

Consolidated Text
Prepared for Public Release

Anti-Counterfeiting Trade Agreement

PUBLIC Predecisional/Deliberative Draft:
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This draft text does not identify participants' positions in respect of square bracketed options.

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 any international obligation of a Party with respect to any other Party under existing agreements to which both Parties are party.

ARTICLE 1.2: NATURE AND SCOPE OF OBLIGATIONS²

1. Members shall give effect to the provisions of this Agreement. A Party may implement in its domestic law more extensive protection and enforcement of intellectual property rights than is required by this Agreement, provided that such protection and enforcement does not contravene the provisions of this Agreement. Members 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.

ARTICLE 1.4: PRIVACY AND DISCLOSURE OF INFORMATION

[A suitable provision needs to be drafted that would ensure nothing in the Agreement detracts from national legislation regarding protection of personal privacy. In the same

¹ This Section A has been proposed as an initial discussion draft, 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.

way, a suitable provision needs to be drafted regarding disclosure of commercial information]

[Section B³: General Definitions

ARTICLE 1.X: DEFINITIONS

For purposes of this Agreement, unless otherwise specified:

days means calendar days;

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.

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;⁴

WTO means the World Trade Organization; and

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

³ Section B of the Initial Provisions is still to be discussed.

⁴ 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 Obligations⁵

ARTICLE 2.X: GENERAL OBLIGATIONS WITH RESPECT TO ENFORCEMENT

1. 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.
2. In respect of civil remedies and criminal penalties for enforcement of intellectual property rights, each Party shall take into account the need for proportionality between the seriousness of the infringement and the remedies or penalties ordered.
- [3. Those measures, procedures and remedies shall also be [effective, proportionate][fair and equitable] and [deterrent]]⁶
4. [Provision on limitations on remedies available against use by governments as well as exemptions of public authorities and official from liability to be inserted here at a later date.]
5. [Define scope of the intellectual property rights covered in the Agreement]] [The scope of intellectual property rights will be defined at the start of each chapter.]

Section 1: Civil Enforcement

ARTICLE 2.1: AVAILABILITY OF CIVIL PROCEDURES

In the context of this section, e) [E]ach Party shall make available to right holders [civil judicial] [or administrative] procedures concerning the enforcement of any [intellectual property right] [copyrights and related rights and trademarks].

ARTICLE 2.X: INJUNCTIONS

- [1.]In civil judicial proceedings concerning the enforcement of [copyright or related rights and trademarks] [intellectual property rights], each Party shall provide that its judicial authorities shall have the authority [subject to any statutory limitations under its domestic law] to issue [against the infringer an injunction aimed at prohibiting the continuation of the] [an order to a party to desist from an] infringement, including an order to prevent infringing goods from entering into the channels of commerce [and to

⁵This General Obligations Section has been proposed as an initial discussion draft, to receive detailed reactions at the next Round.

⁶[Move (with adjustments) Art. 2.1.2 to General Obligations.]

prevent their exportation].⁷

[2. The Parties [may] shall also ensure that right holders are in a position to apply for an injunction against [infringing] intermediaries whose services are used by a third party to infringe an intellectual property right.⁸]⁹

ARTICLE 2.2: DAMAGES

1. Each Party shall provide that:

(a) 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 [copyright or related rights and trademarks] [intellectual property rights] to pay the right holder

(i) damages adequate to compensate for the injury the right holder has suffered as a result of the infringement; or

(ii) [at least in the case of copyright or related rights infringement and trademark counterfeiting,] [in the case of IPR infringements] the profits of the infringer that are attributable to the infringement, [which may be presumed to be the amount of damages] [and that are not taken into account in computing the amount of damages] [referred to in clause (i)]¹⁰

[which may be presumed to be the amount of damages referred to in clause (i)]; and

(b) in determining the amount of damages for [copyright or related rights infringement and trademark counterfeiting] [infringement of intellectual property rights], its judicial authorities shall 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, or [the profits of the infringer that are attributable to the infringement].

⁷ A Party may comply with its obligation relating to exportation of infringing goods through its provisions concerning distribution [or transfer].]

⁸ The conditions and procedures relating to such injunction will be left to each Party's legal system.]

⁹ At least one delegation opposes paragraph 2 and is considering its placement

¹⁰At least one delegation proposes to delete (ii) as originally proposed and move (ii) into paragraph 2.2.1(b).

[2. At least with respect to works, phonograms, and performances protected by copyright or related rights, and in [cases of trademark counterfeiting], in civil judicial proceedings, [As an alternative to paragraph 1,] each Party [shall][may] establish or maintain a system that provides:

- (a) pre-established damages;
- (b) presumptions for determining the amount of damages¹¹ sufficient to compensate the right holder for the harm caused by the infringement.¹² [; or
- (c) additional damages]]

[3. Where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity, each Party may [lay down that] [establish] [may authorize its] the judicial authorities may [to] order the recovery of profits or the payment of damages, which may be pre-established.]

[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 [¹³] as an alternative to the remedies referred to in paragraph 1.]

Option 1

[5. Each Party shall provide that its judicial authorities, except in exceptional circumstances, shall have the authority to order, at the conclusion of civil judicial proceedings [[at least in cases] concerning copyright or related rights infringement, [patent infringement,] or trademark infringement] that the prevailing party be awarded payment by the losing party of [[reasonable and proportionate] legal] court costs or fees. [Each Party shall also provide that its judicial authorities, [except in exceptional circumstances], [in proceedings concerning copyright or related rights infringement or willful trademark counterfeiting,] shall have the authority to order, [in appropriate cases], that the prevailing party be awarded payment by the losing party of reasonable attorney's fees [, and other expenses as provided for under that Party's domestic

¹¹ Such measures may include the presumption that the amount of damages is (i) the quantity of the goods infringing the right holder's intellectual property right and actually assigned to third persons, multiplied by the amount of profit per unit of goods which would have been sold by the right holder if there had not been the act of infringement or (ii) a reasonable royalty [or (iii) a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorization to use the intellectual property right in question].

[¹² No Party is required to apply paragraph 2 to actions for infringement against a Party or a third party acting with the authorization or consent of the Party.]

[¹³ No Party is required to provide the right holders with more than one of the options referred to in paragraph 2.]

law].^{14]}

Option 2

[5. Each Party shall provide that its judicial authorities, [in appropriate cases], shall have the authority to order, at the conclusion of civil judicial proceedings [[at least in cases] concerning copyright or related rights infringement, [patent infringement,] or trademark counterfeiting] that the prevailing party be awarded payment by the losing party of court costs or fees and reasonable [and proportionate] attorney's fees [, and any other expenses as provided for under that Party's domestic law].^{15]}

ARTICLE 2.3: OTHER REMEDIES

1. With respect to goods that have been found to be [pirated or counterfeited] [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 [recalled, definitively removed from the channel of commerce, or] 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 [infringing] [pirated 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.

[3. The judicial authorities shall order that those remedies be carried out at the expense of the infringer, unless particular reasons are invoked for not doing so.]

[4. [In ordering those remedies, the judicial authorities][Each Party shall further provide that its judicial authority in ordering these remedies] shall take into account the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interest of third parties.]^{16]}

ARTICLE 2.4: INFORMATION RELATED TO INFRINGEMENT

[Without prejudice to other statutory provisions which, in particular, govern the protection of confidentiality of information sources or the processing of personal

¹⁴ For greater certainty, the term "reasonable attorney's fees" is not intended to require a higher amount than the amount of "appropriate attorney's fees" under the TRIPS Article 45.2.]

¹⁵ For greater certainty, the term "reasonable attorney's fees" is not intended to require a higher amount than the amount of "appropriate attorney's fees" under the TRIPS Article 45.2.]

¹⁶ This provision is to be reflected in the General Obligations Section.

data,]¹⁷ Each Party shall provide that in civil judicial proceedings concerning the enforcement of [intellectual property rights][copyright or related rights and trademarks], its judicial authorities shall have the authority upon a justified request of the right holder, to order the [alleged] infringer [including an alleged infringer] to provide, [for the purpose of collecting evidence] any [relevant] information [information on the origin and distribution network of the infringing goods or services][in the form as prescribed in its applicable laws and regulations] that the infringer possesses or controls, [where appropriate,] 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. [For greater clarity, this provision does not apply to the extent that it would conflict with common law or statutory privileges, such as legal professional privilege.]]

ARTICLE 2.5: PROVISIONAL MEASURES

[X. Each Party shall provide that its judicial authorities shall have the authority, at the request of the applicant, to issue an interlocutory injunction intended to prevent any imminent infringement of an intellectual property right [copyright or related rights or trademark]. An interlocutory injunction may also be issued, under the same conditions, against an [infringing] intermediary whose services are being used by a third party to infringe an intellectual property right. Each Party shall also provide that provisional measures may be issued, even before the commencement of proceedings on the merits, to preserve relevant evidence in respect of the alleged infringement. Such measures may include *inter alia* the detailed description, the taking of samples or the physical seizure of documents or of the infringing goods.]

1. Each Party shall [provide][ensure] that its judicial authorities [shall]act [expeditiously][on requests] for provisional measures *inaudita altera parte*, and shall endeavor to make a decision[on such requests] without undue delay, except in exceptional cases.

2. [In civil judicial proceedings concerning copyright or related rights infringement and trademark counterfeiting¹⁸], each Party shall provide that its 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, documentary evidence relevant to the infringement].

[3. Each Party shall provide that its [judicial][competent] 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

¹⁷[Negotiators Note: Study moving this clause to General Provisions section]

¹⁸At least one delegation raises issue of scope of this provision.

certainty that the plaintiff's right is being infringed or that such infringement is imminent, and to order the plaintiff to provide a reasonable security or equivalent assurance [set at a level sufficient] to protect the defendant [, 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 Measures¹⁹[²⁰] [²¹]

[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 TRIPS²². 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.]

3. [Parties shall provide for the provisions related to border measures to be applied [at least]in cases of trade mark counterfeiting and copyright piracy. [Parties may provide for such provisions to be applied in other cases of infringement of intellectual property rights.]]

¹⁹ 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.

²⁰ 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].

²¹ No Party shall be obliged to apply this section to any goods that do not infringe an intellectual property right held within the territory of that Party]. [Negotiator's note: Study moving to General Provisions section.]

²² The provisions of this section shall also apply to confusingly similar trademark goods [, 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.]

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 [or sent in small consignments.]

ARTICLE 2.X: PROVISION OF INFORMATION FROM THE 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

1. Each Party shall provide procedures for import [and in-transit²³] shipments and [may] [shall] provide procedures for export shipments, by which right holders may request the competent authorities to suspend release²⁴ of suspected counterfeit trademark goods²⁵ and suspected pirated copyright goods²⁶ [goods suspected of infringing an intellectual property right] into free circulation.

²³ 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.]

[²⁴For 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.]

²⁵ 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.

[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.]

²⁶ 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.

Option 2

[1. 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.]

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 infringing goods that apply to all goods²⁷ under customs control in its territory and remain applicable to multiple [or in the alternative 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 [one year][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 [one year][or sixty days].

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 [may] [shall] 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, [exported] [, or in-transit] goods including suspected counterfeit trademark goods or suspected pirated copyright goods admitted to, withdrawn from, or located in free trade zones [goods suspected of infringing an intellectual property right]. [Each Party [may][shall endeavor to] provide

²⁷Whether this applies to imports, exports and/or in transit goods depends on paragraph 1.

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.]

Option 2

[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 initiative, to suspend the release of goods suspected of infringing other intellectual property rights [, not covered by this section].]

ARTICLE 2.X:

[As an alternative to procedures in Article 2.6.1 and 2.7.1 relating to export or in-transit shipments, each Party shall provide that where shipments are exported from that Party, or shipments are in-transit through that Party, it shall cooperate to provide all available information to the destination Party, upon request of the destination Party, to enable 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 [is not a counterfeit trademark good or a pirated copyright good] [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 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 intellectual property right²⁹.

²⁸Subject to scope.

²⁹Subject to scope.

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 infringing³⁰. [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.] [or that they be disposed of outside the channels of commerce in such a way as to preclude injury 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 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: FEES³¹

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 to 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 infringing 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

³⁰Subject to scope.

³¹At least one delegation may come back with a possible additional paragraph for Article 2.12, depending upon the progress of discussion in the Civil Enforcement Section.

covered by 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 the section, each Party shall authorize its competent authorities to provide right holders within 30 days³² 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.³³

[Article 2.X: LIABILITY OF THE COMPETENT AUTHORITIES

[1. With respect to the border measures covered by this Section, each Party shall provide measures concerning the liability of competent authorities in the execution of their duties.]

Option 1

2. The acceptance of an application on its own shall not entitle the right-holder to compensation in the event that goods infringing an intellectual property right [copyright, related rights and trademarks] are not detected by [competent authorities] a customs office and are released or no action is taken to detain them.

Option 2

[2. Each Party may limit remedies sought by a right holder or other persons against a Party's competent authorities as a result of mere acceptance of an application under Article 2.[6], where the competent authorities release, or fail to detect, detain, or take action against or in connection with, goods that may infringe [IPR] covered by this Section.]

[3. The competent authorities shall not be liable towards the persons involved in the situations referred to in Article 2.6 for damages suffered by them as a result of the authority's intervention, except where provided for by the law of the Party in which the application is made or in which the loss or damage is incurred.]]

³²For purposes of the Article, "days" shall mean "business days".

³³Subject to agreement by at least one delegation.

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 Willful copyright or related rights piracy on a commercial scale includes:

- [(a) significant willful copyright or related rights infringements that have no direct or indirect motivation of financial gain; and
- (b) willful copyright or related rights infringements for purposes of commercial advantage or financial gain.³⁷]

[2. Each Party shall provide for criminal procedures and penalties to be applied in cases of [willful], [unauthorized] [importation] and [or] [domestic] [trafficking] [conducted] [use in the course of trade] [on a commercial scale] of labels [or packaging],

- (a) to which a mark has been applied [without consent of the right holder] which is identical to or cannot be distinguished [in its essential aspects] from a trademark registered in [its territory] [the Party in respect of certain goods or services], and
- (b) which are intended to be used [by the importer or user or, by a third party with the knowledge of the importer or user, for willful trademark counterfeiting] [on [either] the goods or [in relation to] services [for which is registered] [which are identical to goods or services for which the trademark is registered.]

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

³⁴ Negotiator's Note: Definitions of "counterfeit trademark goods" and "pirated copyright goods" provided for in footnotes 12 and 13 of Section 2 (Border Measures) should be used as context for this Section.

³⁵This provision is under internal examination by at least one delegation. Subparagraphs (a) and (b) are still under examination by at least one delegation. At least one is still considering paragraphs 1 and 2.

³⁶ Each Party shall treat willful importation [or exportation] of counterfeit trademark goods or pirated copyright goods on a commercial scale [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] of pirated copyright or counterfeit trademark goods through its measures concerning distribution.

³⁷For purposes of this Section, **financial gain** includes the receipt or expectation of receipt of anything of value.

accordance with its laws and regulations,] against any person who, without authorization of the holder of copyright [or related rights] [or the theatre manager] in a [motion picture or other audiovisual work], [cinematographic work] [knowingly] [uses an audiovisual recording device to transmit or make] [makes] a copy of [, or transmits to the public] the motion picture or other audiovisual work, or any part thereof, from a performance of the motion picture or other audiovisual work in a motion picture exhibition facility open to the public.]³⁸

ARTICLE 2.15: [CRIMINAL] LIABILITY AND PENALTIES [AND SANCTIONS]

[1. *Liability of Legal Persons*

- (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.]

[2. *Inciting, Aiding and Abetting*

The provisions of this section shall apply to [inciting,] aiding and abetting the offences referred to in Article 2.14.]]³⁹

[3. *Penalties and Sanctions*]

- [(a)] For the [offences] crimes referred to in [Article 2.14] [Article 2.14.1], each Party shall provide [effective, proportionate and dissuasive] penalties⁴⁰ [The available penalties shall] that include imprisonment [as well as] [and] monetary fines⁴¹ [sufficiently high to provide a deterrent to future acts of infringement, with a view to removing the monetary incentive of the infringer].
- [(b)] For legal persons held liable under Article 2.15.1, each Party shall

³⁸At least one delegation has asked for the deletion of paragraph 3.

³⁹At least one delegation opposes paragraph 2, 'Inciting, Aiding and Abetting'.

⁴⁰[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: [It is understood that there is no obligation for a Party to impose both imprisonment and monetary fines in parallel] [This does not imply an obligation for a Party to provide for the courts a possibility to impose both penalties in parallel.]

provide for effective, proportionate and dissuasive sanctions, including monetary sanctions.]

[ARTICLE 2.16. SEIZURE, FORFEITURE[/CONFISCATION] AND DESTRUCTION

[1. *Seizure*]

- (a) In case of an offence referred to in Article 2.14 [.1], each Party shall provide that its competent authorities shall have the authority to order [authorise] [at least for serious offences] 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 any assets derived from, or obtained directly or indirectly through the infringing activity [⁴²].
- (b) 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.] [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.]

[2. *Forfeiture/Confiscation and Destruction*]

- (a) For the offences referred to in Article 2.14[.1], each Party shall provide that its competent authorities shall have the authority to order [confiscation/][forfeiture⁴³ [and/]or] destruction [where appropriate] of all counterfeit trademark goods or pirated copyright [or related right] goods, of materials and implements [predominantly] used in the creation of counterfeit trademark goods or pirated copyright goods [or related rights goods], and [at least for serious offences] [forfeiture to the State] of the [any] assets derived from, or obtained directly or indirectly, through the infringing activity.
- (b) Each Party shall [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 [confiscated/] forfeited [to the state] under this subparagraph shall, if not destroyed, be disposed of outside the channels of commerce, [under the condition that the goods are not dangerous for the health and security of persons.] [in such a

⁴²Each Party may provide that its judicial authorities have the authority to order [fines or] the seizure of assets the value of which corresponds to that of such assets derived from or obtained, directly or indirectly, through the infringing activity.

⁴³At least one delegation to propose wording to clarify whether forfeiture to right holder or to state.

manner as to avoid any harm caused to the right holder.]

- (c) Each Party shall further ensure that [confiscation/]forfeiture and destruction under this subparagraph shall occur without compensation of any kind to the defendant.
- (d) Each Party may provide that its judicial authorities have the authority to order the confiscation/ forfeiture [to the state] of assets 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] [and/or] legal action with respect to the [criminal] offenses described in [Article 2.14] [Sections 3 and 4.] [at least in cases of significant public interest, in accordance with national law.]

[ARTICLE 2.X. RIGHTS OF THE DEFENDANT AND THIRD PARTIES

Each Party shall ensure that the rights of the [defendants and] third parties shall be duly protected and guaranteed.]⁴⁴

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

ARTICLE 2.18 [ENFORCEMENT PROCEDURES IN THE DIGITAL ENVIRONMENT]⁴⁵

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 [trademark, copyright or related rights][intellectual property rights] infringement which takes place [by means of the Internet][in the digital environment] , including expeditious remedies to prevent infringement and remedies which constitute a deterrent to further infringement.

2. [Those measures, procedures and remedies shall also be fair and proportionate.]⁴⁶ *

⁴⁴At least one delegation proposes that this provision be reflected in the General Provisions of the Agreement.

⁴⁵At least one delegation reserves its right to revisit elements of this Section at a later date.

⁴⁶[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.]

3. Without prejudice to the rights, limitations, exceptions, or defenses to [[patent, industrial design, trademark and][copyright or related rights]][intellectual property rights] infringement available under its law, including with respect to the issue of exhaustion of rights, each Party [confirms that] [shall provide for] [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 liability⁴⁷][or liability for those who authorize infringement, or both] for [[patent, industrial design, trademark and][copyright or related rights]][intellectual property rights] infringement.⁴⁸

Option 1

[3. Each Party recognizes that some persons⁴⁹ use the services of third parties, including online service providers,⁵⁰ for engaging in [patent, industrial design and trademark,] copyright or related rights infringement. Each Party also recognizes that legal uncertainty with respect to application of copyright and related rights, limitations, exceptions, and defenses in the digital environment may present barriers to the economic growth of, and opportunities in, electronic commerce.]⁵¹ Accordingly, in order to facilitate the continued development of an industry engaged in providing information services online while also ensuring that measures to take adequate and effective action against copyright or related rights infringement are available and reasonable each Party [shall][may]:

(a) provide limitations⁵² on the scope of civil remedies available against an

⁴⁷[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.] At least one delegation opposes this footnote.

⁴⁸ Negotiator's Note: This provision may be moved and located in the civil enforcement section.

⁴⁹ Negotiator's Note: Definition of person still pending in General Provisions.

⁵⁰[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, 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.]

⁵¹At least one delegation suggests moving the second and third sentences of paragraph 3. At least one delegation suggests moving the first and second sentences of paragraph 3.

⁵²For greater certainty, the Parties understand that [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

online service provider for infringing activities that occur by

- (i) automatic technical processes, and
- (ii) the actions of the provider's users that are not directed or initiated by that provider and when the provider does not select the material, and
- (iii) the provider referring or linking users to an online location,

when, in cases of subparagraphs (ii) and (iii)⁵³, the provider does not have actual knowledge of the infringement and is not aware of facts or circumstances from which infringing activity is apparent; and]

Option 2

[Each Party recognizes that some persons⁵⁴ use the services of third parties, including online service providers,⁵⁵ for engaging in intellectual property rights infringements.

- (a) In this respect, each Party shall provide limitation on the [liability of] [scope of civil remedies available against an] on-line service provider[s] for infringing activities⁵⁶ that occur by⁵⁷

- (i) automatic technical processes [that keep the provider from taking measures to prevent the infringement], or
- (ii) the actions of the provider's users that are not initiated nor modified by that provided and when the provider does not select the material or
- (iii) the storage of information provided by the recipient of the service or at the request of the recipient of the service,

when exercising the activities as stipulated in paragraph 3(a)(ii) and/or (iii) the online service providers act [takes appropriate measures] expeditiously, in accordance with applicable law [s], [such as those] to remove or disable access to infringing material or infringing activity upon obtaining actual knowledge of the infringement [or the fact that

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.

⁵³Clarify which conditions apply to which activities.

⁵⁴ [Negotiator's Note: Definition of "person" still pending in General Provisions.]

⁵⁵ 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, 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.]

⁵⁶ The activities covered in paragraph 3(a)(i) cover the mere conduit and the activities covered in paragraph 3(a)(ii) and (iii) cover respectively caching and hosting in accordance with parties legal systems.]

⁵⁷At least one delegation proposes to redraft this sub-paragraph.

the information at the initial source has been removed or disabled.] [or having reasonable grounds to know that the infringement is occurring]]

Option 1

- (b) condition the application of the provisions of subparagraph (a) on meeting the following requirements:
- (i) an online service provider adopting and reasonably implementing a policy⁵⁸ to address the unauthorized storage or transmission of materials protected by copyright or related rights [except that no Party may condition the limitations in subparagraph (a) on the online service provider's monitoring its services or affirmatively seeking facts indicating that infringing activity is occurring]; and
 - (ii) an online service provider expeditiously removing or disabling access to material or [activity][alleged infringement], upon receipt [of legally sufficient notice of alleged infringement,][of an order from a competent authority] and in the absence of a legally sufficient response from the relevant subscriber of the online service provider indicating that the notice was the result of mistake or misidentification.

except that the provisions of (ii) shall not be applied to the extent that the online service provider is acting solely as a conduit for transmissions through its system or network.]

Option 2:

[Paragraph 3(a) shall not affect the possibility for a judicial or administrative authority, in accordance with the Parties legal system, requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility of the parties establishing procedures governing the removal or disabling of access to information

The Parties shall not impose a general monitoring requirement on providers when acting in accordance with this paragraph 3.]

[3 *ter*. Each Party shall enable right holders, who have given effective notification to an online service provider of materials that they claim with valid reasons to be infringing their copyright or related rights, to expeditiously obtain from that provider information on the identity of the relevant subscriber.

⁵⁸At least one delegation proposes to include language in this footnote to provide greater certainty that their existing national law complies with this requirement.

3 *quater*. Each Party shall 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.]

[4.⁵⁹ In order to provide adequate legal protection⁶⁰ and effective legal remedies against the circumvention of effective technological measures that are used by authors, [performers or producers of phonograms] [the right holder of any copyright or related rights or owner of an exclusive license⁶¹] in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, [performances, and phonograms] [or other subject matters specified under Article 14 of the TRIPS Agreement], each Party shall provide for civil remedies, [or] [as well as] criminal penalties in appropriate cases of willful conduct [⁶²], that apply to:

[Each Party shall provide for adequate legal protection⁶³ and effective legal remedies, in the form of civil remedies or criminal penalties in appropriate cases of willful conduct, against the circumvention of effective technological measures that are used by authors, performers or producers or phonograms in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, performances, and phonogram. These shall apply to:]

- (a) the unauthorized circumvention of an effective technological measure⁶⁴ [that controls access to a protected work, performance, or phonogram]; and
- (b) the manufacture, importation, or circulation of a [technology], service, device, product, [component, or part thereof, that is: [marketed] or primarily designed or produced for the purpose of circumventing an effective technological measure; or that has only a limited commercially

⁵⁹At least one delegation has reservations about several elements in paragraph 4.

⁶⁰At least one delegation opposes inclusion of ‘adequate legal protection’.

⁶¹At least one delegation opposes inclusion of ‘or owner of an exclusive license’.

⁶²[For the purpose of this Article, willful conduct means actual knowledge or reasonable grounds to know that he or she is pursuing the objective of circumventing any effective technological measure.]

⁶³At least one delegation opposes inclusion of ‘adequate legal protection’.

⁶⁴ For the purposes of this Article, effective technological measure means any technology, device, or component that, in the normal course of its operation, [controls access to a protected work, performance, phonogram, or protects any copyright or any rights related to copyrights.][is controlled by the right holders through application of an access control or protection process such as encryption, scrambling, or other transformation of their works, performances or phonograms, or a copy control mechanism, which achieves the protection objective.]

significant purpose or use other than circumventing an effective technological measure.]]

[5. [4.2] Each Party shall provide [that a] [adequate legal protection against a] violation of a measure implementing paragraph (4) [is a separate civil or criminal offense,] independent of any infringement of copyright or related rights.⁶⁵]⁶⁶

Option 1

[Further, [each Party may adopt exceptions and limitations to measures implementing paragraph 4 so long as they do not significantly impair the adequacy of legal protection of those measures or the effectiveness of legal remedies for violations of those measures.]⁶⁷

Option 2

[5. Each Party may provide for measures which would safeguard the benefit of certain exceptions and limitations to copyright and related rights, in accordance with its legislation.]

[6. [In order to] [Each Party shall] provide adequate and effective legal remedies to protect [electronic] rights management information[, e]
[E]ach Party shall provide for civil remedies, [or] [as well as] criminal penalties] in appropriate cases of willful [⁶⁸] conduct, that apply to 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 related right:

- (a) to remove or alter any [electronic] right management information⁶⁹

⁶⁵[The] [In accordance with the applicable national legislation, the] obligations in paragraphs (4) and (5) [are][may be] without prejudice to the rights, limitations, exceptions, or defenses to copyright or related rights infringement. Further, [in implementing paragraph (4), no Party may][paragraph (4) does not imply any obligation 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).

⁶⁶At least one delegation is to reflect on appropriate location for this provision.

⁶⁷Negotiator's Note: This provision is subject to broader government action/sovereign immunity provision elsewhere in the Agreement.

⁶⁸[For the purpose of this Article, willful conduct means knowingly performing without authority any of the following acts listed under subparagraph 6 (a) or (b), if such person knows or has reasonable grounds to know that by so doing he is inducing, enabling, facilitating, or concealing an infringement of any copyright or any rights related to copyright.]

⁶⁹For purposes of this Article, [electronic] rights management information means: (a) information that identifies a work, [or other subject matters specified under Article 14 of the TRIPS Agreement] [performance, or phonogram]; the author [of the work, the performer of the performance, or the producer of the phonogram] [or any other right holders of the subject matters specified under Article

- (b) to distribute, import for distribution, broadcast, communicate, or make available to the public copies of works, [or other subject matters specified under Article 14 of the TRIPS Agreement] [performances, or phonograms], knowing that [electronic]rights management information has been removed or altered without authority.]

[7.] [6.2] Each Party may adopt [limitations or] exceptions to the requirements of subparagraphs (a) and (b) [of paragraph (6)] [so long as they do not significantly impair the adequacy of legal protection or effectiveness of legal remedies for violations of those measures.]

14 of the TRIPS Agreement]; 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] [or any other right holders of the subject matters specified under Article 14 of the TRIPS Agreement]; 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] [or other subject matters specified under Article 14 of the TRIPS Agreement] or appears in connection with the communicator or making available of a work, [performance, or phonogram] [or other subject matters specified under Article 14 of the TRIPS Agreement] to the public.

CHAPTER THREE INTERNATIONAL COOPERATION

ARTICLE 3.1: INTERNATIONAL ENFORCEMENT COOPERATION

1. Each Party recognizes that international [enforcement] cooperation [is vital [to realize [fully] effective protection of intellectual property rights] [in order to deal with the increasingly global problem of the trade in counterfeit and pirated goods]] [plays an important role in the protection of copyright and trademark rights]and should be [undertaken] [encouraged] regardless of the origin of the infringing goods or the location [or nationality] of the right holder [of the intellectual property rights.

2. In order to combat [intellectual property right infringement, in particular,] trademark counterfeiting and copyright piracy, each Party shall promote [may, as it deems appropriate,] cooperation [measures, where appropriate,] among the [relevant] competent authorities of the Parties [concerned with] [responsible for] enforcement of intellectual property rights. Such [cooperation includes][measures may include] [cooperation shall include][may include] law enforcement cooperation with respect to criminal investigation or prosecution [concerning] [relating to] the offences covered by this Agreement and [border measures] [cooperation at the border], [which may be conducted bilaterally or multilaterally] Particular attention shall be devoted to the circulation of IPR infringing goods detrimental to the health and safety.]

3. Each Party [shall][may], consistent with the [existing][domestic law and policy and the] [international agreements and arrangements to which such Party is a party], [conduct][undertake] enforcement cooperation [foreseen] [activities as provided] [international cooperation as set out] in this Chapter [,in line with the international agreements and arrangements to which such Party is a party.] [Each Party may also conduct enforcement cooperation or provide assistance to another Party pursuant to other international agreements, arrangements, and practices, and in accordance with its domestic law and policies.]

[4. Nothing in this Chapter and Chapter 4 shall require any Party to disclose confidential information which would be contrary to its laws, regulations, policies, legal practices and applicable international agreements and arrangements, including laws protecting investigative techniques, right of privacy or confidential information for law enforcement, or otherwise be contrary to public interest, or would prejudice the legitimate commercial interests of particular enterprises, public or private.]

[4. The Parties understand that obligations under this Chapter and Chapter 4 are subject to the domestic laws, policies, resource allocation and law enforcement priorities of each Party.]

ARTICLE 3.2: INFORMATION SHARING

1. [In order to ensure effective enforcement of the provisions of this Agreement,] each Party [[shall][may] promote sharing or exchanging] [may, as it deems appropriate, share or exchange] with other Parties [of the following information][as appropriate and mutually agreed]:

- (a) information collected by the Party under provisions of Chapter 4, including statistical data and information on best practices including those relating to[risk analysis] [risk management]; and
- (b) information on [the] development [and implementation] of legislative and regulatory measures [of the] [by the] Party [related to the protection and enforcement of intellectual property rights].

For this purpose, the Parties shall endeavour to establish appropriate modalities including holding of periodical meetings.

[Parties shall endeavor to establish an observatory as a tool for collecting information]

2. Each Party shall ensure, as appropriate and mutually agreed, [within the limits of [its] national legislation][consistent with its domestic laws] , policies, [legal] practices, and applicable [existing] international agreements and arrangements, that its competent authorities have the [ability] [authority] to provide the competent authorities of any other [Parties][Party], either on request or on its own initiative, with information [[necessary to ensure][to facilitate][to allow] a proper application of laws concerning enforcement of intellectual property rights and to prevent, investigate, [and repress acts of intellectual property right infringements][or prosecute infringement of Intellectual property rights] [related to the enforcement of intellectual property rights].

ARTICLE 3.3: CAPACITY BUILDING AND TECHNICAL ASSISTANCE

1. [In order to facilitate the implementation of this Agreement or the accession thereto,] [Developed country] Parties shall [endeavour to] provide, on request and on mutually agreed terms and conditions, assistance in capacity building and technical assistance[in improving enforcement of intellectual property rights,] [focused on initiatives to combat the trade in counterfeit and pirated goods] in favour of developing country Parties to this Agreement and [, where appropriate,] [for third countries][for countries not a Party to this Agreement.][Parties shall make all reasonable efforts to ensure that such capacity building and technical assistance are compatible and do not overlap with similar activities provided by international organizations active in the field of intellectual property.] [The provision of assistance under this Article and Articles 3.3.2 and 3.3.3 is subject to the availability of resources on the part of the donor Party.]

2. For the purpose of paragraph 1, [developed country]Parties shall [, at the request of developing country Parties and on mutually agreed terms and conditions,] work

closely with [developing country] [other] Parties [and, where appropriate, countries not a Party to this Agreement or separate customs territories,] [to enact] [implement and to] or strengthen their [domestic] [national] legislation, as appropriate, and assist them in improving their national intellectual property law enforcement capacities through sharing best practices concerning intellectual property law enforcement and providing relevant technical training for enforcement officials.

3. [[Developed country][Developed and developing country] Parties] [Each Party] may undertake the obligations under this Article in conjunction with relevant private sector or international organizations.

[4. Parties shall put in place a special allocation Fund to finance ACTA initiatives on capacity building and technical assistance]

[5. Parties shall, in the implementation and administration of this Agreement, take into account developing countries needs in the field of financing and technical assistance. In this respect, States Parties to the Agreement agree:

- (a) To support, developing countries efforts, for the implementation of the Agreement and the integration of anti-counterfeiting and anti-hacking actions in national development strategies. This assistance shall be designed to help developing countries to harmonize their laws, to carry out their obligations and to exercise their rights as Members.
- (b) To ensure predictable and sustainable financing.
- (c) To promote coordination of technical assistance activities with the bilateral donors, WTO Secretariat, WIPO as well as with other relevant international intergovernmental institutions.
- (d) States Parties shall review annually the implementation of this Article].

[5. State parties shall endeavour to provide technical assistance in the following areas:

- (a) Promoting the culture of intellectual property.
- (b) Training professionals in charge of the protection of the rightholders involved in the protection of intellectual Property.
- (c) Capacity building and experience sharing among institutions in charge of fighting counterfeiting and piracy.
- (d) Tools for measuring the economic impact of counterfeiting on the market and evaluating the anti counterfeiting and anti-hacking actions.

- (e) Conducting joint operations at the regional and international levels.
- (f) Enforcement of laws regarding fighting counterfeiting and piracy through the Internet.

Technical assistance shall be extended to all other types of actions facilitating the implementation and the applicability of the ACTA Agreement].

CHAPTER FOUR ENFORCEMENT PRACTICES

ARTICLE 4.1: ENFORCEMENT EXPERTISE, INFORMATION AND DOMESTIC COORDINATION

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

2. Each Party shall [promote collection and analysis of] [endeavor to collect] statistical data and other [relevant] information [, which such Party determines is useful and relevant,] [concerning infringement of intellectual property rights [within its territory], 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] [trademark counterfeiting and copyright piracy].

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

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

ARTICLE 4.2: MANAGEMENT OF RISK AT BORDER⁷⁰

1. 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 [that [could] contain] [which are suspected to contain] [counterfeit trademark goods or pirated copyright goods] [goods infringing intellectual property rights.] Such activities may include,[subject to paragraph 2 of Article 3.2] [clause in article 3.4. is applicable]:

⁷⁰[Article 4.2 should be reviewed in relation to other proposal on Chapter 2 regarding Information Exchange between Customs Authorities.]

- (a) contact with relevant stakeholders and with relevant authorities to identify and address risks;
- (b) exchanging available data with custom authorities of other Parties regarding significant seizures of [counterfeit and pirated] [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 [counterfeit and pirated] [infringing] goods.

[2. 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.

3. 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.]

ARTICLE 4.3: TRANSPARENCY/PUBLICATION OF ENFORCEMENT PROCEDURES AND PRACTICES

Option 1

[1. For the purpose of [further] promoting transparency in the administration of [the] intellectual property right enforcement system, each Party shall take appropriate measures [pursuant to domestic laws and policies,] [available] to publish or make available to the public information [within a reasonable period of time] on:

- (a) procedures [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, [final judicial decisions] and administrative rulings of general application pertaining to enforcement of intellectual

property rights;]

- [(c) applications [forms]for the suspension by the competent authorities of the release of goods [infringing intellectual property right] [suspected counterfeit and pirated goods] as a border measure;] and
- (d) its efforts to ensure effective enforcement of intellectual property rights and [an effective][intellectual property protection system] including any statistical data that the Party may collect.]

Option 2

[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 published⁷¹, 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.⁷²]

Option 1

[2. Nothing in this [Chapter and Chapter 3][Agreement] shall require any Party to disclose {confidential} information which would impede the enforcement of its laws and regulations, including laws protecting investigative techniques, right of privacy or

⁷¹ [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.]

⁷²[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.]

confidential information for law enforcement, or otherwise be contrary to [its domestic laws or policy, or] the public interest, or would prejudice the legitimate commercial interests of particular enterprises, public or private.

Option 2

[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.]

[3. 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 [necessary] [such][appropriate]] [promote the adoption of appropriate] measures [as it deems appropriate] to enhance [will promote] [including educational projects, designed to raise] public awareness of the importance of [the protection of][protecting] intellectual property rights and the detrimental effects of intellectual property right infringement, including educational [and dissemination] projects. [Such measures may include joint initiatives with the private sector.]

[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 ARRANGEMENTS⁷³

ARTICLE 5.1: THE [OVERSIGHT] [STEERING] [COMMITTEE]

1. The [Contracting] Parties [hereby establish][[shall have a] the [Oversight][ACTA] [Steering] Committee, comprising [[representatives of] [each of] the Parties] [one delegate from each Party who may be assisted by alternative delegates, advisors and experts.]

2. The Committee shall:

- (a) supervise the implementation of this Agreement; [including a periodic mutual evaluation process of the implementation of the Agreement by the parties, according to the principles of equal treatment and a fair hearing.]
- (b) [oversee [its][the] [the Agreement's] further elaboration [or development?] [of this Agreement], [deal with matters concerning the amendment and development of this Agreement] while ensuring that such[elaboration][development]does not duplicate other international efforts regarding the enforcement of intellectual property rights;
- (c) [[resolve][facilitate the avoidance of] disputes that may arise regarding [its][the] interpretation or application⁷⁴] [of this Agreement];]and
- (d) consider any other matter that may affect the operation of this Agreement.

3. The Committee may:

- (a) [establish,] [and delegate [tasks] tasks/responsibilities] to, ad hoc or standing committees working groups or [Government] experts groups;][to assist the Committee in accomplishing its tasks;][a Task-Force to undertake the monitoring and the evaluation of the Agreement, namely by reviewing the implementation of Parties' obligations, as defined in Article 5.1.2.a) and assisting candidate countries to join the Agreement. This Task-Force should consist of experts appointed by the Parties and agreed upon by the Oversight Committee;]
- (b) seek the advice of non-governmental persons or groups [from the State

⁷³At least one delegation reserves its right to revisit elements of this chapter at a later date.

⁷⁴ The application of this provision shall not conflict with the rules and implementation of the Dispute Settlement Understanding of the World Trade Organization.

Parties];

- (c) [make recommendations regarding the implementation of the Agreement [including endorsing best practice guidelines for implementing the Agreement, identifying and monitoring techniques of piracy and counterfeiting and their evolution]];
- (d) assist non-Party governments in assessing the benefits of accession to the Agreement [and share information and best practices on reducing IPR infringements];
- (e) [support international organizations in the enforcement of intellectual property rights;] and
- (f) take such other action in the exercise of its functions as the Parties may decide.

[4. One-half of the members of the Committee shall constitute a quorum.]

5. The Committee shall [establish its rules and procedures][at its first meeting adopt its rules of procedures] [including rules for the convocation of extraordinary sessions]. All decisions of the Committee shall be taken by consensus, [except as the Committee may otherwise decide [by consensus]]. [The working language of the Committee shall be English.]

6. The Committee shall convene [at least [once a year]] [once every two years] [in regular session]. [T]he Committee shall be chaired [and hosted][successively by each Party][by a volunteering Party] [in English alphabetically] . [assisted by a Vice-Chair from the Party due to chair and host the subsequent meeting.] [A Special session may be called for by one Party and convened if the majority of the Parties does not oppose such request. The Special session shall be chaired by the Party chairing the Regular session of that year. The Committee shall preferably meet in Geneva.]

[7. The Committee's role as set forth in Article 5.1 shall not include any oversight or supervision relating to domestic or international criminal investigations or enforcement of specific intellectual property cases.]

ARTICLE 5.2: THE SECRETARIAT

1. The Party that is the Chair of the Committee shall provide the Secretariat to the Committee for [the calendar year][the two calendar years beginning with the calendar year [immediately prior to that]] in which the Committee shall be convened with that Party as Chair.

2. The functions of the Secretariat shall be:

- (a) to provide assistance to the Committee [as required, and];
- (b) [to provide administrative support to the Chair][to perform the administrative tasks concerning this Agreement.]
- (c) [to elaborate all documents resulted from ordinary or extraordinary sessions]
- (d) [to submit documents derived from ordinary or extraordinary sessions to all parties]

ARTICLE 5.3: CONTACT POINTS

1. [Each Party shall designate a [current] contact point to facilitate communications [between the][with other] Parties on any matter covered by this Agreement.] [The][Each Party shall transmit the] [name, [and][physical] address, telephone number [and e-mail address]] of that contact point [shall be transmitted] to the Depository [prior to the entry into force of the Agreement for that Party], who shall circulate the information to the Parties.

2. On the request of [another][one] Party, the contact point [of another Party] shall identify [the] [according to the matter concerned, an appropriate] office or official [responsible for the matter concerned] and assist, as necessary, in facilitating communication between the [responsible] office or official concerned with the requesting Party.

[ARTICLE 5.4: TRANSPARENCY

Option 1

[1. Each Party shall ensure that its laws, regulations,[procedures] [final judicial decisions], and administrative rulings of general application respecting any matter covered by this Agreement are promptly [in an appropriate time] published 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.]

Option 2

[1. Each Party shall ensure 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 ensure that such decisions or rulings shall be published⁷⁵, 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.]

⁷⁵For greater certainty, a Party may satisfy the requirement in [Article 5.3] to publish a measure by making it available to the public on a publically accessible Internet site.]

[2. Each Party shall notify the laws and regulations referred to in [paragraph (1)][Article 4.3] to the Oversight Committee in order to assist that Committee in its review of the operation of this Agreement.]

3. Each Party shall supply, in response to a written request from another Party, information regarding its laws, regulations, [procedures][final judicial decisions] and administrative rulings of general application [respecting][with respect to] any matter covered by this Agreement.

4. Nothing in paragraphs [1, 2 and 3][1 and 2] shall require a Party to disclose {confidential} information which would impede law enforcement or otherwise be contrary to [domestic laws and policies, or] the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

ARTICLE 5.5: CONSULTATION

Each Party shall [accord sympathetic consideration to, and shall] afford adequate opportunity for consultation regarding, such representations as may be made [to it] by another Party with respect to any matter affecting the operation of this Agreement.

[ARTICLE 5.6: OBSERVERS

Countries candidate to become a Party to the Agreement may be invited [by the Committee] to attend sessions or parts thereof of the Oversight Committee as observers. An invitation under the same status may be extended [by the Committee] to international organizations active in the field of intellectual property and to non-governmental groups of intellectual property stake-holders]

CHAPTER SIX
FINAL PROVISIONS⁷⁶

[ARTICLE X : TRANSPARENCY

1. Each Party shall ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made publicly available in such a manner as to enable governments and interested persons to become acquainted with them.
2. Each Party shall notify the laws and regulations referred to in paragraph (1) to the Oversight Committee in order to assist that Committee in its review of the operation of this Agreement.
3. Each Party shall supply, in response to a written request from another Party, information regarding its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement.
4. Nothing in paragraphs 1, 2 and 3 shall require a Party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.]

ARTICLE 6.1: BECOMING PARTY TO THE AGREEMENT

1. [Any member of the [World Intellectual Property Organisation] [World Trade Organization] [or the World Trade Organization (WTO)] [or of the United Nations] may become party to this Agreement.[Decisions on accession shall be taken by the Oversight Committee. The Oversight Committee shall approve the agreement on the terms of accession by [unanimity][a two-thirds majority of the Parties]].
2. Any Intergovernmental Organization which [the Committee decides] meets the requirements of paragraph 5 may become party to this Agreement. The Organization shall inform the Depositary of its competence [in respect of matters governed by this Agreement], and any subsequent changes in its competence, with respect to the matters governed by this Agreement. The Organization and its member States may, without, however, any derogation from the obligations under this Agreement, decide on their respective responsibilities for the performance of their obligations under this Agreement [without, however, any derogation from the obligations under this Agreement].
3. A [State or Intergovernmental Organization][member of any organization identified in paragraph 1] may become party to this Agreement by:

⁷⁶At least one delegation reserves its right to revisit elements of this chapter at a later date.

- (a) signature followed by the deposit of an instrument of ratification, acceptance or approval, or
- (b) the deposit of an instrument of accession.

4. The instruments referred to in paragraph (3) shall be deposited with the Depositary.

5. In this Article, “Intergovernmental Organization” means an organization constituted by, and composed of, States of any region of the world, which has competence in respect of matters governed by this Agreement, has its own legislation providing for intellectual property protection and binding on all its member States, and has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to this Agreement.

ARTICLE 6.2: ENTRY INTO FORCE OF THE AGREEMENT

1. This Agreement shall enter into force, with respect to each of the [first five States or Intergovernmental Organizations] [[five] members of either organization identified in Article 6.1.1] which have deposited their instruments of ratification, acceptance, approval or accession, [three months] [90 days] after the date on which the [fifth] instrument of ratification, acceptance, approval or accession has been deposited.

2. With respect to any [State or Intergovernmental Organization][member of either organization identified in Article 6.1.1] not covered by paragraph (1), this Agreement shall enter into force [three months][90 days] after the date on which that [State of Intergovernmental Organization][member of either organization identified in Article 6.1.1] has deposited its instrument of ratification, acceptance, approval or accession.

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 [one year][six months] after the notification was received by the Depositary.

ARTICLE 6.4: AMENDMENTS

1. [Any Party may initiate a proposal to amend the provisions of this Agreement by submitting such proposal [to the Oversight Committee]]. This Agreement may be amended by the Parties on the basis of a [previous] text adopted by the [Oversight][ACTA][Steering] Committee.[Each Party may propose amendments to the Agreement to the Committee. The Committee shall decide upon the proposed amendments by consensus.]

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

3. Such amendment shall enter into force on the [first day of the third month following] [90 days after the date of] [three months after the date of] the deposit of the last of the instruments of ratification, acceptance or approval of all the Parties.

ARTICLE 6.5: TEXTS OF THE AGREEMENT

[This Agreement is established in [a single original in the][English][, French][, Spanish][, Arabic] languages, all texts being equally authentic.] [In case of any inconsistency between the texts, the English version shall prevail.]

ARTICLE 6.6: DEPOSITARY

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

ARTICLE 6.7: SIGNATURE

This Agreement shall be open for signature between [date] and [date] with the [Government of] [the [country][entity]] that exercises the functions of Depositary].