLDER

Each Party shall permit the competent authorities to request a right holder to supply relevant information to assist the competent authorities in taking border measures provided for under this Section. Each Party may also allow a right holder to supply relevant information to the competent authorities.

ARTICLE 2.6: APPLICATION BY RIGHT HOLDER

Option 1

[EU/KOR/Mor: 1. Each Party shall provide procedures for import and in-transit¹⁸ shipments and [Mor: may] [EU/KOR: shall] provide procedures for export shipments, by which right holders may request the competent authorities to suspend release¹⁹ of suspected counterfeit trademark goods²⁰ and suspected pirated copyright goods²¹ [EU/

[¹⁷ NZ: For greater certainty, Parties may apply this Section where a small consignment forms part of a series of small consignments that may reasonably be considered to have been undertaken or arranged for the purpose of meeting the conditions of an exclusion.]

¹⁸ For the purposes of this Section, in-transit goods means goods under "Customs transit" and under "transshipment". "Customs transit" means the Customs procedure under which goods are transported under Customs control from one Customs office to another. "Transshipment" means the Customs procedure under which goods are transferred under Customs control from the importing means of transport to the exporting means of transport within the area of one Customs office which is the office of both importation and exportation.]

[US/J: ¹⁹ For the purpose of this Section, where the competent authorities suspend the release of suspected counterfeit trademark or pirated copyright goods, the authorities shall not permit the goods to be released into free circulation, exported, or subject to other customs procedures, except in exceptional circumstances.]

²⁰ For purposes of this Section, counterfeit trademark goods means any goods, including packaging, bearing without authorization a trademark that is identical to the trademark validly registered in respect of such goods, or that cannot be distinguished in its essential aspects from such a trademark, and that thereby infringes the rights of the owner of the trademark in question under the law of the country in which the procedures set out in this Section are invoked.

[Can/US: It is to be understood that there shall be no obligation to apply such procedures to imports of goods put on the market in another country by or with the consent of the right holder.]

goods suspected of infringing an intellectual property right] into free circulation [Kor: or the detention of such goods].

Option 2

[US/J/NZ/Can/Sing/Aus/CH/Mex: 1. Each Party shall provide procedures for import and export [NZ/Can/Sing/Aus: ~~and export~~] shipments and may provide procedures for in-transit²² shipments, by which right holders may request the competent authorities to suspend the release of the suspected counterfeit trademark goods²³ and suspected pirated copyright goods.²⁴]

Option 3

[EU: Each Party shall provide procedures by which right holders may request the competent authorities to suspend the release of goods suspected of infringing intellectual property rights or detain them.]

2. The competent authorities shall require a right holder requesting the procedures described in paragraph 1 to provide adequate evidence to satisfy themselves that, under the laws of the Party providing the procedures, there is *prima facie* an infringement of the right holder's intellectual property right and to supply sufficient information that may reasonably be expected to be within the right holder's knowledge to make the suspected infringing goods reasonably recognizable by the competent authorities. The requirement to provide sufficient information shall not unreasonably deter recourse to the procedures described in paragraph 1.

3. Each Party shall provide for applications to suspend the release of suspected

²¹ For purposes of this Section, pirated copyright goods means any goods that are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and that are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country in which the procedures set out in this Section are invoked.

[US/J: ²² For the purpose of this Section, where the competent authorities suspend the release of suspected counterfeit trademark or pirated copyright goods, the authorities shall not permit the goods to be released into free circulation, exported, or subject to other customs procedures, except in exceptional circumstances.]

²³ For purposes of this Section, counterfeit trademark goods means any goods, including packaging, bearing without authorization a trademark that is identical to the trademark validly registered in respect of such goods, or that cannot be distinguished in its essential aspects from such a trademark, and that thereby infringes the rights of the owner of the trademark in question under the law of the country in which the procedures set out in this Section are invoked.

[Can/US: It is to be understood that there shall be no obligation to apply such procedures to imports of goods put on the market in another country by or with the consent of the right holder.]

²⁴ For purposes of this Section, pirated copyright goods means any goods that are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and that are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country in which the procedures set out in this Section are invoked.

infringing goods that apply to all goods²⁵ under customs control in its territory and remain applicable to multiple [Sing: or in the alternative specified] shipments [US: or where there is a specific shipment at issue, the application will apply to specified shipments]. Each Party may provide that, at the request of the right holder, the application to suspend the release of goods may apply to selected points of entry and exit under customs control. These applications for suspension shall remain applicable for a period of not less than [NZ/US/CH/J/EU/Kor/Can/AUS/Mor: one year] [Sing: or sixty days] from the date of application, or the period of protection of the relevant intellectual property rights under the laws of the Party providing border measures under this Section, whichever is shorter. Each Party may permit a right holder to specify that an application to suspend remain applicable for a period of less than [NZ/US/CH/J/EU/Kor/Can/AUS/Mor: one year] [Sing: or sixty days].

[Sing: 3. Each Party shall provide for applications to suspend the release of suspected infringing goods that apply to all goods²⁶ under customs control in its territory and that shall remain applicable for a reasonable period. Each Party may [J (drafting suggestion): shall [or shall endeavor]] provide for such applications to apply to multiple shipments. Each Party may provide that, at the request of the right holder, the applications may apply to selected points of entry and exit under customs control.]

4. The competent authorities shall inform the applicant within a reasonable period whether they have accepted the application. Where the competent authorities have accepted the application, they shall also make known to the applicant the period of validity of the application.

5. Each Party may provide, where the applicant has abused the process, or where there is due cause, that an application may be denied, suspended, or voided.

ARTICLE 2.7: EX-OFFICIO ACTION

Option 1

1. Each Party shall [NZ: may] provide that its customs authorities may act upon their own initiative, to suspend the release of suspected counterfeit trademark goods or suspected pirated copyright goods with respect to imported, [US/J/Mex: exported] [US/J/NZ/Mex: , or in-transit] goods including suspected counterfeit trademark goods or suspected pirated copyright goods admitted to, withdrawn from, or located in free trade zones [EU/CH: goods suspected of infringing an intellectual property right]. [Aus/Can/NZ/Sing: Each Party may provide its customs authorities the same authority as the foregoing provision of this Article in respect of exported and in-transit goods that are suspected counterfeit trademark goods or suspected pirated copyright goods.]

²⁵ Whether this applies to imports, exports and/or in transit goods depends on paragraph 1.

²⁶ Whether this applies to imports, exports and/or in transit goods depends on paragraph 1.

Option 2

[EU: 1. Each Party shall provide that its competent authorities may act upon their own initiative, to suspend the release of goods suspected of infringing an intellectual property right.]

2. [Each Party may also provide that its customs authorities may act, upon their own ²⁷initiative, to suspend the release of goods suspected of infringing other intellectual property rights [EU: , not covered by this section].]

ARTICLE 2.X

[Aus/NZ: As an alternative to procedures in Article 2.6.1 and 2.7.1 relating to export or in-transit shipments, each Party [shall/may] provide that where shipments are exported from that Party, or shipments are in-transit through that Party, it shall have the authority, (drafting suggestion Can: consistent with the Party's bilateral information sharing agreements), to provide sufficient information to the destination Party, about such shipments, to promote effective enforcement against shipments of infringing²⁸ goods.]

ARTICLE 2.9: SECURITY OR EQUIVALENT ASSURANCE

Each Party shall provide that its competent authorities shall have the authority to require a right holder requesting procedures described under Article 2.6 to provide a reasonable security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. Each Party shall provide that such security or equivalent assurance shall not unreasonably deter recourse to these procedures. Each Party may provide that such security may be in the form of a bond conditioned to hold the defendant harmless from any loss or damage resulting from any suspension of the release of the goods in the event the competent authorities determine that the good [US/J/Can/Aus/Kor/Mor/Sing: is not a counterfeit trademark good or a pirated copyright good] [EU/CH: does not infringe intellectual property rights covered by this section]. Only in exceptional circumstances or pursuant to a judicial order may a Party permit a defendant to post a bond or other security to obtain possession of suspected counterfeit trademark goods or suspected pirated copyright goods.

ARTICLE 2.10: DETERMINATION AS TO INFRINGEMENT

Each Party shall adopt or maintain a procedure by which their competent authorities may determine, within a reasonable period of time after the initiation of the procedures described under Article 2.X or 2.X, whether the suspected infringing goods infringe an

²⁷ Negotiator's note: Subject to 1.4

²⁸ Subject to scope

intellectual property right²⁹.

ARTICLE 2.11: REMEDIES

1. Each Party shall provide its competent authorities with the authority to order the destruction of goods following a determination under Article 2.10 that the goods are infringing.³⁰ In cases where such goods are not destroyed, each Party shall ensure such goods are disposed of outside the channels of commerce in such a manner as to avoid any harm to the right holder, except in exceptional circumstances.

2. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit the release of the goods into the channels of commerce.

3. Each Party may provide its competent authorities with the authority to impose administrative penalties following a determination under Article 2.10 that the goods are infringing.

ARTICLE 2.12: FEES

1. Each Party shall provide that any application fee, storage fee, or destruction fee to be assessed by competent authorities in connection with procedures described in this Section shall not be used to unreasonably deter recourse to these procedures.

ARTICLE 2.13: DISCLOSURE OF INFORMATION

Without prejudice to a Party's laws pertaining to³¹ the privacy or confidentiality of information:

- a) each Party may authorize its competent authorities to provide right holders with information about specific shipments of goods, including the description and quantity, to assist in the detection of infringing³² goods;
- b) each Party may authorize its competent authorities to provide right holders with information about goods including, but not limited to, the description and quantity of the goods and the name and address of the consignor, importer, exporter or consignee, and, if known, the country of origin and name and address of the manufacturer of the goods to assist in the determination under Article 2.10 of whether goods infringe rights covered by

²⁹Subject to scope

³⁰Subject to scope

³¹ Negotiator's note: legal scrubbing pending.

³² Subject to scope.

this section;

- c) unless a Party has granted authority under subparagraph (b), at least in the case of imported goods, where competent authorities have seized or, in the alternative, made a determination under Article 2.10 that goods infringe rights covered by this section, each Party shall authorize its competent authorities to provide right holders, within 30 days³³ of seizure or determination, with information about goods including, but not limited to, the description and quantity of the goods and the name and address of the consignor, importer, exporter or consignee, and, if known, the country of origin and name and address of the manufacturer of the goods.

Article 2.X

Negotiator's note: Mex will submit draft text on customs' liability concerning accepting applications.

Section 3: Criminal Enforcement³⁴

ARTICLE 2.14: CRIMINAL OFFENSES

1.³⁵ Each Party shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright or related rights piracy on a commercial scale.³⁶

[EU: [J: For the purpose of this Agreement.] [US: Infringements] Acts [Can: of piracy] carried out on a commercial scale are [US/CH: include at least] those carried out in the context of commercial activity for direct or indirect economic or commercial advantage; [[US/J/CH: however a Party may exclude] [EU: this excludes] such acts carried out by end consumers.] [US: Each Party may treat acts carried out by end consumers as outside the scope of this Section.]

[2. Each Party shall provide for criminal procedures and penalties to be applied in

³³ For purposes of the Article, "days" shall mean "business days".

³⁴ Negotiator's Note: Definitions of "counterfeit trademark goods" and "pirated copyright goods" provided for in footnotes [] and [] of Section 2 (Border Measures) should be used as context for this Section.

³⁵ This provision is under internal examination in the EU.

³⁶ Each Party shall treat willful importation [or exportation] [Sing/Can: ~~or exportation~~] of counterfeit trademark goods or pirated copyright goods on a commercial scale [J/EU: in accordance with its laws and regulations,] as unlawful activities subject to criminal penalties under this Article. A Party may comply with its obligation relating to [exportation] [EU: and importation] of pirated copyright or counterfeit trademark goods through its measures concerning distribution.

cases of willful [importation³⁷] and domestic use, in the course of trade and on a commercial scale, of labels or packaging:

- a. to which a mark has been applied without the consent of the right holder which is identical to or cannot be distinguished from a trademark registered in its territory³⁸; and
- b. which are intended to be used in the course of trade on goods or in relation to services which are identical to goods or services for which the trademark is registered.]

[EU: 3. The provisions of this section shall apply to aiding and abetting the offences referred to in Article 2.14.]

[EU: 4.

- (a) Each Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for the offences referred to in Article 2.14.
- (b) Subject to the legal principles of the Party, the liability of legal persons may be criminal or [non-criminal].
- (c) Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the criminal offences.]

[3. Each Party shall provide for criminal procedures and penalties to be applied against any person who, without authorization of the holder of copyright [or related rights] in [Mor: an audiovisual work, including] a cinematographic work [Can: or the theatre manager] [knowingly] [US: uses an audiovisual recording device to transmit or make] a copy of the cinematographic or other audiovisual work, or any part thereof, from a performance of the cinematographic or other audiovisual work in a cinematographic work exhibition facility open to the public.]³⁹

[Option J: 3. Each Party may provide for more specific criminal procedures and penalties to be applied against any person who, without authorization, makes a copy of a cinematographic work for private use from a performance or a movie theatre.]

[EU/Sing: delete paragraph 3]

ARTICLE 2.15: PENALTIES

[EU: For the [EU: offences] crimes referred to in [EU: Article 2.14.1 to 2.14.3] [US: Article 2.14.1], each Party shall provide [EU/CH/Kor/Mor: effective, proportionate and

³⁷ A Party may comply with its obligation relating to importation of labels or packaging through its measures concerning distribution.

³⁸ To be checked in legal scrubbing.

³⁹ At least one delegation has asked for the deletion of paragraph 3.

dissuasive] penalties⁴⁰ that include imprisonment [US/NZ/Sing/J/CH/Mex/Aus/Kor: as well as] [EU/CH/Mor: and] monetary fines⁴¹ [US/NZ/Sing/J/CH/Mex/Aus/Kor: sufficiently high to provide a deterrent to future acts of infringement, with a view to removing the monetary incentive of the infringer].

[EU/CH/Mor: For legal persons held liable under Article 2.15.1, each Party shall provide for effective, proportionate and dissuasive sanctions, including monetary sanctions.]]

[EU: ARTICLE 2.16. SEIZURE, FORFEITURE AND DESTRUCTION

1. [In case of an offence referred to in Article 2.14,] Each Party shall provide that its competent authorities shall have the authority to order [Can: authorise] the seizure of suspected counterfeit trademark goods or pirated copyright [or related rights] goods, any related materials and implements used in the commission of the alleged offence, documentary evidence relevant to the alleged offence and the assets derived from, or obtained directly or indirectly through the alleged infringing activity.

2. [EU: Each Party shall, if a prerequisite for such an order, according to its national law, is the identification of the items, ensure that the order need not determine the items that are subject to seizure in more detail than necessary to allow their identification for the purpose of the seizure.] [US: Each Party shall provide that such orders need not individually identify the items that are subject to seizure, so long as they fall within specified categories in the relevant order.]

3. [For the offences referred to in Article 2.14,] Each Party shall provide that its competent authorities shall have the authority to order forfeiture or destruction of all counterfeit trademark goods or pirated copyright [or related rights] goods, of materials and implements predominantly [EU: ~~predominantly~~] used in the creation of counterfeit trademark goods or pirated copyright [or related rights] goods, and [Aus/Can/J/Sing/CH/NZ: at least for [serious] [US: indictable] offences [J/CH:⁴²]] of the assets derived from, or obtained directly or indirectly, through the infringing activity.

4. Each Party shall provide that its competent authorities shall have the authority to [EU/J: ~~provide that its competent authorities shall have the authority to~~] ensure that the counterfeit trademark goods and pirated copyright [or related rights] goods that have been forfeited under this subparagraph shall, if not destroyed, be disposed of outside the channels of commerce, [EU: under the condition that the goods are not dangerous for

⁴⁰ [US: It is understood that there is no obligation to provide penalties of imprisonment against legal persons for the crimes set forth in Article 2.14.]

⁴¹ [Negotiator's note: [US: It is understood that there is no obligation for a Party to impose both imprisonment and monetary fines in parallel] [EU: This does not imply an obligation for a Party to provide for the courts a possibility to impose both penalties in parallel.]

⁴² Each Party may define "serious offences" in accordance with its national law.

the health and security of persons.] [US/CH/NZ/EU: in such a manner as to avoid any harm caused to the right holder.]

[J: Each Party shall ensure that the counterfeit trademark goods and pirated copyright goods that have been forfeited under this paragraph shall, except in exceptional cases, be destroyed if they are dangerous for the health and security of persons. Each Party shall ensure that the counterfeit trademark goods and pirated copyright goods that have been forfeited under this paragraph shall, if not destroyed, be disposed of outside the channels of commerce.]

5. Each Party shall further ensure that forfeiture and destruction under this subparagraph shall occur without compensation of any kind to the defendant.

6. Each Party may provide that its judicial authorities have the authority to order the seizure or forfeiture, of assets the value of which corresponds to that of such assets derived from or obtained directly or indirectly through the infringing or allegedly infringing [NZ: ~~or allegedly infringing~~] activity.

[option NZ: Each Party may provide that its judicial authorities have the authority to order:

- a) the seizure of assets the value of which corresponds to that of such assets derived from or obtained directly or indirectly through the allegedly infringing activity; and
- b) the seizure or forfeiture of assets [, or the imposition of fines.] the value of which corresponds to that of such assets derived from or obtained directly or indirectly through the infringing activity.]

ARTICLE 2.17: *EX OFFICIO* CRIMINAL ENFORCEMENT

Each Party shall provide that its competent authorities may act upon their own initiative to initiate investigation or legal action with respect to the criminal offences described in Article 2.14 [EU: at least in cases of significant public interest, in accordance with national law.] [CH/Aus/US/Mor/J: at least for serious offences [US⁴³].]

Section 4: [Special Measures Related to Technological Enforcement of Intellectual Property in the Digital Environment]

ARTICLE 2.18 [ENFORCEMENT PROCEDURES IN THE DIGITAL ENVIRONMENT]⁴⁴

1. Each Party shall ensure that enforcement procedures, to the extent set forth in the civil and criminal enforcement sections of this Agreement, are available under its law so as to permit effective action against an act of [US/Aus/NZ/Can/Sing/MX: trademark, copyright or related rights][J/EU/CH: intellectual property rights] infringement which takes place [US/Sing/MX: by means of the Internet][EU/CH: in the

⁴³ Each Party may define "serious offences" in accordance with its national law.

⁴⁴ Canada and Mexico reserve their right to revisit elements of this Section at a later date.

digital environment] , including expeditious remedies to prevent infringement and remedies which constitute a deterrent to further infringement.

[EU/CH/NZ: Those measures, procedures and remedies shall also be fair and proportionate.]⁴⁵

2. Without prejudice to the rights, limitations, exceptions, or defenses to [[J: patent, industrial design, trademark and][US/NZ/Aus/J/Sing/Can/MX: copyright or related rights]][EU/CH: intellectual property rights] infringement available under its law, including with respect to the issue of exhaustion of rights, each Party [US: confirms that] [CH: shall provide for] [US/J: civil remedies as well as limitations, exceptions, or defenses with respect to the application of such remedies, are available in its legal system in cases of third party liability]⁴⁶ [Can/NZ/Sing/Aus: or liability for those who authorize infringement, or both] for [[J: patent, industrial design, trademark and][US/NZ/Aus/Sing/Can/J/MX: copyright or related rights]][EU/CH: intellectual property rights] infringement.⁴⁷

3. Each Party shall [CH: may] provide at least

- (a) that online service providers⁴⁸ shall not be held liable or shall not be subject to monetary remedies⁴⁹ for at least civil copyright or related rights infringements⁵⁰ that occur by any of the following:

⁴⁵ [EU/CH/NZ: See identical comment on the draft Chapter 2, Section 1 “Civil Enforcement” and Section 3 “Criminal Enforcement”. A suggestion is to move these provisions into Chapter 1, Section A which applies to the whole Agreement. Direct reference to TRIPS might also clarify the scope of these obligations.]

⁴⁶ [US/MX: For greater certainty, the Parties understand that third party liability means liability for any person who authorizes for a direct financial benefit, induces through or by conduct directed to promoting infringement, or knowingly and materially aids any act of copyright or related rights infringement by another. Further, the Parties also understand that the application of third party liability may include consideration of exceptions or limitations to exclusive rights that are confined to certain special cases that do not conflict with a normal exploitation of the work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder, including fair use, fair dealing, or their equivalents.]

⁴⁷ Negotiator’s note: This provision may be moved and located in the civil enforcement section.

⁴⁸ For purposes of this Article, online service provider and provider mean a provider of online services or network access, or the operators of facilities therefore, and includes an entity offering the transmission, routing, or providing of connections for digital online communications, [Can: ~~between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received~~] between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received

⁴⁹ In implementing Article 2.18.3, each Party may provide limitations on the scope of injunctions available against online service providers for infringing activities included in paragraph (a).

⁵⁰ For greater certainty, the Parties understand that [EU: these limitations are not intended to harmonize the liability of online service provider, but exclude liability in certain situations. Thus] the failure of an online service provider’s conduct to qualify for a limitation of liability under its measures implementing

- (i) automatic technical processes [J: that keep the provider from taking measures to prevent infringement, such as those] as part of the transmission of material when the online service provider did not initiate the transmission, did not select or modify the material, and did not select the recipients of the material⁵¹;
 - (ii) the automatic, intermediate, and temporary storage of material made available online by a person other than the online service provider and transmitted by the online service provider to its users without modification of the material; or
 - (iii) [storage of material provided by a user of the online service provider [US/Can: or][EU: and including] referring or linking users to an online location containing infringing material or activity.]
- (b) that the application of the provisions of subparagraph (a)(ii) is conditioned on an online service provider [J: take appropriate measures] expeditiously [Can: or within a defined period of time] [J: such as those to remove or disable] removing or disabling access to material upon [J: obtaining actual knowledge of the infringement or having reasonable grounds to know that the infringement is occurring] receipt of a legally sufficient notice of alleged infringement concerning material that has previously been removed from the originating site.
- (c) that the application of the provisions of subparagraph (a)(iii) is conditioned on
- [US: (i)] an online service provider not receiving a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and]
- [(i) [US: (ii)] an online service provider [J: taking appropriate measures] expeditiously [J: such as those to remove or disable] removing or disabling access to material
- (A) upon obtaining actual knowledge that the material or an activity using the material is infringing, such as [US/Aus: for example] upon receipt of a legally sufficient notice⁵² of alleged infringement, [US/Aus:

this provision shall not bear adversely upon the consideration of a defense by the provider that the provider's conduct is not infringing or any other defense.

⁵¹ [US/ EU/ CAN will provide for clarification of this provision with respect to ephemeral caching].

⁵² [US: Each party understands that a legally effective notice or counter-notice must, at a minimum, contain information that is reasonably sufficient to enable the online service provider to identify the work or works claimed to have been infringed and the online location of the alleged infringement.]

and] in the absence of a legally sufficient response from the relevant alleged infringer indicating that the notice was the result of mistake or misidentification;]

(B) in the absence of actual knowledge, when the online service provider [J: has reasonable grounds to know that the infringement is occurring] is aware of facts or circumstances from which infringing activity is apparent.

[Can: or]

(iii) [Can: the service provider not knowing of a decision of a court of competent jurisdiction that the hosted materials are infringing]

3 bis No Party's legislation may condition the limitations in subparagraph (a) on an obligation that the online service provider monitors its services or [CH: in any other way] actively or affirmatively seeks facts indicating that infringing activity is occurring.

[J: 3 *ter*. Each Party shall ensure that its judicial authorities have the authority to order an online service provider to expeditiously disclose the information of the relevant subscriber to the right holders, who have given legally sufficient claim with valid reasons to be infringing their trademarks or copyright or related rights.

3 *quarter*. Each Party shall endeavor to promote the development of mutually supportive relationships between online service providers and right holders to deal effectively with patent, industrial design, trademark and copyright or related rights infringement which takes place by means of the Internet, including the encouragement of establishing guidelines for the actions which should be taken.]

[EU/J/CH/Mex/Sing/Mor/Aus: 4. Each Party shall provide adequate legal protection and effective legal remedies [US: at least] against the circumvention of effective technological measures⁵³ that [US: are used by, or at the direction of,] authors, and [NZ: ~~performers~~] performers and producers of phonograms [US: ~~use~~] use in connection with the exercise of their rights and that restrict acts in respect of their works, [NZ: ~~performances~~] performances, and phonograms, which are not authorized by the authors, the [NZ: ~~performers~~] performers or the producers of phonograms concerned or permitted by law.

[US: In order to provide such adequate legal protection and effective legal remedies,

⁵³ [Option US: For purposes of this Article, an effective technological measure means any technology, device, or component that, in the normal course of its operation is used by or at the direction of a right holder to control access, such as encryption, scrambling, or other transformation of their works, [NZ: ~~performers~~] performances, or phonograms, or a copy control that protects any copyright or rights related to copyright.] [EU:, which achieves the protection objective.] [NZ: For the avoidance of doubt, it does not include any technology, device or component that only controls access to a protected work or phonogram for non-infringing purposes]

each Party shall provide protection at least against:]⁵⁴ Adequate legal protection shall be provided, in appropriate cases, at least against:

(a) [NZ: ~~the unauthorized circumvention of an effective technological measure [US: that restricts acts not authorized by the right holder and is]carried out knowingly or with reasonable grounds to know~~⁵⁵;] and the unauthorized circumvention of an effective technological measure [US: that restricts acts not authorized by the right holder and is]carried out knowingly or with reasonable grounds to know⁵⁶; and

(b) the manufacture, importation, or distribution [US: of, or offer to distribute, a device or product, that circumvents an effective technological measure and is either:] of a device that has predominant function of circumventing an effective technological measure and that is any of the following:

- (i) [US: ~~marketed for the purpose of circumventing an effective technological measure~~] marketed for the purpose of circumventing an effective technological measure;
- (ii) primarily designed or produced for the purpose of circumventing an effective technological measure; or
- (iii) has only a limited commercially significant purpose other than circumventing an effective technological measure.]

Option 1

5. Each Party shall provide that effective legal remedies [EU: ~~effective legal remedies~~] [EU: adequate legal protection] against a violation of a measure implementing paragraph (4) is independent of any [J: other unlawful activities] infringement of copyright or related rights.⁵⁷

Option 2

5. [US/Sing/NZ/Aus/: Each Party shall provide that a violation of a measure

⁵⁴ [J: Each Party may comply with its obligation under this paragraph by providing such protection against appropriate cases of conduct referred to in subparagraph (a) and (b), provided that it does not impair the adequacy of legal protection or the effectiveness of legal remedies.]

⁵⁵ No Party shall be obliged to apply subparagraph (a) to the unauthorized circumvention of a copy control.

⁵⁶ No Party shall be obliged to apply subparagraph (a) to the unauthorized circumvention of a copy control.

⁵⁷ [J: in accordance with the applicable national legislation,] The obligations in paragraphs (4) and (5) are without prejudice to the rights, limitations, exceptions, or defenses to copyright or related rights infringement. Further, [US: in implementing] paragraph (4)[US: ~~does not create an obligation to~~] does not create an obligation [US: no Party may] to require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as the product does not otherwise violate any measures implementing paragraph (4).

implementing paragraph (4) is independent of any [J: other unlawful activities] [J: ~~infringement of copyright or related rights~~] infringement of copyright or related rights.^{58]}

Article 2.18.X

Each Party may adopt and maintain exceptions or limitations to measures [Can: ~~measures~~] [Can: provisions] implementing paragraph (4), so long as they do not significantly impair the adequacy of legal protection of those [Can: ~~those~~] [Can: technological] measures or the effectiveness of legal remedies for violations of those measures.⁵⁹

6. To protect electronic rights management information, each Party shall provide adequate legal protection and effective legal remedies against any person performing without authority any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any copyright or [Can: with respect to phonograms any] related right:

- (a) to [Sing: knowingly] remove or alter any electronic right management information⁶⁰
- (b) to distribute, [Can: or] import for distribution [Can: to an extent that the copyright owner is prejudicially affected], broadcast, communicate [Can: ~~to~~], or make available to the public copies of works, [KOR⁶¹: or other protected subject matters of copyrights or related rights] [performances, or phonograms], knowing that electronic rights management information has

⁵⁸ [J: in accordance with the applicable national legislation,] The obligations in paragraphs (4) and (5) are without prejudice to the rights, limitations, exceptions, or defenses to copyright or related rights infringement. Further, [US: in implementing] paragraph (4)[US: ~~does not create an obligation to~~] does not create an obligation [US: no Party may] to require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as the product does not otherwise violate any measures implementing paragraph (4).

⁵⁹ Negotiator's note: sovereign immunity provision required for this provision

⁶⁰ For purposes of this Article, [electronic] rights management information means: (a) information that identifies a work, [KOR: or other protected subject matters of copyrights or related rights] [performance, or phonogram]; the author [of the work, the performer of the performance, or the producer of the phonogram] [KOR: or the right holders of any of copyright or related rights]; or the owner of any right in the work, performance, or phonogram; (b) information about the terms and conditions of the use of the work, [performance, or phonogram] [KOR: or other protected subject matters of copyrights or related rights]; or (c) any numbers or codes that represent the information described in (a) or (b) above, when any of these items is attached to a copy of the work, [performance, or phonogram] [KOR: or other protected subject matters of copyrights or related rights] or appears in connection with the communication or making available of a work, [performance, or phonogram] [KOR: or other protected subject matters of copyrights or related rights] to the public.

⁶¹ Consider substituting term „at least“

been removed or altered without authority.]

7. Each Party may adopt and maintain exceptions or limitations to measures [Can: measures] [Can: provisions] implementing paragraph (4) [EU/CH/US: and (5)], so long as they do not significantly impair the adequacy of legal protection of those [Can: those] [Can: technological] measures or the effectiveness of legal remedies for violations of those measures.

CHAPTER THREE INTERNATIONAL COOPERATION⁶²

ARTICLE 3.1: INTERNATIONAL COOPERATION

1. Each Party recognizes that international cooperation is vital to realize effective protection of intellectual property rights and should be encouraged regardless of the origin of the goods infringing intellectual property rights, or the location or nationality of the right holder.

2. In order to combat intellectual property rights infringement, in particular, trademark counterfeiting and copyright piracy, each Party shall promote cooperation, where appropriate, among the competent authorities of the Parties responsible for enforcement of intellectual property rights. Such cooperation may include law enforcement cooperation with respect to criminal enforcement and border measures covered by this Agreement.

3. Each Party understands that cooperation under this Chapter shall be conducted consistent with relevant international agreements as well as subject to the domestic laws, policies, resource allocation and law enforcement priorities of the Parties.

ARTICLE 3.2: INFORMATION SHARING

1. The Parties shall endeavor to promote the exchange of the following information:

- (a) information collected by a Party under provisions of Chapter 4, including statistical data and information on best practices; and
- (b) information on legislative and regulatory measures by a Party related to the protection and enforcement of intellectual property rights.

2. Each Party [shall ensure], as appropriate and mutually agreed, that its competent authorities have the authority to provide the competent authorities of any other Party, either on request or on their own initiative, with information on the enforcement of intellectual property rights.

⁶² Subject to scope.

ARTICLE 3.3: CAPACITY BUILDING AND TECHNICAL ASSISTANCE

1. Each Party shall endeavor to provide, on request and on mutually agreed terms and conditions [~~Mor: and on mutually agreed terms and conditions~~], assistance in capacity building and technical assistance in improving enforcement of intellectual property rights for Parties to this Agreement and, where appropriate, for prospective Parties to this Agreement. Such capacity building and technical assistance may cover such areas as:

- (a) enhancement of public awareness on intellectual property rights;
- (b) development and implementation of national legislation related to enforcement of intellectual property rights;
- (c) training of officials on enforcement of intellectual property rights; and
- (d) coordinated operations conducted at the regional and multilateral levels.

2. For the purposes of paragraph 1, each Party shall endeavor to work closely with other Parties and, where appropriate, countries or separate customs territories not a Party to this Agreement.⁶³

3. Each Party may undertake the activities described in this Article in conjunction with relevant [private sector] or international organizations. Each Party shall strive to avoid unnecessary duplication of the activities described in this Article with respect to other international efforts.⁶⁴

CHAPTER FOUR ENFORCEMENT PRACTICES

ARTICLE 4.1: ENFORCEMENT EXPERTISE, INFORMATION AND DOMESTIC COORDINATION

1. Each Party shall [[J:facilitate] [NZ: encourage][Sing: as it deems appropriate foster the] development of] [US: develop] specialized expertise [J: of][Sing: in its] competent authorities concerned with enforcement of [J:intellectual property rights] [Sing/NZ: copyright and trademark rights] , in order to [J: ensure] [Sing: promote] effective enforcement of [J: intellectual property rights] [Sing: copyright and trademark rights] [CAN: ~~in order to ensure effective enforcement of intellectual property rights~~] . [US: One means of implementation is through specialized law enforcement authorities for the investigation and prosecution of cases concerning the infringement of intellectual property rights.]

[AUS: Reserve its position on this article.]

2. Each Party shall [J: promote collection and analysis of] [Sing: endeavor to collect]

⁶³ Subject to confirmation by Mor.

⁶⁴ Language to be reviewed by legal experts.

statistical data and other[J: relevant] [Sing: ~~relevant~~] information [Sing: , which such Party determines is useful and relevant,] [J: concerning infringement of intellectual property rights [Sing: within its territory], especially] [CAN/NZ: ~~infringement of intellectual property right, especially~~] trade in counterfeit trademark goods and pirated copyright goods [EU: , ~~especially trade in counterfeit trademark goods and pirated copyright goods~~]. Each Party shall [J: further] [US: further] promote collection of information on best practices to prevent and combat [J: intellectual property right infringement] [CAN: trademark counterfeiting and copyright piracy]. [Sing: , ~~especially trade in counterfeit trademark goods and pirated copyright goods~~. Each Party shall further promote collection of information on best practices to prevent and combat intellectual property right infringement.]

3. Each Party shall [Sing: , as it deems appropriate,] [US: , as appropriate,] [J: endeavour to enhance] [US: promote] internal coordination among, [J: and facilitate joint actions by] [US/CAN: ~~and facilitate joint actions by~~], [Sing: such Party's] [US: the] competent authorities [J: concerned with] [US: responsible for] enforcement of intellectual property rights [J: through an appropriate coordinating [J: body][EU: bodies] or other relevant mechanisms] [Sing: ~~through an appropriate coordinating body or other relevant mechanisms~~].

4. [J: In order to promote effective enforcement of intellectual property rights,] [US/CAN: ~~In order to promote effective enforcement of intellectual property rights,~~] each Party shall [Sing: , as it deems appropriate,] [J: endeavour to encourage][EU: ~~endeavour to encourage~~][US: promote] [US/EU: the] establishment and maintenance of formal or informal mechanisms, [US: as appropriate,] such as public and/or private advisory groups, whereby competent authorities may hear [US: the views of] right holders and other relevant stakeholders [J: where appropriate] [US/EU: ~~where appropriate~~] [Sing: ~~encourage establishment and maintenance of formal or informal mechanisms, such as public and/or private advisory groups, whereby competent authorities may hear right holders and other relevant stakeholders where appropriate~~] foster dialogue and information exchanges with shareholders in its territory]

[NZ: Reserve its position on this paragraph.]

ARTICLE 4.2: MANAGEMENT OF RISK AT BORDER⁶⁵

Each Party shall adopt and maintain appropriate measures that facilitate activities of custom authorities for better identifying and targeting for inspection at its border, shipments [J: that [EU: could] contain] [CAN/CH: which are suspected to contain] [J: counterfeit trademark goods or pirated copyright goods] [EU: goods infringing intellectual property rights.] Such activities may include, [J: subject to paragraph 2 of Article 3.2] [EU: clause in article 3.4. is applicable]:

(a) contact with relevant stakeholders and with relevant authorities to identify and

⁶⁵ Article 4.2 should be reviewed in relation to other proposals in Chapter 2 regarding Information Exchange between Customs Authorities.

address risks;

- (b) exchanging available data with custom authorities of other Parties regarding significant seizures of [J: counterfeit and pirated] [EU: infringing] goods by customs, wherever possible; and
- (c) sharing information with custom authorities of other Parties on approaches that are developed to provide greater effectiveness in targeting shipments that could contain [J: counterfeit and pirated] [EU: infringing] goods.

[US: 1. To better identify and target shipments for inspection that are suspected to contain counterfeit trademark goods or pirated copyright goods, each Party may:

- (a) consult with relevant stakeholders and with competent authorities responsible for intellectual property rights enforcement to identify and address significant risks and promote actions to mitigate those risks;
- (b) when appropriate, exchange data with border authorities of other Parties; and
- (c) share information with border authorities of other Parties on approaches that are developed to provide greater effectiveness in the border enforcement of intellectual property rights, including approaches for targeting shipments that could contain counterfeit and pirated goods.

- 2. Each Party shall provide that its competent authorities may conduct audits of an importer's business records, including methods of payment and purchase contracts, as well as its internal controls to track illicit financial gains and expose business practices related to trademark counterfeiting and copyright piracy.]

[KOR: Article 4.2 should be reviewed in relation to other proposal on Chapter 2 regarding Information Exchange between Customs Authorities.

[ARTICLE XX: INFORMATION EXCHANGE BETWEEN CUSTOMS AUTHORITIES

If the customs authority of an importing party seizes counterfeit trademark goods or pirated goods to be imported, the party may request the customs authority of the exporting party to take proper measures to the exporters of the goods concerned. The requesting party shall provide information necessary for the identification of the goods concerned by the customs authority of the requested party.]

[CAN: Reserve its position on US proposal and Korea proposal.]

[MX : Move this paragraph to Boarder Measure section.]

ARTICLE 4.3: TRANSPARENCY/PUBLICATION OF ENFORCEMENT PROCEDURES AND PRACTICES

Option 1

[J: 1. For the purpose of [J: further] [US: ~~further~~] promoting transparency in the administration of [US: the] intellectual property right enforcement system, each Party shall take appropriate measures [US: pursuant to domestic laws and policies,] [J:

available] [US/CAN: ~~available~~] to publish or make available to the public information [CAN: within a reasonable period of time] on:

- (a) procedures [EU: available] regarding the enforcement of intellectual property rights including competent authorities for enforcement of intellectual property rights and contact points for assistance to right holders;
- (b) relevant laws, regulations, [J: final judicial decisions][EU: ~~final judicial decisions~~] and administrative rulings of general application pertaining to enforcement of intellectual property rights; [Sing: delete subparagraph]
- (c) applications [EU: forms] for the suspension by the competent authorities of the release of goods [J: infringing intellectual property right] [US/CAN/CH: suspected counterfeit and pirated goods] as a border measure; and
[Sing: delete subparagraph]
[CH: Data protection laws in Switzerland may limit the possibility to publish applications for the suspension of the release of goods.]
- (d) its efforts to ensure effective enforcement of intellectual property rights and [US: an effective][J: intellectual property protection system] [Sing: ~~intellectual property protection system~~] including any [US: ~~any~~] statistical data that the Party may collect.]

Option 2

[US: 1. For the purpose of promoting transparency in the administration of its intellectual property rights enforcement system, each Party shall:

(a) provide that final judicial decisions or administrative rulings of general applicability pertaining to the enforcement of intellectual property rights shall be in writing and shall state any relevant findings of fact and the reasoning or the legal basis upon which the decisions are based. Each Party shall also provide that such decisions or rulings shall be published⁶⁶, or otherwise made publicly available, in a national language in such a manner as to enable governments and interested persons to become acquainted with them.

(b) identify in a manner readily available to the public, the competent authorities for intellectual property enforcement and contact points where right holders may seek assistance;

(c) [publish applications for the suspension by the competent authorities of the release of suspected counterfeit and pirated goods as a border measure;] and

(d) publicize information on its efforts to ensure effective enforcement of intellectual property rights in its domestic intellectual property rights system, including any statistical information that the Party may collect for such purposes.⁶⁷]

⁶⁶ [US : For greater certainty, a Party may satisfy the requirement in [Article 5.3] to publish a measure by making it available to the public on the Internet.]

⁶⁷ [US: For greater certainty, nothing in [this sub-paragraph] is intended to prescribe the type, format, and method of publication of the information a Party must publicize.]

Option 1

[J/US: 2. Nothing in this [J: Chapter and Chapter 3][US: Agreement] shall require any Party to disclose {J: confidential} information which would impede the enforcement of its laws and regulations, including laws protecting investigative techniques, right of privacy or confidential information for law enforcement, or otherwise be contrary to [US: its domestic laws or policy, or] the public interest, or would prejudice the legitimate commercial interests of particular enterprises, public or private.

[EU: Move this paragraph to Chapter 3.1.4]

[AUS: 2. Nothing in paragraphs 1, 2 and 3 shall require Members to disclose personal information, or confidential information which would impede law enforcement or otherwise be contrary to the public interest or could prejudice the legitimate commercial interests of particular enterprises, public or private.]

[NZ: It is NZ's preference for this article to be developed into a separate general "Transparency" provision within ACTA that would apply "horizontally" across the Agreement, rather than having transparency obligations peppered throughout individual chapters.]

[EU: 2. In civil legal proceedings instituted for infringement of an intellectual property right, the judicial authorities may order, at the request of the applicant and at the expense of the infringer, appropriate measures for the dissemination of the information concerning the decision, including displaying the decision and publishing it in full or in part. Parties may apply this provision to other judicial and administrative proceedings.]

ARTICLE 4.4: PUBLIC AWARENESS

Each Party shall [take [J:necessary] [CAN: ~~necessary~~][Sing: such][AUS: appropriate]] [US: promote the adoption of appropriate] measures [Sing: as it deems appropriate] to enhance] [NZ: will promote] [US/MX: including educational projects, designed to raise] public awareness of the importance of [J: the protection of][US: protecting] intellectual property rights and the detrimental effects of intellectual property right infringement, including educational [J: and dissemination] [CAN: ~~and dissemination~~] projects. [US/CAN/MX: Such measures may include joint initiatives with the private sector.]

[EU: Article 4.5: Destruction of infringing goods

In cases where confiscated goods found to be infringing intellectual property rights are to be destroyed, Parties shall endeavour to take environmental concerns into account when deciding on the destruction method.]

CHAPTER FIVE INSTITUTIONAL ARRANGEMENTS

ARTICLE 5.1: THE ACTA COMMITTEE

1. Each Party to this Agreement shall be represented in the ACTA Committee hereby established by the Parties.⁶⁸

2. The Committee shall:

- (a) review the implementation and operation of this Agreement;
- (b) consider matters concerning the development of this Agreement;
- (c) consider in accordance with Article 6.4 any amendments to the Agreement;
- (d) approve the terms of accession to the Agreement for WTO-Members seeking to become Party to this Agreement; and
- (e) consider any other matter that may affect the implementation and operation of this Agreement.

3. The Committee may:

- (a) establish ad hoc committees or working groups to assist the Committee in accomplishing its responsibilities under paragraph 2, as well as, upon request, to assist prospective Parties in joining the Agreement;
- (b) seek the advice of non-governmental persons or groups;
- (c) make recommendations regarding implementation and operation of the Agreement, including endorsing best practice guidelines related thereto;
- (d) share information and best practices on reducing intellectual property rights infringements, including techniques for identifying and monitoring piracy and counterfeiting; and
- (e) take such other action in the exercise of its functions as the Committee may decide.

4. [AUS/Mex: All negotiating parties to the ACTA shall have the opportunity to contribute to and endorse the rules of procedure of the Committee.] The Committee shall adopt its rules and procedures [EU/Kor/Mor: ~~no later than its first meeting~~] [no later than its first meeting] [US: within a reasonable period of time after its first meeting]. Such rules and procedures shall include provisions with respect to chairing and hosting meetings, performance of organizational duties relevant to the Agreement and its operation, and may include provisions with respect to observer status, and any other matter the Committee decides necessary for its proper operation. [J/Mex: The Committee may amend, as required rules and procedures.] [NZ/US/J: The Committee shall adopt its rules and procedures [US/J: within a

⁶⁸ Exact wording to be determined by the expert group.

reasonable period of time]. The Committee shall invite [those] [AUS: negotiating parties to ACTA] signatories [that are not yet parties] to participate to the Committee's deliberation on rules and procedures. Decisions adopting rules and procedures shall be taken by the Committee if there is a consensus of all the signatories [Mex: and of Parties] [whether or not they are parties to the Agreement].

5. All decisions of the Committee shall be taken by consensus⁶⁹, except as the Committee may otherwise decide by consensus. The working language of the Committee shall be English.⁷⁰

6. The Committee shall convene at least once every year, with the first meeting held within a reasonable period of time after entry into force of the Agreement, pursuant to Article 6.2.1.

7. The Committee's role shall not include any oversight or supervision relating to domestic or international enforcement or criminal investigations of specific intellectual property cases.

8. The Committee shall strive to avoid unnecessary duplication of other international efforts regarding the enforcement of intellectual property rights.

ARTICLE 5.2: CONTACT POINTS

1. Each Party shall designate a contact point to facilitate communications among the Parties on any matter covered by this Agreement.

2. On the request of a Party, the contact point of another Party shall identify an appropriate office or official and assist, as necessary, in facilitating communication between the office or official concerned and the requesting Party.

ARTICLE 5.3: CONSULTATION

1. Each Party [Mex/Kor: may request in writing consultations with another Party regarding the implementation and operation of this Agreement .The requested Party] shall accord sympathetic consideration to [Mex: such request], and shall afford [CH: upon request] adequate opportunity for consultation regarding, such [representations][statements] as may be made to it by another Party with respect to any matter affecting the implementation of this Agreement.

2. Each Party shall supply, in response to a written request from another Party,

⁶⁹ [Negotiator's note: consensus may be defined in the rules and procedures, at a later stage.]

⁷⁰ [Negotiator's note: will be finalized after 5.1.4]

information regarding its laws, regulations, procedures, [final judicial decisions,]⁷¹ or administrative rulings of general application with respect to any matter covered by this Agreement.⁷²

3. Any such consultations, including particular positions taken by Parties therein, shall be confidential, and without prejudice to the rights of either Party in any other proceeding, including ones under the auspices of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes.

4. The Parties may by mutual agreement notify the result of consultation referred to in paragraph 2 of this Article to the Committee.

CHAPTER SIX FINAL PROVISIONS

ARTICLE 6.1: SIGNATURE

This Agreement shall remain open for signature by participants⁷³ in its negotiation from [date] until [date] at the Depositary.

ARTICLE 6.2: ENTRY INTO FORCE OF THE AGREEMENT

1. This Agreement shall enter into force [[30] days after the deposit of the fifth instrument of ratification, acceptance or approval between those states which have deposited instruments of ratification, acceptance or approval][, with respect to each of the first [five] signatories which deposit their instruments of acceptance, [30] days after the date on which the fifth instrument of acceptance is deposited.]

2. With respect to an acceptance deposited [after entry into force of the Agreement pursuant to paragraph (1)] [JP: after the date on which the fifth instrument of acceptance [CH: , ratification or approval] is deposited], this Agreement shall enter into force [30] days after the date on which [JP: its instrument of] [the] acceptance [CH: , ratification or approval] is deposited by a signatory.

[CA: 2. For each additional signatory that deposits its instrument of ratification, acceptance or approval after the entry into force of the Agreement [NZ: after the date on which the fifth instrument of acceptance is deposited], the Agreement shall enter into force for that signatory [30] days after the date of deposit of its instrument of ratification, acceptance or approval.]

⁷¹ Pending confirmation from the EU

⁷² [NZ: appropriateness to have a transparency section]

⁷³ [Will insert a list of participants as a footnote or as part of a preamble.]

ARTICLE 6.3: WITHDRAWAL

A Party may withdraw from this Agreement by means of a written notification to the Depositary. Such withdrawal shall take effect 180 days after the notification is received by the Depositary.

ARTICLE 6.4: AMENDMENTS

1. Each Party may propose amendments to the Agreement to the Committee. Any decision by the Committee to present the proposed amendments to the Parties for adoption shall be taken by consensus.

2. The Parties shall deposit their respective instruments of acceptance [NZ: , ratification or approval] of any such amendment with the Depositary.

3. Such amendment shall enter into force 90 days after the date that all the Parties have deposited instruments of acceptance [NZ: , ratification or approval].

[JP: 1. Each Party may propose amendments to the Agreement to the Committee. Any decision to adopt the proposed amendments shall be made by consensus.

2. The Parties shall deposit their respective instruments of ratification, acceptance or approval of any such amendments with the Depositary.

3. Such amendments shall enter into force on the 90 days after the date that all the Parties have deposited the instruments of ratification, acceptance or approval.

4. Notwithstanding the provisions of paragraphs 2 and 3 of this Article, amendments not involving new obligations for the Parties shall enter into force on the date of their adoption by the Committee. The decision of the Committee on whether the amendments involve such obligation or not shall be made by consensus.]

ARTICLE 6.5: BECOMING PARTY TO THE AGREEMENT

1. After the expiration of the period provided in Article 6.1, any Member of the World Trade Organization ("WTO") may [apply to become Party to this Agreement.] [JP: become a Party to this Agreement by the deposit of an instrument of accession. As to that Party, this agreement shall enter into force 90 days after the date of such deposit.]

2. The Committee shall approve the terms of accession for each applicant by consensus.

3. After the Committee approves of the terms of accession to the Agreement, the applicant shall become a Party to the Agreement [30] days after the deposit of an instrument of acceptance [US: ratification or approval] [Mex: ~~acceptance~~ accession] with the depositary.

ARTICLE 6.6: TEXTS OF THE AGREEMENT

This Agreement shall be [signed in a single official copy in the English language] [CA: signed in the English and French languages, both copies being equally authentic] and copies established in the [insert name(s) of language(s)].

ARTICLE 6.7: DEPOSITARY

[Name of entity] shall be the Depositary of this Agreement.