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FOR IMMEDIATE RELEASE
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Knowledge Ecology International Leaks TPP Text on Intellectual Property

Tuesday, August 4th, 2015

Washington, DC — Today, August 4, 2015, Knowledge Ecology International (KEI) released text from three sections of the 95-page secret negotiating text on the Intellectual Property Chapter being used in the Trans-Pacific Partnership Agreement (TPP, sometimes referred to as TPPA) trade negotiations. The negotiating text is dated May 11, 2015, and reflects the state of the text right before the Maui rounds of the negotiation, which ended Friday, July 31, 2015.

Released this morning is text from the following sections of the IP Chapter:

- All of Section B on Cooperation. (Pages 8 to 10 of the IP Chapter)
- All of Section E on "Patents / Undisclosed Test or Other Data / Traditional Knowledge." (Pages 29 to 53 of the IP Chapter)
- Articles 1 through 11 from Section H on enforcement. (Pages 67 through 89 of the IP Chapter)

We hope to release the remaining sections (A, C, D, F, G, and the rest of H) later today and Wednesday.

The text will be placed on this web page: http://keionline.org/tpp/11may2015-ip-text

The text released this morning is most relevant to issues related to pharmaceuticals, especially rules on biologics and new chemicals. Later today or tomorrow, KEI will release sections of the text relevant to copyright and trademarks.

KEI will publish a more detailed analysis of the text later. James Love, Director of Knowledge Ecology International, released the following statement this morning:

> "KEI is publishing the consolidated text for the TPP IP Chapter from May 11, 2015, in order to enable the public to understand, analyze, and influence the rules that have been proposed for intellectual property in this important trade negotiation. Over 600 corporate advisors already have access to this text, and this leak, at least temporarily, levels the field somewhat (there will be a new text coming out of last week's talks in Maui).
>
> The May 11, 2015, text includes country positions, and reveals extensive disagreements among parties, as well as the isolation of the United States as the country that continues to be the most aggressive supporter of expanded intellectual property rights for drug companies, publishers and other companies.
>
> The proposals contained in the TPP will harm consumers and in some cases block innovation. In countless ways, the Obama Administration has sought to expand and extend drug monopolies and raise drug prices. The astonishing collection of proposals

pandering to big drug companies make more difficult the task of ensuring access to drugs for the treatment of cancer and other diseases and conditions.

The widely reported dispute over the number of years of protection for biologic drug test data is only one of dozens of measures that significantly expand the power of big drug companies to charge high prices. Taken together these provisions will take the public down a road of more and more rationing of medicines, and less and less equality of access. It could have and still can be different. Rather than focusing on more intellectual property rights for drug companies, and a death-inducing spiral of higher prices and access barriers, the trade agreement could seek new norms to expand the funding of medical R&D as a public good, an area where the United States has an admirable track record, such as the public funding of research at the NIH and other federal agencies. Many people reading the provisions released today will appreciate how misguided and wrong are the USTR's values and negotiating objectives."

James Love, Director, KEI, August 4, 2015

For more information and perspectives, we are also attaching the names and contact information for several persons who can comment on the text released this morning, including health and consumer group NGOs, academics, and industry experts.

Health and consumer group NGOs

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Pharmaceutical and biotechnology industry experts who are familiar with the TPP IP Chapter

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COVER PAGE

INTELLECTUAL PROPERTY [RIGHTS] CHAPTER

Consolidated Text (Rebooted)

Clean version

11 May 2015

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CHAPTER QQ[1]
{INTELLECTUAL PROPERTY RIGHTS/INTELLECTUAL PROPERTY}

{Section A: General Provisions}

Included in this document are the following Articles and non papers

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CHAPTER QQ[1]
{INTELLECTUAL PROPERTY RIGHTS/INTELLECTUAL PROPERTY}

{Section A: General Provisions}

Article QQ.A.1: {Definitions}

For the purposes of this Chapter **intellectual property** refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II of the TRIPS Agreement.

Article QQ.A.X: {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 QQ.A.Y: {Principles}

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

2. Appropriate measures, provided that they are consistent with the provisions of this Chapter, 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.

QQ.A.Z: {Understandings in respect of this Chapter}

Having regard to the underlying public policy objectives of national systems, the Parties recognise the need to:

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[1] Section and Articles titles and headings appear in this text on a without prejudice basis. Parties have agreed to defer consideration of the need for, and drafting of, Section and Article titles and headings. Such titles or headings that appear in braces (i.e., '{ }" are included for general reference and information purposes only.

- promote innovation and creativity;
- facilitate the diffusion of information, knowledge, technology, culture and the arts; and
- foster competition and open and efficient markets;

through their intellectual property systems, while respecting the principles of transparency and due process, and taking into account the interests of relevant stakeholders, including rights holders, service providers, users and the public [CL/CA propose; US/JP oppose; , and acknowledging the importance of preserving the public domain.]

Article QQ.A.5: {General Provisions}

Each Party shall give effect to the provisions of this Chapter. A Party may, but shall not be obliged to, provide more extensive protection for, and enforcement of, intellectual property rights under its law than is required by this Chapter, provided that such protection and enforcement does not contravene the provisions of this Chapter. Each Party shall be free to determine the appropriate method of implementing the provisions of this Chapter within its own legal system and practice.

Article QQ.A.7: {Understandings Regarding Certain Public Health Measures}

1. The Parties affirm their commitment to the *Declaration of the TRIPS Agreement and Public Health* (WT/MIN(01)/DEC/2). In particular, the Parties have reached the following understandings regarding this Chapter:

(a) The obligations of this Chapter do not and should not prevent a Party from taking measures to protect public health. Accordingly, while reiterating their commitment to this Chapter, the Parties affirm that this Chapter can and should be interpreted and implemented in a manner supportive of each Party's right to protect public health and , in particular, to promote access to medicines for all. Each Member had the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.

(b) In recognition of the commitment to access to medicines that are supplied to accordance with the Decision of the General Council of 30 August 2003 on the Implementation of Paragraph Six of the Doha Declaration on the TRIPS Agreement and Public Health (WT/L/540) and the WTO General Council

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Chairman's statement accompanying the Decision (JOB/(03)/177, WT/GC/M/82), as well as the Decision on the Amendment of the TRIPS agreement, adopted by the General Council, 6 December 2005 and the WTO General Council Chairperson's statement accompanying the Decision (WT/GC/M/100) (collectively, the "TRIPS/health solution"), this Chapter does not and should not prevent the effective utilization of the TRIPS/health solution.

(c) With respect to the aforementioned matters, if any waiver of any provision of the TRIPS Agreement, or any amendment of the TRIPS Agreement, enters into force with respect to the Parties, and a Party's application of a measure in conformity with the waiver or amendment is contrary to the obligations of this Chapter, the PArties shall immediately consult in order to adapt this Chapter as appropriate in the light of the waiver or amendment.

2. Each Party shall notify the WTO of its acceptance of the Protocol amending the TRIPS Agreement done at Geneva on December 6, 2005.

Article QQ.A.8 {existing Rights and Obligations / International Agreements} [2]

[NZ/MY/CA/MX/VN/BN/PE/CL oppose: 1. Each Party affirms that it has ratified or acceded to the following agreements~~, as revised and amended~~:

(a) *Patent Cooperation Treaty* ~~(1970), as amended in (~~1979~~)~~;
(b) *Paris Convention for the Protection of Industrial Property* (1967); and
(c) *Berne Convention for the Protection of Literary and Artistic Works* (1971).

~~[JP oppose:~~ 2. Each party shall ratify or accede to each of the following agreements, where it is not already a Party to such agreement, ~~subject to the fulfillment of its necessary domestic requirements and in any event no later than 1 January 2015, or alternatively~~, by the date of entry into force of this Agreement <u>for the Party concerned</u>.} :

(a) *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (1989)*;

[2] Parties reserve right to revisit in light of outcome of AA.2 and QQ.C.2.2.

(b) *Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure* (1977), as amended in 1980;

(c) *International Convention for the Protection of New Varieties of Plants* (1991) (UPOV Convention);

(d) ~~{~~Singapore Treaty on the Law of Trademarks (2006) [3]/ ~~the Trademark Law Treaty (1994) [4]}~~;

(e) *WIPO Copyright Treaty* (1996); and

(f) ~~WIPO Performances and Phonograms Treaty~~ (1996).]

4. ~~{~~Each Party shall undertake reasonable efforts to ratify or accede to the following agreements:

(a) [SG oppose: *Patent Law Treaty* (2000);]

(b) *Hague Agreement Concerning the International Registration of Industrial Designs* (1999)

(c) [JP oppose: *Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite* (1974).]]~~}~~

Addendum V Version of National Treatment
Article QQ.A.9: {National treatment}

Negotiator's note: Copyright group to continue consideration of this provision , including with respect to TRIPS national treatment language as well as "enjoyment" and "benefits" in the first sentence.

1. In respect of all categories of intellectual property covered in this chapter, [5] each Party shall accord to nationals [6] of the other Party treatment no less favorable that it

[3] A Party may satisfy the obligation in Article QQ.A.8.2(a) and (d) by ratifying or acceding to either the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (1989) or the Singapore Treaty on the Law of Trademarks (2006).

[4] ~~A Party may satisfy the obligation in Article QQ.A.8.2 (d) by ratifying or acceding to the *Singapore Treaty on the Law of Trademarks* (2006).~~

accords to its own nationals with regards to the protection [7] [MY/CA/VN/BN/NZ oppose : and enjoyment] of such intellectual property rights [MY/CA/VN/BN/NZ oppose, and any benefits derived from such rights [8]].

[US propose: With respect to secondary uses of phonograms by means of analog communications [CA propose: ,] [CA oppose: and] free over-the-air broadcasting [AA/JP propose; US/MX oppose: and other non-interactive communications to the public], however, a Party may limit the rights of the performers [MX oppose: and producers] of the other Party [CA oppose: to the rights its persons] [CA propose, US oppose: to the extent to which the rights] are accorded [CA propose, US propose: to its persons] within the jurisdiction of the other Party.]

ALTERNATIVE to the previous paragraph: [CA/MX/VN propose: US oppose: With respect to secondary uses of phonograms, a Party may limit the rights of the performers [MX oppose: and producers] of the other Party to the rights its persons are accorded within the jurisdiction of the other Party.]

2. A Party may derogate from paragraph 1 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.

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[5]For greater certainty, nothing in the Agreement limits Parties from taking an otherwise permissible derogation from national treatment with respect to {copyright and related rights} that are not covered under Section G (Copyright and Related Rights) of this Chapter. Negotiator's note: Chile will confirm

[6]For purposes of Articles [QQ.A.9.1-2__(National Treatment and Judicial/Admin Procedures), QQ.D.2.a__(GIs/Nationals), and QQ.G.14.1 (Performers/Phonograms/Related Rights),] a 'national of a Party" shall mean, in respect of the relevant right, a person of that Party that would meet the criteria for eligibility for protection provided for in the agreements listed in [Article QQ.A.6.4] and the TRIPS Agreement. Negotiator's note: Parties to remember to insert correct cross references to other treaties including WPPT (Article 3) depending on whether chapter includes an obligation to accede to a list of treaties.

[7]For purposes of this paragraph (Article QQ.A.9.1), "protection" shall include 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 paragraph 1, "protection" also includes the prohibition on circumvention of effective technological measures set out in Article QQ.G.10 and the provisions concerning rights management information set out in Article QQ.G.13

[8]For greater certainty, "benefits derived from such rights" refers to benefits such as copyright levies.

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3. Paragraph 1 does not apply to procedure provided in multilateral agreements concluded under the auspices of WIPO relating to the acquisition or maintenance of intellectual property rights.

Article QQ.A.10: {Transparency}

1. Further to Article ZZ.2 {Publication} and QQ.H.3.1 {Enforcement Practices With Respect to Intellectual Property Rights}, each Party shall endeavour to make available on the Internet its laws, regulations, procedures and administrative ruling of general application concerning the protection and enforcement of intellectual property rights.
2. Each Party shall, subject to its national law, endeavour to make available on the Internet information that it makes public concerning applications for trademarks, geographical indications, designs, patents and plant variety rights. [9] [10]
3. Each party, subject to its national law, make available on the Internet information that it makes public concerning registered or granted trademarks, geographical indications, designs, patents and plant variety rights, , sufficient to enable the public to become acquainted with the registration or granted rights. [11]

{Article QQ.A.10bis: {Application of Agreement to Existing Subject Matter and Prior Acts}

1. Except as it otherwise provides, including in Article QQ.G.8__(Berne 18/TRPS 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.
2. [CL/NZ/PE/MY/BN/VN/CA/MX oppose: Except as otherwise provided in this Chapter, including Article QQ.G.8__(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. [12]

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[9] For greater certainty, paragraphs 2 and 3 are without prejudice to a Party's obligations under QQ.C.7 {Electronic Trademarks System}.

[10] For greater certainty, it is understood that paragraph 2 does not require parties to make available the entire dossier for the relevant registered or granted right on the Internet.

[11] For greater certainty, it is understood that paragraph 3 does not require parties to make available the entire dossier for the relevant registered or granted right on the Internet.

[12] Negotiator's Note: AU/NZ/CL/SG/PE/MY/BN/VN/JP/MX/CA/US reserve positions {on paragraphs 1 and 2} pending final outcome of Chapter. All Parties agree to revisit this provision at the conclusion of this chapter.

Without Prejudice

3. This Chapter does not give rise to obligations in respect of acts that occurred before the date of entry into force of this Agreement.}

Article QQ.A.11: {Exhaustion of IP Rights}

Nothing in this Agreement prevents a Party from determining whether and under what conditions the exhaustion of intellectual property rights applies under its legal system [13].

------- After this article, also on page 8, Section B begins

==========end page 8==========

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3. This Chapter does not give rise to obligations in respect of acts that occurred before the date of entry into force of this Agreement.}

Article QQ.A.11: {Exhaustion of IP Rights}

Nothing in this Agreement prevents a Party from determining whether and under what conditions the exhaustion of intellectual property rights applies under its legal system [13].

Section B: Cooperation

Article QQ.B.1: {Contact Points for Cooperation}

Further to TT.3 {Contact Points for Cooperation and Capacity Building}, each Party may designate one or more contact points for the purpose of cooperation under this section.

Article QQ.B.2 {Cooperation Activities and Initiatives}

The Parties shall endeavor to cooperate on the subject matter covered by this Chapter, such as through appropriate coordination, training and exchange of information between the intellectual property offices of the Parties, or other institutions as determined by each Party. Cooperation may cover such areas as:

a. developments in domestic and international intellectual property policy;
b. intellectual property administration and registration systems;
c. education and awareness relating to intellectual property;
d. intellectual property issues relevant to:
    a. small and medium-sized enterprises;
    b. science, technology & innovation activities; and
    c. the generation, transfer and dissemination of technology.

e. policies involving the use of intellectual property for research, innovation and economic growth;

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[13] For greater certainty, this Article is without prejudice to any provisions addressing the exhaustion of intellectual property rights in international agreements to which a Party is a party.

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f. implementation of multilateral intellectual property agreements, such as those concluded or administered under the auspices of WIPO; and
g. technical assistance for developing countries.

Article QQ.B.3: {Patent Cooperation/Work Sharing}

1. The Parties recognise the importance of improving quality and efficiency in their patent registration systems and simplifying and streamlining their patent office procedure and processes for the benefit of all users of the system and the public as a whole.

2. Further to paragraph 1, the Parties shall endeavour to cooperate among their respective patent offices to facilitate the sharing and use of search and examination work of other Parties. This may include:

(a) making search and examination results available to the patent offices of other Parties [14], and
(b) exchanges of information on quality assurance systems and quality standards relating to patent examination.

3. In order to reduce the complexity and cost of obtaining the grant of a patent, the Parties shall endeavor to cooperate to reduce differences in the procedures and processes of their respective patent offices.

4. Parties recognize the importance of giving due consideration to ratifying or acceding to the *Patent Law Treaty*; or in the alternative adopting or maintaining procedural standards consistent with the objective of the *Patent Law Treaty*.

Article QQ.B.x: {Public Domain}

1. The Parties recognize the importance of a rich and accessible public domain.

2. The Parties also acknowledge the importance of informational materials, such as publicly accessible databases of registered intellectual property rights that assist in the identification. of subject matter that has fallen into the public domain.

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[14] Parties recognize the importance of multilateral efforts to promote the sharing and use of search and examination results, with a view to improving the quality and search and examination processes and to reducing the cost for both applicants and patent offices.

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Article QQ.B.4: {Cooperation on Request}

Cooperation activities and initiatives undertaken under this Chapter shall be subject to the availability of resources, and on request and on terms and conditions mutually agreed upon between the Parties involved.

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{Section C: Trademarks}

Article QQ.C.1: {Types of Signs Registrable as Trademarks}

No Party may require, as a condition of registration, that a sign be visually perceptible,[15] nor may a Party deny registration of a trademark solely on the ground that the sign of which it is composed is a sound [VN/BN//CA/JP/ oppose: or a scent]. A Party may require a concise and accurate description, or graphical representation, or both, as applicable, of the trademark.

Article QQ.C.2: {Collective and Certification Marks}

1. Each Party shall provide that trademarks shall include collective marks and certification marks. A Party is not obligated to treat certification marks as a separate category in its domestic law, provided that such marks are protected. Each Party shall also provide that signs that may serve as geographical indications are capable of protection under its trademark system.[16]

[US/PE/MX[17]/SG propose; AU/NZ/VN/BN/MY/CA oppose: 2. Pursuant to Article 20 of the TRIPS Agreement, each Party shall ensure that its measures mandating the use of the term customary in common language as the common name for a good or service ("common name") including, inter alia, requirements concerning the relative size, placement or style of use of the trademark in relation to the common name, do not impair the use or effectiveness of trademarks used in relation to such good or service.[18]][19][20]

Article QQ.C.3: {Use of Identical or Similar Signs}

Each Party shall provide that the owner of a registered trademark shall have the exclusive right to prevent third parties not having the owner's consent from using in the course of trade identical or similar signs, [PE/MY/VN/CA/MX oppose: including subsequent

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[15] Negotiators' note: VN can accept the protection of sound but only if it is given an adequate transitional period.
[16] For purposes of this Chapter, **geographical indication** means indications that identify a good as originating in the territory of a party, or a region or locality in that territory, where a given quality, reputation, or other characteristic of the good is essentially attributable to its geographical origin. Consistent with this definition, any sign or combination of signs shall be eligible for protection under one or more of the legal means for protecting GIs, or a combination of such means. {Chair's note: address placement in legal scrub.}
[17] Negotiators' Notes: PE/MX/SG will go with consensus on this paragraph.
[18] [PE/US propose: For greater certainty, the existence of such measures does not per se, amount to impairment.]
[19] Negotiators' Note: JP is considering this provision.
[20] [SG propose: This provision is not intended to affect the use of common names of pharmaceutical products in prescribing medicine.]

geographical indications,] for goods or services that are related to those goods or services in respect of which the owner's trademark is registered, where such use would result in a likelihood of confusion. In the case of the use of an identical sign, [PE/MY/SG/CL/CA/MX/VN oppose: including a geographical indication,] for identical goods or services, a likelihood of confusion shall be presumed.

Article QQ.C.4:

Each Party may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interest of the owner of the trademark and of third parties.

Article QQ.C.5: {Well Known Trademarks}

1. No Party may require as a condition for determining that a trademark is well-known that the trademark has been registered in the Party or in another jurisdiction, included on a list of well-known trademarks, or given prior recognition as a well-known trademark.

2. Article 6*bis* of the Paris Convention for the Protection of Industrial Property (1967) shall apply, *mutatis mutandis*, to goods or services that are not identical or similar to those identified by a well-known trademark,[21] whether registered or not, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the trademark, and provided that the interests of the owner of the trademark are likely to be damaged by such use.

3. Each Party recognizes the importance of the *Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks* (1999) asadopted by the Assembly of the Paris Union for the Protection of Industrial Property and the General Assembly of WIPO.

4. Each Party shall provide for appropriate measures to refuse the application or cancel the registration and prohibit the use of a trademark that is identical or similar to a well-known trademark,[22] for identical or similar goods or services, if the use of that trademark is likely to cause confusion with the prior well known trademark. A Party may also provide such measures *inter alia* in cases in which the subsequent trademark[23]:

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[21] Where a Party determines whether a mark is well-known in the Party, the Party need not require that the reputation of the trademark extend beyond the sector of the public that normally deals with the relevant goods or services.
[22] It is understood that such a well-known trademark is one that was already well-known before the registration or use of the first-mentioned trademark.
[23] Negotiator's note: AU opposes the last sentence of this chapeau, but is in discussions with NZ and US as to language that could resolve this.

(a) is likely to deceive [UNREADABLE] or risk associating the trademark with the owner of the well-known trademark, or

(b) constitutes unfair exploitation of the reputation of the well-known trademark.]

Article QQ.C.6: {Examination, Opposition and Cancellation / Procedural Aspects}

Each Party shall provide a system for the examination and registration of trademarks which shall include, *inter alia*:

(a) providing to the applicant a communication in writing, which may be electronic, of the reasons for any refusal to register a trademark;

(b) providing the opportunity for the applicant to respond to communications from the competent authorities, to contest an initial refusal, and to appeal judicially any final refusal to register a trademark;

(c) providing an opportunity to oppose the registration of a trademark or to seek cancellation[24] of a trademark; and

(d) requiring that administrative decisions in opposition and cancellation proceedings be reasoned and in writing. Written decisions may be provided electronically.

Article QQ.C.7: {Electronic Trademarks System}

Each Party shall provide:

(a) a system for the electronic application for, and maintenance of, trademarks; and

(b) a publicly available electronic information system, including an online database, of trademark applications and of registered trademarks.

Article QQ.C.8: {Classification of Goods and Services}

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[24] For greater certainty, cancellation for purposes of this Section may be implemented through nullity or revocation proceedings.

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Each Party shall adopt or maintain a trademark classification system that is consistent with the *Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks* (Nice Classification) of June 15, 1957, as revised and amended. Each Party shall provide that:

> [CA oppose: (a) registrations and the publications of applications indicate the goods and services by their names, grouped according to the classes established by the Nice Classification[25]; and]
>
> (b) goods or services may not be considered as being similar to each other on the ground that, in any registration or publication, they are classified in the same class of the Nice Classification. Conversely, each Party shall profice that goods or services may not be considered as being dissimilar from each other on the ground that, in any registration or publication, they are classified in different classes of the Nice Classification.

Article QQ.C.9: {Term of Protection for Trademarks}

Each Party shall provide that initial registration and each renewal of registration of a trademark shall be for a term of no less than 10 years.

Article QQ.C.10:

No Party may require recordal of trademark licenses: to establish the validity of the license; [VN/MX oppose: [CL/BN/MY oppose: as a condition for any right that a licensee may have under that Party's law to join infringement proceedings initiated by the holder, or to obtain by way of civil infringement proceedings damages resulting from an infringement of the trademark which is subject to the license]; or as a condition for use of a trademark by a licensee, to be deemed to constitute use by the holder in proceedings relating to the acquisition, maintenance and enforcement of trademarks].

Article QQ.C.12: {Domain Name Cybersquatting}

1. In connection with each Party's system for the management of its country-code top-level domain (ccTLD) domain names, the following shall be available:

> (a) an appropriate procedure for the settlement of disputes, based on, or modelled along the same lines as, the principles established in the Uniform Domain-Name Dispute-Resolution Policy, or that is: (i) designed to resolve

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[25] Parties that rely on translations of the Nice Classification are required to follow updated versions of the Nice Classification to the extent that official translations have been issued and published.

disputes expeditiously and at low cost, (ii) fair and equitable, (iii) not overly burdensome, and (iv) does not preclude resort to court litigation; and

(b) online public access to a reliable and accurate database of contact information concerning domain-name registrants;

in accordance with each Party's laws and, where applicable, relevant administrator policies regarding protection of privacy and personal data.

2. In connection with each Party's system for the management of ccTLD domain names, appropriate remedies,[26] shall be available, at least in cases where a person registers or holds, with a bad faith intent to profit, a domain name that is identical or confusingly similar to a trademark.

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[26] It is understood that such remedies may but need not include, for example, revocation, cancellation, transfer, damages, or injunctive relief.

Without Prejudice

{Section D: Geographical Indications}[CL/MX propose; US oppose:[27]]

Article QQ.D.1: {Recognition of Geographical Indications}

The Parties recognize that geographical indications may be protected through a trademark or sui generis system or other legal means.

Article QQ.D.2:

Where a Party provides administrative procedures for the protection or recognition of geographical indications, whether through trademark or a sui generis system, the Party shall with respect to applications for such protection or petitions for such recognition:

(a) accept those applications or petitions without requiring intercession by a Party on behalf of its nationals[28];

(b) process those applications or petitions without imposition of overly burdensome formalities;

(c) ensure that its regulations governing the filing of those applications or petitions are readily available to the public and clearly set out the procedures for these actions;

(d) make available information sufficient to allow the general public to obtain guidance concerning the procedures for filing applications or petitions and the processing of those applications or petitions in general; and allow applications, petitioners, or their representatives to ascertain the status of specific applications and petitions;

(e) ensure that those applications or petitions are published for opposition and provide procedures for opposing geographical indications that are the subject of applications or petitions; and

(f) provide for cancellation[29] of the protection or recognition afforded to a geographical indication.

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[27] [CL/MX propose; US oppose: Section D shall not apply to geographical indications protected pursuant to an agreement with another government or international organization, except for to the extent as are provided for in QQ.D.5.] Negotiator's note: US' opposition is not based on a conceptual difference but on the necessity for this footnote.

[28] Subparagraph (a) shall also apply to judicial procedures that protect or recognize a geographical indication

Without Prejudice

Article QQ.D.3 {Grounds of Opposition and Cancellation}[30]

1. Where a Party protects or recognizes a geographical indication through the procedures referred to in Article QQ.D.2, that party shall provide procedures that allow interested persons to object to the protection or recognition of a geographical indication, and that allow for any such protection or recognition to be refused or otherwise not afforded, at least on the following grounds:

(a) [VN oppose: the geographical indication is likely to cause confusion with a trademark or geographical indication that is the subject of a pre-existing good faith pending application or registration in the territory of the Party;]

(b) [VN oppose: the geographical indication is likely to cause confusion with a pre-existing trademark or geographical indication, the rights to which have been acquired in accordance with the Party's law; and][VN propose:[31]]

(c) the geographical indication is a term customary in common language as the common name [AU/NZ/US propose; CL/MX/PE/JP/VN/MY/CA oppose: [32]] for the relevant goods in that Party's territory.

2. [JP propose: As an alternative to paragraph 1,][33] Where a Party has protected or recognized a geographical indication through the procedures referred to in Article QQ.D.2, that Party shall provide procedures that allow for interested persons to seek the cancellation of a geographical indication, and that allow for the protection or recognition

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[29] For greater certainty, cancellation for purposes of this Section may be implemented through nullity or revocation proceedings.

[30] A Party is not required to apply Article QQ.D.3 to geographical indications for wines and spirits or applications for such geographical indications.

[31] [VN propose: For the purpose of subparagraphs (a) and (b) of Article QQ.D.3.1, a Party may confine "likely to cause confusion" to cases of foreseeable confusion, which shall include at least the case of a prior well-known protected framework or a prior well-known protected geographical indication.] Negotiator's note: VN will withdraw its opposition to subparagraphs (a) and (b) of Article QQ.D.3.1 as well as proposition of "(c)" if the foregoing FN is accepted.

[32] [AU/NZ/US propose; CL/MX/PE/JP/VN/MY/CA oppose: For greater certainty, where a Party provides for the procedures in QQ.D.2 and QQ.D.3 to be applied to geographical indications for wines and spirits or applications for such geographical indications, this article also applies to a product of the vine for which the relevant indication is identical to the customary name of a graph variety in ~~a~~ that Party's territory.] [CL/SG propose: Nothing in this Article shall require a Party to apply its provisions in respect of a geographical indication of any other Party with respect to products of the vine for which the relevant indication is identical with the customary name of a grape variety existing in the territory of that Party as of the date of entry into force of this agreement] Negotiators' note: VN would not support FN 4 and "relevant" va FN 14, because it is appropriate only in case of GI of grape variety, and inappropriate in other cases, eg GI Product is made of grape variety.

[33] Negotiators' note: This is connected to QQ.D.5 issue.

to be cancelled, at least on the grounds listed in paragraph 1[VN propose: (c)]. A Party may provide that the grounds in QQ.D.3.1 (a), (b) and (c) shall apply as of the time of filing the request for protection or recognition of a geographical indication in the territory of the Party[34][35]]~~[36]~~

[US/AU/NZ propose; PE/CL oppose: 2bis. [VN propose; US/AU/NZ oppose: Without prejudice to paragraph 2 above] No Party shall preclude the possibility that the protection or recognition of a geographical indication may be cancelled, or otherwise cease, on the basis ~~[VN propose; US/AU/NZ oppose: other than those mentioned in paragraph 1~~] that the protected or recognised term has ceased meeting the conditions upon which the protection was originally granted [US propose; MY oppose: in the Party].] [CL propose: No Party shall be obliged to protect geographical indications which are not or ceased to be protected in their country of origin, or which have fallen into disuse in that country.][37]

~~[VN propose; US/NZ oppose:~~

~~Alternative 2bis. Without prejudice to paragraph 2 above no [8] Party shall preclude the possibility that the protection or recognition of a geographical indication may be cancelled,[9] or otherwise cease, at least on the following grounds that the protected or recognised term has ceased meeting the conditions upon which the protection was originally granted in the Party[10][11]~~

~~(a) the GI ceased to be protected in the country of origin;~~

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[34] ~~[MY/NZ/SG propose:~~ For greater certainty, where the grounds listed in paragraph 1 did not exist in a Party's law as of the time of filing of the request for protection or recognition of a geographical indication under Article QQ.D.2, a Party is not required to apply such grounds for the purposes of paragraph 2 or Article QQ.D.3.4 in relation to such geographical indication.] {~~No Party shall be required to apply paragraph 2 in respect of geographical indications that are protected or recognized in that Party before this Agreement comes into force.~~ Negotiators' Note: Parties considering the need for the second footnote in view of QQ.A.10bis.3.

[35] [JP/PE/VN/MX propose; US oppose: This paragraph does not prevent a Party from limiting the availability of the procedures for cancellation to a certain period after registration.] Negotiators' note: US has proposed the following footnote as a possible alternative to the preceding footnote: [A Party may fulfil the obligation to provide procedures for interested persons to seek cancellation of a geographical indication if the Party provides that, after protection or recognition is granted to a geographical indication, the Party's competent authorities: (a) have the authority to cancel such protection or recognition ex officio; and (b) take into account relevant information submitted by interested persons.]

[36] ~~Negotiators' note: Parties need to reflect on rationale and placement of the last sentence.~~

[37] [JP/VN propose: For greater certainty, this Article does not apply to cases where a GI becomes {generic} after protection or recognition is given.] Drafters note: JP VN to confirm if footnote still needed under new structure.

- VN confirms that FN10 is still needed to accommodate its national policy as well as bilateral policy with EU unless language of para 2bis does not prejudice the last sentence of para 2.

[38] Negotiators note: MX/PE is still reflecting on the application of this provision with regards to its national geographical indications.

~~(b) the GI ceased to be GI as such due to change of geographical conditions.]~~

3. Where a Party has in place a *sui generis* system for protecting unregistered geographical indications by means of judicial procedures, a Party shall provide that its judicial authorities have the authority to deny the protection or recognition of a geographical indication where any of the circumstances identified in paragraph 1(i), paragraph 1(ii) and paragraph 1(iii) have been established[39]. Such a Party shall also provide a process that allows interested persons to commence a proceeding on such grounds.

4. Where a Party provides protection or recognition of any geographical indication, pursuant to the procedures referred to in Article QQ.D.2, to the translation or ~~[PE oppose~~: transliteration~~]~~ of such geographical indication, the Party shall make available procedures that are equivalent to, and grounds that are the same as, those set forth in paragraphs 1 and 2 with respect to such translation or ~~[PE oppose:~~ transliteration~~]~~.[40]

Article QQ.D.8: {Guidelines for determining whether a term is the term customary in the common language as the common name for the relevant goods in a Party's territory}

With respect to the procedures in D.2 and D.3 in determining whether a term is the term customary in common language as the common name for the relevant goods in a Party's territory, that Party's authorities shall have the authority to take into account how consumers understand the term in that Party's territory. Factors relevant to such consumer understanding may include:

(a) whether the term is used to refer to the type of product in question, as indicated by competent sources such as dictionaries, newspapers, and relevant websites; and

(b) how the product referenced by the term is marketed and used in trade in the territory of that Party.[41] [AU propose; PE/CA/SG/CL/MX/MY/JP oppose:[42]]

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[39] As an alternative to paragraph 3, where a Party has in place a *sui generis* system of the type referred to in paragraph 3 as of {*date x -- already in place pre-TPP*}, that Party shall at least provide that its judicial authorities have the authority to deny the protection or recognition of a geographical indication where the circumstances identified in paragraph 1(c) have been established. Negotiators' note: MY's removal of opposition at various places in QQ.D.3.1 and QQ.D.3.2 upon acceptance of MY's several proposals in this Section is ad ref.

[40] Negotiators' note: MY has removed its opposition ad ref.

[41] For purposes of subparagraph (b), a Party's authorities may take into account, where appropriate, whether the term is used in relevant international standards recognized by the Parties to refer to a type or class of product in the Party's territory.

[42] [AU propose; PE/CA/SG/CL/MX/MY/VN/JP oppose: For the avoidance of doubt, this paragraph does not preclude a Party's authorities from taking into account how consumers in the Party's territory

Without Prejudice

Article QQ.D.9: {Multi-Component Terms}

With respect to the procedures in D.2 and D.3, an individual component of a multi-component term that is protected as a geographical indication in a Party shall not be protected in that Party where the individual component is a term customary in the common language as the common name for the associated goods.

Article QQ.D.6: {Date of Protection of a Geographical Indication}

Where a Party grants protection or recognition to a geographical indication through the procedures referred to in Article QQ.D.2, such protection or recognition shall commence no earlier than the filing date[43] in the Party or the registration date in the Party, as applicable.

Article QQ.D.11: [CL/SG/BN/MX propose[44] ; AU/PE/US/NZ/CA/JP/VN/MY oppose: List of Geographical Indications

The terms listed in Annex [...] are recognized as geographical indications of the respective Party, within the meaning of paragraph 1 of Article 22 of the TRIPS Agreement. Subject to domestic laws [45], in a manner that is consistent with the TRIPS Agreement, such terms will be protected as geographical indications in the territories of the other Parties.]

Article QQ.D.12: {Homonymous Geographical Indications}

[PE oppose: 1. Where a Party provides protection for homonymous geographical indications for spirits, that Party shall determine the practical conditions under which such indications will be differentiated from each other in its territory, taking into account the need to ensure equitable treatment of the producers concerned and that consumers are not misled.]

[CL propose; AU/US/PE/NZ/VN/SG/MY/BN/MX/CA/JP oppose: 2. The Parties recognize the geographical indication *Pisco* for the exclusive use for products from Chile and Peru.]

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understand how the product referenced by the term is marketed or used in trade outside the territory of the Party.]
[43] For greater certainty, the filing date referenced in this paragraph includes the priority filing date under the Paris Convention, where applicable.
[44] Negotiators' Note: VN supports subject to the list of GIs in the Annex.
[45] [CL/BN/SG propose: For greater certainty, the Parties acknowledge that geographical indications will be recognized and protected in the Parties only to the extent permitted by and according to the terms and conditions set out in their respective domestic laws.]

Without Prejudice

[CL/SG/BN/MX propose; AU/PE/US/NZ/CA/JP/VN/MY oppose: Annex [...] Lists of Geographical Indications]

Article QQ.D.13: {Country Names}[46]

Each Party shall provide the legal means for interested parties to prevent commercial use of country names of the Parties in relation to goods in a manner which misleads consumers as to the origin of such goods.

Article QQ.D.5 (International Agreements)[47]

1. Where a Party protects or recognizes a geographical indication other than for wines and spirits pursuant to an {international agreement} {agreement with another government or international organization} {international agreement involving a Party or a non-Party}[48], {and} where those geographical indications are not protected pursuant to the procedures in Article QQ.D.2 [MY/SG propose: and QQ.D.3.3], the Party shall [CL/MX/JP propose; US/AU/NZ oppose: endeavor to apply at least procedures set forth in QQ.D.2.(e)]: ~~[CL propose: apply at least procedures in QQ.E.2.(e).]~~

[US/AU/NZ propose; CL/PE/MX oppose:

(a) provide opposition [JP/VN/MY oppose: and cancellation] procedures and grounds equivalent to those set forth in Article QQ.D.2(e) [JP/VN/MY oppose: and (f)] and [VN oppose: Article QQ.D.3, paragraphs 1] [JP/VN/MY oppose: and 2];

(b) [[MY oppose: provide the procedures and grounds described under subparagraph (a) where a Party provides protection or recognition of any geographical indication to the translation or transliteration of such geographical indication; and]

(c) [JP/VN/CA oppose: apply Article QQ.D.3.2bis.]]

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[46] Negotiators' note: Legal scrub to determine placement in TM vs GI vs standalone.
[47] Negotiators' note: Parties' attributions with respect to QQ.D.5 does not prejudice its final views on QQ.D.5.
[48] Negotiators' note: Proponents are still considering the most appropriate formulation to capture the type of international agreements they see as falling within the ambit of this provision.

Without Prejudice

2. [US/AU/NZ propose; CL/JP/PE/CA/MX oppose: Where a Party protects or recognizes a geographical indication for wines and spirits pursuant to an agreement with another government or international organization, where those geographical indications are not protected pursuant to the procedures in Article QQ.D.2 [MY/SG propose: and QQ.D.3.3], the Party shall provide opposition [JP/VN oppose: and cancellation] procedures equivalent to those set forth in Article QQ.D.2(e) [JP/VN oppose: and (f)]; and]

[JP/VN/MY/CL[49]/MX[50] propose; US/AU/NZ oppose: 2bis. ~~as an alternative to no cancellation in paras. 1 and 2: "~~With respect to the cancellation procedures referred to in paragraphs 1 and 2 above, a Party may instead provide in such agreement for a possibility of modification or cancellation of geographical indications protected pursuant to the agreement, on a mutual consent of the parties to the agreement.[22]]

3. [US/AU/NZ propose; MX oppose: Each Party shall apply Articles QQ.D.8 and QQ.D.9 when [CA/CL propose: determining whether to grant] ~~[CA/CL oppose: granting] protection or recognition~~protecting or recognizing ~~to~~ a GI pursuant to paragraph 1 and, if applicable, paragraph 2.]

4. [JP/MY/VN/CL-/MX/PE propose; US/AU/NZ oppose: No Party shall be required to apply Article QQ.D.5, paras 1 - 3, to geographical indications that are protected pursuant to an {international agreement} {agreement with another government or international organization} {international agreement involving a Party or a non-Party}~~agreement between that Party and another govenrment, government entity {or international organizations)~~, provided that that agreement includes provisions of procedures to protect geographical indications that are equivalent to those included in the agreements as exempted from the application of Section D pursuant to QQ.D.5.6]

5. [MX oppose: Protection or recognition provided pursuant to paragraphs 1 and 2 shall commence no earlier than the date on which such agreement enters into

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[49] [Negotiators note: CL ~~cannot accept obligations with respect to cancellation procedures~~is still considering the drafting of this provision and is exploring the following language ~~Chile would be able to consider an alternative paragraph 2 Bis worded as follows~~: A Party may comply with cancellation procedures referred to in paragraph 1 and 2 above, if such agreements permits for the possibility of modification or cancellation of geographical indications protected pursuant to the agreement, on a mutual consent of the Parties to the agreement.].
[50] Negotiators' note: MX is still considering the drafting of this provision.

force, or if that Party grants such protection or recognition on a date after entry into force of the agreement, on that later date.} [MY propose: [51]]

6. No Party shall be required to apply QQ.D.5, paras. 1 (non-wines/spirits procedures & grounds), 2 (wines/spirits procedures), 3 (QQ.D.8 and 9 genericness stds) and 5 (commencement of protection), to geographical indications that have been specifically identified in, {or} {and} that are protected or recognized pursuant to, an {international agreement} {agreement with another government or international organization} {international agreement involving a Party or a non-Party} ~~{international agreement} {agreement between that Party and another government, government entity {or international organization} }~~, provided that [CL/PE/MX propose; US/AU/NZ oppose: [52]] [53]

[US propose; JP/VN/MY/MX/CL oppose: Option 1: such agreement was concluded or agreed in principle[CA propose:[54]] prior to 31 December 2013]
[PE/CL propose; NZ/AU/JP/VN/MY/MX oppose: Option 2: such agreement was concluded or agreed prior to entry into force of this Agreement]
[VN/MY/JP/BN/~~PE~~/MX propose; NZ/AU oppose: Option 3: such agreement was concluded or agreed prior to three years after entry into force of this Agreement]~~[55]~~

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[51] [MY propose: This paragraph shall not apply to protection or recognition of unregistered geographical indications by means of juridicial procedures.]
[52] [CL/PE/MX propose; US/AU/NZ oppose: For greater certainty, this provision applies to any modification made to an existing agreement.]
[53] Negotiators' note: AU/NZ ~~is~~are still considering its position on the cut off date.
[54] [CA propose: For the purpose of this Article, "agreed in principle" refers to an agreement with another government or government entity or international organization in respect of which a political understanding has been reached and the negotiated outcomes of the agreement have been publically notified/announced.]
~~[55] Negotiators' note: MX is considering the QQ.D.5 depending on the final outcome of paragraphs 6 and 7.~~

Without Prejudice

7. Notwithstanding paragraph 6, each Party shall apply QQ.D.5, paras. 1, [MX oppose: 2, 3 and 5], to GIs that are protected pursuant to an existing {international agreement} {agreement with another government or international organization} {international agreement involving a Party or a non-Party} ~~{international agreement} {agreement with another government {or international organization}}~~, where such GIs are protected or recognized after the date referenced in paragraph 6 above, [US/AU/NZ propose; CL/MX/PE/JP/MY oppose:{option 1: except to the extent that the existing agreement prevents the Party from complying with}/{option 2: except to the extent that the existing agreement is in direct legal conflict with}the obligations set forth in QQ.D5, paras. 1 (non-wines/spirits procedure & grounds_, 2 (wines/spirits procedures), 3 (QQ.D.8 and 9 genericness stds) and 5 (commencement of protection)][56][CL/CA/PE/JP/MX/BN/MY propose; US oppose: option 3: except to the extent that the obligations set forth in QQ.D.5 1, 2, 3 and 5 are inconsistent with [AU/NZ oppose: or not provided in] the existing agreement][57].

[CL Propose: **Annex [...]**

List of Geographical Indications from Chile

Wines	**Name of Indication**
	Valle de Aconcagua
	Valle del Bío Bío
	Valle del Cachapoal
	Valle de Casablanca
	Valle del Choapa
	Valle de Colchagua
	Valle de Copiapó
	Valle de Curicó
	Valle del Claro
	Valle del Elqui
	Valle del Huasco
	Valle del Itata
	Valle de Leyda
	Valle del Loncomilla
	Valle del Lontué
	Valle del Limarí
	Valle del Maipo
	Valle del Marga-Marga

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[56]Negotiators' note: US/AU/NZ are still considering whether to land on option 1 or 2.
[57]Negotiators' note: US/AU/NZ/MY/VN still considering their view with regard to the three options. ~~BN is flexible with either the second or third option.~~

Valle del Maule
Valle del Malleco
Valle del Rapel
Valle de San Antonio
Valle del Teno
Valle del Tutuvén
Valle del Cautín
Valle de Osorno
Región de Aconcagua
Region de Atacama
Region de Coquimbo
Región del Sur
Region del Valle Central
Región Austral
Secano Interior -- Rauco
Secano Interior -- Romeral
Secano Interior -- Molina
Secano Interior -- Sagrada familia
Secano Interior -- Talca
Secano Interior -- Pencahue
Secano Interior -- San Clemente
Secano Interior -- San Rafael
Secano Interior -- San Javier
Secano Interior -- Villa alegre
Secano Interior -- Parral
Secano Interior -- Linares
Secano Interior -- Cauquenes
Secano Interior -- Chillan
Secano Interior -- Quillon
Secano Interior -- Portezuelo
Secano Interior -- Coelemu
Secano Interior -- Yumbel
Secano Interior -- Curepto
Secano Interior -- Niquén

Alhué
Buin
Cauquenes
Chillán
Bulnes
San Carlos
Chimbarongo
Coelemu (Treguaco)
Illapel

Without Prejudice

Isla de Maipo
Linares Yerbas Buenas
Lolol
Maria Pinto
Marchigue
Melipilla (San Pedro)
Molina (Rio Claro Curicó)
Monte Patria
Mulchén (Nacimiento)
Nancagua (Placilla)
Ovalle
Paiguano
Pajarete
Palmilla
Panquehue
Parral
Pencahue
Peralillo
Peumo (Pichidehua)
Pirque
Portezuelo (Ninhue)
Puente Alto
Punitaqui
Quillón (Ranquil, Florida)
Rancagua (Graneros)
Rauco (Gualañe)
Rengo (Malloa)
Requínoa
Río Hurtado
Romeral (Teno)
Sagrada Familia
San Juan
Salamanca
San Clemente
San Fernando
San Javier
San Rafael
Santa Cruz (Chépica)
Santiago (Peñalolen)
Talagante (Peñaflor)
Talca, Maule, Pelarco
Traiguén
Vicuña
Villa Alegre

	Vino Asoleado	
	Yumbel (Laja)	
	La Serena	
	Zapallar	
	Quillota	
	Hijuelas	
	Catemu	
	Llaillay	
	San Felipe	
	Santa María	
	Calle Larga	
	San Esteban	
	Cartagena	
	Algarrobo	
	Santo Domingo	
	Colina	
	Calera de Tango	
	Til Til	
	Lampa	
	Machalí	
	Coltauco	
	Litueche	
	La Estrella	
	Paredones	
	Pumanque	
	Vichuquen	
	Empedrado	
	Curepto	
	Colbun	
	Longaví	
	Retiro	

Spirits	**Name of Indication**	**Country**
	Pisco	Chile

Other products	**Name of Indication**	**Country**
	Limón de Pica	Chile
	Langosta de Juan Fernandez	Chile
	Atún de Isla de Pascua	Chile
	Cangrejo Dorado de Juan Fernandez	Chile
	Dulces de la Ligua	Chile
	Sal de Cahuil, Boyeruca y lo Valdivia	Chile
	Alfarería de Pomaire	Chile
	Chamantos de Doñihue	Chile

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Alfarería de Quinchamalí	Chile
Cordero Chilote	Chile

========== end page 28==========

Without Prejudice

Cover Page

Intellectual Property [Rights] Chapter

Consolidated Text (Rebooted)

Clean version

11 May 2015

Notes on this document.

This is the first installment of text from the May 11, 2015 negotiating text for the TPP chapter on intellectual property. The whole IP chapter is 95 pages long, including the cover page.

This PDF includes: {Section E: Patents / Undisclosed Test or Other Data / Traditional Knowledge } , from pages 29 to 53 of the 11 May 2015 IP Chapter.

The next installments will include:

QQ.F. Industrial designs (page 54)
QQ.G. Copyright and Related Rights (pages 55 to 66),
QQ.H. Enforcement (pages 67 to 95), and
QQ.A-D, the front sections of the Agreement.

Given how fast negotiations are going on and how long it has been since anyone has leaked the IP Chapter we wanted to get the text out sooner rather than later. We might revise the document next week, after doing more proof reading.

We obtained the text in hard copy, and typed it into this document, preserving the formatting as best we can. The page numbers here refer to the May 11, 2015 consolidated text, rather than the page numbers of this PDF file.

Knowledge Ecology Staff, August 4, 2015.

Included in this PDF

Without Prejudice

{Section E: Patents / Undisclosed Test or Other Data / Traditional Knowledge }

Article QQ.E.1: {Patents / Patentable Subject matter }

1. Subject to paragraphs 3 and 4, each Party shall make patents available for any invention, whether a product or process, in all fields of technology, provided that the invention is new, involves an inventive step, and is capable of industrial application. [58]

2. [US/NZ/SG/AU/JP/CA/PE/MX/BN/VN propose; CL oppose: Subject to paragraphs 3 and 4 and consistent with paragraph 1, each Party confirms that patents are available for inventions claimed as at least one of the following: new uses of a known product, new methods of using a known product, or new processes of using a known product. A Party may limit such processes to those that do not claim the use of the product as such.]

3. Each Party may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to nature or the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law. Each Party may also exclude from patentability: diagnostic, therapeutic, and surgical methods for the treatment of humans or animals; animals other than microorganisms; and essentially biological processes for the production of plants or animals, other than non-biological and microbiological processes.

4. [59] Each Party may also exclude from patentability plants other than microorganisms. [US/JP/AU propose; CL oppose: However, consistent with paragraph 1 and subject to paragraph 3, each Party confirms that patents are available at least for inventions that are derived from plants. [US/AU/JP propose; MY/NZ oppose: [60]]]

FN4 (based on TRIPs Art. 27.3): Each Party shall provide for the protection of plant varieties either by patents or by a sui generis system or by any combination thereof.

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[58] For purposes of this Section, a Party may deem the terms "inventive step" and "capable of industrial application" to be synonymous with the terms "non-obvious" and "useful", respectively. In determinations regarding inventive step (or non-obviousness), each Party shall consider whether the claimed invention would have been obvious to a person skilled or having ordinary skill in the art having regard to the prior art.

[59] Negotiators' note: CL has a substantive issue with the second part of paragraph 4, and is exploring language that explicitly allow the application of national practices in respect to this part.

[60] US/AU/JP propose; MY/NZ oppose: Each Party affirms its commitment to the protection of plant varieties by, inter alia, an effective sui generis system, [CA oppose: Alt 1: consistent with UPOV '91] [Alt 2: through the obligation in QQ.A.8.2(c) (UPOV '91)]]].

Without Prejudice

Such a sui generis system shall, that at a minimum, adopts or maintains the standards regarding scope and conditions of protection, scope of rights, exceptions and duration of protection as set forth in UPOV '91.

Negotiator's Note: With respect to the second sentence of FN 4, Parties discussed the relationship between the UPOV '91 ratification provision in general provisions and the language of the FN. Some Parties commented that if a commitment to ratify/accede to UPOV '91 is agreed upon then the second sentence of the FN may not be necessary or may be necessary for an interim period only. One Party stated it is unlikely to accept the second sentence of the FN without further elaboration as to the provisions of UPOV '91 from which a Party may derogate.

Negotiator's Note: One Party is considering the placement of paragraph 2.

Negotiator's Note: CL has a fundamental issue with the content of paragraph 4, notwithstanding its support for the exception to patentability for plants.

Article QQ.E.2: {Grace Period}

Each Party shall disregard at least information contained in public disclosure used to determine if an invention is novel or has an inventive step if the public disclosure [61] [62]:

was made by the patent applicant or by a person who obtained the information directly or indirectly from the patent applicant,

and

occurred within 12 months prior to the date of filing of the application in the territory of the Party.

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[61] A Party shall not be required to disregard information contained in applications for, or registrations of, intellectual property rights made available to the public or published by a patent office unless erroneously published or unless the application was filed without consent of the inventor of their successor in title by a third party who obtained the information directly or indirectly from the inventor.

[62] For greater certainty, a Party may limit application of this provision to disclosures made by or obtained directly or indirectly from the inventor or joint inventor. For greater certainty, a Party May provide that, for purposes of this article information obtained directly or indirectly from the patent application may be information contained in the public disclosure that was authorized by, or derived from, the patent applicant.

Without Prejudice

Article QQ.E.3:

New Option

{Without prejudice to Article 5A of the Paris Convention, each Party shall provide that a patent may be cancelled, revoked or nullified only on grounds that would have justified a refusal to grant the patent. A party may also provide that fraud, misrepresentation, or inequitable conduct may be the basis for cancelling, revoking or nullifying a patent or holding a patent unenforceable.[63]}

AU brainstorming on patents

Article QQ.E.3:
Option 2: Each Party shall provide that a patent may be cancelled, revoked or nullified only on grounds that would have justified a refusal to grant the patent. A Party may also provide that fraud, misrepresentation, or inequitable conduct may be the basis for cancelling, revoking or nullifying a patent or holding a patent unenforceable.[64] [AU/CL/MY/NZ/BN/CA/MX/VN/SG propose[65]; US/JP oppose: A Party may also provide that a patent may be cancelled, revoked or nullified on the basis that the patent is used in a manner determined to be anti-competitive {, or abusive,} in a judicial or administrative proceeding, {and} where the grant of a compulsory license would not have been sufficient to prevent the said anti-competitive use or abuse]. This Article is without prejudice to Article 5A of the Paris Convention.

Article QQ.E.4: {Exceptions}

Each Party may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.[AU propose: [66]]

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[63] Negotiators' note: AU/US still need to resolve how to incorporate the issue of anti-competitive use as a basis for revoking a patent.

[64] {For greater certainty, a Party may provide for forfeiture of a patent pursuant to Article 5A(3) of the Paris Convention.} Negotiators' note: Some Parties consider that this footnote may be necessary to ensure consistency with Article 5A(3) of the Paris Convention.

[65] Negotiators' Note: PE and SG are flexible with both options.

[66] [AU propose: For greater certainty, nothing in this Chapter shall prevent a Party from taking measures pursuant to Article 31 of the TRIPS Agreement, including any waivers or amendments thereto.]

Without Prejudice

[AU: Insert new QQ.E.4.2

For greater certainty, nothing in this {Chapter} shall limit a Party's rights and obligations pursuant to Article 31 of the TRIPS Agreement, including any waivers or amendments thereto.]

Pharmaceutical regulatory review non paper 26 April 2015

OPTION 1

1. Consistent with, and without prejudice to {a Party's right to provide} limited exceptions under, QQ.E.4: [FN 1]

Each Party shall permit a third person to use the subject matter of a subsisting patent to support an application for marketing approval [FN 2] of a pharmaceutical product in that Party.
A Party may permit a third person to use the subject matter of a subsisting patent to support an application for marketing approval of a pharmaceutical product in another country.

ALT 1 (paragraph 3): A Party may also permit a third person to do {any} other acts that would infringe the exclusive rights of the patent owner {under that Party's law}.

ALT 2 [FN 1]: For greater certainty, nothing in this Article prevents a party from permitting a third person to do any other act that would otherwise infringe the exclusive rights of a patent for purposes of obtaining marketing approval in that Party or another country {provided that the Party acts in a manner consistent with QQ.E.4}.

[FN 2: For purposes of this Chapter, the term marketing approval is synonymous with sanitary approval {under a Party's Law}]

OPTION 2 (CA proposal)

Without limiting a Party's ability to provide regulatory review exceptions in any field of technology under, and consistent with, QQ.E.4 each Party shall permit a third person to use the subject matter of a subsisting patent to support an application for marketing approval [FN 1] of a pharmaceutical product in that Party. [FN2]

[FN 1: For greater certainty, nothing in this Article prevents a Party from permitting a third person to do any other act that would otherwise infringe the exclusive rights of a patent for purposes of obtaining marketing approval in that Party or another country.]

Without Prejudice

[FN 2: For purposes of this Chapter, the term marketing approval is synonymous with sanitary approval {under a Party's law}]

OPTION 3: do nothing (CA proposal)

OPTION 4: Article QQ.*.** — Pharmaceutical Regulatory Review Exception

Consistent with and without prejudice to Article QQ.E.4, each party shall permit a third person to *perform an act that would otherwise infringe a patent, if such act is done for* the purposes of supporting an application for marketing approval of a pharmaceutical[FN]product in that Party and may permit such an act for the purposes of supporting an application for marketing approval of a pharmaceutical product in another territory.

[FN]: This article is without prejudice to a Party's right to provide for any other [CA: regulatory review] exception that {complies with/satisfies/meets the requirements of} Article QQ.E.4.

Article QQ.E.13[67][68]: {Exceptions / Regulatory Review Exception}

[CL oppose: Consistent with Article QQ.E.4 (Exceptions),] if a party permits a third person to use the subject matter of a subsisting patent to support an application for marketing approval of a pharmaceutical [CA/MY/BN propose; US oppose: or other] product [PE propose: and an agricultural chemical product], that Party shall provide that any product produced under such authority shall not be made, used, sold in, [AU/NZ considering: offered for sale,] [AU/NZ considering: or imported into,] the territory of that Party other than for purposes related to meeting requirements for marketing approval [US propose; AU/VN/NZ/MY/CA/BN oppose: of that Party] for the product [AU/VN/NZ/MY/CA/BN/MX propose; US oppose: , and each party may also permit such a product to be exported outside its territory for purposes related to support an application for marketing approval in the exporting party or another country.]][69]

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[67] Negotiator's Note: CA/MX/AU is still considering the options in this provision.

[68] [MX propose: For greater clarity, the duration of the regulatory review exception will be subject to each Party's national legislation.]

[69] Negotiators' note: 1. Parties focused discussion on Option 1, as a possible landing zone, rather than Option 2; 2. Consider moving Option 1 (Bolar for pharmaceuticals) to the Other Regulated Products provisions; For some countries, that might potentially remove the need to include reference to "other products" in the section.; 3. Would it be possible to remove "generating information necessary" if the reference to QQ.E.4 remained?; 4. Given length and complexity of paragraph, could we break this out into two subparagraphs?; 5. Comment that the drafting/structure of the provisions makes it a limiting provision, rather than a more affirmative approach.

Without Prejudice

Option 2:

[NZ/CA/SG/CL/MY/VN/BN/AU propose[70]: Consistent with [Article QQ.E.5 (Exceptions)], each party may provide that a third person may do an act that would otherwise infringe a patent if the act is done for purposes connected with [AU oppose: the collection and submission of data in order to comply with the regulatory requirements of that Party or another country, including for purposes connected with marketing or sanitary approval.][AU propose: obtaining marketing or regulatory approval or meeting sanitary permit requirements of that Party or another country.]][71]

Article QQ.E.6: {Patent filing}

Each Party shall provide that where an invention is made independently by more than one inventor, and separate applications claiming that invention are filed with or for the relevant authority of the party, that Party shall grant the patent on the application that is patentable and that has the earliest filing, or if applicable, priority date[72], unless that application has, prior to publication,[73] been withdrawn, abandoned or refused.

Article QQ.E.7: Each Party shall provide patent applicants with at least one opportunity to make amendments, corrections, and observations in connection with their applications[74].

Article QQ.E.8: [US/AU/PE/VN/JP propose; CL/MY/BN/CA/SG/MX[75] oppose: Each Party shall provide that a disclosure of a claimed invention shall be considered to be

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[70] Negotiator's Note: MX supports in principle, pending the discussion on QQ.E.13.

[71] Negotiators' Note: Parties did not discuss Option 2 in detail as it some parties indicated that it was not a possible landing zone.

[72] A Party shall not be required to apply this provision in cases involving derivation or in situations involving any application that has or had at any time at least one claim having an effective filing date before this agreement comes into force or any application that has or had at any time a priority claim to make an application that contains or contained such a claim.

[73] For greater certainty, a Party may grant the patent to the subsequent application that is patentable, when an earlier application has been withdrawn, abandoned, or refused, or is not prior art against the subsequent application.

[74] Each Party may provide that such amendments do not go beyond the scope of the disclosure of the invention as of the filing date.

sufficiently clear and complete if it provides information that allows the invention to be made and used by a person skilled in the art, without undue experimentation, as of the filing date.]

Article QQ.E.9: [US/PE/AU/JP/SG/VN propose; CL/MY/BN/NZ/CA/MX oppose:
Each Party shall provide that a claimed invention [AU/VN oppose: is] [AU/VN propose: shall be] sufficiently supported by its disclosure [AU/JP/SG/VN oppose: if the disclosure reasonably conveys to a person skilled in the art that the applicant was in possession of the claimed invention] [JP propose; VN oppose: if the disclosure allows a person skilled in the art to extend the teaching therein to the entire scope of the claim] as of the filing date.]

Article QQ.E.10: [US/AU/MX/SG propose; [76] CL/MY/VN/PE/BN/NZ/CA oppose:
Each Party shall provide that a claimed invention is [US/AU/SG propose: useful] [MX propose: industrially applicable] if it has a specific [MX propose: and], substantial, [MX oppose: and credible] utility.]

{Article QQ.E.11: Publication of Patent Applications

CL oppose[77] 1. Recognizing the benefits of transparency in the patent system, each Party shall endeavour to publish unpublished pending patent applications promptly after the expiry of 18 months from the filing date or, if priority is claimed, from the priority date.

2. Where a pending application is not published promptly under paragraph 1, Parties shall publish such application or the corresponding patent as soon as practicable.

3. Each Party shall provide that an applicant may request the early publication of an application prior to the expiry of the period mentioned in paragraph 1.]}

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[75] Negotiator's Note: MX/SG are willing to accept the article provided that the sentence "without undue experimentation" is deleted. NZ can go along with consensus.

[76] Negotiators' Note: JP is considering this provision.

[77] Negotiator's Note: CL supports option 2 of the original proposal and see this as a CN issue.]

Without Prejudice

Non-Paper

Patent Small Group Discussion on QQ.E.11 Publication of Applications
Jan. 30, 2015 (as of 11:45AM)
WITHOUT PREJUDICE

[OPTION 2 [78]
Article QQ.E.11: {Publication of Patent Applications}

[AU/PE/NZ/MY/CL/VN/US/CA/MX/BN/JP/SG propose: 1. Each Party shall publish [79] [US/MX oppose: or make available for public inspection] any patent application promptly after the expiry of 18 months from its filing date or, if priority is claimed, from its priority date, unless the application has been published earlier or has been withdrawn, abandoned or refused [CA/CL/BN/PE propose: , without leaving any rights outstanding [PE propose: , where applicable]].][80,81]

[US/JP/MY/SG/CA/PE/BN/CL/MX/NZ/VN propose: 2. A Party may provide that the obligation in paragraph 1 does not apply where the patent application:

(a) [82] implicates national security, [VN oppose: public safety, or public order [JP/MY/SG/PE/BN/CL propose: or morality]];

[US propose; JP/MY/SG/CA/PE/BN/CL/MX/AU/NZ/VN oppose: (b) has been issued as a patent;

(c) contains or comprises disparaging or offensive subject matter;

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[78] Negotiators' note: CL sees this as a CN level issue and prefers option 2.

[79] [CA/SG/MY/JP/PE/MX/BN/VN/CL propose; US oppose: For the purposes of this Section [*Patents*], 'publish' or 'publication' includes making available for public inspection, which may include making available on the internet.] *Negotiators Note: AU support for this FN is linked to resolution of Article QQ.A.10(2) and subject to clarification of the use of the word Internet.*
Alt. [US propose; VN oppose: For the purposes of this Section [*Patents*], publish' or 'publication' means making available on the internet.] *Negotiators' note: To drop this footnote if the larger package involving transparency and publication is resolved.*
Negotiators' note: Other relevant provisions in QQ.E (Patents) are QQ.E.6 (priority date re where publication of patent application has occurred) and QQ.E.12 (other information in respect of published patents to be made publicly available) CA/SG propose to move this FN to be attached to QQ.E.6.

[80) Negotiators' note: US Support for this provision is contingent upon accommodating exceptions provided under U.S. law.

[81] [US propose; AU oppose: For greater certainty, this Article does not apply to industrial designs].

[82] Negotiators' note: AU is still considering (a).

Without Prejudice

(d) was filed with a non-publication request, accompanied by the applicant's certification that the invention has not been and will not be the subject of an application filed in another country, or under a multilateral international agreement that requires publication of applications; or

(e) involves other exceptional cases under the Party's law.]]**]**

Negotiator's Note: One Party indicated a preference for maintaining both Options for consideration at this time.

Article QQ.E.11*bis*

For published patent applications and issued patents, and in accordance with the Party's requirements for prosecution of such applications and patents, each Party shall make available to the public at least the following information, to the extent that such information is in the possession of the competent authorities and is generated on or after the date of entry into force of the Agreement for that Party:

search and examination results, including details of, or information related to, relevant prior art searches;
non confidential communications from applicants, where appropriate: and
patent and non-patent related literature citations submitted by applicants, and relevant third parties.

[Secretariat's Note: Non-paper on QQ.E.12 dated 13 March 2015]

Article QQ.E.12

[AUS propose. 1. Each party shall make best efforts to process patent applications in an efficient and timely manner with a view to avoiding unreasonable or unnecessary delays.

2. Each Party may provide procedures for patent applications to request to expedite the examination of their patent application.

3.] [US/SG propose [83]; CA/NZ/MY/VN/CL/PE/MX/AU/BN [84] oppose:

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[83] Negotiator's Note: JP can support this Article if JP proposals are accepted.

Without Prejudice

{Option 1: Each Party, at the request of the patent owner, shall adjust the term of a patent to compensate for unreasonable delays that occur in the granting of the patent.}

{Option 2: If there are unreasonable delays in a Party's issuance of patents, that Party shall provide the means to, and at the request of the patent owner, shall, adjust the term of the patent to compensate for such delays.}

For purposes of this {subparagraph/Article}, an unreasonable delay at least shall include a delay in the issuance of {the} / {a} patent of more than four [CL/PE propose: five] years from the date of filing of the application in the territory of the Party, or two [JP/CL/PE propose: three] years after a request for examination has been made, whichever is later.

{ Option 1: Periods attributable to actions of the patent applicant [JP propose: and to judicial or quasi-judicial actions on the patent application] need not be included in the determination of such delays.} /

{ Option 2: For the purposes of this Article, any delays that occur in the issuance of a patent due to periods attributable to actions of the patent applicant or any opposing third person need not be included in the determination of such delay.}

[US propose: AU/NZ/VN oppose: Any patent term adjustment under this article shall confer all of the exclusive rights of a patent subject to the same limitations and exceptions that would otherwise apply to the patent absent any adjustment of the patent term.]] [SG: 85] [JP: 86] [87] [88]

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[84] Negotiator's note: CA/PE cannot agree to including pharmaceuticals within the scope of this Article.

[85] [SG propose: Periods attributable to actions of the patent applicant shall include such periods of time taken to file prescribed document relating to the examination as provided in the laws of the Party.]

[86] JP propose: Notwithstanding Article QQ.A.*10bis*, this Article shall apply to all patent applications filed after the date of entry into force of this Agreement for a Party, or the date two years after the signing of this Agreement, whichever is later for that Party.]

[87] Negotiator's Note: JP and US to lead work on an appropriate transition period for Parties who do not provide such a system.

[88] (a) "Quasi-judicial" is intended to cover primarily processes by patent appeal boards; (b) One Party suggested using the phrase, "or any opposing third person" within the scope of provision; (c) One Party suggested including provision on "judicial or quasi-judicial" proceedings in a footnote: (d) Some Parties suggested including "administrative" proceedings, in addition to, or in lieu of "quasi-judicial."; (e) At least one Party expressed a concern that this provision goes beyond existing FTAs.

Without Prejudice

[Secretariat's note: Non paper on Ag Chem, 13 March 2015]

Article QQ.E.13 {Agricultural Chemical Products}[89]

1. If a Party requires, as a condition for granting marketing approval [90] for a new agricultural chemical product, [91][1] the submission of undisclosed [92] test or other data concerning the safety or efficacy of the product, the Party shall not permit third persons, without the consent of the person who previously submitted such information, to market the same or a similar [93] product on the basis of that information of the marketing approval granted to the person who submitted such test or other data for at least ten years from the date of marketing approval of the new agricultural chemical product in the territory of the party.

[CL oppose: 2. If a party permits, as a condition of granting marketing approval for a new agricultural chemical product, the submission of evidence of prior marketing approval of the product in another territory, the Party shall not permit third persons, without the consent of a person who previously submitted such test or other data concerning the safety [US/JP propose: or] [CL Propose: and] efficacy of the product, to market a same or a similar product based on evidence relating to prior marketing approval in the other territory for at least ten years from the date of marketing approval of the new agricultural chemical product in the territory of the Party.]

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[89] CL's negotiator's note: If there is going to be an explicit mention to the possibility of implementing flexibilities to encourage early entry, then CL will need to have a high level language such as the one in QQ.E.14.3(*For greater certainty, in implementing the obligations of this Article, each Party may provide for conditions and limitations provided that the Party continues to give effect to this Article)* and also to apply it to undisclosed test or other data protection for agricultural chemical products, pharmaceutical products (small molecules) and biologics.

[90] For purposes of this Chapter, the term "marketing approval" is synonymous with "sanitary approval" {under a Party's law}.

[91] For Purposes of this Article, a new agrochemical product is one that either (i) does not contain a chemical entity that has been previously approved for marketing in the Party, or for which a sanitary permit has been obtained (IN THE PARTY) or (ii) which utilizes a new chemical entity that has not been previously approved in the territory of the Party.]

[92] Negotiator's note: Issues under discussion between JP/CA/US/AU.

[93] For greater certainty, for purposes of this Section, an agricultural chemical product is "similar" to a previously approved agricultural chemical product if the marketing approval of that similar agricultural chemical products is based upon the information concerning the safety [US/JP propose: or] [CL propose: and] efficacy of the previously approved agricultural chemical product, or the prior approval of that previously approved product.

Without Prejudice

3. For the purposes of this Article, a new agricultural chemical product [CL propose; US oppose: Means a product that does not contain or utilize a chemical entity that has been previously approved in the Party.] [CL oppose; US propose: is one that contains a chemical entity that has not been previously approved in the territory of the Party for use in an agricultural chemical product.][2][AU propose:[94]]

[Note: One Party sees "considerable efforts" as part of the overall package.]

Article QQ.E.23[95]: {Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources}

[PE/NZ/VN/BN/MX/SG/CL/MY propose[96]: 1. The parties recognise the importance and contribution of traditional knowledge, traditional cultural expressions, and biological diversity to cultural, economic and social development.]

[[97]PE/MY/MXBN propose; NZ/AU/SG/CL oppose: 2. Each Party exercises sovereignty over their biological [MY/BN oppose: diversity] [MY/BN propose: resources] and shall determine the access conditions to their genetic resources and their derivatives in accordance to their domestic legislation.]

[PE/BN/MY/MX/VN propose; AU/SG/CL oppose: [98] 3. Where national legislation [MY/BN propose: or policies] establishes such requirements, the parties recognise that users of genetic resources [NZ/CA oppose: and their derivatives][99] or traditional knowledge associated with genetic resources [NZ/CA oppose: and their derivatives] and [NZ propose: may] [PE/MY propose: shall]:

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[94][AU propose: For greater certainty and for the purposes of this Article, a Party may require a chemical entity to {ALT 1: include an active component that has not been previously approved}{ALT 2: be primarily responsible for the product's intended effect}{ALT 3: be an active component}.]

[95]Negotiators' Note: CA/US position is that QQ.E.23 provisions should be addressed in the Environment Chapter. The US/JP opposes the inclusion of the Article in this Chapter.

[96]Negotiator's Note: AU is considering this paragraph in light of the rest of the Article.

[97]Negotiators Note: Appropriate placement within the Agreement of paragraphs 2, 3 and 7 is under consideration

[98] Negotiator's Note: NZ/CA prefer the issues included in this paragraph to be discussed in the Environment Chapter.

[99][MX/PE propose; CL/MY/SG/AU/NZ oppose: For greater certainty "derivative" means a naturally occurring biochemical compound resulting from the genetic expression or metabolism of biological or genetic resources, without human manipulation, even if does not contain functional units of heredity.]

(a) obtain prior informed consent to access genetic resources [NZ/CA oppose: and their derivatives];

(b) access traditional knowledge associated with genetic resources [NZ/CA oppose: and their derivatives] with the prior informed consent or approval and involvement of the indigenous or local community holding such knowledge; and

(c) [BN/MY propose: fairly and] equitably share the benefits arising from the use of genetic resources [NZ/CA oppose: and its derivatives] and traditional knowledge associated with genetic resources [NZ/CA oppose: and their derivatives on mutually agreed terms.]

[PE/NZ/MX/CL/VN/BN/MY propose: 4. The parties recognize that the intellectual property system patent examination including applications concerning genetic resources and traditional knowledge associated with genetic resources. This may include:

(a) in determining prior art, publicly available documented information related to genetic resources or traditional knowledge associated with genetic resources may be taken into account;

(b) an opportunity for third parties to cite, in writing, to the competent examining authority prior art that may have a bearing on patentability;

(c) where applicable and appropriate, the use of database or digital libraries containing traditional knowledge associated genetic resources ; and

(d) cooperation in the training of patent examiners in the examination of patent applications related to genetic resources and traditional knowledge associated with genetic resources.]

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[100] [PE/MY/BN/VN propose; NZ/CL/AU/SG/CA oppose: For greater certainty, the term “genetic resources” may also encompass its derivatives].

Without Prejudice

[PE/NZ/AU/MX/MY/BN/VN/CL/SG propose: 6. Subject to each Party's international obligations each Party may establish appropriate measures to {respect, preserve and promote} {protect} traditional knowledge and traditional cultural expressions[101].]

[PE/MX/BN propose; NZ/AU/SG/CL oppose: 7. Each Party will take appropriate, effective and proportionate measures to address situations of non-compliance with provisions established in paragraph 3.]

[PE/NZ/MX/SG/MY/BN/VN/VL propose: 8. The Parties shall endeavour to cooperate through their respective agencies responsible for intellectual property or other relevant institutions to enhance understanding of how the intellectual property system can deal with issues associated with traditional knowledge, traditional cultural expressions and genetic resources[102].

[Secretariat's note: Non paper dated 31 Jan 2015] [3]

[Article QQ.B.xx {Cooperation in the Areas of Traditional Knowledge]

XX.1. The Parties recognise the importance and contribution of traditional knowledge, traditional knowledge associated with genetic resources and traditional cultural expressions to cultural, economics and social development.

XX.2. The Parties recognize the relevance of IP systems to {the respect, preservation and promotion of} {respecting, preserving and maintaining}[103] the traditional knowledge associated with genetic resources.

XX.3. The Parties shall endeavor to cooperate through their respectives agencies responsible for intellectual property or other relevant institutions to enhance the understanding of issues connected with traditional knowledge associated with genetic resources, and genetic resources.

XX.4. The Parties shall endeavor to pursue quality patent examination, [in relation to applications that may involve the subject matter of paragraph x above]. This may include:

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[101] Negotiators' Note: Proponents of this provision could be flexible to move this provision to Chapter AA {*Initial Provisions}* in order to drive consensus.
[102] Negotiators' Note: Proponents of this paragraph could be flexible to move to Section B {Cooperation} in order to drive consensus.
[103] Negotiator's note: Parties will reflect on the formulation of wording on this and consistency with para 6.

Without Prejudice

(a) in determining prior art, relevant publicly available documented information related to traditional knowledge associated with genetic resources may be taken into account;

(b) an opportunity for third parties to cite, in writing, to the competent examining authority prior art that may have a bearing on patentability;

(c) where applicable and appropriate, the use of databases or digital libraries containing traditional knowledge associated with genetic resources; and

(d) cooperation in the training of patent examiners in the examination of patent applications related to traditional knowledge associated with genetic resources.

(Note: Paragraph 6 in consolidated text, as amended, placed in Chapter AA.)

Article QQ.E.14: {Patent Term Adjustment/Marketing Approval}

1. Each Party shall make best efforts to process {patent applications and} [104] applications for marketing approval [105] of pharmaceutical products in an efficient and timely manner, with a view to avoiding unreasonable or unnecessary delays.

[106,107] [US/JP/CL/SG propose; MX/PE/VN/MY oppose [108]: 2. With respect to a pharmaceutical product [AU propose: [109]] that is subject to a patent, each Party shall make

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[104] Negotiators' note: Parties agree that this may be removed if the language in QQ.E.12 is accepted.

[105] For greater certainty, the term "marketing approval" is synonymous with "sanitary approval" under a Party's law.

[106] Negotiators' note: NZ is considering its position on paragraphs 2 and 3.

[107]Negotiators' note: MY may consider this if the ~~provision is redrafted in a similar manner as patent term extension~~ and Parties establish cooperation between drug approval authorities to facilitate processing applications of marketing approval. MY/MX are also considering inclusion of a footnote similar to that proposed by JP in QQ.E.12 to clarify that this provision only applies to marketing approval applications filed after entry into force of this Agreement for that Party. ~~BN also supports MY's proposal for this provision to be redrafted in a similar manner as a patent term extension.~~

[108] Negotiators' note: MX/PE can accept if this is a "may" provision. VN can accept these paragraphs only if an adequate transition period for VN based on a development indicator is agreed.

[109] [AU/SG propose: A Party may comply with the obligations of this paragraph with respect to a pharmaceutical product or, alternatively, with respect to a pharmaceutical substance.]

available an adjustment[110] of the patent term to compensate the patent owner for unreasonable curtailment [MX propose; US/JP oppose;[111] of the effective patent term as a result of the marketing approval process.

3. For greater certainty, in implementing the obligations of this Article, each Party may provide for conditions and limitations provided that the Party continues to give effect to this Article.

Article QQ.E.16: {Pharmaceutical Data Protection}[112]

[113] 1. (a) If a Party requires, as a condition for granting marketing approval for a [US propose; PE/MX oppose: new pharmaceutical product], the submission of undisclosed test or other data concerning the safety [US/JP propose; PE/CL/MX/CA oppose: or][PE/CL/MX/CA propose; US/JP oppose: and] efficacy of the product, the Party shall not permit third persons; without the consent of the person who previously submitted such information [MX/PE propose; US/JP oppose:, if the origination of such information involves considerable effort], to market the same [US propose; MY/PE/VN/BN/MX oppose: or a similar[114]] product on the basis of:

(i) that information; or

[PE oppose: (ii) the marketing approval granted to the person who submitted such information]

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[110] For greater certainty, a Party may alternatively make available a period of additional sui generis protection to compensate for unreasonable curtailment of the effective patent term as a result of the marketing approval process. The sui generis protection shall confer the rights conferred by the patent subject to any conditions and limitations pursuant to Paragraph 3.

[111] [MX propose: For greater certainty, the definition of "unreasonable curtailment" is subject to each Party's domestic legislation.] Negotiator's note: PE/MY/BN/CL/SG neutral on this footnote.

[112] Negotiator's note: VN can give consideration to these paragraphs only if an adequate transition period for VN based on a development indicator is agreed.

[113] Negotiator's note: CL position on this paragraph is pending outcome on the discussion of the definition of "similar."

[114] For greater certainty, for purposes of this Section, a pharmaceutical product is "similar" to a previously approved pharmaceutical product if the marketing approval of that similar pharmaceutical products is based upon the information concerning the safety or efficacy of the previously approved pharmaceutical product, or the prior approval of that previously approved product.

for [PE oppose: at least][PE propose:normally] five years from the date of marketing approval of the new pharmaceutical product in the territory of the Party [MY/PE/VN/Bn propose; JP/US oppose: , or an other country where marketing approval is first granted]. [115]

[US/JP propose; CL oppose: (b) If a Party permits, as a condition of granting marketing approval for a [US/JP propose; PE/MX oppose: new pharmaceutical product], the submission of evidence of prior marketing approval of the product in another territory, the Party shall not permit third persons, without the consent of a person who previously submitted such information [MX/PE propos; US/JP oppose:, if the origination of such information involves considerable effort] concerning the safety [PE/ME oppose: or] [PE/MX propose: and] efficacy of the product, to market a same [MY/PE/VN/BN/MX oppose: or a similar] product based on evidence relating to prior marketing approval in the other territory for [PE oppose: at least] [PE propose: normally] five years from the date of marketing approval of the new pharmaceutical product in the territory of the party [MY/PE/VN/BN propose; JP/US oppose: , or any other country where marketing approval is first granted].]

[JP/US propose; PE/NZ/VN/BN/CL/MX/AU/SG/CA oppose: 2. With respect to previously approved pharmaceutical products, if a Party requires the submission of:

(a) new clinical information (other than information related to bioequivalency), or

(b) evidence of prior approval of the product in another territory that requires such new information,

which is essential to the subsequent approval of a pharmaceutical product, the Party shall not permit a third person not having the consent of the person providing the information to market the same or a similar pharmaceutical product on the basis of the marketing approval granted to a person submitting the information for a period of at least three years from the date of marketing approval by the Party [JP/US propose; MY oppose: or the other

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[115] Negotiators' note: MX/PE support for this paragraph is contingent on the inclusion of the concept of "considerable effort."

Without Prejudice

territory, as applicable, whichever is later [116] [MY propose; JP/US oppose: or any other country where marketing approval is first granted].[117]]

3. Notwithstanding paragraphs 1 and 2 above, a Party may take measures to protect public health in accordance with: [118]

(a) the Declaration on the TRIPS Agreement and Public Health (WT/MIN(01)/DEC/2) (the "Declaration");

(b) any waiver of any provision of the TRIPS Agreement granted by WTO Members in accordance with the WTO Agreement to implement the Declaration and in force between the Parties; and

(c) any amendment of the TRIPS Agreement to implement the Declaration that enters into force with respect to the Parties.

[MY/VN/BN/MX propose; JP/US oppose: 4. A Party may for the purpose of granting protection under subparagraph (1)(s) and (1)(b), require an applicant to commence the process of obtaining marketing approval for that pharmaceutical product within 18 months from the date the product is first registered or granted marketing approval, and granted protection for such information in any country.][119]

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[116] Negotiators' note: Parties need to discuss the interpretation of the phrase "whichever is later."

[117] As an alternative to this paragraph, where a Party, on the date of entry into force of this Agreement for that Party, has in place a system for protecting information submitted in connection with the approval of a pharmaceutical product that utilizes a previously approved [NZ/SG oppose: chemical] [NZ/SG propose: active] component from unfair commercial use, the Party may retain that system, notwithstanding the obligations of this paragraph. Additionally, a Party is not required to apply Article QQ.E.16.2 with respect to pharmaceutical products covered by Article QQ.E.20 [CA oppose: or to pharmaceutical products that receive a period of at least 8 years of protection pursuant to subparagraph 1(a) and 1(b) of Article QQ.E.16.][CA propose: . A Party that provides a period of at least 8 years of protection pursuant to QQ.E.16 is not required to apply Article QQ.E.16.2.]

[118]Negotiators' note: the applicability of this para 3 to other parts of this sections needs to be discussed in a small group.
[119] CL's Negotiators' note: If there is going to be an explicit mention to the possibility of implementing flexibilities to encourage early entry, then CL will need to have a high level language such as the one in QQ.E.14.3 (*For greater certainty, in implementing the obligations of this Article, each Party may provide for conditions and limitations provided that the Party continues to give effect to this Article*) and also apply it to undisclosed test or other data protection for agricultural chemical products, pharmaceutical products (small molecules) and biologics.
==========end page 46==========

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[MY propose; CL/MX/US/JP/BN/PE/SG oppose: [120] 5. A Party may for the purpose of granting protection under paragraph 2, require an applicant to commence the process of obtaining marketing approval for that pharmaceutical product within 12 months from the date the product is first registered or granted marketing approval, and granted protection for such information in any country.]

[121][MY/VN/MX propose; US/JP oppose: 6. Notwithstanding paragraphs 1 and 2 above, a Party may waive the protection under paragraphs 1 and 2 above, where it has take measures -

(a) in accordance with:

(i) Article 31 of the TRIPS Agreement;

(ii) the Declaration on the TRIPS Agreement and Public Health (WT/MIN(01)/DEC/2)(the "Declaration");

(ii) any waiver of any provision of the TRIPS Agreement granted by WTO Members in accordance with the WTO Agreement to implement the Declaration and in force between the Parties; and/or

(iii) any amendment of the TRIPS Agreement to implement the Declaration that enters into force with respect to the Parties.

(b) necessary to protect public health, national security, non-commercial public use, national emergency or other urgent circumstances as determined by the Party.]

Article QQ.E.17: [122,123, 124, 125]

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[120] Negotiators' note:CL/MX/BN/PE opposition here is linked to their opposition to paragraph 2.

[121] Negotiators' note:MY proposal will be discussed in tandem with paragraph 3.

[122] Negotiators' note: VN can give consideration to these paragraphs only if an adequate transition period for VN based on a development indicator is agreed.

[123] Negotiators' note: MX/CL support for this Article is contingent on acceptance of their respective footnotes.

[124] Negotiators' note: NZ is considering this Article as a whole, but needs to see its footnote on "in conjunction with" included.

Without Prejudice

[JP/US propose; PE/BN oppose: 1. Where a Party permits, as a condition of approving the marketing of a pharmaceutical product, persons, other than the person originally submitting the safety or efficacy information, to rely on evidence or information concerning the safety or efficacy of a product that was previously approved, such as evidence of prior marketing approval by the Party or in another territory:

(a) that Party shall provide measures in its marketing approval process to prevent those other persons from: [126]

(i) marketing a product, where that product is claimed in a patent; or

(ii) marketing a product for an approved use, where that approved use is claimed in a patent,

during the term of that patent, unless by a consent or acquiescence of the patent owner [127,128]; and

(b) If the Party permits a third person to request marketing approval to enter the market with:

(i) A product during the term of a patent identified as claiming the product; or

(ii) A product for an approved use, during the term of a patent identified as claiming that approved use,

the Party shall provide for the patent owner to be notified of such request and the identity of any such other person.][129]

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[125] Negotiators' note: SG is considering how to best address the issue of not extending QQ.E.17.1 to (a)(ii) and (b)(ii).

[126] For greater certainty, the measures referred to in this subparagraph may be in conjunction with a Party's marketing approval process.

[127] For greater certainty, for purposes of this Article, a Party may provide that a "patent owner" includes a patent licensee or the holder of the marketing approval.

[128] For greater certainty, for the purposes of Article QQ.E.17.1, consent or acquiescence may arise, inter alia, where a patent owner has failed to avail itself of opportunities afforded by the measures, or as the result of a legal proceeding involving the patent or patents at issue.

[129] Negotiators' note: MY is still considering how to reflect the implementation of this Article through its specialised intellectual property court.

Without Prejudice

[J{/US propose; PE/BN oppose: 1. {As an alternative to paragraph 1} {Where a Party chooses not to implement paragraph 1}, such Party shall provide that with respect to any pharmaceutical product that is subject to a patent[130][MX propose; US oppose:[131]]:

(a) the Party shall not grant marketing approval to any third party prior to the expiration of the patent term, unless by consent or with the acquiescence of the patent owner [CL propose; JP?US oppose: [132]]; and

(b) the Party shall provide for the patent owner to be notified of, or make available to the patent owner, the identity of any third party requesting marketing approval effective during the term of the patent.[133/134]]

Peru' alternative proposal on patent linkage QQ.E.17[4]

[As an alternative to paragraphs 1 and 2, A Party shall provide the following measures with respect to any pharmaceutical product that is subject to a patent:

a) sufficient time and opportunity for a patent holder to get the expeditious adjudication of disputes concerning the infringement of the patent, prior to the marketing of an allegedly infringing product through procedures, such as judicial or administrative proceedings, and available remedies, such as preliminary injunctions or equivalent effective provisional measures; and

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[130] For greater certainty, a Party may limit the obligation of paragraph 2 to the types of patents described in paragraphs 1(a)(i) [US/JP propose; SG/MX oppose: and (ii).]
[131] [MX/SG propose: WHere a party has in place a system with the requirements set forth in paragraph 2(a) on the date of entry into force of this Agreement for that Party, it may retain that system as an alternative to paragraphs 1(a)(i) and (ii).]
[132] [CL propose; JP.US oppose: For greater certainty, Parties may comply with this obligation by providing expeditious, efficient and transparent judicial proceedings, with include injunctions, and criminal sanctions in the case of patent infingement.]
[133] For greater certainty, a Party is not required to provide [JP propose: for] the [JP propose: system of] notification or to make available the information set forth in paragraph 2(b), if that Party [JP propose: has a system to preclude] [JP oppose: precludes] the issuance of marketing approval or sanitary permit to a third party prior to the expiration of the patent term in the absence of legal enforcement action by a rightholder.
[134] For greater certainty, the Parties recognize that this Article does not imply that the marketing approval authority should make patent validity or infringement determinations.

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(b) a transparent system to provide notice to a patent holder that another person is seeking to market an approved pharmaceutical product during the term of the protection of a patent.]

[US/JP propose; CL/MX/BN/PE/MY/VN/AU/NZ oppose [135]: **Article QQ.E.20**: With respect to the first marketing approval of a pharmaceutical product that [contains/is] [136] a [new] biologic [137,138], each Party shall provide the protection afforded under Article

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[135] Negotiators' note: CL/MX/NZ/BN considering this proposal subject to definition of biologics, length of protection and QQ.E.16.
[136]Negotiators' note: Some Parties need to discuss "contains/is" after the discussion on "new pharmaceutical product" in QQ.E.21 is settled.
[137]Negotiators' note: CA needs to discuss the formulation of "pharmaceutical product that is biologic."
[138]Negotiators' note:Delegations discussed two approaches to a foote on biologics, which are set forth below. Delegations different views and preferences regarding these two approaches.

Approach 1: {For purposes of this Chapter, a pharmaceutical product that is a biologic means [at least] a vaccine, a protein, or a [US propose: blood-derivative, JP propose: blood-derived product]] for use in human beings for the prevention, treatment, or, cure of a disease or condition. A Party may limit the scope of such pharmaceutical products that are produced [US propose: at least in part, through biological processes involving living organisms, tissues, or cells, such as those involving][US oppos: by biotechnology [such as]/[including]] recombinant DNA technology. [CA propose; Products that] A Party may exclude [CA oppose: the following] from the scope of such pharmaceutical products, naturally occurring] animal-derived polypeptides that are derived wholly by means of extraction and purification from animal organs and tissues [CA propose: or from plants].} ***Note: Delegations also to consider necessity and potential drafting of the following text:*** [CA oppose: For greater certainty, each Party confirms that pharmaceutical products that are not defined as biologics under this provision [are subject to]/[shall be evaluated under] Article QQ.E.16]

Approach 1*bis*: For the purposes of this [Article][Section][Chapter], a pharmaceutical product that is a biologic means a peptide or protein produced using biotechnology [FN] processes for use in human beings for the prevention, treatment, or sure of a disease or condition.

FN: Biotechnology means any technological application that uses biological systems, living organisms or derivatives thereof, to make or modify products or processes for specific uses.

Approach 1*ter*: For the purposes of this [Article][Section][Chapter], a pharmaceutical products that [contains/is] a biologic means a product produced using biotechnology processes for use in human beings for the prevention, treatment, or cure of a disease or condition. At a minimum, such products include polypeptides, proteins [,blood derivatives, and vaccines] produced using biotechnology [FN] processes.

[Option 1: FN: Biotechnology means any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific uses.]

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QQ.E.16.1(a)-(b), *mutatis mutandis* for a period of [0]/[5]/[8]/[12] years from the date of marketing approval of such pharmaceutical product in that Party.[139]][140]

{Option 1: Article QQ.E.21: For the purposes of Article QQ.E.16, a new pharmaceutical product means a product that does not contain [Cl propose: or utilize] [FN[a chemical entity that has been previously approved in the Party. [CA propose: In the alternative, a][CA oppose: A] Party may provide that a new pharmaceutical product means a

- pharmaceutical product that utilizes a chemical entity that has not been previously approved in the Party.[141]

[FN: For purposes of this [Article][Section], the term "utilize" may be deemed by a Party to be synonymous with the term "contain."]}

{Option 2: Article QQ.E.21

For the purposes of Article QQ.E.16, a new pharmaceutical product means a product that does not utilize [FN] a chemical entity that has been previously approved in the Party.

[FN: For purposes of this [Article][Section], the term "utilize" may be deemed by a Party to be synonymous with the term "contain."}

[Option 2: FN: Biotechnology process means a biological processes involving living organisms, tissues, or cells.]

Negotiators' note: Consistent with QQ.A.5, the Parties may, but shall not be obliged to, implement in their laws more extensive protection than is required by this Article, provided such protection does not contravene the provisions of this Agreement.

Approach 2: Self-defining/according to national law. [NZ/AU propose: For the purposes of this Chapter, each Party is free to determine the scope of the pharmaceutical products that constitute biologics under its domestic law.] CL supports this approach.

[139] Each Party may provide that an applicant may request approval of a pharmaceutical product that is a biologic under the procedures set forth in Article QQ.E.16(1)(a)-(b) within 5 years of entry into force of this Agreement, provided that the other pharmaceutical products in the same class of products have been approved by the party under the procedures set forth in Article QQ.E.16(1)(a)-(b) before entry into force of this Agreement.
[140] CL negotiators' note: If there is going to be an explicit mention to the possibility of implementing flexibilities to encourage early entry, then CL will need to have a high level language such as the one in QQ.E.14.3 (*For greater certainty, in implementing the obligations of this Article, each Party may provide for conditions and limitations provided that the Party continues to give effect to this Article*) and also to apply it to undisclosed test or other data protection for agricultural chemical products, pharmaceutical products (small molecules) and biologics.
[141] Negotiators' note: CL does not consider the 2nd sentence necessary given the 1st sentence.

Without Prejudice

Article QQ.E.22: Subject to Article QQ.E>16.3 (*protection of public health),* when a product is subject to a system of marketing approval in the territory of a Party pursuant to Articles QQ.E.16, QQ.E.20, or QQ.E.XXX (*agricultural chemical products*) and is also convers by a patent in the territory of that Party, the Party shall not altoer the term of the protection that it provides pursuant to Articles QQ.E.16, QQ.E.20, or QQ.E.XXX (*agricultural chemical products*) in the event that the patent protection terminates on a date earlier than the end of the term of protection specificed in Articles QQ.E.16, [MX/BN propose; US/JP oppose: **Article QQ.E.XX**.

[MX/AU/NZ propose; US/JP oppose: Each Party may adopt or maintain measures to discourage vexatious or unreasonable proceedings as a result of the use of the exclusive rights of a patent.]

NON-PAPER
DRAFT PROPOSAL ON TRANSITION PERIODS OF PHARMACEUTICAL PATENTS OBLIGATIONS

[5]

Article QQ.A.X

1. For the purposes of the entry into force of the provisions contained in articles QQ.E.14, QQ.E.16, QQ.E.17, QQ.E.21, QQ.E.22, and QQ.E.XX (Data protection for biologics), the Parties to this Agreement shall, based on transparent, predictable and objective criteria, be divided into Category A, Category, B, Category C and Category D, as follows:

    a. Category A: United States, Japan, Singapore, [others]

    b. Category B:

    c. Category C:

    d. Category D:

2. Accordingly, Parties shall comply with the implementation schedules stated as follows:

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[142] Negotiators' note:CL is considering this provision subject to the outcome of the other provisions of this Section.

Without Prejudice

Category A	Upon entry into force of the Agreement
Category B	X years after entry into force of the Agreement for that Party
Category C	Y years after entry into force of the Agreement for that Party
Category D	Z years after entry into force of the Agreement for that Party

3. A Party in Category B, C, or D shall provide periodic updates to the Joint Commission, at least annually, regarding the progress of its implementation schedule for the provisions contained in paragraph 1, C. until those provisions come into force for that Party.

4. A Party may seek an extension of the time applicable to that Party for the implementation of the Section on Patent Pharmaceuticals from the Joint Commission if there has been any significant change in a Party's social or economic circumstances.

Without Prejudice

Section F: Industrial Designs

Article QQ.F.1: {Industrial Designs}

Subject to Articles 25 and 26 of the TRIPS Agreement, each Party shall ensure adequate and effective protection of industrial designs [NZ oppose: and also confirms that protection for industrial designs is available for designs:

(a) embodied in a party of an article, or alternatively,

(b) having a particular regard, where appropriate, to a part of an article in the context of the article as a whole.]

QQ.F.2.

The Parties recognize the importance of improving quality and efficiency in their industrial design registration systems, as well as facilitating the process of cross border acquisition of rights thereof including giving due consideration to ratify or acceding to Hague Agreement Concerning the International Registration of Industrial Designs (1999).

{Section G: Copyright and Related Rights}

The copyright text includes the following Articles and non papers.

See also, in a separate document, Addendum XV on Internet Service Providers, and the extensive provisions in Section H on enforcement.

Without Prejudice

{Section G: Copyright and Related Rights}

Article QQ.G.1: {Copyright and Related Rights/Right of Reproduction}

Each Party shall provide [143] that authors, performers, and producers of phonograms [144] have the right [145] to authorize or prohibit all reproductions of their works, performances [146], and phonograms in any manner or form, including in electronic form.

Article QQ.G.2 {Copyright/Right of Communication to the Public}

Without prejudice to Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii), and 14*bis*(1) of the Berne Convention, each Party shall provide to authors the exclusive right to authorize or prohibit the communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them. [147]

Article QQ.G.4 {Right of Distribution}

Each Party shall provide to authors, performers, and producers of phonograms the right to authorize or prohibit the making available of the original and copies [148] of their works, performances, and phonograms through sale or other transfer of ownership. ~~[149,150]~~

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[143] The Parties reaffirm that it is a matter for each Party's law to prescribe that works in general or any specified categories of works, performances, and phonograms shall not be protected by copyright or related rights unless they have been fixed in some material form.

[144] References to "authors, performers, and producers of phonograms" refer also to any successors in interest.

[145] With respect to copyrights and related rights in this Chapter, the "right to authorize or prohibit" and the "right to authorize" refer to exclusive rights.

[146] With respect to this Chapter, a "performance" means a performance fixed in a phonogram unless otherwise specified.

[147] It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Chapter or the Berne Convention. It is further understood that nothing in this article precludes a Party from applying Article 11*bis*(2) of the Berne Convention.

[148] The expressions "copies" and "original and copies" subject to the right of distribution in this paragraph refer exclusively to fixed copies that can be into circulation as tangible objects.

~~[149] Nothing in this Agreement shall affect a Party's right to determine the conditions, if any, under which the exhaustion of this right applies after the first sale or other transfer of ownership of the original or a copy of their works, performances, or phonograms with the authorization of the author, performer, or producer.~~

~~[150] Negotiator's Note: AU's support for this provision may be contingent on how the exhaustion issue is dealt with in General Provisions.~~

Without Prejudice

Article QQ.G.5: {No Hierarchy}

Each Party shall provide that in cases where authorization is needed from both the author of a work embodied in a phonogram and a performer or producer owning rights in the phonogram, the need for the authorization of the performer or producer is also required. Likewise, each party shall provide that in cases where authorization is needed from both the author of a work embodied in a phonogram and a performer or producer owning rights in the phonogram, the need for the authorization of the performer or producer does not cease to exist because the authorization of the author is also required.

Article QQ.G.14: {Related Rights}

1. Each Party shall accord the rights provided for in this Chapter with respect to performers and producers of phonograms to the performers and producers of phonograms who are nationals [CA propose: [151]] of another Party and to performances or phonograms first published or first fixed in the territory of another Party. [CA propose: [152]] A performance or phonogram shall be considered first publication in the territory of a Party in which it is published within 30 days of its original publication.[153]

2. Each Party shall provide to performers the right to authorize or prohibit:

   (a) broadcasting and communication to the public of their unfixed performances, except where the performance is already a broad performance; and

   (b) fixation of their unfixed performances.

[CA oppose:

3. (a) Each party shall provide to performers and producers of phonograms the right to authorize or prohibit the broadcasting or any communication to the

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[151] [CA propose: For the purposes of determining points of attachment under this Article, with respect to performers, a party may treat "nationals" as those who would meet the criteria for eligibility under the WPPT Article 3.]

[152] For greater certainty, in this paragraph with respect to performances or phonograms first published or first fixed in the territory of a Party, a Party may apply the criterion of publication, or alternatively, the criterion of fixation, or both. [CA propose: For greater certainty, consistent with QQ.A.9, it is understood that Parties shall accord to performances and ~~sound recordings~~ phonograms first published or first fixed in the territory of another Party, treatment no less favourable than it accords to performances or ~~sound recordings~~ phonograms first published or first fixed in its own territory.]

[153] For purposes of this Article, fixation means the finalization of the master tape or its equivalent.

public of their performances or phonograms, by wire or wireless means [154] [~~155~~][156], and the making available to the public of those performances and phonograms in such a way that members of the public may access them from a place and at a time individually chosen by them.

(b) Notwithstanding subparagraph (a) and Article [QQ.G.16] [*three step test*], the application of this right to analog transmissions and non-interactive free over-the-air broadcasts, and exceptions or limitations to this right for such activities, shall be a matter of each Party's law.][CA propose: [157]]

[CA propose: Alt 3. Each Party shall provide to performers and producers of phonograms the rights to authorize or prohibit:

1. the broadcasting or any communication to the public of their performances or phonograms; and
2. the making available to the public, by wire or wireless means, of their performances and phonograms in such a way that members of the public may access them from a place and a time individually chosen by them.

Where, upon the date of signature of this Agreement, the right in subparagraph (a) has not been implemented by a Party, the requirement may be satisfied by providing a right to a single equitable remuneration for the direct or indirect use of phonograms published [158] for commercial purposes for broadcasting or for any communication to the public.[159]]

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[154] With respect to broadcasting and communication to the public, a Party may satisfy the obligation by applying Article 15(1) and 15(4) of the WPPT and may also apply Article 15(2) of the WPPT, as long as it is done in a manner consistent with that Party's obligations under Article QQ.A.7 (National Treatment).

[156] For greater certainty, the obligation under Article QQ.G.14.3 does not include broadcasting or communication by the public, by wire or wireless means, of the sounds or representations of sounds fixed in a phonogram that are incorporated in a cinematographic or other audiovisual work.

[157] [CA propose: For the purposes of this Article, it is understood that a party may provide for the retransmission of non-interactive, free over-the-air broadcasts, provided that such retransmissions are [AU propose: permitted under a Party's law or] lawfully permitted by that Party's government communications authority; any entity engaging in such retransmissions complies with the relevant rules, orders or regulations of that authority; and such retransmission do not include those delivered and accessed over the Internet..]

[158] The term published in this paragraph includes phonograms that are made available in accordance with Article 15(4) of the WPPT.

[159] Where a Party has availed itself of the option contained in Article 15(3) of the WPPT, the obligation contained in [QQ.A.7 - national treatment] does not apply to the extent that a Party makes use of a reservation taken under that Article.

Article QQ.G.15: For purposes of this [Article QQ.G.1 and Article QQ.G.3 - 11-article to be verified on scrub], the following definitions apply with respect to performers and producers of phonograms:

(a) "broadcasting" means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also "broadcasting"; transmission of encrypted signals is "broadcasting" where the means for decrypting are provided to the public by the broadcasting organization or with consent;

(b) "communication to the public" or a performance or a phonogram means the transmission to the public by an medium, other than broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. ;

(c) "fixation" means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced, or communicated through a device;

(d) "performers" means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore;

(e) "phonogram" means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;

(f) "producer of a phonogram" means the person who, or the legal entity which, takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds; and

(g) "publication of a performance or a phonogram" means the offering of copies of the performance or the phonogram to the public, with the consent of the rightholder, and provided that copies are offered to the public in reasonable quantity.

Article QQ.G.6: Each shall provide that, where the term of protection of a work including a photographic work), performance, or phonogram is to be calculated [160]:

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[160] For greater certainty, in implementing QQ.G.6, nothing prevents a Party from promoting certainty for the legitimate use and exploitation of works, performances and phonograms during their terms of protection, consistent with QQ.G.16 and that Party's international obligations.

(a) on the basis of the life of a natural person, the term shall be not less than the life of the author and [50][70][100] years after the author's death; and

(b) on a basis other than the life of a natural person, the term shall be:

(i) not less than [50][70][75][95] years from the end of the calendar year of the first authorized publication [161] of the work, performance, or phonogram, or

(ii) failing such authorized publication within [25][50] years from the creation of the work, performance, or phonogram, not less than [50][70][100][120] years from the end of the calendar year of the creation of the work, performance, or phonogram. [162]

[JP propose: Notwithstanding Article QQ.A.7.1, a Party may limit the term provided to authors of another Party to the term provided to authors under the legislation of the other Party.

Alt: Nothing in this agreement shall prevent a Party from taking measures necessary for it to maintain the measures covered by Article 7(8) of the Berne Convention that have been introduced with regard to a non-Party to this Agreement.]

Article.GG.8: {Berne 18}

Each Party shall apply Article 18 of the Berne Convention for the Protection of Literary and Artistic Works (1971) Berne Convention) and Article 14.6 of the TRIPS Agreement, *mutatis mutandis*, to works, performances, and phonograms, and the rights in and protections afforded to that subject matter as required by Section G. [163]

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[161] For greater certainty, for the purposes of Article QQ.G.6(b)(i) and (ii), where a party's law provides for the calculation of term from fixation rather than from the first authorized publication, that Party may continue to calculate term from fixation.

[162] For greater certainty, a party may calculate a term of protection for an anonymous or pseudonymous work or a work of joint authorship in accordance with Article 7(3) or 7*bis* of the Berne Convention, provided that the Party implements the corresponding numerical term of protection required under Article QQ.G.6.]

[163] Negotiator's Note: MY agrees but reserves the right to revisit where there are changes to certain positions on substantive obligations in the Copyright Section, if required.

Without Prejudice

Article QQ.G.16: {Limitations and Exceptions}

(a) With respect to Section G, each party shall confine limitations or exceptions to exclusive right 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.

(b) Article QQ.G.16(a) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the TRIPS Agreement, the Berne Convention, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty.

Article.GG.Y {Limitations and Exceptions}

Each Party shall endeavour to achieve an appropriate balance in its copyright and related rights system, *inter alia* by means of limitations or exceptions that are consistent with Article QQ.G.16.1, including those for the digital environment, giving due consideration to legitimate purposes such as, but not limited to: criticism; comment; news reporting; teaching, scholarship, research, and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired, or otherwise print disabled. [164][165]

Article QQ.G.ZZ: {Internet Retransmission}

[US/SG/PE propose: CL/VN/MY/NZ/MX/CA/BN/JP oppose: No Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the right holder or right holders of the content of the signal [SG oppose: and, if any, of the signal].[166]][167]

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[164] As recognized by the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled (June 27, 2013). The Parties recognize that some Parties facilitate the availability of works in accessible formats for beneficiaries beyond the requirements of the Marrakesh Treaty.

[165] For purposes of greater clarity, a use that has commercial aspects may in appropriate circumstances be considered to have a legitimate purpose under Article QQ.G.16.3.

[166] For purposes of this Article and for greater certainty, retransmission within a Party's territory over a closed, defined, subscriber network that is not accessible from outside the Party's territory does not constitute retransmission on the Internet.

[167] Negotiators' note: PE is considering the use of the work "emissions" in addition to "signals" as an alternative.

[ALTERNATE: [168]

FN attached to QQ.G.2 : A Party may not limit this right in order to provide for a compulsory remuneration regime in cases where an over the air signal containing an audiovisual work is transmitted on the internet.]

Article QQ.G.9: [Contractual Transfers]

Each Party shall provide that for copyright and related rights, any person acquiring or holding any economic right [169] in a work, performance, or phonogram:

(a) may freely and separately transfer that right by contract; and

(b) by virtue of a contract, including contracts of employment underlying the creation of works, performances, and phonograms, shall be able to exercise that right in that person's own name and enjoy fully the benefits derived from that right.[170]

Article QQ.G.10 {Technological Protection Measures}[171][172]

(a) In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers, and producers of phonograms use in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, performances, and phonograms,[173] each Party shall provide that any person who:

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[168] Negotiator's note: If this alternative is used, it is understood that there may be changes required in this language.

[169] For greater certainty, this provision does not affect the exercise of moral rights.

[170] Nothing in this Article affects a Party's ability to establish: (i) which specific contracts underlying the creation of works or phonograms shall, in the absence of a written agreement, result in a transfer of economic rights by operation of law; and (ii) reasonable limits to protect the interests of the original right holders, taking into account the legitimate interests of the transferees.

[171] Nothing in this agreement shall require any Party to restrict the importation or domestic sale of a device that does not render effective a technological measure the sole purpose of which is to control market segmentation of legitimate physical copies of cinematographic film, and is not otherwise a violation of law.

[172] Negotiator's Note: NZ/CA/MY/VN's agreement to this article is subject to securing sufficient flexibility to adopt exceptions and limitations to the prohibition on circumvention for non-infringing uses.

[173] {NZ propose: For greater certainty, nothing shall prevent a Party from limiting 'unauthorized acts in respect of their works, performances, and phonograms' to infringing acts, where appropriate, subject to any other [remedies/liability} available under the Party's law.}

(i) knowingly, or having reasonable grounds to know,[174] circumvents without authority or any effective technological measure that controls access to a protected work,[175] performance, or phonogram;[176] or

(ii) manufactures, imports, distributes[177], offers for sale or rental to the public or otherwise provide devices, products, or components, or offers to the public or provides services, that:

(A) are promoted, advertised, or otherwise marketed by that person[178] for the purpose of circumventing any effective technological measure,

(B) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure,

(C) are primarily designed, produced, or performed for the purpose of circumventing any effective technological measure,

shall be liable and subject to the remedies set out in [Article QQ.H.4.17(Civil Judicial Proceedings relating to TPMs and RMIs)[180]].

Each Party [~~US/CA/SG/NZ/MX/PE/AU/BN/JP/CL/MY propose:~~ shall~~]~~ ~~[VN propose: may]~~ provide for criminal ~~[VN propose: or alternatively, administrative]~~ procedures and penalties to be applied where any person is found to have engaged willfully[181] and for the purposes of commercial advantage or financial gain[182] in any of the above above activities.[183] [VN propose: [184] [6]

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[174] A Party may provide that reasonable grounds to know may be demonstrated through reasonable evidence, taking into account the facts and circumstances surrounding the alleged illegal act.

[175[For greater certainty, in this Chapter, cinematographic works and computer programs are included in the term "work". *Chair's note: Ultimate placement of this FN to be determined based on when the word "works" first appears in this Chapter as this is a cross-section issues*.

[176] For greater certainty, no Party is required to impose civil or criminal liability under subparagraph (a)(i) for a person who circumvents any effective technological measure that protects any of the exclusive rights of copyright or related rights in a protected work, performance or phonogram, but that does not control access to such work, performance or phonogram.

[177] A Party may provide that the obligations described in paragraph (ii) with respect to manufacturing, importation, and distribution apply only where such activities are undertaken for sale or rental, or where such activities prejudice the interests of the right holder of the copyright or related right.

[178] It is understood that this provision still applies where the person promotes, advertises, or markets through the services of a third party.

[179] A Party may comply with this paragraph if the conduct referred to in (ii) does not have a commercially significant purpose or use other than to circumvent any effective technological measure.

[180] Negotiator's Note: Parties' position on this reference is pending resolution of the discussion on QQ.H.4.17 (Civil Judicial Proceedings relating to TPMs and RMIs). .

[181] For greater certainty, for purposes of Articles QQ.G.10 and QQ.G.13, it is understood that willfulness contains a knowledge element.

Each Party may provide that such criminal procedures and penalties do not apply to a non-profit library, museum, archive, educational institution, or public non-commercial broadcasting entity. A Party may also provide that the remedies set out in Article QQ.H.4.17 (Civil Judicial Proceedings relating TPMs and RMIs) do not apply to those same entities provided that the above activities are carried out in good faith without knowledge that the conduct is prohibited.

(b) In implementing subparagraph (a), no Party shall be obligated 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 subparagraph (a).

(c) Each Party shall provide that a violation of a measure implementing this paragraph is independent of any infringement that might occur under the Party's law on copyright and related rights. [185]

(d) (i) Each Party may provide certain exceptions and limitations to the measures implementing subparagraphs (a)(i) and (ii) in order to enable non-infringing uses where there is an actual or likely adverse impact of those measures on non-infringing uses, as determined through a legislative, regulatory, or administrative process in accordance with the Party's law, giving due consideration to evidence when presented in that process, including with respect to whether appropriate and effective measures have been taken by rightsholders to enable the beneficiaries to enjoy the limitations and exceptions to copyright and related rights under that Party's law.[186]

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[182] For greater certainty, for purposes of Articles QQ.G.10, QQ.G.13 and QQ.H.7.1, it is understood that a Party may treat "financial gain" as "commercial purposes in its law.

[183] For purposes of greater certainty, no Party is required to impose liability under Articles [QQ.G.10(TPMs)] and [QQ.G.13 (RMIs)] for actions taken by that Party of a third party acting with the authorization or consent of that Party.

[184] Negotiator's note: VN propose as part of enforcement package: A Party may comply with the obligation under this paragraph by providing criminal procedures and penalties to be applied to activities against TPM in computer systems or digital devices as well as preparations or attempts to commit a copyright offence, provided that any other activities refer to in this paragraph shall be subject to administrative procedures and penalties as referred to in FN {to the title of Article QQ.H.7}.]

[185] [For greater certainty, a Party is not required to treat the criminal act of circumvention set forth in subparagraph (a)(i) as an independent violation, where the Party criminally penalizes such acts through other means.

[186] For greater certainty, nothing in this provision requires Parties to make a new determination via the legislative, regulatory, or administrative process with respect to exceptions and limitations to the legal protection of effective technological measures: i) previously established pursuant to trade agreements in force between Parties; or ii) previously implemented by the Parties, provided that such exceptions and limitations are otherwise consistent with Article QQ.G.10(d).

(ii) Any exceptions and limitations to the measures implementing subparagraph (a)(ii) shall be permitted solely to enable the legitimate use of an exception or limitation permissible under Article QQ.G.10 (TPMs) by its intended beneficiaries [187] and shall not authorize the making available of devices, products, components, or services beyond such intended beneficiaries. [188]

(iii) By providing exceptions and limitations under paragraph d(i) and (ii) a Party shall not undermine the adequacy of that Party's legal system for the protection of effective technological measures, or the effectiveness of legal remedies against the circumvention of such measures, that authors, performers, or producers of phonograms used in connection with the exercise of their rights, or that restrict unauthorized acts in respect of their works, performances or phonograms, as provided for in this Chapter.

(e) "Effective technological measure" means any effective [189] technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, or phonogram, or protects copyright or related rights related to a work, performance or phonogram.

Article QQ.G.13: {Copyright and Related Rights / Rights Management Information}

In order to provide adequate and effective legal remedies to protect rights management information: [190]

(a) each Party shall provide that any person who without authority, and knowing, or having reasonable grounds to know, that it would induce, enable, facilitate, or conceal an infringement of the copyright or related right of authors, performers, or producers of phonograms,

(i) knowingly [191] removes or alters any rights management information;

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[187] For greater certainty, a Party may provide an exception to a(ii) without providing a corresponding exception to a(i), provided that the exception to a(ii) is limited to enabling a legitimate use that is within the scope of exceptions or limitations to a(i) as provided under d(i).

[188] For the purposes of interpreting subparagraph d(ii) only, subparagraph a(i) should be read to apply to all effective technological measures as defined in paragraph (e), mutatis mutandis. Negotiator's note: agreement ad referendum on this footnote; further technical work required.

[189] For greater certainty, it is understood that a technological measure that can, in a usual case, be circumvented accidentally is not an "effective" technological measure.

[190] Each Party may comply with the obligations in this Article by providing legal protection only to electronic rights management information.

[US/BN/SG/NZ/PE/CL/~~JP~~/AU/MX/MY propose: CA/VN/JP oppose: (ii) knowingly distributes or imports for distribution rights management information knowing that the rights management information has been altered without authority [CA propose:[192]];] or

(iii) knowingly distributed, imports for distribution, broadcasts, communicates or makes available to the public copies of works, performances, or phonograms, knowing that rights management information has been removed or altered without authority,

shall be liable and subject to the remedies set out in [Article QQ.H.4(17).][193]

Each [7] Party [US/SG/MX/NZ/PE/JP/BN/AU/CL/MY propose: shall] [~~VN~~/CA propose: may] provide for criminal ~~[VN: or alternatively, administrative]~~ procedures and penalties to be applied where any person is found to have engaged willfully and for purposes of commercial advantage or financial gain in any of the above activities.[VN propose:[194]]

Each Party may provide that such criminal procedures and penalties do not apply to a non-profit library, museum, archive, educational institution, or public noncommercial broadcasting entity.[195]

(b) For greater certainty, nothing prevents a Party from excluding lawfully authorized activities carried out for the purpose of law enforcement, essential security interests or other related governmental purposes, such

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[191] Each Party may extend the protections afforded by this paragraph to circumstances in which a person engages without knowledge in the acts in subparagraph (i), (ii) and (iii), and to other related rights holders.

[192][CA propose: A Party may meet its obligation under paragraph (a)(ii), where it provides effective protection for either original compilations or moral rights, provided that the acts described in paragraph (a)(ii) are treated either as infringements of copyright in such original compilations or as infringements or moral rights.] CA: Text has been worked out between CA/US/JP. US: Still working on JP/CA on redrafting the footnote. One option is to leave it and say JP/US/CA is to revert with amended language.

[193]Negotiator's Note: CL's position on this reference is pending resolution of the discussion on QQ.H.4(17).

[194]Negotiator's Note: [VN propose as part of enforcement package: A Party may comply with the obligation under this paragraph by providing criminal procedures and penalties to be applied to activities against TPM in computer systems or digital devices as well as preparations or attempts to commit a copyright offence, provided that any other activities referred to in this paragraph shall be subject to administrative procedures and penalties as referred to in FN {to the title of Article QQ.H.7}.]

[195] For greater certainty, a Party may treat a broadcasting entity established without a profit-making purpose under its law as a public non-commercial broadcasting entity.

as performance of a statutory functions, from measures implementing subparagraph (a).

(c) "Rights management information" means:

(i) information that identifies a work, performance, or phonogram, the author of the work, the performer of the performance, or the producer of the phonogram; or the owner of any right in the work, performance or phonogram;

(ii) information about the terms and conditions of the use of the work, performance, or phonogram; or

(iii) any numbers or codes that represent such information,

when any of these items of information is attached to a copy of the work, performance or phonogram or appears in connection with the communication or making available of a work, performance, or phonogram to the public.

Article QQ.G.18: {Collective Management}

The Parties recognize the important role collective management societies for copyright and related rights in collecting and distributing royalties[196] based on practices that are fair, efficient, transparent and accountable, and which may include appropriate record keeping and reporting mechanisms.

[196]For greater certainty, royalties may include equitable remuneration.

KEI note on **Section H: Enforcement**

Included in this document are Article 1-11 and some non-papers from the Enforcement Section.

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{Section H: Enforcement}

Article QQ.H.1: {General Enforcement / General Obligations Relating to the Enforcement of Law of Intellectual Property Rights}

1. Each Party shall ensure that enforcement procedures as specified in this section, are available under its law[197] so as to permit effective action against any act of infringement of intellectual property rights covered by this Chapter, including expeditious remedies to infringements and remedies which constitute a deterrent to future 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.[198]

2. [US/NZ/MY/BN/SG/AU/CA/PE/MX/JP propose, CL/VN[199]~~[200]~~ oppose: Each Party confirms that the enforcement procedures [~~as~~] set forth in Articles {QQ.H.4 and QQ.H.5 (civil and provisional measures) and QQ.H.7 (criminal measures)} shall be available to the same extent with respect to acts of [PE oppose: trademark,] copyright or related rights infringement in the digital environment.

3. Each Party shall ensure that its procedures concerning the enforcement of intellectual property rights shall be fair and equitable. These procedures shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

4. This section does not create any obligation:

   (a) 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 each Party to enforce their law in general, or

   (b) with respect to the distribution of resources as between the enforcement of intellectual property rights and the enforcement of law in general.

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[197] For greater certainty, "law" is not limited to legislation.

[198] For greater certainty, each Party confirms that it makes such remedies available, subject to TRIPS Article 44 and the provisions of this Agreement, with respect to enterprises, regardless of whether the enterprises are private or state-owned.

[199] Negotiators' note: VN can accept this as part of enforcement package.

~~[200] Negotiators' note: VN can accept this on the condition that VN's proposal on administrative measures as an alternative to criminal measures is accepted.~~

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5. [US/JP propose, NZ/VN/MX/PE/AU/MY/BN oppose: The Parties understand that the distribution of enforcement resources does not excuse that Party from complying with this Section.
6. In implementing the provisions of this Section in its intellectual property system, each party shall take into account the need for proportionality between the seriousness of the intellectual property infringement, and the applicable remedies and penalties, as well as the interests of third parties.

Article QQ.H.2: {Presumptions}

1. In civil, criminal, and if applicable, administrative proceedings involving copyright or related rights, each Party shall provide:

(a) for a presumption[201] that, in the absence of proof to the contrary, the person whose name is indicated in the usual manner[202] as the author, performer, producer of the work, performance, or phonogram, or as applicable, the publisher is the designated right holder in such work, performance, or phonogram; and

(b) for a presumption that, in the absence of proof to the contrary the copyright or related right subsist in such subject matter.

2. In connection with the commencement of a civil, administrative or criminal enforcement proceeding involving a registered trademark that has been substantively examined by the competent authority, each Party shall provide that such a trademark be considered *prima facie* valid.

3. In connection with the commencement of a civil or administrative enforcement proceeding involving a patent that has been substantively examined and granted[203] by the competent authority, each Party shall provide that each claim in the patent be considered *prima facie* to satisfy the applicable criteria of patentability in the territory of the Party[204][205].

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[201] For greater certainty, a Party may implement this Article on the basis of sworn statements or documents having evidentiary value, such as statutory declarations. A Party may also provide that such presumptions are rebuttable presumptions that may be rebutted by evidence to the contrary.

[202] Each Party may establish the means by which it shall determine what constitutes the "usual manner" for a particular physical support.

[203] For greater certainty, nothing prevents a Party from making available third party procedures in connection with its fulfillment of Paragraphs 2 and 3.

[204] For greater certainty, where a Party provides its administrative authorities with the exclusive authority to determine the validity of a registered trademark or patent, nothing in paragraphs 2 and 3 shall prevent that Party's competent authority from suspending the enforcement procedures until the validity of the registered trademark or patent is determined by the administrative authority. In such validity procedures, the party challenging the validity of the registered trademark or patent shall be required to prove that the registered

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Article QQ.H.3: {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 preferably be in writing and 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 published[206] or, where publication is not practicable, otherwise made available to the public, in a national language in such a manner as to enable interested persons and Parties to become acquainted with them.

2. Each Party recognizes the importance of collecting and analyzing statistical data and other relevant information concerning intellectual property rights infringements as well as collecting information on best practices to prevent and combat infringements.

3. Each party shall publish or otherwise make available to the public information on its efforts to provide effective enforcement of intellectual property rights in its civil, administrative and criminal systems, such as statistical information that the Party may collect for such purposes.

Article QQ.H.4: {Civil Procedures and Remedies / Civil and Administrative Procedures and Remedies}

1. Each Party shall make available to right holders[207] civil judicial procedures concerning the enforcement of any intellectual property right covered in this Chapter.

2. Each Party shall provide[208] that in civil judicial proceedings its judicial authorities have the authority at least 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

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trademark or patent is not valid. Notwithstanding the foregoing sentence, a Party may require the trademark holder to provide evidence of first use.

[205] A Party may provide that this provision applies only to those patents that have been applied for, examined and granted after the entry into force of this agreement.

[206] A Party may satisfy the requirement for publication by making the decision or ruling available to the public on the Internet.

[207] For the purposes of this Article, the term “right holder” shall include those authorized licensees, federations and associations that have the legal standing and authority to assert such rights. The term “authorized licensee” shall include the exclusive licensee of any one or more of the exclusive intellectual property rights encompassed in a given intellectual property.

[208] A Party may also provide that the right holder may not be entitled to any of the remedies set out in 2, 3 and 8 in the case of a finding of non-use of a trademark. It is understood that there is no obligation for a Party to provide for the possibility of the remedies in 2, 3, 7 and 8 to be ordered in parallel.

that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity.[209]

3. At least in cases of copyright or related rights infringement and trademark counterfeiting, each Party shall provide that, in civil judicial proceedings, its judicial authorities have the authority to order the infringer, at least as described in paragraph 2, to pay the right holder the infringer's profits that are attributable to the infringement.[210]

4. In determining the amount of damages under paragraph 2, its judicial authorities shall have the authority consider, *inter alia*, any legitimate measures of value the right holder submits, which may include lost profits, the value of the infringed goods or services measured by the market price, or the suggested retail price.

5. Each Party shall provide that its judicial authorities have the authority to order injunctive relief that conforms to the provisions of Article 44 of the TRIPS Agreement, *inter alia*, to prevent goods that involve the infringement of an intellectual property right under the law of the Party providing such relief from entering into the channels of commerce.

6. [MX/PE/NZ/CL/AU/MY/SG/CA/JP/BN/VN propose; US oppose: Each Party shall ensure that its judicial authorities shall have the authority to order a party at whose request measures were taken and who has abused enforcement procedures to provide the 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.]

7. In civil judicial proceedings, with respect to infringement of copyright or related rights protecting works, phonograms, and performances, each Party shall establish or maintain a system that provides for one or more of the following:

(a) pre-established damages, which shall be available upon the election of the right holder; or
(b) additional damages[211].

8. In civil judicial proceedings, with respect to trademark counterfeiting, each Party [US propose: shall] [NZ/JP/MX/AU/BN/MY propose: may] also establish or maintain a system that provides for one or more of the following:

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[209] ***Negotiator's note: US is withdrawing reasonable royalties for patent infringement ad ref pending outcome.***
[210] A Party may comply with this paragraph through presuming those profits to be the damages referred to in paragraph 2.
[211] For greater certainty, additional damages may include exemplary or punitive damages.

(a) pre-established damages, which shall be available upon the election of the right holder; or
(b) additional damages.[212]

9. Pre-established damages under paragraphs (7) and (8) shall be set out in an amount that would be sufficient to compensate the right holder for the harm caused by the infringement, and with a view to deterring future infringements.

10. In awarding additional damages under paragraphs (7) and (8), judicial authorities shall have the authority to award such additional damages as they consider appropriate, having regard to all relevant matters, including the nature of the infringing conduct and the need to deter similar infringements in the future.[213]

11. Each Party shall provide that its judicial authorities, where appropriate[214], have the authority to order, at the conclusion of civil proceedings concerning infringement of at least copyright or related rights, [US oppose: patents,] and trademarks, that the prevailing party be awarded payment by the losing party of court costs or fees and appropriate attorney's fees, or any other expenses as provided for under that Party's law.

12. Each Party shall provide that in civil judicial proceedings:

(a) At least with respect to pirated copyright goods and counterfeit trademark goods, each Party shall provide that, in civil judicial proceedings, at the right holder's request, its judicial authorities have the authority to order that such infringing goods be ~~[VN propose, US/JP oppose: disposed of outside the channels of commerce in such a manner to avoid any harm caused to the right holder, or]~~ destroyed in exceptional circumstances, without compensation of any sort. [VN propose: Option 1: In cases where such goods are not destroyed, each party shall ensure that, except in exceptional circumstances, such goods are disposed of outside the channels of commerce in such a manner as to avoid any harm to the right holder. Option 2:[215]]

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[212] For greater certainty, additional damages may include exemplary or punitive damages.

[213] US withdraws ad ref Article QQ.H.4.Y on patents/treble damages pending outcome.

[214] [CA propose: For the purposes of this Article, "where appropriate shall not be limited to cases where a party acted in bad faith.]

[215] For greater certainty, destruction of goods, materials or implements referred to in QQ.H.4.12, QQ.H.6.8, QQ.H.7.6(e) may take place in the form of disassembling or deconstruction and not necessarily mean ruin or demolishment; and the destroyed goods still belong to its owner unless they have been confiscated. Furthermore, nothing prevent a Party authorities to order, in state of destruction, distribution of goods for charity purposes.

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~~(a)~~(b) Each Party shall further provide that its judicial authorities have the authority to order that materials and implements that have been [VN propose, US oppose: predominantly] used in the manufacture or creation of such infringing 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.[216]

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

13. Without prejudice to its law governing privilege, the protection of confidentiality or information sources, or the processing of personal data, each Party shall provide that, in civil judicial proceedings concerning the enforcement of intellectual property rights, its judicial authorities have the authority, upon a justified request of the right holder, to order the infringer or, in the alternative, the alleged infringer, to provide the right holder or to the judicial authorities, at least for the purpose of collecting evidence, relevant information as provided for in its applicable laws and regulations that the infringer or alleged infringer possesses or controls. Such information may include information regarding any person involved in any aspect of the infringement or alleged infringement and regarding the means of production or the channels of distribution of the infringing or allegedly infringing goods or services, including the identification of third persons alleged to be involved in the production and distribution of such goods or services and of their channels of distribution.

14. Each Party shall provide that in relation to a civil judicial proceeding concerning the enforcement of intellectual property rights, its judicial or other authorities have the authority to impose sanctions on a party, counsel, experts, or other persons subject to the court's jurisdiction, for violation of judicial orders concerning the protection of confidential information produced or exchanged in that proceeding.

15. 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 Article (civil and administrative proceedings)

16. 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

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[216] Negotiators' Note: This subparagraph was previously closed, but VN would like to insert "predominantly" before "used in manufacture" in subparagraph b.

should seek to ensure that such costs are reasonable and related appropriately, *inter alia*, to the quantity and nature of work to be performed and do not unreasonably deter recourse to such proceedings.

17. In civil judicial proceedings concerning the acts described in Article QQ.G.10 (TPMs) and Article QQ.G.12 (RMI)[217], each Party shall provide that its judicial authorities shall, at least, have the authority to[218]:

(a) impose provisional measures, including seizure or other taking into custody of devices and products suspected of being involved in the prohibited activity;

(b) order the type of damages available for copyright infringement, as provided under its regime in accordance with Article QQ.H.4;[219]

(c) Order court costs, fees, or expenses as provided for under Article QQ.H.4.11; and

(d) order the destruction of devices and products found to be involved in the prohibited activity.

A Party may provide that damages shall not be available against a nonprofit library, archives, educational institution, museum, or public noncommercial broadcasting entity that sustains the burden of proving that such entity was not aware or had no reason to believe that its acts constituted a prohibited activity.

Article QQ.H.5: {Provisional Measures}

1. Each Party's authorities shall act on requests for relief in respect of any intellectual property right *inaudita altera parte* expeditiously in accordance with the Party's judicial rules.

2. Each Party shall provide that its judicial authorities have the authority to require the applicant, with respect to provisional measures in respect of any intellectual property right, 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

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[217] Negotiator's note: CL support depends on content of RMI and TPM provisions

[218] For greater certainty, a Party may, but is not required to, put in place separate remedies in respect of Article QQ.G.10 (TPMs) and Article QQ.G.12 (RMI), if such remedies are available under its copyright law.

[219] Where a Party's copyright regime provides for both pre-established damages and additional damages, it may comply with the requirements of this subparagraph by providing for only one of these forms of damages.

infringement is imminent, and to order the applicant to provide a security or equivalent assurance set at a level sufficient to protect the defendant and to prevent abuse. Such security or equivalent assurance shall not unreasonably deter recourse to such procedures.

3. 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 or other taking into custody of suspected infringing goods, materials and implements relevant to the infringement, and, at least for trademark counterfeiting, documentary evidence relevant to the infringement.

Article QQ.H.6: {Special Requirements Related to Border Enforcement / Special Requirements related to Border Measures}[CA propose:[220]]

1. Each Party shall provide for applications to suspend the release of, or to detain, any suspect counterfeit [US/JP/NZ/AU/MX/PE propose; CA/MY/SG/BN/VN/CL oppose: or confusing similar] trademark, or pirated copyright goods that are imported[CA propose:[221]] into [MY/VN/NZ/AU/BN/MX oppose: ,or [SG oppose: about to be] exported from,] the territory of the Party.

2. [US/AU/JP/NZ/BN propose; CL/SG/PE/MY/MX oppose: Each Party shall provide that such applications remain in force for a period of not less than one year from the date of application[222], or the period that the good is protected by copyright or the relevant trademark registration is valid, whichever is shorter. A Party may provide that its competent authorities have the authority to suspend or invalidate an application when there is due cause, including when the applicant has abused the procedures described in this Article.]

3. 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 goods[223] into free circulation is required to

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[220] [CA propose: It is understood that there shall be no obligation to apply the procedures set forth in this Article to goods put on the market in another country by or with the consent of the right holder.]

[221] [CA propose: For greater certainty, reference to "imported" need not include goods moving "in transit".]

[222] [For purposes of this Article, a Party may also provide that the applicant may designate a shorter period.]

[223] For purposes of article QQ.H.6:

(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 thereby infringes the rights of the owner of the trademark in question under the law of the Party providing the procedures under this section; 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 that are made directly or indirectly from an article where the making of that copy would have constituted an

provide adequate evidence to satisfy the competent authorities that under the law 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 goods reasonably recognizable by its competent authorities. The requirement to provide such information shall not unreasonably deter recourse to these procedures.

4. Each Party shall provide that its competent authorities 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 defendant 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.

5. Without prejudice to a Party's laws pertaining to privacy or the confidentiality of information, where its competent authorities have detained or suspended the release of goods that are suspected of being counterfeit or pirated, a Party may provide that its competent authorities have the authority to inform the right holder without undue delay of the names and addresses of the consignor, exporter, consignee, or importer, a description of the goods, quantity of the goods, and, if known, the country of origin of the goods.[224] Where a Party does not provide such authority to its competent authorities when suspect goods are detained or suspended from release, it shall provide at least in cases of imported goods, its competent authorities with the authority to provide the foregoing information to the right holder normally within 30 days[225] of the seizure or determination that the goods are counterfeit or pirated.

6. [NZ oppose[226]: Each Party shall provide that its competent authorities may initiate border measures *ex officio*[227] with respect to goods {JP/PE propose: subject to customs procedures}/{US/CA/NZ/MY/SG/CL/MX propose: under customs control}[228] that are:

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infringement of a copyright or a related right under the law of the Party providing the procedures under this section.

[224] For greater certainty, a Party may establish reasonable procedures to receive or access such information.

[225] For purposes of this Article, "days" shall mean "business days".

[226] [Negotiator's Note: AU/MX is still considering this article]

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

(a) imported,
(b) [VN/MY/BN/SG opposes:{about to be exported /destined for export}] // [New Alt. Text: {destined for export}/{exported}][SG propose:[229]], or
(c) [VN/SG/CA/MY/BN/AU opposes: in-transit][US/CL propose:[230]],

that are suspected of being counterfeit {or confusingly similar} trademark goods, or pirated copyright goods.][231] [CL propose: In the case of paragraph (c), each Party, in conformity with other international agreements subscribed to by it, may provide that ex officio authority shall be exercised prior to sealing the container, or other means of conveyance, with the customs seals, as applicable.]

7. Each Party shall adopt or maintain a procedure by which its competent authorities may determine, within a reasonable period of time after the initiation of the procedures described under Article QQ.H.6(1) [AU/BN/CA oppose: and (6)][232] whether the suspect goods infringe an intellectual property right. Where a party provides administrative procedures for the determination of an infringement, it may also provide its authorities with the authority to impose administrative penalties or sanctions, which may include fines or the seizure of the infringing goods, following a determination that the goods are infringing.

8. Each Party shall provide that its competent authorities have the authority to order the destruction of goods following a determination that the goods are infringing. In cases where such goods are not destroyed, each Party shall ensure that, except in exceptional circumstances, such goods are disposed of outside the channels of commerce in such a manner as to avoid any harm to the right holder. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit the release of the goods into the channels of commerce.

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[229] [SG propose: A party may treat that “destined for export” is synonymous with “exported”.]

[230] [US propose: Subparagraph (c) applies to suspect goods which are in-transit from one customs office to another customs office in the Party’s territory from which the goods will be exported. As an alternative to subparagraph (c), a Party shall endeavor upon request to examine such suspect goods not consigned to a local party and transshipped through its territory and destined for the territory of another Party, and shall cooperate {upon request} to provide all available information to the other Party to enable effective enforcement against such suspect goods.]

[CA propose: Alt second sentence to footnote 186: As a alternative to subparagraph (c), if upon conducting an examination of goods in transit, a Party suspects such goods are counterfeit trademark or pirated copyright, it shall provide its competent authorities the authority to provide information to other Party to identify those goods upon arrival in the other Party’s territory.]

[231] Negotiator’s Note: Further technical work is needed on terminology used in this Article.

[232] Negotiator’s Note: There may not be a procedure to be invoked in respect of H.6(6), if the obligation is as defined in footnote for H.6(6) covering “in transit”.

Without Prejudice

9. Where a Party establishes or assesses, in connection with the procedures described in this Article, an application fee, storage fee, or destruction fee, such fee shall not be set at an amount that unreasonably deters recourse to these procedures.

10. Each Party shall include in the application of the Article goods of a commercial nature sent in small consignments. A Party may exclude from the application of this Article small quantities of goods of a non-commercial nature contained in travellers' personal luggage.[233]

Article QQ.H.7: {Criminal Procedures and Remedies / Criminal Enforcement}[234]

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. In respect of willful copyright or related rights piracy, "on a commercial scale" includes at least: [VN propose[235]]

(a) acts carried out for commercial advantage or financial gain; and

(b) significant acts, not carried out for commercial advantage or financial gain, that have a substantial prejudicial impact on the interests of the copyright or related rights owner in relation to the marketplace.[236][237]

2. Each Party shall treat willful importation or exportation ~~[VN oppose: or exportation]~~ of counterfeit trademark goods or pirated copyright goods on a commercial

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[233] For greater certainty, a Party may also exclude from the application of this Article small quantities or goods of a non-commercial nature sent in small consignments.

[234] [VN/MX propose: A Party that provides for administrative procedures and penalties as an alternative to criminal procedures and penalties under [this Chapter]/[paragraphs QQ.G.10(a), QQ.G.13(a), [VN propose: QQ.H.7.1~~(b), QQ.H.7.2, QQ.H.7.3~~,] QQ.H.7.4, [MX propose QQ.H.8.2, QQ.H.9.1] shall ensure that: (i) such administrative penalties shall be [of sufficient severity to provide a deterrent]/[substantially equivalent to criminal penalties as required by this Chapter and may not include imprisonment]; and (ii) its administrative authorities may initiate legal action without a formal complaint. VN revised as part of its enforcement package]

[235] [VN propose as part of enforcement package: A Party may provide that the act referred to in subparagraphs a) and b) mean the act carried out in its market on a scale of a typical business for the goods in question, in terms of its volume, value and/or profits, provided that any act referred to in subparagraphs a) and b) falling outside of such meaning shall be subject to administrative procedures and penalties as referred to in FN {to the title of this Article}].

[236] It is understood that a Party may comply with subparagraph (b) by addressing such significant acts under its criminal procedures and penalties for non-authorized uses of protected works, performances and phonograms in its domestic law.

[237] A Party may provide that the volume and value of any infringing items may be taken into account in determining whether the act has a substantial prejudicial impact on the interests of the copyright or related rights owner in relation to the marketplace.

scale as unlawful activities subject to criminal ~~[VN: or alternatively, administrative]~~ penalties.[238][VN propose:[239]]

3. Each Party shall provide for criminal ~~[VN propose: or alternatively, administrative]~~ procedures and penalties to be applied in cases of willful importation[240] and domestic use, in the course of trade and on a commercial scale, of labels or packaging[241]:

(a) to which a mark has been applied without authorization which is identical to, or cannot be distinguished from, a trademark registered in its territory; and

(b) which are intended to be used in the course of trade on goods or in relation to services which are identical to goods or services for which such trademark is registered.[242]

4. Recognising the need to address the unauthorised copying[243] of a cinematographic work from a performance in a movie theatre that causes significant harm to a rights holder in the market for that work, and recognising the need to deter such harm, each Party shall adopt or maintain measures, which shall at a minimum include but need not be limited to, appropriate criminal procedures and penalties. [MX~~/VN~~ propose; US oppose:[244]], [VN: propose [245] [JP propose:[246]]

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[238] For greater certainty, it is understood that a Party may comply with its obligation under Article QQ.H.7.2 relating to importation and exportation of counterfeit trademark goods or pirated copyright goods by providing that distribution or sale of such goods on a commercial scale is an unlawful activity subject to criminal penalties. Furthermore, each Party confirms that criminal procedures and penalties as specified in Articles QQ.H.7.1, QQ.H.7.2, and QQ.H.7.3 are applicable in any free trade zones in a Party.

[239] [[VN propose as part of enforcement package: A Party may also comply with its obligation relating to exportation of counterfeit trademark goods or pirated copyright goods by providing that manufacture of such goods for exportation on a commercial scale is an unlawful activity subject to criminal penalties.]

~~VN propose: A Party may comply with its obligation relating to importation under this paragraph by providing for criminal procedures and penalties to be applied to attempt to commit a trademark or copyright offense.]~~

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

[241] A Party may comply with its obligations under this paragraph by providing for criminal procedures and penalties to to be applied to attempts to commit a trademark offense.

[242] Negotiators' note: US is prepared to drop illicit labels chausette ad ref pending outcome.

[243] For purposes of this Article, a Party may treat the terms "copying" and "reproduction" as synonymous.

[244] [A Party may comply with this paragraph by establishing procedures and penalties other than criminal, provided that they are sufficient to effectively deter the harm caused by the unauthorised reproduction of a cinematographic work from a performance in a movie theatre.]

[245] [VN propose as part of commercial package: A Party may comply with its obligations under this paragraph by providing for criminal procedures and penalties to be applied to preparation and attempts to commit a copyright offence, provided that the other act shall be subject to administrative procedures and penalties as referred to in FN{...}]

Without Prejudice

5. 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.

6. With respect to the offenses described in Article QQ.H.7 (1)-(5) 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 acts of infringement, consistently with the level of penalties applied for crimes of a corresponding gravity;[247]

(b) that its judicial authorities shall have the authority, when determining penalties, to account for the seriousness of the circumstances, which may include those that involve threats to, or effects on, health or safety;[248]

(c) that its judicial or other competent authorities shall have the authority to order the seizure of suspected counterfeit trademark goods or pirated copyright goods, any related materials and implements used in the commission of the alleged offense, documentary evidence relevant to the alleged offense and assets derived from, or obtained through the alleged infringing activity.

Where a Party requires the identification of items subject to seizure as a prerequisite for issuing any such judicial order, that Party shall not require the items to be described in greater detail than necessary to identify them for the purpose of seizure;

(d) that its judicial authorities shall have the authority to order the forfeiture, at least for serious offenses, of any assets derived from, or obtained through the infringing activity;

(e) that its judicial authorities shall have the authority to order the forfeiture or destruction of

(i) all counterfeit trademark goods or pirated copyright goods; and

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[246] [A Party may limit the application of this paragraph to first run cinematographic works.]

[247] It is understood that there is no obligation for a Party to provide for the possibility of imprisonment and monetary fines to be imposed in parallel.

[248] A Party may also account for such circumstances through a separate criminal offense.

Without Prejudice

(ii) materials and implements that have been [CA/VN propose; US oppose: predominantly] used in the creation of pirated copyright goods or counterfeit trademark goods; and

(iii) any other labels or packaging to which a counterfeit trademark has been applied and that have been used in the commission of the offense.

In cases where counterfeit trademark goods and pirated copyright goods are not destroyed, the competent authorities shall ensure that, except in exceptional circumstances, such goods shall be disposed of outside the channels of commerce in such a manner as to avoid causing any harm to the right holder. Each Party shall further provide that forfeiture or destruction under this subparagraph and subparagraph (c) shall occur without compensation of any kind to the defendant;

(g) that its judicial or other competent authorities shall have the authority to release or, in the alternative, provide access to, goods, material, implements, and other evidence held by the relevant authority to a right holder for civil[249] infringement proceedings.

(h) [VN propose[250]~~oppose~~: that its competent authorities may act upon their own initiative to initiate a legal action without the need for a formal complaint by a private party or right holder.]

7. With respect to the offenses described in Article QQ.H.7 (1)-(5) above, a Party may provide that its judicial authorities have the authority to order the seizure or forfeiture of assets, or alternatively, a fine, the value of which corresponds to that of the assets derived from, or obtained directly or indirectly through, the infringing activity;

[non-paper on border marked up with small group discussion in Maryland on 4/25/15]

Non-paper on border
24 April 2015

CLEAN VERSION

6bis. {[AU oppose: Where a Party does not already provide that its competent authorities may initiate border measures ex-officio with respect to goods that are in transit, the Party

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[249] A Party may also provide such authority in connection with administrative infringement proceedings.

[250] Negotiator's note: As part of enforcement package VN can accept commitment.

[251] With regard to copyright and related rights piracy provided for by QQ.H.7.1 (Commercial Scale), a Party may limit the application of subparagraph (h) to the cases where there is an impact on the rightholder's ability to exploit the work in the market.

{may comply with Article QQ.H.6.6(c) by endeavouring to provide} {in the alternative shall} {Each party shall}]
[AU/CA/SG/MY/BN propose 6bis: As an alternative to QQ.H.6.6(c), a Party shall instead endeavour to provide, where [US/JP oppose: it considers] appropriate and with a view to eliminating international trade in counterfeit trade mark or pirated copyright goods. [US/JP oppose: relevant] available information to another Party in respect of goods that it has examined without a local consignee which are transhipped through its territory and destined for the territory of the other Party, to [US oppose: inform][US propose: assist] that other Party's efforts to identify suspect goods upon arrival in its territory.]

[Secretariat's note: Draft package dated 27 Jan 2015]
DRAFT PACKAGE BASED ON MINISTERIAL LANDING ZONE

New footnote for QQ.H.7 (Criminal Procedures and Penalties)

2. Each Party shall treat willful importation or exportation of counterfeit trademark goods or pirated copyright goods on a commercial scale as unlawful activities subject to criminal penalties. [FN}
FN For greater certainty, it is understood that a Party may comply with its obligation under Article QQ.H.7.2 relating to importation and exportation of counterfeit trademark goods or pirated copyright goods by providing that distribution or sale of such gods on a commercial scale is an unlawful activity subject to criminal penalties. Furthermore, each Party confirms that criminal procedures and penalties as specified in Articles QQ.H.7.1, QQ.H.7.2 and QQ.H.7.3 are applicable in free trade zones under the customs law of a Party.

Article QQ.H.6: {Special Requirements Related to Border Enforcement / Special Requirements related to Border Measures} ~~**[CA propose:[252]]**~~

1. Each Party shall provide for applications to suspend the release of, or to detain any suspect counterfeit ~~[US/JP/NZ/AU/MX/PE propose; CA/MY/SG/BN/VN/CL oppose:~~ or confusingly similar ~~]~~ trademark, or pirated copyright goods that are imported ~~[CA propose: [253]]~~ into ~~[MY/VN/NZ/AU/BN/MX oppose: , or [SG oppose: about to be] exported from,]~~ the territory of the Party.
2. ~~[US/AU/JP/NZ/BN propose; CL/SG/PE/MY/MX oppose: Each Party shall provide that such applications remain in force for a period of not less than one year from~~

~~[252] [CA propose: It is understood that there shall be no obligation to apply the procedures set forth in this Article to goods put on the market in another country by or with the consent of the right holder.~~
~~[253] [CA propose: For greater certainty, reference to "imported" need not include goods moving "in transit".]~~

~~the date of application, [254] or the period that the good is protected by copyright or the relevant trademark registration is valid, whichever is shorter. A Party may provide that its competent authorities have the authority to suspend or invalidate an application when there is due cause, including when the applicant has abused the procedures described in this Article.~~

3. Each Party shall provide that any right holder initiating procedures for its competent authorities [255] to suspend release of suspected counterfeit { or confusingly similar } trademark goods, or pirated copyright goods [256] into free circulation is required to provide adequate evidence to satisfy the competent authorities that under the law 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 goods reasonably recognizable by its competent authorities. The requirement to provide such information shall not unreasonably deter recourse to these procedures.

4. Each Party shall provide that its competent authorities have the authority to require a right holder initiating procedures to suspend the release of suspected counterfeit ~~(~~or [AU propose: or] confusingly similar~~)~~ trademark goods, 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 defendant 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.

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[254] ~~[For purposes of this Article, a Party may also provide that the applicant may designate a shorter period.]~~

[255] AU propose: For the purposes of this Article QQ.H. [Border Measures], unless otherwise specified, competent authorities may include the appropriate judicial, administrative, or law enforcement authorities under a Party's law.]

[256] For purposes of Article QQ.H.6:
(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 Party providing the procedures under this section; 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 Party providing the procedures under this section.

5. Without prejudice to a Party's laws pertaining to privacy to privacy or the confidentiality of information, where its competent authorities have detained or suspended the release of goods that are suspected of being counterfeit trademark goods or pirated copyright goods, a Party may provide that its competent authorities have the authority to inform the right holder without undue delay of the names and addresses of the consignor, exporter, consignee, or importer, a description of the goods, quantity of the goods and, if known, the country of origin of the goods.[257] Where a Party does not provide such authority to its competent authorities when suspect goods are detained or suspended from release, it shall provide at least in cases of imported goods, its competent authorities with the authority to provide the foregoing information to the right holder normally within 30 days[258] of seizure or determination that the goods are counterfeit [AU propose: trademark] or pirated [AU propose: copyright goods].

6. [NZ oppose[259]: Each Party shall provide that its competent authorities may initiate border measures ex officio[260] with respect to goods {JP/PE propose: subject to customs procedures}/{US/CA/NZ/MY propose: under customs control}[261][262] that are:
(a) imported,
(b) [VN/MY/BN/SG opposes:{about to be exported /destined for export}]//[New Alt. Text: {destined for export}/{exported}], or
© [VN/SG/CA/M/BN/AU opposes: in-transit][US/CL propose:[263][8]], and

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[257] For greater certainty, a Party may establish reasonable procedures to receive or access such information.

[258] For purposes of this Article, "days" shall mean "business days".

[259][Negotiator's Note: AU/MX is still considering this article]

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

[261][AU oppose: For greater certainty, a Party may treat goods "subject to customs procedures" as synonymous with "goods under custom control."] [AU propose: a Party may treat "goods under customs control" as meaning goods under customs control that are subject to customs procedures. It is understood that paragraph 6(c) need not apply to a Party where goods in transit are not subject to the Party's {customs} {intellectual property} laws.]

[263][US propose: Subparagraph (c) applies to suspect goods which are in-transit from one customs office to another customs office in the Party's territory from which the goods will be exported.]

[US propose; AU oppose: Subparagraph (c) applies to suspect goods which are in transit from one customs office to another customs office in the Party's territory from which the goods will be exported. As an alternative to subparagraph (c), a Party shall endeavor upon request to examine such suspect goods not consigned to a local party and transshipped through its territory and destined for the territory of another Party, and shall cooperate {upon request} to provide all available information to the other Party to enable effective enforcement against such suspect goods.]

[CA propose; AU oppose: Alt second sentence to footnote 186: As a alternative to subparagraph (c), if upon conducting an examination of goods in transit, a Party suspects such goods are counterfeit trademark or pirated copyright, it shall provide its competent authorities the authority to provide

that are suspected of being counterfeit ~~{or confusingly similar}~~ trademark goods, or pirated copyright goods~~]~~[264] [CL propose: In the case of paragraph (c), each Party, in conformity with other international agreements subscribed to by it, may provide that ex officio authority shall be exercised prior to sealing the container, or means of conveyance, with the customs seals, as applicable.]

7. Each party shall adopt or maintain a procedure by which its competent authorities may determine, within a reasonable period of time after the initiation of the procedures described under Article QQ.H.6(1) [AU/BN/CA/oppose: and, [AU oppose: if applicable] [AU propose: to the extent that it applies], (6)~~]~~ [265] whether the suspect goods infringe an intellectual property right [266]. Where a Party provides administrative procedures for the determination of an infringement, it may also provide its authorities with the authority to impose administrative penalties or sanctions, which may include fines or the seizure of the infringing goods, following a determination that the goods are infringing.

8. Each Party shall provide that its competent authorities have the authority to order the destruction of [AU propose: counterfeit trademark goods or pirated copyright] goods following a determination that goods are infringing. Incases where such goods are not destroyed, each Party shall ensure that, except in exceptional circumstances, such goods are disposed of outside the channels of commerce in such a manner as to avoid any harm to the right holder. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit the release of the goods into the channels of commerce.

9. Where a Party establishes or assesses, in connection with the procedures described in this Article, an application fee, storage fee, or destruction fee, such fee shall not be set at an amount that unreasonably deters recourse to these procedures.

10. Each Party shall include in the application of this Article goods of a commercial nature sent in small consignments. A Party may exclude from the application of this

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information to other Party to identify those goods upon arrival in the other Party's territory.] [AU propose: For greater certainty, the Parties agree that the measures in para 6(c) shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide safeguards against their abuse.]

[264]Negotiator's Note: Further technical work is needed on terminology used in this Article.

[265]Negotiator's Note: There may not be a procedure to be invoked in respect of H.6(6), if the obligation is as defined in footnote for H.6(6) covering "in transit".

[266][AU oppose: {Where a Party has adopted a procedure by which its competent authorities determine whether suspect goods violate its law relating to false descriptions, the Party may continue to make such determinations under its law.}][AU propose: For greater certainty, a Party may comply with this obligation {with respect to QQ.H.6.6.} through a determination by its competent authorities that the suspect goods bear a false trade description.]

Without Prejudice

Article small quantities of goods of a non-commercial nature contained in travellers' personal luggage.[267]

Article QQ.H.7: {Criminal Procedures and Remedies / Criminal Enforcement}[268]

(e) that its judicial authorities shall have the authority to order the forfeiture or destruction of
(i) all counterfeit trademark goods or pirated copyright goods; and
(ii) materials and implements that have been [CA/VN propose; US oppose: predominantly] used in the creation of pirated copyright goods or counterfeit trademark goods; and
(iii) any other labels or packaging to which a counterfeit trademark has been applied and that have been used in the commission of the offense.

In cases where counterfeit trademark goods and pirated copyright goods are not destroyed, the [AU propose: judicial or other] competent authorities shall ensure that, except in exceptional circumstances, such goods shall be disposed of outside the channels of commerce in such a manner as to avoid causing any harm to the right holder. Each Party shall further provide that forfeiture or destruction under this subparagraph and subparagraph (c) shall occur without compensation of any kind to the defendant;

Article QQ.H.9: {Trade Secrets}

1. In the course of ensuring effective protection against unfair competition as provided in Article 10*bis* of the Paris Convention, each Party shall ensure that natural and legal

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[267] For greater certainty, a Party may also exclude from the application of this Article small quantities of goods of a non-commercial nature sent in small consignments.

[268] [VN/MX propose: A Party that provides for administrative procedures and penalties as an alternative to criminal procedures and penalties under [this Chapter]/[paragraphs QQ.G.10(a), QQ.G.13(a), [VN propose: QQ.H.7.1(b), QQ.H.7.2] QQ.H.7.3, QQ.H.7.4, QQ.9.2, QQ.H.9.1] shall ensure that: (i) such administrative penalties shall be [of sufficient severity to provide a deterrent]/[substantially equivalent to criminal penalties as required by this Chapter and may not include imprisonment]; and (ii) its administrative authorities may initiate a legal action without a formal complaint.]

persons have the legal means to prevent trade secrets lawfully in their control from being disclosed to, acquired by, or used by others (including state commercial enterprises) without their consent in a manner contrary to honest commercial practices.[269] As used in this Chapter, trade secrets encompass, at a minimum, undisclosed information as provided for in Article 39.2 of the TRIPS Agreement.

2. Subject to Paragraph 3, Each Party shall provide for criminal procedures and penalties for one or more of the following:[270]
(a) the unauthorized, willful access to[271] a trade secret held in a computer system;
(b) the unauthorized, willful misappropriation of a trade secret, including by means of a computer system; or
(c) the fraudulent disclosure, or alternatively, the unauthorized and willful disclosure of a trade secret, including by means of a computer system.

3. With respect to the acts referred to in Paragraph 2, a party may, where appropriate, limit the availability of such criminal procedures, or limit the level of penalties available, to one or more of the following cases:

(a) the acts are for purposes of commercial advantage or financial gain;
(b) the acts are related to a product or service in national or international commerce;
(c) the acts are intended to injure the owner of such trade secret;
(d) the acts are directed by or for the benefit of or in association with a foreign economic entity; or

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[269] For the purposes of this paragraph "a manner contrary to honest commercial practices" shall mean at least practices such as breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.

[270] Negotiator's Note: NZ/US is considering whether any other specific limitations may be necessary.

[271] Negotiator's Note: As part of enforcement package VN can accept commitment fully.

(e) the acts are detrimental to a Party's economic interests, international relations, or national defence or national security [272].[273]

[AU/JP propose: 4. [For purposes of the Article,] a Party may provide that the disclosure of a trade secret in connection with exposing, or providing evidence of, a violation of that Party's law, is not subject to the obligations in paragraphs 1 and 2.

[AU/US/NZ/JP] propose: Alt 4. For greater certainty, this Article is without prejudice to a Party's measures in relation to [CL oppose: whistleblowing or] the [CL propose[274]: lawful] disclosure of a trade secret in connection with exposing, or providing evidence of, a violation of that Party's law.]

INTELLECTUAL PROPERTY [RIGHTS] CHAPTER

Non-Paper on Ex QQ.H.9 - Protection of Encrypted Program-Carrying Satellite Signals / Protection of Encrypted Program-Carring Satellite and Cable

1. Each Party shall make it a [CL propose; US oppose: civil or] criminal offense[VN propose; US oppose [275] to:

   (a) manufacture, assemble, modify[276], import, export, sell, lease, or otherwise distribute a tangible or intangible device or system, knowing [CL oppose: or having reason to know][277] that the device or system:

   (i) is [JP: intended to be used to assist, or]
   (ii) is primarily of assistance, or alternatively,
   (iii) its principal function is solely to assist,

   in decoding an encrypted program-carrying satellite signal without the authorization of lawful distributor[278] of such signal[279]; and

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[272] A Party may deem the term "misappropriation" to be synonymous with "unlawful acquisition."
[273] Negotiators' note: PE needs to clarify whether it can meet the requirements of paragraphs 2 and 3.
[274] Negotiator's note: For CL opposition to whistleblowing is because the word has a different meaning than the one intended in the text. It would be preferable to describe the conduct or be more neutral as to the fact that the disclosure is lawful.
[275][VN propose/US oppose: For greater certainty, it is understood that a Party may also make the acts described in this paragraph administrative offenses.] Negotiator's note: VN can withdraw this footnote if its enforcement package is accepted.
[276] For greater certainty, a Party may treat "assemble" and "modify" as incorporated in "manufacture."]
[277][CL: For the purposes of this paragraph, a Party may provide that "reasonable grounds to know" may be demonstrated through reasonable evidence, taking into account the facts and circumstances surrounding the alleged illegal act, as part of the Party's "knowledge" requirements.] For the purpose of article QQ.H.9.1(a), a Party may treat "having reason to know" as meaning "wilful negligence."
[278] A Party may require a showing of intent to avoid payment to the lawful distributor.

(b) with respect to an encrypted program-carrying satellite signal, willfully:

(i) receive[280] such a signal; or
(ii) further distribute[281] such [a] signal

knowing that it has been decoded without the authorization of the lawful distributor of the signal. [282]

2. Each Party shall provide for civil remedies for any person that holds an interests[283] in an encrypted program carrying satellite signal[284] or its content who is injured by any activity described in paragraph

3. [US/SG propose, CL/VN/MX/PE[285] oppose: Each Party shall provide for criminal penalties or civil remedies[286] for willfully:

(a) Manufacturing or distributing equipment knowing that the equipment is intended to be used in the unauthorized reception of any {encrypted} program-carrying cable signal; and

(b) Receiving, or assisting another to receive[287], a {encrypted} program-carrying cable signal without authorization of the lawful distributor of the signal

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[279]The obligation regarding export may be met by making it a criminal offence to possess and distribute such a device or system. For the purposes of QQ.H.9, a Party may provide that a "lawful distributor" means a person who has the lawful right in that Party's territory to distribute the encrypted program-carrying signal and authorize its decoding.
[280]For greater certainty and for purposes of Article QQ.H.9.1(b) and QQ.H.9.3(b), a Party may provide that "wilful receipt" of an encrypted program-carrying satellite or cable signal means receipt and use of signal, or means receipt and decoding of the signal.
[281] For greater certainty, a Party may interpret "further distribute" as "retransmit" to the public."
[282]A Party may require a showing of intent to avoid payment to the lawful distributor.
[283]Any person who "holds an interest" shall mean, at a minimum, any person who holds an interest in the content of the signal, any lawful distributor of the signal, or any person authorized by such distributor [CA propose: to further distribute the signal] or by such person holding an interest in the content of the signal.
[284] CA propose: For greater certainty, for the purposes of Article H.9.3, a Party may treat 'program-carrying cable signal" as meaning a program-carrying signal that is transmitted by cable for reception by the public upon payment of a lawful charge.
[285]Negotiator's note: MX position will depend on the outcome of the discussion on camcording.
[286][CL: If a Party provides for civil remedies, it may require a showing of injury.]
[287]A Party may comply with its obligation in respect of "assisting another receive" by providing criminal penalties for a person willfully publishing any information in order to enable or assist another person to receive a signal without authorization of the lawful distributor of the signal.

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Article QQ.H.11: {Government Use of Software / Government Use of Software and Other Materials Protected by Copyright or Related Rights}[288]

1. Each Party Recognizes the importance of promoting the adoption of measures to enhance government awareness of respect for intellectual property rights and of the detrimental effects of intellectual property rights infringement.

2. Each Party shall adopt or maintain appropriate laws, regulations, policies, orders, government-issued guidelines, or administrative or executive decrees providing that is [US/AU/MX/MY propose; CL/JP oppose: central] government agencies use only non-infringing computer software, and if applicable only use computer software in a manner authorized by the relevant license. These measures shall apply to the acquisition and management of such software for government use.

…[SNIP]

==========end page 89==========

Without Prejudice

Internet Service Providers

ISP Chair's without prejudice draft of 1/31/2015 as as result of small group technical work

Addendum XV

Negotiators note: Parties are still considering this proposal and reserve their position on the entire section

1. The Parties recognize the importance of facilitating the continued development of legitimate online services and, in a manner consistent with Article 41 of the TRIPS Agreement, providing enforcement procedures that permit effective action by rights holders against copyright infringement[289] covered under this Chapter that occurs [US propose; CL oppose: in the online environment] [CL propose; US oppose: on the internet]. Accordingly, each Party shall ensure that legal remedies are available for rights holders to address such infringement and shall establish or maintain appropriate safe harbours for Internet service providers[290] [US propose; AU oppose: when] acting as

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[288]Negotiators' note: Some Parties are considering this ad ref.

[289]For the purposes of this Article, "copyright" includes related rights.

[290]For the purposes of this Section, "Internet service provider" means:

(a) A provider of online services for 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, undertaking the function in paragraph 2(a);

(b) A provider of online services undertaking the functions in paragraphs 2(c) or (d).

For greater certainty, "Internet service provider" includes a provider of the services listed above who engages in caching carried out through an automated process.

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[neutral[291]] intermediaries [292]. This framework of legal remedies and safe harbours shall include:

(a) legal incentives[293] for Internet service providers to cooperate with [VN propose: authorities or] copyright owners to deter the unauthorized storage and transmission of copyrighted materials or, in the alternative, to take other action to deter the unauthorized storage and transmission of copyrighted materials; and

(b) limitations in its law that have the effect of precluding monetary relief against Internet 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.[294] [CA propose[295]

2. The limitations described in paragraph 1(b) shall cover [CA propose: at least] the following functions:

(a) transmitting, routing, or providing connections for material without modification of its content[296], or the intermediate and transient storage of such material done automatically in the course of such a technical process;

(b) caching carried out through an automated process;

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[291]Negotiators note: US to confim whether it can remove "neutral" pending outcome of dicussions on chapeau

[292]For greater certainty, the phrase "[US propose; AU oppose: when] acting as intermediaries" shall not be interpreted to {limit or expand the scope of} the definition of "Internet Service Provider" or [NZ/AU propose: to determine whether a particular Internet Service Provider] meets the conditions required to qualify for the limitations described in paragraph 1(b).

[293]For greater certainty, Parties recognize that "legal incentives" can take different forms under each Party's legal system [AU oppose: and {does/need not} refer to the conditions for Internet service providers to qualify for the limitations {provided in paragraph 1(b),} as set out in paragraph 3].

[294]It is understood that, to the extent that a Party determines, consistent with its international legal obligations, that a particular act does not constitute copyright infringement, there is no obligation to provide for a limitation in relation to that act.

[295][CA propose; US oppose: It is understood that Internet service providers may control, initiate, or direct various acts of reproduction or communication that may involve infringing acts solely for technical reasons in carrying out the functions in paragraph 3 and as part of a technical process or for solely technical reasons such as division into packets,

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(c) storage[297], at the direction of a user, of material residing on a system or network controlled or operated by or for the service provider[298]; and

(d) referring or linking users to an online location by using information location tools, including hyperlinks and directories.

3. To facilitate effective action to address infringement, each Party shall prescribe in its law conditions for Internet service providers to qualify for the limitations described in paragraph 1(b), or alternatively, shall provide for circumstances under which Internet service providers do not qualify for the limitations described in paragraph 1(b)[299] [AU propose: by either][300]:

(a) With respect to the functions referred to in paragraph 2(c) and 2(d) above, such conditions shall include a requirement for Internet service providers to expeditiously remove or disable to material residing on their networks or systems upon {MX: one or more of the following:]:

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[297]For greater certainty, Parties may interpret "storage" as "hosting".

[298]For greater certainty, such storage of material may include e-mails and their attachments stored in the Internet service provider's server and web pages residing on the Internet service provider's server.

[299]A Party may comply with the obligations in Paragraphs 3, by maintaining a framework wherein:

(i) there is a [VN propose: competent authority or authorized organization or] stakeholder organization that includes representatives of both Internet service providers and rights holders, established with government involvement;

(ii) such [VN propose: competent authority or authorized organization or] stakeholder organization develops and maintains effective, efficient and timely procedures for entities certified by the [VN propose: competent authority or authorized organization or] stakeholder organization to verify without undue delay the validity of each notice of alleged copyright infringement by confirming that the notice is not the result of mistake or misidentification, before forwarding such verified notice to the relevant Internet service provider; and

(iii) there are appropriate guidelines for Internet service providers to follow in order to: qualify for the limitation described in paragraph 1(b), including requiring that such Internet service provider promptly remove or disable access to the identified materials upon receipt of a verified notice; and be exempted from liability for having done so in good faith in accordance with such guidelines; and

(iv) there are appropriate measures that provide for liability where an Internet service provider has actual knowledge of the infringement or awareness of facts of circumstances from which the infringement is apparent.

[300]Negotiator's Note: For AU, they can withdraw their proposal if AU's concerns about country-specific outcomes are resolved. AU would also need to oppose the JP/MX footnotes and the CA annex if its concerns are not resolved. JP is happy to have its footnote as an alternative standard in the main text and is also open to having a merit based discussion on this footnote.

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(i) [VN propose: receiving a notification from the authority or person authorized to do so, in accordance to the national legislation of each Party; or][301][302]

(ii) obtaining actual knowledge of the infringement or becoming aware of facts of circumstances from which the infringement is apparent,[CL propose: including through effective notice of claimed infringement. For these purposes, each party shall establish appropriate procedure through an open and transparent process which is set forth in domestic law, for notices[303] of claimed infringement, and may establish such procedures for counter notices by those whose material is disabled or removed through mistake or misidentification.] [CL oppose: [CL/VN propose:[304] such as through receiving a notice [305][306][CL propose:[307]] of alleged infringement from the rights holder or a person authorized to act on its behalf, and in the absence of a counter-notice from the person whose material is subject to a notice for removal or disabling indicating that the notice was issued by mistake or misidentification.][308]

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[301]Negotiator's Note: For MX, the need for this language is dependent on whether their constitutional FN is accepted.

[302]Negotiators' note: VN can drop this proposal if its amendments to JP's footnote above is accepted.

[303][CL propose: For greater certainty, such a notice, as may be set out under a Party's law, by a written communication physically or electronically signed by a person who represents a right holder and must contain information that is reasonably sufficient to enable the online service provider to identify the work, performance or phonogram claimed to be infringed, the alleged infringing material, and the online location of the alleged infringement, and that has a sufficient indicia of reliability with respect to the authority of the person sending the notice.]

[304][CL/VN propose: A Party may require judicial [VN propose: or administrative authority] intervention for purpose of obtaining actual knowledge of the infringement or awareness of facts or circumstances from which the infringement in apparent.]

[305]For greater certainty, such a notice, as may be set out under a Party's law, must contain information that is reasonably sufficient to enable the online service provider to identify the work, performance or phonogram claimed to be infringed, the alleged infringing material, and the online location of the alleged infringement, and that has a sufficient indicia of reliability with respect to the authority of the person sending the notice.

[306]Placeholder to address VN's concerns about the identity of the person sending the notice to be discussed by the US and VN, e.g., {and that person's identity}. VN may consider removal of "legally sufficient" from the paragraph on the outcome of this discussion..

[307][CL propose: For greater certainty, upon receiving a legally sufficient notice or statement, a Party may require judicial intervention for the purpose of removing a disabling access to infringing material.]

[308]Negotiator's note: CL's opposition to this paragraph is meant to reflect that its proposal would replace the problematic issues that it faces in this sub paragraph

(b) An Internet service provider that removes or disables access to material in good faith pursuant to and consistent with sub-paragraph (a) shall be exempt from any liability for having done so, provided that it takes reasonable steps in advance or promptly after to notify the person whose material is removed or disabled.[309]

[AU propose: placeholder for alternative requirements for effective action with respect to the functions referred to in paragraph 2 above]

4. Where a system for counter-notices is provided under a Party's law, [AU propose: and where material has been removed or access has been disabled in accordance with paragraph 3,] that Party shall require that the Internet service provider restore the material subject to a counter-notice [CL propose:[310]], [Cl oppose: unless the person giving the original notice seeks judicial relief within a reasonable period of time.] [VN propose; US oppose: or in the alternative, the Internet service provider receives a notification from the authority or person authorized to do so, in accordance to the national legislation of each Party.]

5. Each Party shall ensure that monetary remedies are available in its legal system against any person who makes a knowing material misrepresentation in a notice or counter-notice that causes injury to any interested part[311] as a result of an Internet service provider relying on the misrepresentation.

6. Eligibility for the limitations in paragraph 1 may not be conditioned on the Internet service provider monitoring its service or affirmatively seeking facts indicating infringing activity.

7. Each Party shall provide procedures, whether judicial or administrative, in accordance with that Party's legal system, and consistent with principles of due process and privacy, enabling a copyright owner who has made a legally sufficient claim of copyright infringement to obtain expeditiously from an Internet service provider information in the provider's possession identifying the alleged infringer,

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[309]With respect to the function in subparagraph 2(b), a Party may limit the requirements of paragraph 3 related to an Internet service provider removing or disabling access to infringing material to circumstances in which the service provider becomes aware or receives notification that the cached material has been removed or access to it has been disabled at the originating site.

[310][CL propose: A Party may require that the restoration of the material by the Internet service provider is subject to conditions as specified in the Party's law.]

[311]For greater certainty, it is understood "any interested party" may be limited to those with a legal interest recognized under that Party's law.

where such information is sought for the purpose of protecting or enforcing such copyright.

8. It is understood that the failure of an Internet service provider to qualify for the limitations in paragraph 1 does not itself result in liability. Moreover, this article is without prejudice to the availability of other limitations and exceptions to copyright, or any other defences under a Party's legal system.

9. The Parties recognize the importance, in implementing their obligations under this Article, of taking into account the impacts on rights holders and Internet service providers.

[MX propose: **"constitutional footnote"** - Placement to be determined]

"It is understood that Parties that have yet to implement the obligations set forth in par 3 and 4 will do so in a manner that is both effective and consistent with the Party's existing constitutional provisions. To that end, a Party may establish an appropriate role for the government that does not impair the timeliness of the process set forth under par 3 or 4 or entail advance government review of each individual {legal notice}."[312]

[US/CA propose; **[ANNEX TO IP CHAPTER][313]**

In order to facilitate the enforcement of copyright on the Internet {and to avoid unwarranted market disruption in the digital environment}, {paragraph(s) x] shall not apply to a Party, provided that, if upon the date of entry into force of this Agreement, it continues to:

i) prescribe in its law circumstances under which Internet service providers do not qualify for the limitations described in paragraph 2;

ii) provide statutory secondary liability for copyright infringement where a person, by means of the Internet or another digital network, provides a service primarily for the purpose of enabling acts of copyrights infringement, in relation to prescribed factors, such as:

    a. whether the person marketed or promoted the service as one that could be used to enable acts of copyright infringement;

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[313]Negotiator's Note: CL/VN/BN/PE are opposed to the concept of an Annex to address only one party's system but can go along with the Annex that is flexible enough to accommodate other parties' system. For CL/MY, this applies to other parts of the text where there are specific references to a particular system.

b. whether the person had knowledge that the service was used to enable a significant number of acts of copyright infringement;
c. whether the service has significant uses other than to enable acts of copyright infringement;
d. the person's ability, as part of providing the service, to limit acts of copyright infringement, and any action taken by the person to do so;
e. any benefits the person received as a result of enabling the acts of copyright infringement; and
f. the economic viability of the service if it were not used to enable acts of copyright infringement;

iii) require Internet service providers carrying out the functions referred to in paragraph 2(a) and 2(c) to participate in a system for forwarding notices of alleged infringement, including where material is made available online, and where they fail to do so, subjecting them to pre-established {monetary remedies/sanctions/amounts};

iv) {induce} Internet service providers offering information location tools to remove within a specified period of time any reproductions of material that they make, and communicate the public, as part of offering the location information tool upon receiving a notice of alleged infringement and after that original material has been removed from the electronic location set out in the notice; and

v) {induce} Internet service providers carrying out the function referred to in paragraph 2(c) to remove or disable access to material upon becoming aware of a decision of a court to the effect that the person storing the material infringes copyright in the material.]