

ภาคผนวก

ภาคผนวก ก

**COVER PAGE TRANS-PACIFIC PARTNERSHIP INTELLECTUAL
PROPERTY RIGHTS CHAPTER DRAFT – FEBRUARY 10, 2011**

COVER PAGE

TRANS-PACIFIC PARTNERSHIP INTELLECTUAL PROPERTY RIGHTS

CHAPTER DRAFT – FEBRUARY 10, 2011

Derived From: Classification Guidance
dated March 4, 2010

Reason: 1.4(b)

Declassify on: Four years from entry into
force of the TPP
agreement or, if no
agreement enters into
force, four years from
the close of the
negotiations.

* This document must be protected from unauthorized disclosure, but may be mailed or transmitted over unclassified e-mail or fax, discussed over unsecured phone lines, and stored on unclassified computer systems. It must be stored in a locked or secured building, room, or container.

CHAPT INTELLECTUAL PROPERTY RIGHTS

ARTICLE 1: GENERAL PROVISIONS

1. Each Party shall, at a minimum, give effect to this Chapter.

International Agreements

2. Further to Article 1, the Parties affirm their existing rights and obligations with respect to each other under the TRIPS Agreement.
3. Each Party shall ratify or accede to the following agreements by the date of entry into force of this Agreement:
 - (a) *Patent Cooperation Treaty* (1970), as amended in 1979;
 - (b) *Paris Convention for the Protection of Industrial Property* (1967);
 - (c) *Berne Convention for the Protection of Literary and Artistic Works* (1971);
 - (d) *Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite* (1974);
 - (e) *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks* (1989);
 - (f) *Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure* (1977), as amended in 1980;
 - (g) *International Convention for the Protection of New Varieties of Plants* (1991) (UPOV Convention);
 - (h) *Singapore Treaty on the Law of Trademarks* (2006);
 - (i) *WIPO Copyright Treaty* (1996); and
 - (j) *WIPO Performances and Phonograms Treaty* (1996).
4. Each Party shall notify the WTO of its acceptance of the Protocol amending the TRIPS Agreement done at Geneva on December 6, 2005.
5. Each Party shall make all reasonable efforts ratify or accede to the following agreements by the date of entry into force of the Agreement:
 - (a) *Patent Law Treaty* (2000); and
 - (b) *Hague Agreement Concerning the International Registration of Industrial*

6. A party may provide more extensive protection for, and enforcement of, intellectual property rights under its law than this Chapter requires, provided that the more extensive protection does not contravene this Chapter.

National Treatment

7. In respect of all categories of intellectual property covered in this Chapter, each Party shall accord to nationals¹ of the other Parties treatment no less favorable than it accords to its own nationals with regard to the protection² and enjoyment of such intellectual property rights and any benefits derived from such rights.
8. A Party may derogate from paragraph [7] in relation to its judicial and administrative procedures, including requiring a national of the other Party to designate an address for service of process in its territory, or to appoint an agent in its territory, provided that such derogation is:
 - (a) necessary to secure compliance with laws and regulations that are not inconsistent with this Chapter; and
 - (b) not applied in a manner that would constitute a disguised restriction on trade.
9. Paragraph [7] does not apply to procedures provided in multilateral agreements to which any Party is a party and which were concluded under the auspices of the World Intellectual Property Organization (WIPO) in relation to the acquisition or maintenance of intellectual property rights.

Application of Agreement to Existing Subject Matter and Prior Acts

10. A Party may provide more extensive protection for, and enforcement of, intellectual property rights under its law than this Chapter requires, provided that the more extensive protection does not contravene this Chapter.

National Treatment

11. In respect of all categories of intellectual property covered in this Chapter, each

¹ [For purposes of Articles [(NT & Judicial/Admin Procedures)(GIs/Nationals), and (Performers/Phonograms/Related Rights,)] a national of a Party shall also mean, in respect of the relevant right, an entity of that Party that would meet the criteria for eligibility for protection provided for in the agreements listed in [Article 1.3] and the TRIPS Agreement.]

² For purposes of this paragraph, “protection” includes matters affecting the availability, acquisition, scope, maintenance, and enforcement of intellectual property rights as well as matters affecting the use of intellectual property rights specifically covered by this Chapter. Further, for purposes of this paragraph, “protection” also includes the prohibition on circumvention of effective technological measures set out in Article and the right and obligations concerning rights management information set out in Article

Party shall accord to nationals³ of the other Parties treatment no less favorable than it accords to its own nationals with regard to the protection⁴ and enjoyment of such intellectual property rights and any benefits derived from such rights.

12. A Party may derogate from paragraph [7] in relation to its judicial and administrative procedures, including requiring a national of the other Party to designate an address for service of process in its territory, or to appoint an agent in its territory, provided that such derogation is:
 - (a) necessary to secure compliance with laws and regulations that are not inconsistent with this Chapter; and
 - (b) not applied in a manner that would constitute a disguised restriction on trade.
13. Paragraph [7] does not apply to procedures provided in multilateral agreements to which any Party is a party and which were concluded under the auspices of the World Intellectual Property Organization (WIPO) in relation to the acquisition or maintenance of intellectual property rights.

Application of Agreement to Existing Subject Matter and Prior Acts

14. Except as it otherwise provides, including in Article (Berne 18/TRIPS 14.6), this Chapter gives rise to obligations in respect of all subject matter existing at the date of entry into force of this Agreement that is protected on that date in the territory of the Party where protection is claimed, or that meets or comes subsequently to meet the criteria for protection under this Chapter.
15. Except as otherwise provided in this Chapter, including Article (Berne 18/TRIPS 14.6), a Party shall not be required to restore protection to subject matter that on the date of entry into force of this Agreement has fallen into the public domain in its territory.
16. This Chapter does not give rise to obligations in respect of acts that occurred before the date of entry into force of this Agreement.

³ [For purposes of Articles [(NT & Judicial/Admin Procedures)(GIs/Nationals), and (Performers/Phonograms/Related Rights),] a national of a Party shall also mean, in respect of the relevant right, an entity of that Party that would meet the criteria for eligibility for protection provided for in the agreements listed in [Article 1.3] and the TRIPS Agreement.]

⁴ [For purposes of this paragraph, “protection” includes matters affecting the availability, acquisition, scope, maintenance, and enforcement of intellectual property rights as well as matters affecting the use of intellectual property rights specifically covered by this Chapter. Further, for purposes of this paragraph, “protection” also includes the prohibition on circumvention of effective technological measures set out in Article and the rights and obligations concerning rights management information set out in Article]

Transparency

17. Further to Article (Publication), and with the object of making the protection and enforcement of intellectual property rights transparent, each Party shall ensure that all laws, regulations, and publicly available procedures concerning the protection or enforcement of intellectual property rights are in writing and are published,³ or where publication is not practicable, made publicly available, in a national language in such a manner as to enable governments and right holders to become acquainted with them.

ARTICLE 10: GENERAL OBLIGATIONS RELATING TO THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

1. The Parties understand that a decision that a Party makes on the distribution of enforcement resources shall not excuse that Party from complying with this Chapter.
2. In civil, administrative, and criminal proceedings involving copyright or related rights, each Party shall provide for a presumption that, in the absence of proof to the contrary, the person whose name is indicated in the usual manner as the author, producer, performer, or publisher of the work, performance, or phonogram is the designated right holder in such work, performance, or phonogram. Each Party shall also provide for a presumption that, in the absence of proof to the contrary, the copyright or related right subsists in such subject matter. In civil, administrative, and criminal proceedings involving trademarks, each Party shall provide for a rebuttable presumption that a registered trademark is valid. In civil and administrative proceedings involving patents, each Party shall provide for a rebuttable presumption that a patent is valid, and shall provide that each claim of a patent is presumed valid independently of the validity of the other claims.

ARTICLE 11: ENFORCEMENT PRACTICES WITH RESPECT TO INTELLECTUAL PROPERTY RIGHTS

1. Each Party shall provide that final judicial decisions and administrative rulings of general application 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 on which the decisions and rulings are based. Each Party shall also provide that such decisions and rulings shall be published⁵ or, where publication is not practicable, otherwise made available to the public, in its national language in such a manner as to enable governments and right holders to become acquainted with them.

⁵ A Party may satisfy the requirement for publication by making the decision or ruling available to the public on the Internet

2. Each Party shall promote the collection and analysis of statistical data and other relevant information concerning intellectual property rights infringements as well as the collection of information on best practices to prevent and combat infringements.
3. Each Party shall publicize information on its efforts to provide effective enforcement of intellectual property rights in its civil, administrative and criminal systems, including statistical information that the Party collects for such purposes.
4. Nothing in this Chapter shall require a Party to disclose confidential information the disclosure of 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 12: CIVIL AND ADMINISTRATIVE PROCEDURES AND REMEDIES

1. Each Party shall make available to right holders⁶ civil judicial procedures concerning the enforcement of any intellectual property right.
2. Each Party shall provide for injunctive relief consistent with Article 44 of the TRIPS Agreement, and shall also make injunctions available to prevent the exportation of infringing goods.
3. Each Party shall provide that:
 - (a) in civil judicial proceedings, its judicial authorities shall have the authority to order the infringer to pay the right holder:
 - (i) damages adequate to compensate for the injury the right holder has suffered as a result of the infringement,⁷ and
 - (ii) at least in the case of copyright or related rights infringement and trademark counterfeiting, the profits of the infringer that are attributable to the infringement and that are not taken into account in computing the amount of the damages referred to in clause (i).
 - (b) in determining damages for infringement of intellectual property rights, its judicial authorities shall consider, *inter alia*, the value of the

⁶ For the purposes of this Article, the term “right holder” shall include exclusive licensees as well as federations and associations having the legal standing and authority to assert such rights; the term “exclusive licensee” shall include the exclusive licensee of any one or more of the exclusive intellectual property rights encompassed in a given intellectual property.

⁷ In the case of patent infringement, damages adequate to compensate for the infringement shall not be less than a reasonable royalty.

infringed good or service, measured by the suggested retail price or other legitimate measure of value submitted by the right holder.

4. In civil judicial proceedings, each Party shall, at least with respect to works, phonograms, and performances protected by copyright or related rights, and in cases of trademark counterfeiting, establish or maintain a system that provides for pre-established damages, which shall be available upon the election of the right holder. Pre-established damages shall be in an amount sufficiently high to constitute a deterrent to future infringements and to compensate fully the right holder for the harm caused by the infringement. In civil judicial proceedings concerning patent infringement, each Party shall provide that its judicial authorities shall have the authority to increase damages to an amount that is up to three times the amount of the injury found or assessed.⁸
5. Each Party shall provide that its judicial authorities, except in exceptional circumstances, have the authority to order, at the conclusion of civil judicial proceedings concerning copyright or related rights infringement, trademark infringement, or patent infringement, that the prevailing party shall be awarded payment by the losing party of court costs or fees and, at least in proceedings concerning copyright or related rights infringement or willful trademark counterfeiting, reasonable attorney's fees. Further, each Party shall provide that its judicial authorities, at least in exceptional circumstances, shall have the authority to order, at the conclusion of civil judicial proceedings concerning patent infringement, that the prevailing party shall be awarded payment by the losing party of reasonable attorneys' fees.
6. In civil judicial proceedings concerning copyright or related rights infringement and trademark counterfeiting, each Party shall provide that its judicial authorities shall have the authority to order the seizure of allegedly infringing goods, materials and implements relevant to the infringement, and, at least for trademark counterfeiting, documentary evidence relevant to the infringement.
7. Each Party shall provide that in civil judicial proceedings:
 - (a) at the right holder's request, goods that have been found to be pirated or counterfeit shall be destroyed, except in exceptional circumstances;
 - (b) its judicial authorities shall have the authority to order that materials and implements that have been used in the manufacture or creation of such pirated or counterfeit goods be, without compensation of any sort, promptly destroyed or, in exceptional circumstances, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements; and

⁸ No Party shall be required to apply this paragraph to actions for infringement against a Party or a third party acting with the authorization or consent of a Party.

- (c) in regard to counterfeit trademarked goods, the simple removal of the trademark unlawfully affixed shall not be sufficient to permit the release of goods into the channels of commerce.
- 8. Each Party shall provide that in civil judicial proceedings concerning the enforcement of intellectual property rights, its judicial authorities shall have the authority to order the infringer to provide any information that the infringer possesses or controls regarding any persons or entities 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, and to provide this information to the right holder.
- 9. Each Party shall provide that its judicial authorities have the authority to:
 - (a) fine or imprison, in appropriate cases, a party to a civil judicial proceeding who fails to abide by valid orders issued by such authorities; and
 - (b) impose sanctions on parties to a civil judicial proceeding their counsel, experts, or other persons subject to the court's jurisdiction, for violation of judicial orders regarding the protection of confidential information produced or exchanged in a proceeding.
- 10. 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 Chapter.
- 11. In the event that a Party's judicial or other authorities appoint technical or other experts in civil proceedings concerning the enforcement of intellectual property rights and require that the parties to the litigation bear the costs of such experts, that Party should seek to ensure that such costs are closely related, *inter alia*, to the quantity and nature of work to be performed and do not unreasonably deter recourse to such proceedings.
- 12. In civil judicial proceedings concerning the acts described in Article 4.[9] (TPMs) and Article 4.[10] (RMI), each Party shall provide that its judicial authorities shall, at the least, have the authority to:
 - (a) impose provisional measures, including seizure of devices and products suspected of being involved in the prohibited activity;
 - (b) provide an opportunity for the right holder to elect between actual damages it suffered (plus any profits attributable to the prohibited activity not taken into account in computing those damages) or pre-established damages;

- (c) order payment to the prevailing right holder at the conclusion of civil judicial proceedings of court costs and fees, and reasonable attorney's fees, by the party engaged in the prohibited conduct; and
- (d) order the destruction of devices and products found to be involved in the prohibited activity.

No Party shall make damages available under this paragraph against a nonprofit library, archives, educational institution, or public noncommercial broadcasting entity that sustains the burden of proving that such entity was not aware and had no reason to believe that its acts constituted a prohibited activity.

ARTICLE 13: PROVISIONAL MEASURES

1. Each Party shall act on requests for provisional relief *inaudita altera parte* expeditiously, and shall, except in exceptional cases, generally execute such requests within ten days.
2. Each Party shall provide that its judicial authorities have the authority to require the applicant, with respect to provisional measures, to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a reasonable security or equivalent assurance set at a level sufficient to protect the defendant and to prevent abuse, and so as not to unreasonably deter recourse to such procedures.

ARTICLE 14: SPECIAL REQUIREMENTS RELATED TO BORDER ENFORCEMENT

- 1 Each Party shall provide that any right holder initiating procedures for its competent authorities to suspend release of suspected counterfeit or confusingly similar trademark goods, or pirated copyright goods⁹ into free circulation is required to provide adequate evidence to satisfy the competent authorities that, under the laws of the country of importation, 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

⁹ For purposes of Article 14:

(a) **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 of importation; and

(b) **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 of importation.

right holder's knowledge to make the suspected goods reasonably recognizable by its competent authorities. The requirement to provide sufficient information shall not unreasonably deter recourse to these procedures. Each Party shall provide that the application to suspend the release of goods apply to all points of entry to its territory and remain in force for a period of not less than one year from the date of application, or the period that the good is protected by copyright or the relevant trademark registration is valid, whichever is shorter.

- 2 Each Party shall provide that its competent authorities shall have the authority to require a right holder initiating procedures to suspend the release of suspected counterfeit or confusingly similar trademark goods, or pirated copyright goods, 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. A Party may provide that such security may be in the form of a bond conditioned to hold the importer or owner of the imported merchandise harmless from any loss or damage resulting from any suspension of the release of goods in the event the competent authorities determine that the article is not an infringing good.
- 3 Where its competent authorities have seized goods that are counterfeit or pirated, a Party shall provide that its competent authorities have the authority to inform the right holder within 30-days¹⁰ of the seizure of the names and addresses of the consignor, exporter, consignee, or importer, a description of the merchandise, quantity of the merchandise, and, if known, the country of origin of the merchandise.
- 4 Each Party shall provide that its competent authorities may initiate border measures *ex officio*¹¹ with respect to imported, exported, or in-transit merchandise,¹² or merchandise in free trade zones, that is suspected of being counterfeit or confusingly similar trademark goods, or pirated copyright goods.
- 5 Each Party shall adopt or maintain a procedure by which its competent authorities shall determine, within a reasonable period of time after the initiation of the procedures described under Article 14.1 whether the suspect goods infringe an intellectual property right. Where a Party provides administrative procedures for the determination of an infringement, it shall also provide its authorities with the authority to impose administrative penalties following a determination that the goods are infringing.

¹⁰ For purposes of this Article, "days" shall mean "business days".

¹¹ For greater certainty, the parties understand that *ex officio* action does not require a formal complaint from a private party or right holder.

¹² For purposes of Article 14.4, **in-transit merchandise** means goods under "Customs transit" and goods "transhipped," as defined in the *International Convention on the Simplification and Harmonization of Customs Procedures* (Kyoto Convention).

- 6 Each Party shall provide that goods that have been determined by its competent authorities to be pirated or counterfeit shall be destroyed, except in exceptional circumstances. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient to permit the release of the goods into the channels of commerce. In no event shall the competent authorities be authorized, except in exceptional circumstances, to permit the exportation of counterfeit or pirated goods or to permit such goods to be subject to other customs procedures.
- 7 Where an application fee, merchandise storage fee, or destruction fee is assessed in connection with border measures to enforce an intellectual property right, each Party shall provide that such fee shall not be set at an amount that unreasonably deters recourse to these measures.
- 8 A Party may exclude from the application of this Article (border measures), small quantities of goods of a non-commercial nature contained in traveler's personal luggage.

ARTICLE 15: CRIMINAL ENFORCEMENT

1. 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. 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 infringements for purposes of commercial advantage or private financial gain.¹³

Each Party shall treat willful importation or exportation of counterfeit or pirated goods as unlawful activities subject to criminal penalties.¹⁴

2. Each Party shall also provide for criminal procedures and penalties to be applied, even absent willful trademark counterfeiting or copyright or related rights piracy, at least in cases of knowing trafficking in:
 - (a) labels or packaging, of any type or nature, to which a counterfeit trademark¹⁵ has been applied, the use of which is likely to cause

¹³ For greater certainty, "financial gain" for purposes of this Article includes the receipt or expectation of anything of value.

¹⁴ A Party may comply with this obligation in relation to exportation of pirated goods through its measures concerning distribution.

¹⁵ For purposes of this Article, "illicit label" means a genuine certificate, licensing document,

confusion, to cause mistake, or to deceive; and

(b) counterfeit or illicit labels¹⁶ affixed to, enclosing, or accompanying, or designed to be affixed to, enclose, or accompany the following:

(i) a phonogram,

(ii) a copy of a computer program or a literary work,

(iii) a copy of a motion picture or other audiovisual work,

(iv) documentation or packaging for such items; and

(c) counterfeit documentation or packaging for items of the type described in subparagraph (b).

3. Each Party shall also provide for criminal procedures and penalties to be applied against any person who, without authorization of the holder of copyright or related rights in a motion picture or other audiovisual work, knowingly uses or attempts to use an audiovisual recording device to transmit or make a copy of a motion picture or other audiovisual work, or any part thereof, from a performance of such work in a public motion picture exhibition facility.
4. With respect to the offenses for which this Article requires the Parties to provide for criminal procedures and penalties, Parties shall ensure that criminal liability for aiding and abetting is available under its law.
5. With respect to the offences described in Article 15.[1]-[4] above, each Party shall provide:
 - (a) penalties that include sentences of imprisonment as well as monetary fines sufficiently high to provide a deterrent to future infringements, consistent with a policy of removing the infringer's monetary incentive. Each Party shall further establish policies or guidelines that

registration card, or similar labeling component:

(a) that is used by the copyright owner to verify that a phonogram, a copy of a computer program or literary work, a copy of a motion picture or other audiovisual work, or documentation or packaging for such phonogram or copies is not counterfeit or infringing of any copyright; and

(b) that is, without the authorization of the copyright owner—

(i) distributed or intended for distribution not in connection with the phonogram or copies to which such labeling component was intended to be affixed by the respective copyright owner; or

(ii) in connection with a genuine certificate or licensing document, knowingly falsified in order to designate a higher number of licensed users or copies than authorized by the copyright owner, unless that certificate or document is used by the copyright owner solely for the purpose of monitoring or tracking the copyright owner's distribution channel and not for the purpose of verifying that a copy or phonogram is noninfringing.

¹⁶ Negotiator's Note: For greater certainty, the definition of "counterfeit trademark goods" in footnote [12] shall be used as context for this Article.

encourage judicial authorities to impose those penalties at levels sufficient to provide a deterrent to future infringements, including the imposition of actual terms of imprisonment when criminal infringement is undertaken for commercial advantage or private financial gain;

- (b) that its judicial authorities shall have the authority to order the seizure of suspected counterfeit or pirated goods, any related materials and implements used in the commission of the offense, any assets traceable to the infringing activity, and any documentary evidence relevant to the offense. Each Party shall provide that items that are subject to seizure pursuant to any such judicial order need not be individually identified so long as they fall within general categories specified in the order;
- (c) that its judicial authorities shall have the authority to order, among other measures, the forfeiture of any assets traceable to the infringing activity, and shall order such forfeiture at least in cases of trademark counterfeiting;
- (d) that its judicial authorities shall, except in exceptional cases, order
 - (i) the forfeiture and destruction of all counterfeit or pirated goods, and any articles consisting of a counterfeit mark; and
 - (ii) the forfeiture or destruction of materials and implements that have been used in the creation of pirated or counterfeit goods.

Each Party shall further provide that forfeiture and destruction under this subparagraph and subparagraph (c) shall occur without compensation of any kind to the defendant;

- (e) that its judicial authorities have the authority to order the seizure or forfeiture of assets the value of which corresponds to that of the assets derived from, or obtained directly or indirectly through, the infringing activity.
- (f) that, in criminal cases, its judicial or other competent authorities shall keep an inventory of goods and other material proposed to be destroyed, and shall have the authority temporarily to exempt such materials from the destruction order to facilitate the preservation of evidence upon notice by the right holder that it wishes to bring a civil or administrative case for damages¹⁷; and
- (g) that its authorities may initiate legal action *ex officio* with respect to the

¹⁷ For greater certainty, a notice from the right holder that it wishes to bring a civil or administrative case for damages is not the sole basis for the authority to exempt materials from the destruction order.

offenses described in this Chapter, without the need for a formal complaint by a private party or right holder.

**ARTICLE 16: SPECIAL MEASURES RELATING TO ENFORCEMENT
IN THE DIGITAL ENVIRONMENT**

1. Each Party shall ensure that enforcement procedures, to the extent set forth in the civil and criminal enforcement sections of this Chapter, are available under its law so as to permit effective action against an act of trademark, copyright or related rights infringement which takes place in the digital environment, including expeditious remedies to prevent infringement and remedies which constitute a deterrent to further infringement.
2. Each Party shall provide appropriate laws, orders, regulations, government-issued guidelines, or administrative or executive decrees providing that its central government agencies not use infringing computer software and other materials protected by copyright or related rights and only use computer software and other materials protected by copyright or related rights as authorized by the relevant license. These measures shall provide for the regulation of the acquisition and management of software and other materials for government use that are protected by copyright or related rights.
3. For the purpose of providing enforcement procedures that permit effective action against any act of copyright infringement covered by this Chapter, including expeditious remedies to prevent infringements and criminal and civil remedies that constitute a deterrent to further infringements, each Party shall provide, consistent with the framework set out in this Article:
 - (a) legal incentives for service providers to cooperate with copyright¹⁸ owners in deterring the unauthorized storage and transmission of copyrighted materials; and
 - (b) limitations in its law regarding the scope of remedies available against service providers for copyright infringements that they do not control, initiate or direct, and that take place through systems or networks controlled or operated by them or on their behalf, as set forth in this subparagraph (b).¹⁹
 - (i) These limitations shall preclude monetary relief and provide reasonable restrictions on court-ordered relief to compel or restrain certain actions for the following functions, and shall be confined to those functions:
 - (A) transmitting, routing, or providing connections for

¹⁸ For purposes of this paragraph, “copyright” includes related rights.

¹⁹ This subparagraph is without prejudice to the availability of defenses to copyright infringement that are of general applicability

- material without modification of its content, or the intermediate and transient storage of such material in the course thereof;
- (B) caching carried out through an automatic process;
 - (C) storage, at the direction of a user, of material residing on a system or network controlled or operated by or for the service provider; and
 - (D) referring or linking users to an online location by using information location tools, including hyperlinks and directories.
- (ii) These limitations shall apply only where the service provider does not initiate the chain of transmission of the material, and does not select the material or its recipients (except to the extent that a function described in clause (i)(D) in itself entails some form of selection).
 - (iii) Qualification by a service provider for the limitations as to each function in clauses (i)(A) through (D) shall be considered separately from qualification for the limitations as to each other function, in accordance with the conditions for qualification set forth in clauses (iv) through (vii).
 - (iv) With respect to functions referred to in clause (i)(B), the limitations shall be conditioned on the service provider:
 - (A) permitting access to cached material in significant part only to users of its system or network who have met conditions on user access to that material;
 - (B) complying with rules concerning the refreshing, reloading, or other updating of the cached material when specified by the person making the material available online in accordance with a generally accepted industry standard data communications protocol for the system or network through which that person makes the material available;
 - (C) not interfering with technology consistent with industry standards accepted in the Party's territory used at the originating site to obtain information about the use of the material, and not modifying its content in transmission to subsequent users; and
 - (D) expeditiously removing or disabling access, on receipt of an effective notification of claimed infringement, to cached material that has been removed or access to which has been disabled at the originating site.
 - (v) With respect to functions referred to in clauses (i)(C) and (D), the limitations shall be conditioned on the service provider:

- (A) not receiving a financial benefit directly attributable to the infringing activity, in circumstances where it has the right and ability to control such activity;
 - (B) expeditiously removing or disabling access to the material residing on its system or network on obtaining actual knowledge of the infringement or becoming aware of facts or circumstances from which the infringement was apparent, such as through effective notifications of claimed infringement in accordance with clause (ix); and
 - (C) publicly designating a representative to receive such notifications.
- (vi) Eligibility for the limitations in this subparagraph shall be conditioned on the service provider:
- (A) adopting and reasonably implementing a policy that provides for termination in appropriate circumstances of the accounts of repeat infringers; and
 - (B) accommodating and not interfering with standard technical measures accepted in the Party's territory that protect and identify copyrighted material, that are developed through an open, voluntary process by a broad consensus of copyright owners and service providers, that are available on reasonable and nondiscriminatory terms, and that do not impose substantial costs on service providers or substantial burdens on their systems or networks.
- (vii) Eligibility for the limitations in this subparagraph may not be conditioned on the service provider monitoring its service, or affirmatively seeking facts indicating infringing activity, except to the extent consistent with such technical measures.
- (viii) If the service provider qualifies for the limitations with respect to the function referred to in clause (i)(A), court-ordered relief to compel or restrain certain actions shall be limited to terminating specified accounts, or to taking reasonable steps to block access to a specific, non-domestic online location. If the service provider qualifies for the limitations with respect to any other function in clause (i), court-ordered relief to compel or restrain certain actions shall be limited to removing or disabling access to the infringing material, terminating specified accounts, and other remedies that a court may find necessary, provided that such other remedies are the least burdensome to the service provider among comparably effective forms of relief. Each Party shall provide that any such relief shall be issued with due regard for the relative

burden to the service provider and harm to the copyright owner, the technical feasibility and effectiveness of the remedy and whether less burdensome, comparably effective enforcement methods are available. Except for orders ensuring the preservation of evidence, or other orders having no material adverse effect on the operation of the service provider's communications network, each Party shall provide that such relief shall be available only where the service provider has received notice of the court order proceedings referred to in this subparagraph and an opportunity to appear before the judicial authority.

- (ix) For purposes of the notice and take down process for the functions referred to in clauses (i)(C) and (D), each Party shall establish appropriate procedures in its law or in regulations for effective notifications of claimed infringement, and effective counter-notifications by those whose material is removed or disabled through mistake or misidentification. Each Party shall also provide for monetary remedies against any person who makes a knowing material misrepresentation in a notification or counter-notification that causes injury to any interested party as a result of a service provider relying on the misrepresentation.
- (x) If the service provider removes or disables access to material in good faith based on claimed or apparent infringement, each Party shall provide that the service provider shall be exempted from liability for any resulting claims, provided that, in the case of material residing on its system or network, it takes reasonable steps promptly to notify the person making the material available on its system or network that it has done so and, if such person makes an effective counter-notification and is subject to jurisdiction in an infringement suit, to restore the material online unless the person giving the original effective notification seeks judicial relief within a reasonable time.
- (xi) Each Party shall establish an administrative or judicial procedure enabling copyright owners who have given effective notification of claimed infringement to obtain expeditiously from a service provider information in its possession identifying the alleged infringer.
- (xii) For purposes of the function referred to in clause (i)(A), **service provider** means a provider of transmission, routing, or connections for digital online communications without modification of their content between or among points specified by the user of material of the user's choosing, and for purposes of the functions referred to in clauses (i)(B) through

(D) **service provider** means a provider or operator of facilities for online services or network access.

[Placeholder for additional provisions on enforcement measures, including optical disk production]

[Placeholder for provision on understanding regarding certain public health measures]

Side Letter 1

In connection with the signing on this date of the Trans-Pacific Partnership Agreement (the “Agreement”), I have the honor to confirm the following understandings reached between the [Parties] and [Party] during the course of the negotiations of Chapter ## (Intellectual Property Rights) of the Agreement:

In meeting the obligations of Article 16.3(ix), the United States shall apply the pertinent provisions of its law²⁰ and [x Party] shall adopt requirements for: (a) effective written notice to service providers with respect to materials that are claimed to be infringing, and (b) effective written counter-notification by those whose material is removed or disabled and who claim that it was disabled through mistake or misidentification, as set forth in this letter. Effective written notice means notice that substantially complies with the elements listed in section (a) of this letter, and effective written counter-notification means counter-notification that substantially complies with the elements listed in section (b) of this letter.

- (a) Effective Written Notice, by a Copyright²¹ Owner or Person Authorized to Act on Behalf of an Owner of an Exclusive Right, to a Service Provider’s Publicly Designated Representative²²

In order for a notice to a service provider to comply with the relevant requirements set out in Article 16.3(ix), that notice must be a written communication, which may be provided electronically, that includes substantially the following:

1. the identity, address, telephone number, and electronic mail address of the complaining party (or its authorized agent);
2. information reasonably sufficient to enable the service provider to identify

²⁰ 17 U.S.C. Sections 512(C)(3)(A) and 512(g)(3).

²¹ All references to copyright in this letter are understood to include related rights, and all references to works are understood to include the subject matter of related rights.

²² The Parties understand that a representative is publicly designated to receive notification on behalf of a service provider if the representative’s name, physical and electronic address, and telephone number are posted on a publicly accessible portion of the service provider’s website, and also in a register accessible to the public through the Internet, or designated in another form or manner appropriate for [insert Party name].

the copyrighted work(s)²³ claimed to have been infringed;

3. information reasonably sufficient to permit the service provider to identify and locate the material residing on a system or network controlled or operated by it or for it that is claimed to be infringing, or to be the subject of infringing activity, and that is to be removed, or access to which is to be disabled;²⁴
4. a statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law;
5. a statement that the information in the notice is accurate;
6. a statement with sufficient indicia of reliability (such as a statement under penalty of perjury or equivalent legal sanctions) that the complaining party is the holder of an exclusive right that is allegedly infringed, or is authorized to act on the owner's behalf; and
7. the signature of the person giving notice.²⁵

(b) Effective Written Counter-Notification by a Subscriber²⁶ Whose Material Was Removed or Disabled as a Result of Mistake or Misidentification of Material

In order for a counter-notification to a service provider to comply with the relevant requirements set out in Article 16.3(ix), that counter-notification must be a written communication, which may be provided electronically, that includes substantially the following:

1. the identity, address, and telephone number of the subscriber;
2. the identity of the material that has been removed or to which access has been disabled;
3. the location at which the material appeared before it was removed or access

²³ If multiple copyrighted works at, or linked to from, a single online site on a system or network controlled or operated by or for the service provider are covered by a single notification, a representative list of such works at, or linked to from, that site may be provided.

²⁴ In the case of notices regarding an information location tool pursuant to paragraph (b)(i)(D) of Article 16.3, the information provided must be reasonably sufficient to permit the service provider to locate the reference or link residing on a system or network controlled or operated by or for it, except that in the case of a notice regarding a substantial number of references or links at a single online site residing on a system or network controlled or operated by or for the service provider, a representative list of such references or links at the site may be provided, if accompanied by information sufficient to permit the service provider to locate the references or links.

²⁵ A signature transmitted as part of an electronic communication satisfies this requirement.

²⁶ All references to "subscriber" in this letter refer to the person whose material has been removed or disabled by a service provider as a result of an effective notice described in part (a) of this letter.

to it was disabled;

4. a statement with sufficient indicia of reliability (such as a statement under penalty of perjury or equivalent legal sanctions) that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material;
5. a statement that the subscriber agrees to be subject to orders of any court that has jurisdiction over the place where the subscriber's address is located, or, if that address is located outside the Party's territory, any other court with jurisdiction over any place in the Party's territory where the service provider may be found, and in which a copyright infringement suit could be brought with respect to the alleged infringement;
6. a statement that the subscriber will accept service of process in any such suit; and
7. the signature of the subscriber.²⁷

I have the honor to propose that this letter and your letter in reply confirming that your Government shares this understanding shall constitute an integral part of the Agreement.

²⁷ A signature transmitted as part of an electronic communication satisfies this requirement.

ภาคผนวก ข

Agreement on Trade-Related Aspects of Intellectual Property Right

ANNEX 1C

AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

PART I	GENERAL PROVISIONS AND BASIC PRINCIPLES
PART II	STANDARDS CONCERNING THE AVAILABILITY, SCOPE AND USE OF INTELLECTUAL PROPERTY RIGHTS
	<ol style="list-style-type: none"> 1. Copyright and Related Rights 2. Trademarks 3. Geographical Indications 4. Industrial Designs 5. Patents 6. Layout-Designs (Topographies) of Integrated Circuits 7. Protection of Undisclosed Information 8. Control of Anti-Competitive Practices in Contractual
Licences	PART III ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS
	<ol style="list-style-type: none"> 1. General Obligations 2. Civil and Administrative Procedures and Remedies 3. Provisional Measures 4. Special Requirements Related to Border Measures 5. Criminal Procedures
PART IV	ACQUISITION AND MAINTENANCE OF INTELLECTUAL PROPERTY RIGHTS AND RELATED <i>INTER-PARTES</i> PROCEDURES
PART V	DISPUTE PREVENTION AND
SETTLEMENT	PART VI TRANSITIONAL ARRANGEMENTS
PART VII	INSTITUTIONAL ARRANGEMENTS; FINAL PROVISIONS

**AGREEMENT ON TRADE-RELATED
ASPECTS OF INTELLECTUAL
PROPERTY RIGHTS**

Members,

Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade;

Recognizing, to this end, the need for new rules and disciplines concerning:

- (a) the applicability of the basic principles of GATT 1994 and of relevant international intellectual property agreements or conventions;
- (b) the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights;
- (c) the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems;
- (d) the provision of effective and expeditious procedures for the multilateral prevention and settlement of disputes between governments; and
- (e) transitional arrangements aiming at the fullest participation in the results of the negotiations;

Recognizing the need for a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods;

Recognizing that intellectual property rights are private rights;

Recognizing the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives;

Recognizing also the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base;

Emphasizing the importance of reducing tensions by reaching strengthened commitments to resolve disputes on trade-related intellectual property issues through multilateral procedures;

Desiring to establish a mutually supportive relationship between the WTO and the World Intellectual Property Organization (referred to in this Agreement as "WIPO") as well as other relevant international organizations;

Hereby agree as follows:

PART I

GENERAL PROVISIONS AND BASIC PRINCIPLES

Article 1 *Nature and Scope of Obligations*

1. Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection 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. For the purposes of this Agreement, the term "intellectual property" refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II.
3. Members shall accord the treatment provided for in this Agreement to the nationals of other Members.¹ In respect of the relevant intellectual property right, the nationals of other Members shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for in the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits, were all Members of the WTO members of those conventions.² Any Member availing itself of the possibilities provided in paragraph 3 of Article 5 or paragraph 2 of Article 6 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for Trade-Related Aspects of Intellectual Property Rights (the "Council for TRIPS").

Article 2 *Intellectual Property Conventions*

1. In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967).
2. Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.

¹When "nationals" are referred to in this Agreement, they shall be deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.

²In this Agreement, "Paris Convention" refers to the Paris Convention for the Protection of Industrial Property; "Paris Convention (1967)" refers to the Stockholm Act of this Convention of 14 July 1967. "Berne Convention" refers to the Berne Convention for the Protection of Literary and Artistic Works; "Berne Convention (1971)" refers to the Paris Act of this Convention of 24 July 1971. "Rome Convention" refers to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, adopted at Rome on 26 October 1961. "Treaty on Intellectual Property in Respect of Integrated Circuits" (IPIC Treaty) refers to the Treaty on Intellectual Property in Respect of Integrated Circuits, adopted at Washington on 26 May 1989. "WTO Agreement" refers to the Agreement Establishing the WTO.

Article 3
National Treatment

1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection³ of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS.

2. Members may avail themselves of the exceptions permitted under paragraph 1 in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a Member, only where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade.

Article 4
Most-Favoured-Nation Treatment

With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member:

- (a) deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property;
- (b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country;
- (c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement;
- (d) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.

³For the purposes of Articles 3 and 4, "protection" shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement.

Article 5
Multilateral Agreements on Acquisition or Maintenance of Protection

The obligations under Articles 3 and 4 do not apply to procedures provided in multilateral agreements concluded under the auspices of WIPO relating to the acquisition or maintenance of intellectual property rights.

Article 6 Exhaustion

For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.

Article 7 Objectives

The protection and 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.

Article 8 Principles

1. Members 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.
2. 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.

PART III
ENFORCEMENT OF INTELLECTUAL
PROPERTY RIGHTS
SECTION 1: GENERAL OBLIGATIONS

Article 41

1. Members shall ensure that enforcement procedures as specified in this Part 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 concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

3. Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.

4. Parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in a Member's law concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of a case. However, there shall be no obligation to provide an opportunity for review of acquittals in criminal cases.

5. It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.

SECTION 2: CIVIL AND ADMINISTRATIVE PROCEDURES AND
REMEDIES

Article 42

Fair and Equitable Procedures

Members shall make available to right holders¹¹ civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement. Defendants shall have the right to written notice which is timely and contains sufficient detail, including the basis of the claims. Parties shall be allowed to be represented by independent legal counsel, and procedures shall not impose overly burdensome requirements concerning mandatory personal appearances. All parties to such procedures shall be duly entitled to substantiate their claims and to present all relevant evidence. The procedure shall provide a means to identify and protect confidential information, unless this would be contrary to existing constitutional requirements.

Article 43 Evidence

1. The judicial authorities shall have the authority, where a party has presented reasonably available evidence sufficient to support its claims and has specified evidence relevant to substantiation of its claims which lies in the control of the opposing party, to order that this evidence be produced by the opposing party, subject in appropriate cases to conditions which ensure the protection of confidential information.
2. In cases in which a party to a proceeding voluntarily and without good reason refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes a procedure relating to an enforcement action, a Member may accord judicial authorities the authority to make preliminary and final determinations, affirmative or negative, on the basis of the information presented to them, including the complaint or the allegation presented by the party adversely affected by the denial of access to information, subject to providing the parties an opportunity to be heard on the allegations or evidence.

Article 44 Injunctions

1. The judicial authorities shall have the authority to order a party to desist from an infringement, *inter alia* to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of an intellectual property right, immediately after customs clearance of such goods. Members are not obliged to accord such authority in respect of protected subject matter acquired or ordered by a person prior to knowing or having reasonable grounds to know that dealing in such subject matter would entail the infringement of an intellectual property right.
2. Notwithstanding the other provisions of this Part and provided that the provisions of Part II specifically addressing use by governments, or by third parties authorized by a government, without the authorization of the right holder are complied with, Members may limit the remedies available against such use to payment of remuneration in accordance with subparagraph (h) of Article 31. In other cases, the remedies under this Part shall apply or, where these remedies are inconsistent with a Member's law, declaratory judgments and adequate compensation shall be available.

Article 45 Damages

1. The judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity.
2. The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney's fees. In appropriate cases, Members may authorize the judicial authorities to order recovery of profits and/or payment of pre-established damages even where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity.

¹¹For the purpose of this Part, the term "right holder" includes federations and associations having legal standing to assert such rights.

Article 46 Other Remedies

In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed. The judicial authorities shall also have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements. In considering such requests, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account. 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 release of the goods into the channels of commerce.

Article 47 Right of Information

Members may provide that the judicial authorities shall have the authority, unless this would be out of proportion to the seriousness of the infringement, to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution.

Article 48 Indemnification of the Defendant

1. The judicial authorities shall have the authority to order a party at whose request measures were taken and who has abused enforcement procedures to provide to a party wrongfully enjoined or restrained adequate compensation for the injury suffered because of such abuse. The judicial authorities shall also have the authority to order the applicant to pay the defendant expenses, which may include appropriate attorney's fees.

2. In respect of the administration of any law pertaining to the protection or enforcement of intellectual property rights, Members shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith in the course of the administration of that law.

Article 49

Administrative Procedures

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

SECTION 3: PROVISIONAL MEASURES

Article 50

1. The judicial authorities shall have the authority to order prompt and effective provisional measures:
 - (a) to prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance;
 - (b) to preserve relevant evidence in regard to the alleged infringement.
2. The judicial authorities shall have the authority to adopt provisional measures *inaudita altera parte* where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.
3. The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.
4. Where provisional measures have been adopted *inaudita altera parte*, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed.
5. The applicant may be required to supply other information necessary for the identification of the goods concerned by the authority that will execute the provisional measures.
6. Without prejudice to paragraph 4, provisional measures taken on the basis of paragraphs 1 and 2 shall, upon request by the defendant, be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority ordering the measures where a Member's law so permits or, in the absence of such a determination, not to exceed 20 working days or 31 calendar days, whichever is the longer.
7. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures.
8. To the extent that any provisional measure can be ordered as a result of administrative procedures, such procedures shall conform to principles equivalent in substance to those set forth in this Section.

SECTION 4: SPECIAL REQUIREMENTS RELATED TO BORDER MEASURES¹²

Article 51 Suspension of Release by Customs Authorities

Members shall, in conformity with the provisions set out below, adopt procedures¹³ to enable a right holder, who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods¹⁴ may take place, to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods. Members may enable such an application to be made in respect of goods which involve other infringements of intellectual property rights, provided that the requirements of this Section are met. Members may also provide for corresponding procedures concerning the suspension by the customs authorities of the release of infringing goods destined for exportation from their territories

¹²Where a Member has dismantled substantially all controls over movement of goods across its border with another Member with which it forms part of a customs union, it shall not be required to apply the provisions of this Section at that border.

¹³It is 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, or to goods in transit.

¹⁴For the purposes of this Agreement:

- (a) "counterfeit trademark goods" shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation;
- (b) "pirated copyright goods" shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which 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 of importation.

Article 52 Application

Any right holder initiating the procedures under Article 51 shall be required to provide adequate evidence to satisfy the competent authorities that, under the laws of the country of importation, there is *prima facie* an infringement of the right holder's intellectual property right and to supply a sufficiently detailed description of the goods to make them readily recognizable by the customs authorities. The competent authorities shall inform the applicant within a reasonable period whether they have accepted the application and, where determined by the competent authorities, the period for which the customs authorities will take action.

Article 53

Security or Equivalent Assurance

1. The competent authorities shall have the authority to require an applicant to provide a security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. Such security or equivalent assurance shall not unreasonably deter recourse to these procedures.
2. Where pursuant to an application under this Section the release of goods involving industrial designs, patents, layout-designs or undisclosed information into free circulation has been suspended by customs authorities on the basis of a decision other than by a judicial or other independent authority, and the period provided for in Article 55 has expired without the granting of provisional relief by the duly empowered authority, and provided that all other conditions for importation have been complied with, the owner, importer, or consignee of such goods shall be entitled to their release on the posting of a security in an amount sufficient to protect the right holder for any infringement. Payment of such security shall not prejudice any other remedy available to the right holder, it being understood that the security shall be released if the right holder fails to pursue the right of action within a reasonable period of time.

Article 54 Notice of Suspension

The importer and the applicant shall be promptly notified of the suspension of the release of goods according to Article 51

Article 55 Duration of Suspension

If, within a period not exceeding 10 working days after the applicant has been served notice of the suspension, the customs authorities have not been informed that proceedings leading to a decision on the merits of the case have been initiated by a party other than the defendant, or that the duly empowered authority has taken provisional measures prolonging the suspension of the release of the goods, the goods shall be released, provided that all other conditions for importation or exportation have been complied with; in appropriate cases, this time-limit may be extended by another 10 working days. If proceedings leading to a decision on the merits of the case have been initiated, a review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period, whether these measures shall be modified, revoked or confirmed. Notwithstanding the above, where the suspension of the release of goods is carried out or continued in accordance with a provisional judicial measure, the provisions of paragraph 6 of Article 50 shall apply.

Article 56

Indemnification of the Importer and of the Owner of the Goods

Relevant authorities shall have the authority to order the applicant to pay the importer, the consignee and the owner of the goods appropriate compensation for any injury caused to them through the wrongful detention of goods or through the detention of goods released pursuant to Article 55.

Article 57

Right of Inspection and Information

Without prejudice to the protection of confidential information, Members shall provide the competent authorities the authority to give the right holder sufficient opportunity to have any goods detained by the customs authorities inspected in order to substantiate the right holder's claims. The competent authorities shall also have authority to give the importer an equivalent opportunity to have any such goods inspected. Where a positive determination has been made on the merits of a case, Members may provide the competent authorities the authority to inform the right holder of the names and addresses of the consignor, the importer and the consignee and of the quantity of the goods in question.

Article 58

Ex Officio Action

Where Members require competent authorities to act upon their own initiative and to suspend the release of goods in respect of which they have acquired *prim a facie* evidence that an intellectual property right is being infringed:

- (a) the competent authorities may at any time seek from the right holder any information that may assist them to exercise these powers;
- (b) the importer and the right holder shall be promptly notified of the suspension. Where the importer has lodged an appeal against the suspension with the competent authorities, the suspension shall be subject to the conditions, *mutatis mutandis*, set out at Article 55;
- (c) Members shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith.

Article 59 Remedies

Without prejudice to other rights of action open to the right holder and subject to the right of the defendant to seek review by a judicial authority, competent authorities shall have the authority to order the destruction or disposal of infringing goods in accordance with the principles set out in Article

46. In regard to counterfeit trademark goods, the authorities shall not allow the re-exportation of the infringing goods in an unaltered state or subject them to a different customs procedure, other than in exceptional circumstances.

Article 60
De Minimis Imports

Members may exclude from the application of the above provisions small quantities of goods of a non-commercial nature contained in travellers' personal luggage or sent in small consignments.

SECTION 5: CRIMINAL PROCEDURES
Article 61

Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.