

## **FTAA – Free Trade Area of the Americas**

### **Draft Agreement**

#### **Chapter XX Intellectual Property Rights**

## CHAPTER XX INTELLECTUAL PROPERTY RIGHTS

### Section A General Aspects

#### Article 1. Nature and Scope of Obligations

[1.1. Each Party shall [provide] [ensure] in its territory to the nationals of the other Parties<sup>1</sup> adequate and effective protection and enforcement of intellectual property rights<sup>2</sup>. Each Party shall ensure that measures to protect and enforce those rights do not themselves become barriers to legitimate trade [nor socioeconomic and technological development].]

1.2. Each Party may implement in its law [, although it is not obliged to do so,] more extensive protection of intellectual property rights than is required under this Chapter, provided that such protection is not [inconsistent with][contrary to] this Chapter.

1.3. Each Party shall be free to determine the appropriate method of implementing the provisions of this Chapter within its own legal system and practice.

[1.4. No provision of this Chapter prevents, and should not prevent, any Party from adopting measures to promote and protect public health, and it should be interpreted and implemented in a manner that takes into account each Party's right to protect public health and, in particular, to promote access to [existing] medicines and to the research and development of new medicines.]

#### [Article 2. General Objectives]

[2.1. The protection and enforcement of intellectual property rights covered in this Chapter should contribute to the promotion of technological innovation and to the transfer and dissemination of technology in the Americas, to the mutual advantage of producers and users of technological knowledge, with a view to fostering social and economic welfare and a balance of rights and obligations.]

#### [Article 3. General principles]

[3.1. Each Party may, in formulating or amending its laws and regulations, adopt measures necessary to protect public health and nutrition, or to promote public interest in sectors of vital importance to their socioeconomic and technological development, provided that such measures are consistent with the provisions of this Chapter.]

[3.2. The abuse of intellectual property rights by right holders or practices that unjustifiably limit trade, that prejudice local industry and employment or are detrimental to the transfer of technology shall be prevented.]

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1 [-National of a Party: in respect of the relevant intellectual property right shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for in the Paris Convention (1967), the Berne Convention (1971), [the Geneva Convention,] the Rome Convention, [the Brussels Convention] and the Treaty on Intellectual Property in Respect of Integrated Circuits.]

2 [Intellectual property rights: all categories of intellectual property protected in this Chapter, under the terms indicated.]

**[Article 4. Exhaustion of rights]**

[4.1. This Chapter shall not affect the authority of each Party to determine the conditions under which the exhaustion of rights related to products legitimately introduced in the market by, or with the authorization of, the right holder shall apply.

However, each Party undertakes to review its domestic legislation within a period not exceeding five (5) years after the entry into force of this Agreement, in order to adopt, at a minimum, the principle of regional exhaustion in regard to all Parties.]

**Article 5. [Relationship to other Intellectual Property Agreements [and Joint Recommendations]<sup>3</sup>]**

[5.1. No clause in this Agreement shall affect in any way existing obligations that Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works.]

[5.2. Each Party may enter into intellectual property treaties or cooperation agreements, provided that they are not inconsistent with the provisions of this Chapter.]

[5.3. For the purpose of [granting] [ensuring] adequate and effective protection and enforcement of the intellectual property rights and obligations referred to in this Chapter, each Party shall give effect to [, at a minimum,] the principles and norms of this Chapter and the cited provisions of the following agreements:]

- [a] Articles 1-21 [and the Appendix] of the Berne Convention for the Protection of Literary and Artistic Works, (Paris Act of July 24, 1971) (Berne Convention);]
- [b] Articles 1 to 12 and 19 of the Paris Convention for the Protection of Industrial Property, (Stockholm Act of July 14, 1967) (Paris Convention);]
- [c] [Articles 1 to 7 of the] Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, (adopted on October 29, 1971) (Geneva Convention);]
- [d] [Articles 1 to 31 of the] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, (adopted on October 26, 1961) (Rome Convention);]
- [e] [Articles 9 to 40 of the] Agreement on Trade-Related Aspects of Intellectual Property Rights (1994), (TRIPS Agreement) [, until such time as such Party has acceded to, and implemented the TRIPS Agreement];]
- [f] [Articles 1 to 14 of the 1978 Act of the] International Convention for the Protection of New Varieties of Plants (UPOV Convention)[[, or Articles 1 to 22 of the 1991 Act][[, depending on which is in force in each country];]

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<sup>3</sup> [The NGIP will need to determine whether issues solely related to the obligations of the TRIPS Agreement, as incorporated in this Chapter, the international agreements and joint recommendations in paragraph 5.3 (Section A. General Aspects), and provisions related to international agreements concerning the registration of intellectual property rights in paragraph 5.5 (Section A. General Aspects) may be referred to the dispute settlement procedures of this Agreement.]

- [g] [Articles 1 to 7 of the] Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974) (Brussels Convention);]
- [h] Articles 1 to 25 of the Trademark Law Treaty (1994);]
- [i] [Articles 1 to 23 of the] WIPO Performances and Phonograms Treaty, 1996;]
- [j] [Articles 1 to 14 of the] WIPO Copyright Treaty, 1996;]
- [k] Articles 1 to 16 and 22 as well as Regulations under the Patent Law Treaty;]
- [l] Articles XX to XX of Instrument for the Protection of Audio-Visual Performers' Rights - placeholder<sup>4</sup>;]
- [m] Articles XX to XX of Treaty for the Protection of Non-Copyrightable Elements of Databases - placeholder;]
- [n] the Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks (1999)<sup>5</sup> and;]
- [o] Articles XX to XX of WIPO Protocol on Trademark Licenses<sup>6</sup> - place holder;]
- [p] [Articles 1 to 22 of the] Convention on Biological Diversity;]
- [q] Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet - place holder;]
- [r] Articles XX to XX of the Instrument for the Protection of Broadcasting Organizations' Rights - place holder.]

[5.4. Each Party shall make best efforts to ratify or accede to the International Agreements referred to in paragraph 5.3 (Section A General Aspects) if they are not a Party to them on or before the date of entry into force of this Agreement.]

[5.4 Each Party that has not ratified these agreements shall [make best efforts] [have one (1) year] from the entry into force of this Agreement to ratify or accede to the international agreements referred to.]

[5.5. Each Party who has not already done so shall make best efforts to ratify or accede to the following international agreements concerning registration of intellectual property rights, within a period of one (1) year within the entry into force of this Agreement:

- a) the Patent Cooperation Treaty (PCT) (1984);
- b) the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks;

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4 [In the cases of subparagraphs (l), (m), (o), (q), (r) "place holder" was included since those treaties are currently under negotiation. This list will be revised and the designations will be included later.]

5 [Adopted by the Assemblies of the Member States of WIPO, September, 1999.]

6 [Adopted by the WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications on[...].]

- c) the Hague Agreement Concerning the International Deposit of Industrial Designs (1999);
- d) the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (1980);]

[5.6. For all purposes, including the settlement of disputes, nothing in this Chapter shall be construed as additional or higher levels of protection than the minimum standards established in the TRIPS Agreement [, nor may it be interpreted as a reduction in the protection to levels inconsistent with the standards established in that Agreement] with the exception of matters not considered in the TRIPS Agreement, and those issues covered in the TRIPS Agreement whose scope is reserved to national legislation.]

## **Section B Substantive Provisions**

### **Subsection B.1. Obligations and Commitments**

#### **Article 1. National Treatment**

1.1. Each Party shall accord to the nationals of other Parties treatment no less favorable than that accorded to its own nationals with regard to the protection<sup>7</sup> [and enjoyment] of intellectual property rights [and any benefits derived therefrom][and the rights and obligations set forth in this Chapter][, subject to the exceptions already provided in, respectively the Agreement on Trade-Related Aspects of Intellectual Property Rights (1994), the Paris Convention (1967), the Berne Convention (1971), the Rome Convention (1961) , the Geneva Convention, and the Treaty on Intellectual Property in Respect of Integrated Circuits]. [The rights and obligations already exempted in the Agreements referred to in Article 5.2 (Section A General Aspects) shall remain exempt.]

1.2. Each Party may [avail itself of the exceptions allowed under paragraph 1.1] [derogate from paragraph 1.1.] in relation to its judicial and administrative procedures for the protection [and enforcement] of intellectual property rights including the designation of an address for service or the appointment of an agent within the jurisdiction of a Party, only where such exceptions:

- a) are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement, and
- b) where such practices are not applied in a manner which would constitute a disguised restriction on trade.

[1.3. In respect of performers, producers of phonograms and broadcasting organizations, all rights under this Chapter that exceed the protection under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) shall be excepted from national treatment in regard to countries that are not Parties to this Agreement and of the Rome Convention, for which the principle of reciprocity shall apply.]

[1.4. No Party may, as a condition of according national treatment under this Chapter, require the nationals from another Party, to comply with any formalities or conditions in order to acquire rights in respect of copyright and related rights.]

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<sup>7</sup> For purposes of proposed Article 1 on National Treatment and Article 2 on Most-Favored Nation Treatment, "protection" shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as uses of intellectual property rights specifically covered by this Agreement.

## **Article 2. Most-Favored-Nation Treatment**

2.1. With regard to the protection [and enjoyment] of intellectual property, any advantage, favour, privilege or immunity granted by a Party to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Parties.

[2.2. Exempted from this obligation are any advantage, favor, privilege or immunity accorded by a Party [deriving from international agreements and, in particular, trade and integration agreements within the Americas:]

- a) [deriving from international agreements on] [on] judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property;
- b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country;
- c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Chapter;
- d) in respect of the protection of intellectual property and which have entered into force prior to the entry into force of the WTO Agreement (January 1, 1995), provided that such agreements are notified to the TRIPS Council and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Parties.]

## **Article 3. Multilateral Agreements on Acquisition and Maintenance of Protection**

3.1. The obligations under Article 1 (National Treatment) and Article 2 (Most Favored Nation Treatment) do not apply to procedures provided in multilateral agreements concluded under the framework of WIPO relating to the acquisition or maintenance of intellectual property rights.

## **[Article 4. Technology Transfer]**

[4.1. [Each Party agrees that the principle which underlies this Chapter and which should inform its implementation is that] the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and the transfer and dissemination of technology, to the mutual advantage of producers and users [of technology,][of technological knowledge,] in a manner conducive to social and economic welfare and to achieve a proper balance of rights and obligations.]

[4.2. The needs of countries for financial resources and access to technology and knowledge, technology transfer and joint technological development under the relevant provisions of this Chapter should be considered, especially for technological capability in order to increase the competitiveness of the countries domestically and internationally.]

[4.3. Accepting the principle set out in paragraph 4.1, each Party agrees to take legislative, administrative or policy measures, as appropriate, to encourage and facilitate access to, joint development and transfer of, technology among private sectors of the Parties. Such measures should take account of the needs of the Parties, having regard to their stage of development, and in particular, the special needs of those Parties that have small economies.]

[4.3. Each Party shall contribute to the promotion of technological innovation and the transfer and dissemination of technology, through government regulations favorable to industry and trade, that do not hinder free competition.]

[4.4. Each Party may provide in its legislation rules that prohibit contractual practices or conditions that restrict or limit the effective transfer of technology and lawful trade.]

[4.5. Each Party may suspend any or all obligations established in this Chapter if the commitments on transfer of technology are not effectively implemented.]

[4.5. Each Party may suspend any or all obligations established in this Chapter if the provisions of this Chapter are not effectively implemented.]

[4.6. For the purpose of implementing the objectives set out in this Chapter, each Party shall:

- a) Support efforts designed to promote public and private investment and development in research and development in the different territories of each Party;
- b) Take the appropriate steps to encourage the participation of companies from one Party in programs and initiatives—in particular, in those related to innovation and the transfer of technology—implemented by another Party;
- c) Foster the dissemination of information on the possibilities for intellectual-property-development-related investment;
- d) Help small and medium-sized enterprises prepare research and development projects, the results of which may eventually be protected by intellectual property rights, and obtain, under the best conditions possible, adequate financing for them;
- e) Foster promotion and dissemination of issues related to the protection of intellectual property rights in all aspects.]

[4.7. Each Party may offer the companies and institutions established in their territory incentives intended to promote technological change in recipient countries, and access to, and transfer of, technologies for the purpose of establishing a solid, competitive and viable technological base in recipient countries. ]

[4.8. Each Party agrees to work in conjunction with other Parties for promoting the transfer and dissemination of technology and to cooperate to avoid any measure, including contractual practices or conditions, that restricts or limits technical cooperation and/or the effective transfer of technology.]

**[Article 5. Exercise of Rights[/Abuse of Rights]]**

[5.1. No Party shall allow the abusive use or abusive non-use of a right. In this regard, each Party may apply appropriate measures to [protect and promote public health and nutrition, socioeconomic and technological development of sectors of vital importance and] prevent the abusive exercise of intellectual property rights by right holders or practices that unreasonably limit trade or adversely affect the transfer of technology.]

[5.2. Each Party shall take into consideration, for the recognition and exercise of such rights, the social purposes of intellectual property, which may not be used to arbitrarily or unjustifiably discriminate against or restrict technological development or technology transfer, nor cause the abuse of dominant position on the market or the elimination of competition.]

[5.3. The provisions in this Chapter shall be interpreted in light of its objectives and principles.]

## **Subsection B.2. Intellectual Property Rights**

### **Subsection B.2. a. Trademarks**

#### **Article 1. Protectable Subject Matter**

1.1. Any sign or any combination of signs, capable of distinguishing goods or services of one person<sup>8</sup> from those of other persons, shall be capable of constituting a trademark.

[1.2. Each Party may require, as a condition of registration, that signs be visually perceptible.]

[1.2. No Party may require that signs be visually perceptible to be eligible for registration.]

[1.3. Trademarks shall include collective marks [and certification marks].]

[1.3. Each Party may provide for protection of collective and certification marks.]

#### **[Article 2. Principles]**

[2.1. Each Party shall adopt the principle of first to file and priority in registration shall be determined on the date and hour of the presentation of the application.]

#### **Article 3. Prohibitions**

3.1. Each Party may establish prohibitions on the registration of trademarks, provided that they are not inconsistent with regional or multilateral agreements on intellectual property to which it is a party.

#### **Article 4. Exhaustion of Rights**

[4.1. The registration of a trademark shall not entitle a right holder to prevent a third party from trading goods protected by such registration if the good has already been introduced in the market in any country by the right holder or by any other person with the authorization of the right holder or by someone economically related to him, in particular when the goods and the containers or packages have been in direct contact with them and have not been modified, altered, or deteriorated.

For purposes of this Article, two (2) persons are economically related where one person can exercise a decisive influence on the other, either directly or indirectly, with respect to the use of the rights on the trademark, or where a third party may exercise such an influence on both persons.]

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<sup>8</sup> For the purposes of this Article the term "person" includes natural and legal persons.

[4.1. This Chapter shall not affect the authority of each Party to determine the conditions, if any, under which the exhaustion of rights related to products legitimately introduced in the market by, or with the authorization of the owner of the trademark shall apply.

However, if a Party recognizes the principle of domestic exhaustion or the principle of non-exhaustion, the right holder, based on his registration or grant, shall not prevent the circulation of patented goods or goods bearing a trademark, when legitimately introduced in the market under a compulsory license or any other safeguard.

Each Party undertakes to review their domestic legislation within a period not exceeding five (5) years after the entry into force of this Agreement, in order to adopt, at a minimum, the principle of regional exhaustion in regard to all Parties.]

[4.1. Each Party agrees to apply the principle of regional exhaustion of rights, i.e., the holder of the intellectual property right may not prevent the free trade of legitimate products, once lawfully introduced into the market in any Party, whether by the right holder himself or by a licensee or third party authorized by the right holder, provided that the products and the containers or packaging that have been in direct contact with such products have not been modified or altered.

Each Party shall have two (2) years from the entry into force of this Agreement to incorporate this principle in their national legislation.]

#### **Article 5. Rights Conferred**

[5.1. The owner of a registered trademark shall have the exclusive right to prevent all persons not having the owner's consent from using in the course of trade identical or similar signs [, including geographical indications,] for goods or services [that are identical or similar] [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 case of the use of an identical sign for [identical][identical or similar][related] goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of each Party making rights available on the basis of use.]

#### **Article 6. Well-Known Marks**

[6.1. Each Party shall protect well known marks pursuant to Article 6 bis of the Paris Convention and Article 16.2 and 16.3 of the TRIPS Agreement.]

[6.2. In applying Article 6 bis of the Paris Convention, no Party shall require that the reputation of the trademark extend beyond the sector of the public that normally deals with the relevant goods or services.]

[6.3. Article 6bis of the Paris Convention (1967) shall apply, *mutatis mutandis*, to goods or services which are not similar to those identified by a well-known trademark, 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.]

## **Article 7. Exceptions**

[7.1. 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 interests of the trademark owner and of third parties.]

[7.1. Each Party may establish exceptions pursuant to Article 17 of the TRIPS Agreement.]

## **Article 8. Term of Protection**

8.1. Initial registration and each renewal of registration of a trademark shall be for a term of not less than ten (10) years [from the date of filing of the application or the date of its registration according to the legislation of each Party]. The registration of a trademark shall be renewable indefinitely.

## **Article 9. Requirement of Use**

[9.1. Each Party shall apply the provisions of Article 19 of the TRIPS Agreement.]

[9.1. Use of a trademark shall be required by a Party to maintain registration of a trademark.]

[9.2. In procedures for cancellation due to non-use, according to the national legislation of each Party, the burden of proof on actual use of the trademarks shall be on the holder of the mark.]

## **[Article 10. Other Requirements]**

[10.1 Each Party shall apply Article 20 of the TRIPS Agreement.]

## **Article 11. Licensing and Assignment**

[11.1. Each Party may determine the conditions for the licensing and assignment of trademarks pursuant to Article 21 of the TRIPS Agreement.]

[11.2. Licensing agreements shall be in writing and registered with the competent body of the Party and shall not include clauses that restrain trade. If a license is not registered it shall not have effect against third parties.]

[11.2. The competent authorities of each Party may implement mechanisms for the recording of trademark licenses.]

[11.2. No Party shall require recordal of trademark licenses to establish the validity of the license or to assert any rights in a trademark.]

## **Article 12. Procedural Issues**

12.1. Each Party shall ensure that procedures for applying for, processing, registering and maintaining the registration of trademarks are sufficiently clear and transparent, respecting principles of due process.

[12.2. Each Party shall provide a system for the registration of trademarks, which shall include:

- a) written notice to the applicant<sup>9</sup>of the reasons for the refusal to register its trademark;
- b) a reasonable opportunity for the applicant to respond to the notice;
- c) in the case of a final refusal to register, written notice to the applicant of the reasons for the final refusal; and
- d) for each decision rendered in an opposition or cancellation proceeding, a written explanation of the reasons for the decision.]

[12.3. Each Party shall work, to the maximum degree practical, to provide a system for the electronic application, processing, registration and maintenance of trademarks.]

#### [12.4. International Classification System

- a) Each registration or publication which concerns a trademark application or registration and which indicates goods or services shall indicate the goods or services by their names, [and may be] grouped according to the classes of the Nice Classification.
- b) Goods or services may not be considered as being similar to each other on the ground that, in any registration or publication, they appear in the same class of the Nice Classification. Conversely, goods or services may not be considered as being dissimilar from each other on the ground that, in any registration or publication, they appear in different classes of the Nice Classification.]

[12.5. Each Party shall publish each trademark either before its registration or promptly after it is registered, and shall afford a reasonable opportunity for petitions to cancel the registration. In addition, each Party [may][shall], afford an opportunity for the registration of a trademark to be opposed.]

#### **[Article 13. Domain names on the Internet] [Article XX. Domain names on the Internet]**

[13.1. Each Party shall participate in the Government Advisory Committee (GAC) of the Internet Corporation for Assigned Names and Numbers (ICANN) to promote appropriate country code Top Level Domain (ccTLD) administration and delegation practices and appropriate contractual relationships for the administration of the ccTLDs in the Hemisphere. Each Party shall have its domestic Network Information Centers (NICs) participate in the ICANN Uniform Dispute Resolution Procedure (UDRP) to address the problem of cyber-piracy of trademarks.]

[13.1. Each Party shall make efforts, to the extent possible, to promote an adequate administration of domain names.]

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<sup>9</sup> [For the purposes of this Article, "Notice to the applicant" refers to the notice to the applicant or his agent or representative in the country of application.]

## **Subsection B.2.b. Geographical Indications**

### **[Article 1. Definition]**

[1.1. “Geographical indication” shall be understood to be the name of a particular country, region or locality, or a name that, without being that of a particular country, region or locality, refers to a specific geographical zone, which serves to designate a product originating therein, the qualities, reputation or other characteristics of which are due exclusively or essentially to the geographical environment in which it is produced, including both natural and human factors.]

[1.2. Any sign, or any combination of signs, capable of identifying a good or service 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 or service is essentially attributable to the geographical origin of the good or service, shall be capable of constituting a geographical indication.]

### **Article 2. Protection of Geographical Indications**

[2.1. Each Party shall protect geographical indications pursuant to its legislation and Articles 22, 23 paragraphs 1-3 and 24 paragraphs 4-9 of the TRIPS Agreement [, at the request of the competent authorities or interested parties of the Party where the geographical indication is protected].]

[2.2. Geographical indications protected in a Party shall not be considered common or generic for distinguishing the good, while its protection in the country of origin subsists.]

### **[Article 3. Protectable Subject Matter]**

[3.1. The use of geographical indications] in relation to natural, agricultural, handicraft or industrial products from the Parties shall be exclusively reserved for the producers, manufacturers and craftsmen who have their production or manufacturing facilities in the locality or region of the Party identified or referred to by such indication. [Only producers, manufacturers and craftsmen authorized to use a registered geographical indication are allowed to use with it the expression “Geographical Indication”].]

### **Article 4. [Right of Action][Ownership]**

[4.1. Each Party may establish that the declaration of protection of a geographical indication be made *ex-officio* or at the request of persons who can prove a legitimate interest, understood as a natural or juridical person directly engaged in the extraction, production or manufacture of the goods to be covered by the geographical indication as well as producer associations. State, departmental, provincial or municipal authorities shall also be considered interested parties when the geographical indications in question are located within their jurisdiction.]

### **Article 5. [Rights Conferred]**

[5.1. No Party shall permit the importation, manufacture or sale of a product that uses a geographical indication protected in another Party, unless it has been manufactured [and certified] therein, pursuant to its laws, regulations and other norms applicable to that product.]

[5.1. The owner of a geographical indication shall have the exclusive right to prevent all persons not having the owner's consent from using in trade identical or similar signs, including trademarks, for goods or services that are related to those in respect of which the owner's geographical indication is registered, where such use would result in a likelihood of confusion. In case of the use of an identical sign for related goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Parties' making rights available on the basis of use.]

#### **Article 6. [Relation to Trademark Protection]**

[6.1. Signs that reproduce, imitate or include a protected geographical indication for the same good, or for different goods, may not be registered as trademarks where such use might cause likelihood of confusion or of association with the indication.]

#### **[Article 7. [Procedural Issues] [Transparency] ]**

[7.1. If Parties provide for notification and/or recordal as a legal means to protect geographical indications:

- a) Each Party shall accept applications for such notification and/or recordal of geographical indications without the requirement for intercession by a Party on behalf of its nationals;
- b) Each Party shall ensure that geographical indications are published for opposition, as well as cancellation, and shall provide processes to effect opposition and cancellation of geographical indications that are the subject of such notification and/or recordal systems.]

#### **Subsection B.2.c. Copyright and Related Rights**

##### **Article 1. Definitions**

[For the purposes of the provisions on Copyright and Related Rights, the following will be understood to mean:]

-[**Author:** [Natural\*] person who produces the [intellectual] creation;]

-[**Author:** Natural person who creates a literary or artistic work;]

-[**Performer:** the person who performs, sings, reads, recites, interprets or in any way executes a [literary and artistic] work [or an expression of folklore];]

-[**Performers:** all actors, singers, musicians, dancers, or other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore;]

-[**Competent National Authority:** Body appointed for the purpose by the relevant national legislation;]

-[**Copy:** Physical medium in which the work is embodied as a result of an act of reproduction;]

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\* Brackets in Spanish only; this symbol will appear wherever multiple Spanish expressions are represented by a single expression in English.

-[**Successor in interest:** The person, whether natural person or legal entity, to whom the rights recognized in the law are transferred, in whole or in part, by any means;]

-[**Successor in title:** The person, whether natural person or legal entity, to whom rights accorded by this Chapter are transferred by any means;]

-[**Distribution to the public:** Act of making available to the public the original of the work, or [one (1) or more] copies thereof, [on a phonogram or a permanent or temporary image of the work,] through sale, rental, loan or any other means [, known or to be known, of transferring ownership or possession of the original or copy];]

-[**Distribution to the public:** any act by which the copies of a work are offered directly or indirectly to the general public or to a part thereof. [Distribution to the public through sale, rental, public loan or any other transfer of the ownership or possession of the original of the work, or copies thereof that have not been subject to distribution authorized by the author. The rental of a copy of an audiovisual work, of a work contained in a soundtrack, of a computer program, regardless of the ownership of the copy.]]

-[**Broadcast:** The [direct or indirect] transmission of sounds or images and sounds, over a distance for public reception[, through any medium or procedure, either through cable or wireless];]

-[**Expressions of folklore:** Productions using elements characteristic of the traditional cultural patrimony, consisting of all literary and artistic works created in the national territory by unknown or unidentified authors presumed to be nationals or members of their ethnic communities, and that are transmitted from generation to generation and reflects the traditional artistic or literary perspective of a community;]

-[**Fixation:** The incorporation of signs, sounds or images, [or] a combination thereof[, or a digital representation thereof,] in a physical material that enables them to be [read,] perceived, reproduced or communicated[, or any other form of use];]

-[**Phonogram:** Any [first time] [exclusively aural] fixation of the sounds of a performance or of other sounds[, or of a [digital] representation thereof, other than [in the form of] a fixation included in [a cinematographic or] an audiovisual work]. [Phonographic and magnetic [and digital] recordings shall be considered copies of phonograms];]

-[**Rights management information:** Information which 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, or information about the terms and conditions of the use of the work, performance or phonogram, and any numbers or codes that represent such information, when any of these items is attached to a copy of the work, performance or phonogram or appears in conjunction with the communication or making available of a work, performance or phonogram to the public. Nothing in the provisions on Copyright and Related Rights requires the owner of any right in the work, performance or phonogram to attach rights management information to copies of it or to cause rights management information to appear in connection with a communication of the work, performance or phonogram to the public.]

-[**Effective technological measure:** Any technology, device or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other subject matter, or protects any copyright or any rights related to copyright.]

-[**Work:** Any original intellectual creation of an artistic, scientific or literary nature, susceptible of disclosure or reproduction in any form;]

-[**Audiovisual work:** Any creation expressed by a series of linked images, [which give it the sensation of movement,] with or without the incorporation of sound, [which is] intended essentially for showing by means of projection apparatus or any other means of communicating images and sounds, independently [of the nature or] of the characteristics of the physical medium in which said work is embodied;]

-[**Audiovisual work:** work consisting of a sequence of connected images, with or without sound, intended for exhibition by means of a suitable device for public communication of sound and images;]

-[**Audiovisual work:** a work resulting from the fixation of images, with or without sound, intended for creating, by means of reproduction thereof, the impression of movement independently of the processes used to capture it, the carrier used initially or subsequently to fix it, as well as the means used for conveying it;]

-[**Broadcasting organization:** Radio or television company that transmits programs to the public[, and makes decisions on the programs to be transmitted];]

-[**Producer:** Person, whether natural person or legal entity, who has the initiative for, coordination of, and responsibility for producing the work; for example, an audiovisual work or a computer program;]

-[**Producer:** the natural person or legal entity who takes the initiative to and has the responsibility for the first fixation of the phonogram or the audiovisual work, whatever the nature of the carrier used;]

-[**Producer of a phonogram:** The person, or the legal entity, under whose initiative, coordination and responsibility, the first fixation of the sounds of a performance or other sounds are taken;]

-[**Producer of phonograms:** Natural person or legal entity who takes the initiative and has responsibility and coordination of the first fixation of the sounds of a performance or other sounds, and digital representations thereof;]

-[**Producer of a phonogram:** a person or legal entity who through his initiative, under his responsibility and coordination takes the first fixation of the sounds of an interpretation, performance or other sounds, or representation thereof;]

-[**Computer programs:** The expression in words, codes, plans or any other form of a set of instructions which, on being incorporated into an automated reading device, is capable of making a computer, an electronic or similar device capable of processing information to execute a specific task or produce a specific result. Software also includes technical documentation and users' manuals. [The protection of computer programs includes both operating and application software, either in source code or object code, as well as technical documentation and users' manuals;]]

-[**Publication:** Production and offering copies to the public, with the consent of the right holder, provided that copies are offered to the public in a reasonable quantity, bearing in mind the nature of the work;]

-[**Publication:** the act of lawfully making a work available to the public, with the author's consent, in sufficient amounts to satisfy reasonable needs given the nature of the work. Representation of dramatic, dramatico-musical, or cinematographic works, the performance of a musical work, public recital of a

literary work, transmission or broadcast of literary or artistic works, exhibition of a work of art, or the construction of an architectural design do not constitute publication;]

-[**Publication:** the offering of a literary or artistic work to the public, with the consent of the author, or any other copyright holder, through any form or process, in a quantity of copies that reasonably satisfies the needs of the public;]

-[**Public:** Aggregation of individuals, whether or not in the same place, that have access by any medium to a work, artistic performance, phonogram or broadcast, regardless of whether they do so at the same time or in different times and places;]

-[**Public:** any aggregation of individuals intended to be the object of, and capable of perceiving, communications or performances of works, regardless of whether they can do so at the same or different times or in the same or different places, provided that such an aggregation is larger than a family and its immediate circle of acquaintances or is not a group comprising a limited number of individuals having similarly close ties that has not been formed for the principal purpose of receiving such performances and communications of works;]

-[**Public:** includes for the purposes of copyright and related rights with respect to rights of communication and performance of works provided for under Articles 11, 11<sup>bis</sup>.(i) and 14.1.(ii) of the Berne Convention, with respect to dramatic, dramatico-musical, musical, literary, artistic or cinematographic works, at least, any aggregation of individuals intended to be the object of, and capable of perceiving, communications or the performance of works, regardless of whether they can do so at the same or different times or in the same or different places, provided that such an aggregation is larger than a family and its immediate circle of acquaintances or is not a group comprising a limited number of individuals having similarly close ties that has not been formed for the principal purpose of receiving such performances and communications of works;]

-[**Broadcasting:** [Communication at a distance by] [The] wireless transmission [, including via satellites,] of sounds, or images and sounds, or representations thereof, for public reception, and the transmission of encrypted signals, where the means of decrypting are provided to the public by broadcasting organizations or with their consent;]

-[**Broadcasting:** communication at a distance of sounds, or images and sounds, or representations or both, via electromagnetic waves propagated through space without artificial guidance, for the purpose of their reception by the public;]

-[**Public performance:** Any representation, diffusion, [interpretation] or performance carried out in theaters, cinemas, concert halls, dance halls, restaurants, [social, sport or recreation] clubs [of any nature], [shops,] commercial establishments, industries and banks, hotels, means of transport, stadiums, gymnasiums, amphitheatres, radio and television, and all those carried out outside the private domicile, whether or not for direct or indirect profit, and either with participation by artist-interpreters or performers or through phono-mechanical processes audiovisual or electronic.]

-[**Reproduction:** the realization, by any medium, of one (1) or more copies of a work, phonogram, or of a sound or audiovisual fixation, either total or partial, permanent or temporary, on any type of material base, including storage by electronic media;]

-[**Reproduction:** the fixation [, by any procedure,] of the work [or intellectual production,] in a [physical support or] medium that makes possible its communication [, including electronic storage, as well as the] [or the] making of [one or more] copies of a work [, directly or indirectly, temporarily or permanently, in whole or in part,] by any means [or process] [and in any form known or to be known].]

-[**Reproduction** includes any act designed to accomplish, in any manner or through any procedure, the material fixation of the work, or to obtain copies of all or part thereof; among other means, by printing, drawing, sound recording, photography, modeling, or through procedures using graphic or visual arts, as well as by mechanical, electronic, phonographic or audiovisual recording methods.]

-[**Retransmission:** Relaying of a signal or of a program received from another source, through the distribution of signs, sounds or images by wireless means, or by wire, cable, fiber optics or other comparable means;]

-[**Retransmission:** the simultaneous [or subsequent] broadcast by a broadcasting entity of a broadcast from another broadcasting entity;]

-[**Encrypted program-carrying satellite signal:** means a program-carrying satellite signal that is transmitted in a form whereby the aural or visual characteristics, or both, are modified or altered for the purpose of preventing the unauthorized reception, by persons without the authorized equipment that is designed to eliminate the effects of such modification or alteration, of a program carried in that signal;]

-[**Right holder.** Natural or juridical person who, as author or successor in title or assignee, holds the economic rights derived from literary or artistic works;]

-[**Ownership:** The holding of rights recognized under this Chapter;]

-[**Transmission or broadcasting:** the dissemination of sounds or of sounds and images by wireless means, satellite signals, wire, cable or other channel, optical media or any other wireless means;]

-[**Cable transmission:** transmission by wire, cable, fiber optic cable or any other analogous means for the transmission of signals;]

-[**Fair use:** Use that does not interfere with the normal exploitation of the work or [unreasonably] [unjustifiably] prejudice the legitimate interests of the author [or the right holder;]]

-[**Personal use:** Reproduction or other use of the work of another person in a single copy, exclusively for an individual's own purposes, in cases such as research and personal entertainment;]

[For the purposes of this Chapter, the following definitions apply with respect to performers and producers of phonograms:]

-[**Performers:** 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; ]

-[**Fixation:** means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device;]

-[**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;<sup>10</sup>]

-[**Producer of a phonogram**: means the person, or the legal entity, who or 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;]

-[**Publication of a fixed performance or a phonogram**: means the offering of copies of the fixed 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;]

-[**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 its consent.]

## **Copyright**

### **Article 2. [Protectable Subject Matter] [Scope of protection]**

[2.1. The following are not subject to copyright, among other:

- a) ideas, regulatory procedures, methods, systems, mathematical designs or concepts *per se*;
- b) outlines, plans or rules for conducting mental processes, games or business;
- c) blank forms to be completed with any type of information, scientific or otherwise, and instructions thereon;
- d) texts of treaties or conventions, laws, decrees, regulations, judicial decisions, and other official records;
- e) information for everyday use such as calendars, diaries, official land registers, or diaries, and keys;
- f) individual names and title;
- g) industrial or commercial exploitation of the ideas in the work]

[2.1. The Protection conferred by Copyright to any original creation, of a literary or artistic nature, is not extended to any idea, procedure, system, process, operating method, concept, or principle, independently of the manner in which it is described, explained, illustrated in said work or incorporated into same.]

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<sup>10</sup> [It is understood that the definition of phonogram provided herein does not suggest that rights in the phonogram are in any way affected through their incorporation into a cinematographic or other audiovisual work.]

**Article 3. [Moral rights]<sup>11</sup>**

[3.1. Moral rights shall be protected, at a minimum, pursuant to Article 6 bis of the Berne Convention.]

[3.2. National legislation of each Party may recognize other moral rights.]

**Article 4. Economic Rights**

[4.1. Each Party shall grant to the authors or other rightholders the exclusive right to authorize, by any means, the use or exploitation of the literary or artistic work, with such limitations and exceptions as may be determined in national laws.]

[4.1. Each Party shall grant the authors or, when applicable, their successors in title, the exclusive right to authorize or prohibit with respect to literary and artistic works:

- a) the reproduction of the work by any means or process;
- b) the communication of a work to the public by any means serving to convey the words, signals, sounds, or images thereof;
- c) The public distribution of the original or copies of the work by sale, lease, or rental. Nothing in this Chapter shall affect the freedom of each Party to determine the conditions, if any, under which the exhaustion of rights applies after the first sale or other transfer of ownership of the original or copies of the work with the authorization of the author.
- d) The importation into the territory of any Party of copies made without the right holder's authorization;
- e) The translation, adaptation, arrangement, or other transformation of the work.]

[4.2. The different modalities of using [literary or artistic] works or [performers and producers of phonograms] are independent of each other, the authorization granted by the author [, performer or by the producer], respectively, shall not extend to any other uses.]

**Article 5. Right of reproduction**

[5.1. The author, or his successors in title or in interest where applicable, shall have the exclusive right to [carry out] authorize or prohibit the reproduction of the work directly or indirectly, temporarily or permanently, in whole or in part, by any process and in any form known or to be known.]

[5.1. Each Party shall grant the authors of literary and artistic works [and other holders of exclusive rights], the exclusive right of authorizing the reproduction of their works by any procedure and in any manner, including by digital means. Each Party may determine that the right of exclusivity of reproduction shall not be applicable when that reproduction is temporary and merely for the purpose of making the work perceptible on electronic media or when it is transitory or incidental, provided that it occurs during the course of use of the work duly authorized by the owner. It shall also be lawful to make a single copy of computer programs for security or backup purposes. ]

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<sup>11</sup> [One delegation indicated that they prefer to place the provisions on moral rights after the provisions on economic rights. ]

## **Article 6. Right of distribution**

[6.1. [Authors of literary and artistic works shall enjoy] [Each Party shall provide to authors, to performers and to producers of phonograms and to their successors in interest] [the exclusive right of authorizing] [the making available to the public of the original and copies of their works [and phonograms] through sale or other transfer of ownership [of the original or of a copy of the work with the authorization of the author].]

[6.2. Each Party shall grant authors and other right holders the exclusive rights to authorize the making of the original and copies of their works available to the public by means of sale or other transfer of ownership, or by means of a user's license.]

[As used in this Article, the expressions "copies" and "original and copies," being subject to the right of distribution refer exclusively to fixed copies that can be put into circulation as tangible objects.]

[6.3. Nothing in this Chapter shall affect the freedom of a Party to determine the conditions, if any, under which the exhaustion of the rights in paragraph 6.2 (Copyright) applies after the first sale or other transfer of ownership of the original or copies of the works with the authorization of the author. [Each Party shall undertake to reexamine its national legislation within a period not exceeding five (5) years from the entry into force of this Chapter to adopt, at a minimum, the principle of regional exhaustion in regards to countries signatories to this Chapter.]]

[6.4. Each Party shall provide to authors, to performers, to producers or phonograms and to their successors in interest the right to authorize or prohibit the importation into each Party's territory of copies of the work, performance, or phonogram, including where the imported copies were made with the authorization of the author, performer or producer of the phonogram or their successors in interest.]

## **Article 7. [Right of Participation]**

[7.1. In respect of the original works of art and original manuscripts of writers and composers, each Party shall grant the author –or after his death, to the persons or institutions to which the rights are conferred under national legislation- the unalienable right to participate in sales of the work made after the initial transfer by the author.]

## **Article 8. Right of communication to the public**

[8.1. The author, or his successors in title where applicable, shall have the exclusive right to carry out, authorize or prohibit the communication of the work to the public by any means serving to convey the words, signs, sounds or images thereof. Communication to the public shall be understood to mean any act by which two (2) or more persons, whether or not gathered together in the same place, may have access to the work without the prior distribution of copies to each one of them, and especially the following:

- a) stage presentations, recitals, dissertations and public performance of dramatic, dramatico-musical, literary and musical works, by any means or process;
- b) the public projection or display of cinematographic or other audiovisual works;

- c) the transmission of any work by broadcasting or by any other means of wireless dissemination of signs, sounds or images. The concept of transmission shall likewise include the sending of signals from a ground station to a broadcasting or telecommunication satellite;
- d) the transmission of works to the public by wire, cable, optic fiber or other comparable means, whether free or by subscription;
- e) the retransmission, by any of the means specified in the foregoing subparagraphs, and by a broadcasting organization different from the original one, of the work broadcast by radio or television;
- f) the emission or transmission in or to a place accessible to the public and by means of any appropriate apparatus, of a work broadcast by radio or television;
- g) the public display of works of art or reproductions thereof;
- h) public access to computer data bases by telecommunication, by means of telecommunication, when said data bases incorporate or constitute protected works; and,
- i) in general, the dissemination of signs, words, sounds or images by any known or future process.
- j) The making available to the public of their works, in such a way that members of the public may access them from a place and at a time individually chosen by them.]

[8.1. [Authors of literary and artistic works shall enjoy] [Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 14(1)(ii), and 14*bis*(1) of the Berne Convention, each Party shall provide to authors, to performers and to producers of phonograms and to their successors in interest] [the exclusive right to authorize [or prohibit] the communication to the public of their works [, performances or phonograms] by wire or wireless means, including the making available to the public of their works [, 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.]]

[8.1. Each Party shall grant the authors of literary and artistic works the exclusive right to authorize any communication of their works to the public by wire or wireless means, including the making available to the public of their works, such that members of the public may access them from a place and at a time individually chosen by them.]

[8.2. This right may be subject, in the case of performers and producers of phonograms, to national exceptions or limitations for traditional free over-the-air broadcasting and further, with respect to other non-interactive transmissions, may be subject to national limitations in certain special cases as may be set forth in national law or regulations, provided that such limitations do not conflict with a normal exploitation of performances or phonograms and do not unreasonably prejudice the interests of such rightholders.]

[8.3. The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication to the public. [It is further understood that nothing in Article 8 (Right of

Communication to the Public) precludes a Party from applying Article 11 bis(2) of the Berne Convention.]]

### **Article 9. Term of protection**

[9.1. With respect to the term of protection, the provisions of the Berne Convention shall be applicable.]

[9.1. Each Party shall provide that:

- a) Where the term of protection of a literary or artistic work is to be calculated on the basis of the life of a natural person, the term shall be the life of the author and no less than seventy (70) years after the author's death.
- b) Whenever the term of protection of a literary or artistic work is calculated on a basis other than the life of a natural person, such term shall be no less than fifty (50) years from the end of the calendar year of authorized publication, or, failing such authorized publication within fifty (50) years from the making of the work, fifty (50) years from the end of the calendar year of making.]

[9.1. Each Party shall provide that:

- a) where the term of protection of a work (including a photographic work), performance or phonogram is to be calculated on the basis of the life of a natural person, the term shall be not less than the life of the author and seventy (70) years after the author's death;
- b) where the term of protection of a work (including a photographic work), performance or phonogram is to be calculated on a basis other than the life of a natural person, the term shall be not less than ninety-five (95) years from the end of the calendar year of the first authorized publication of the work, performance or phonogram or, failing such authorized publication within twenty-five (25) years from the creation of the work, performance or phonogram, not less than one hundred twenty (120) years from the end of the calendar year of the creation of the work, performance or phonogram.]

[9.2. The term of protection for authors of photographic works shall be fifty (50) years counted from the end of the calendar year of their making.]

### **Article 10. Limitations and exceptions**

[10.1. Each Party shall confine limitations or exceptions [to Copyright] [to exclusive rights] [to copyright or related rights] [to rights set forth in this Article] 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.]

[10.1. Each Party may provide, in their national legislation, limitations and exceptions to the rights provided to authors of literary or artistic works in this Section in certain special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.]

**Article 11. [Protection of existing subject matter]**

[11.1. Each Party shall apply the provisions of Article 18 of the Berne Convention for the Protection of Literary and Artistic Works (and Article 14.6 of the TRIPS Agreement), *mutatis mutandis*, to the subject matter, rights and obligations provided for in this Chapter.]

**Article 12. [Transfer of Rights]**

[12.1. Each Party shall provide that for copyright and related rights:

- a) any person acquiring or holding [any] economic rights may freely and separately transfer such rights in any form [for the purposes of exploitation and enjoyment by the assignee]; and,
- b) any person acquiring or holding [any] such economic rights [by virtue of a contract, including contracts of employment underlying the creation of [any type of] works and phonograms,] shall be able to exercise those rights in its own name and enjoy fully the benefits derived from those rights.]

[12.1. Economic rights may be transferred or licensed on a contractual basis, without prejudice to the laws of each country on copyright and related rights applicable in conformity with the rules of international private law.

- a) For works created for a natural or legal person in response to a request or in the framework of work relationship or in carrying out a government responsibility, the right holder of the moral and economic rights shall be the natural person that created the work or participated in its creation.

However, it is assumed that the economic rights over the work have been transferred to the person that requested it, to the employer, or to public entity, as the case may be, to the extent justified by the normal activities of the person acquiring the right at the time of the request, unless expressly stated otherwise.

In no case may the requesting party, the employer, or the public entity use or dispose of the work in a sense or for a purpose other than that stemming from the provisions set forth in the two preceding paragraphs.

The aforementioned implies that the author has granted authorization to disclose his work.

- b) The same provisions shall be applicable, where relevant, to holders of related rights protected under this section.
- c) Any total or partial transfer of copyright or of related rights shall be in writing.
- d) The transfer of copyright and related rights shall be limited to exploitation modalities expressly agreed on and to the duration and territorial scope determined. If no mention of duration is made, the transmission is limited to five (5) years and to the territorial scope of the country in which the transfer is made.]

[12.2. No Party may grant translation and reproduction licenses permitted under the Appendix to the Berne Convention where legitimate needs in that Party's territory for copies or translations of the work could be met by the right holder's voluntary actions but for obstacles created by the Party's measures.]

**[Related rights]**

**Article 13. [Safeguard of Copyright with respect to related rights]**

[13.1. Protection granted under this Chapter for related rights shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Chapter may be interpreted as prejudicing such protection.]

**Article 14. [Points of attachment]**

[14.1. Each Party shall accord the protection provided under this Chapter to the performers and producers of phonograms who are nationals of other Parties and to performances or phonograms first published or first fixed in a Party. A performance or phonogram shall be considered first published in any Party in which it is published within thirty (30) days of its original publication.<sup>12]</sup>

**Article 15. [Economic Rights of Performers in Their Unfixed Performances]**

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

- a) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance, and
- b) the fixation of their unfixed performances.

With respect to all rights of performers and producers of phonograms, the enjoyment and exercise of these rights provided for in this Chapter shall not be subject to any formality.]

**Article 16. Rights of Performers**

**[Moral Rights]<sup>13</sup>**

[16.1.

- a) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.
- b) The rights granted to a performer in accordance with paragraph 16.1 a) shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be

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<sup>12</sup> [For the application of Article 14 (Points of Attachment. Related Rights), it is understood that fixation means the finalization of the master tape.]

<sup>13</sup> [One delegation indicated that they prefer to place the provisions on moral rights after the provisions on economic rights.]

exercisable by the persons or institutions authorized by the legislation of the Party where protection is claimed. However, the Party whose legislation, at the moment of [their] its ratification of or accession to this Agreement, does not provide for protection after the death of the performer of all rights set out in paragraph 16.1 a) may provide that some of these rights will, after his death, cease to be maintained.]

[16.1. Performers have the moral rights of integrity and authorship of their performances, even after the transfer of the economic rights. Each Party may authorize in their domestic legislation the reduction, compacting, editing or dubbing of the work under the responsibility of the producer, who shall not distort the artist's performance.]

**[Economic Rights of Performers]**

[16.2. Each Party shall grant performers the right to authorize or prohibit:

- a) the fixation of their performances;
- b) the reproduction and public performance of their fixed performances;
- c) the broadcast of their fixed or unfixed performances;
- d) the making available to the public of their performances in such a way that any person may access them from a place and a time individually chosen by them;]

[The provisions of Article 14.6 of the TRIPS Agreement shall also apply, *mutatis mutandis*, to the rights of performers and producers of phonograms in phonograms.]

[16.2. Performers shall enjoy the exclusive right to authorize or prohibit, as regards their performances:

- a) The broadcasting and communication to the public of their unfixed performances;
- b) The fixation of their unfixed performances;
- c) The direct or indirect reproduction of their fixed performances;
- d) The distribution to the public of the original and copies of their fixed performances. Nothing in this Chapter shall affect the freedom of each Party to determine the conditions, if any, under which the exhaustion of rights applies after the first sale or other transfer of ownership of the original or copies of the fixed performance with the authorization of the performer;
- e) The commercial rental to the public of the original and copies of their fixed performances;
- f) The making available to the public of their fixed performances;
- g) The importation into the territory of any Party of copies of the fixed performance made without the authorization of the performer.

Performers shall have the right to an equitable and single remuneration for the direct or indirect use for the broadcast or any communication to the public of published phonograms for commercial purposes, which may be shared with producers of phonograms in accordance with terms established in the national legislation of the Parties.]

### **Article 17. Rights of Producers of Phonograms**

[17.1. Each Party shall grant producers of phonograms the exclusive right to authorize or prohibit:

- a) the direct or indirect reproduction of their phonograms;
- b) the distribution of copies of the phonogram by sale;
- c) the making available to the public of their phonograms in such a way that any person may access them from a place and a time individually chosen by them; ]

[17.1. Producers of phonograms shall enjoy the exclusive right to authorize or prohibit with respect to their phonograms:

- a) The direct or indirect reproduction of their phonograms;
- b) The distribution of the original and copies of their phonograms.  
Nothing in this Chapter shall affect the freedom of each Party to determine the conditions, if any, under which the exhaustion of rights applies after the first sale or other transfer of ownership of the original or copies of the phonogram with the authorization of the producer of the phonogram;
- c) The commercial rental to the public of the original and copies of their phonograms;
- d) The making available to the public of their phonograms; and
- e) The importation into the territory of any Party of copies of the phonogram made without the authorization of the producer of the phonogram. [Importation and distribution of phonograms shall be permitted, provided that they are legitimate.]

Producers of phonograms shall have the right to an equitable and single remuneration for the direct or indirect use for the broadcast or any communication to the public of published phonograms for commercial purposes, which may be shared with performers in accordance with terms established in the national legislation of the Parties.]

### **Article 18. Rights of Broadcasting Organizations**

[18.1 Each Party shall grant to broadcasting organizations the [exclusive] right to authorize or prohibit [the following acts when undertaken without their authorization]:

- a) the fixation of their broadcasts [on a physical medium];
- b) the reproduction of the fixation of their broadcasts [without their consent, except:
  - i) When this is for private use

- ii) When short fragments have been used for the purpose of reporting on current events;
  - iii) When it is a short-lived fixation made by a broadcasting organizations itself for its own broadcasts; and,
  - iv) When it is to be used exclusively for teaching or research purposes.]
- c) the rebroadcasting, [ and the [subsequent] distribution by cable, optic fiber or any other means] [or process] [by wireless means] of their broadcast;
- [d) the communication to the public of their television broadcasts [if such communication is made in places accessible to the public against payment of an entrance fee] [, without prejudice to the rights of the owners of intellectual property included in the programming];]
- [e) the reception, in relation to commercial activities, of their broadcasts;]

[Where a Party does not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of TRIPS Article 14.3.]

[The broadcast referred to in Article 18.1 shall include the production of program-carrying signals intended for a broadcasting or telecommunication satellite, and also distribution to the public by a body that broadcasts or disseminates the transmissions of others received by means of such a satellite.]]

[18.1. Each Party shall provide for protection for broadcasting organizations as determined by the relevant international instrument.]

[18.1 Broadcasting organizations shall enjoy the right to authorize or prohibit:

- a) The retransmission of their broadcasts by any means or process;
- b) The fixation of their broadcasts on a physical medium;
- c) The reproduction of a fixation of their broadcasts; and
- d) The communication to the public of their television broadcasts.

Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention.]

## **Article 19. Term of Protection**

[19.1.

- a) The term of protection to be granted to performers under this Chapter shall last, at least, until the end of a period of fifty (50) years counted from the end of the year in which the performance was fixed.
- b) The term of protection to be granted to producers of phonograms under this Chapter shall last, at least, until the end of a period of fifty (50) years counted from the end of the year in which the phonogram was published, or failing such publication within fifty (50) years

from fixation of the phonogram, fifty (50) years from the end of the year in which the fixation was made.

- c) The term of protection to be granted to broadcasting organizations shall last, at least, fifty (50) years counted from the end of the year in which the broadcast took place.]

**Article 20. [Limitations and exceptions to related rights]**

[20.1. Each Party may provide in their national legislation for the same kinds of limitations or exceptions with regard to the protection of performers, producers of phonograms [and broadcasting organizations] as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works. Each Party shall confine any limitations of or exceptions to rights provided for in this Chapter to certain special cases which do not conflict with a normal exploitation of the performance or phonogram [or broadcast] and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram [or of broadcasting organizations.] ]

**[Obligations common to copyright and related rights]**

**Article 21. Protection of program-carrying satellite signals**

[21.1. Within one (1) year from the date of entry into force of this Agreement, each Party shall make it:

- a) a criminal offense to manufacture, import, sell, lease or any other commercial act that makes available a device or system that is primarily of assistance in decoding an encrypted program carrying satellite signal without the authorization of the lawful distributor of such signal; and
- b) a civil offense to receive, in connection with commercial activities, or further distribute, an encrypted program carrying satellite signal that has been decoded without the authorization of the lawful distributor of the signal or to engage in any activity prohibited under subparagraph 21.1.a).

Each Party shall provide that any civil offense established under subparagraph b) of paragraph 21.1, shall be actionable by any person that holds an interest in the content of such signal.]

[21.1. Each Party shall consider, as a civil offense, jointly or not with a criminal offense, and in conformity with their national legislation, the manufacture, importation, sale, renting or leasing or any other activity that permits the use of a device or system that is primarily of assistance in decoding an encrypted program carrying satellite signal without the authorization of the lawful distributor of that signal.]

[21.1. Each Party shall make it:

- a) a criminal offense to manufacture, assemble, modify, import, export, sell, lease or otherwise distribute a tangible or intangible device or system, knowing or having reason to know that the device or system is primarily of assistance in decoding an encrypted program-carrying satellite signal without the authorization of the lawful distributor of such signal;

- b) a criminal offense willfully to receive or further distribute an encrypted program- carrying satellite signal that has been decoded without the authorization of the lawful distributor of the signal; and
- c) a civil offense to engage in any activity prohibited under paragraph 21.1.a) or 21.1.b).

Each Party shall provide that any civil offense established under paragraph 21.1.c) shall be actionable by any person that holds an interest in the encrypted programming signal or the content thereof.]

**Article 22. [Obligations concerning technological measures]**

[22.1. Each Party shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors, performers, producers of phonograms, or broadcasting organizations or their successors in title in connection with the exercise of their rights under this Agreement or the Berne Convention and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

In accordance with the preceding paragraph, technological measures shall not affect the exercise of the exceptions or limitations established in national legislation.]

[22.1. In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors, by performers, by producers of phonograms and their successors in interest in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, performances and phonograms, each Party shall provide that any person who:

- a) knowingly, or having reasonable grounds to know, circumvents without authority any effective technological measure; or
- b) manufactures, imports, distributes, offers to the public, provides or otherwise traffics in devices, products or components or offers to the public or provides services, which:
  - i) are promoted, advertised or marketed for the purpose of circumvention of any effective technological measure, or
  - ii) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure, or
  - iii) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure;

shall be guilty of an offense, and shall be liable, upon the suit of any injured party, to relief by way of damages, injunction, accounts or otherwise.]

[22.2. The prohibition referred to in Article 22.1.b) prohibits circumvention of technological measures and does not require an affirmative response to such measures. This Article does not 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. This does not provide a defense to a claim of violation of Article 22.1.b).]

[22.3. Each Party shall provide that a violation of the law implementing the provisions of this Article is independent of any infringement that might occur under the Party's law on copyright and related rights.]

**Article 23. [Obligations concerning rights management information]**

[23.1. In order to provide adequate and effective legal remedies to protect rights management information

- a) each Party shall provide that any person who without authority, and knowingly, or, with respect to civil remedies, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any copyright or related right,
  - i) knowingly removes or alters any rights management information;
  - ii) distributes or imports for distribution rights management information knowing that the rights management information has been removed or altered without authority; or
  - iii) distributes, imports for distribution, broadcasts, communicates or makes available to the public copies of works or phonograms, knowing that rights management information has been removed or altered without authority,

shall be guilty of an offense, and shall be liable, upon the suit of any injured party, to relief by way of damages, injunction, accounts or otherwise.]

[23.1. Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right covered by this Agreement:

- a) Removing or altering any electronic rights management information without authorization;
- b) Distributing, importing for distribution, broadcasting, communicating, or making available to the public, without authorization, copies of works, performances, copies of fixed performances, phonograms, or broadcasting of signals knowing that electronic rights management information has been removed or altered without authorization.]

**Article 24. [Collective Administration of Rights]**

[24.1. Each Party shall facilitate and encourage collective administration of the rights enshrined in this Chapter, recognizing the legitimacy of societies formed for this purpose to exercise such rights, under the terms of their own statutes, and enforce them in administrative and judicial proceedings, without presenting any legal title other than those statutes. There shall be a presumption, in the absence of evidence to the contrary, that the rights so exercised have been directly or indirectly entrusted to them by their respective owners. Each Party shall establish measures to guarantee that societies are obliged to administer the rights that their owners entrust them with. The decisions and actions of societies for the collective administration of rights shall be guided by transparency and due participation of their respective members. Societies for the collective administration of rights shall be subject to inspection and supervision by the State.]

**[Article 25. Government use of Computer Programs]**

[25.1. Each Party shall issue appropriate administrative or executive decrees, laws, orders or regulations mandating that all government agencies use only computer programs authorized for intended use. Such instruments shall actively regulate the acquisition and management of software for such government use.]

**[Subsection B.2.d. Protection of [Expressions of] Folklore]**

**[Article 1. Protection of [Expressions of] Folklore]**

[1.1. Each Party shall ensure effective protection of all expressions of folklore and artistic expressions, of the traditional and folk culture.]

[1.1. Each Party shall ensure effective protection of all expressions of folklore, particularly those forms that are the product of the traditional and folk culture of indigenous people and communities, Afro-American and local communities.]

[1.1. Each Party shall protect traditional and popular culture manifested in any kind of folklore expression and production, as well as creations of popular art or craftwork.]

[1.2. Each Party shall provide that any fixation, representation or publication, communication or use in any form of a literary, artistic, folk art or craft work, shall identify the community or ethnic group to which it belongs.]

**Subsection B.2.e. Patents [for Inventions]**

**Article 1. Patentable Subject Matter**

[1.1. [Subject to the provisions of Article 3 (Exceptions to Patentability),] each Party shall make patents available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.]

[For purposes of this Article, a Party may treat the terms "inventive step" and "capable of industrial application" as being synonymous with the terms "non-obvious" and "useful", respectively.]

[1.1. Each Party shall apply Article [27.1] [27] of the TRIPS Agreement.]

[1.2. Each Party shall exclude information contained in public disclosures used to determine if an invention is novel or has an inventive step if the public disclosure was made or authorized by, or derived from, the patent applicant and occurs within twelve (12) months prior of the date of filing of the application in the Party.]

[1.2. Disclosure of an invention in any part of the world during the twelve (12) months prior to the filing date of the application or the recognized priority, as applicable, shall not affect the novelty of said invention, provided that the disclosure derives directly or indirectly from actions undertaken by the inventor or by third parties on the basis of information they obtain directly or indirectly from the inventor.]

[1.3. Subject to the exceptions in this Chapter, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether the products are imported or locally produced.]

[Each Party may prohibit, regulate, or limit the exploitation of patented inventions, and no provision of this Chapter shall be construed in any other manner.]

[1.4. Microorganisms shall be patentable as long as different measures are adopted as a result of the review established in Article 27.3 (b) of the TRIPS Agreement. For this purpose, account shall be taken of the commitments assumed by the Parties under the Convention on Biological Diversity.]

[1.5. The following shall not be considered inventions, among others:]

- [a] Discoveries;]
- [b] scientific theories, and mathematical methods;]
- [c] All or part of any living being, as found in nature, natural biological processes, and biological material, as existing in nature or isolated there from, including the genome or germ plasm of any living being;]
- [c] [All or part of biological and genetic material existing in nature or a replica thereof, in the biological processes implicit in animal, plant and human reproduction, including genetic processes involving material of such a nature as to produce a replica of itself under normal and free conditions as in nature;]
- [c] All types of living matter and substances preexisting in nature;]
- [d] Literary and artistic works or any other creation protected by copyright;]
- [e] Schemes, plans, rules, and methods for the pursuit of intellectual activities, games, economic and commercial activities;]
- [e] Economic or business plans, principles or methods and those related to purely mental or industrial activities or to games;]
- [f] modes for presenting information.]
- [g] Computer programs [*per se*];]
- [h] Diagnostic, therapeutic and surgical methods for the treatment of the human body or animals; and,]
- [i] The juxtaposition of previously known inventions or mixtures of known products, variations in their form, dimensions or materials, except when in reality such combination or fusion does not function separately, or where the qualities or functions characteristic thereof are modified to obtain an industrial result that is non-obvious to a technical specialist in the respective field.]

- [j) Products or processes already patented based on a different use to the one covered by the original patent.]

#### **[Article 2. Principles]**

[2.1. Each Party shall apply the principle of first to file, observing the right of priority stipulated in Article 4 of the Paris Convention (1967).]

#### **Article 3. Exceptions to Patentability**

[3.1. Each Party may exclude inventions from patentability only as defined in paragraphs 27.2 and 27.3 a) of the TRIPS Agreement.]

[3.1. Each Party may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public*, security, morality and mores, including to protect and promote human health and preserve human, animal and plant life, nutrition of the population, or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by its domestic laws.]

[3.1. The following inventions shall not be patentable nor shall they be published:

- a) Inventions the exploitation of which would be contrary to public order or morality.
- b) Inventions that are clearly contrary to human or animal health or life or that may cause serious environmental damage.
- c) Plants and animals other than microorganisms, and essentially biological processes for the production of plants or animals other than non-biological and micro-biological processes.]

[3.2. Each Party may provide for exceptions pursuant to Article [27.2 and] 27.3 of the TRIPS Agreement.]

[3.3. Each Party shall provide for protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The system of breeder's rights set forth in the International Convention for the Protection of New Varieties of Plants (UPOV) shall be considered an effective *sui generis* system.]

#### **Article 4. Rights Conferred**

[4.1. Each Party shall apply Article 28 of the TRIPS Agreement.]

[4.2. The scope of the protection conferred by a patent shall be determined by the wording of the claims. The description and drawings, or the deposit of biological material, where applicable, shall be used in the interpretation of the claims.]

#### **Article 5. Exceptions to Rights Conferred**

[5.1. 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.]

[5.1. Each Party may provide for exceptions pursuant to Article 30 of the TRIPS Agreement.]

[5.2. The patent owner may not exercise the right referred to in Article 4 (Rights Conferred) with respect to acts carried out:

- a) in a private circle and for non-commercial purposes;
- b) exclusively to experiment with the subject matter of the patented invention;
- c) exclusively for the purposes of teaching or scientific or academic research;
- d) the acts referred to in Article 5Ter of the Paris Convention on the Protection of Industrial Property;
- e) where the patent protects biological material that is capable of being reproduced, except for plants, using that material as a basis for obtaining a viable new material, except where the patented material must be used repeatedly to obtain the new material.]

[5.3. The rights conferred by a patent may not be enforced against a person who can prove that, prior to the date of application or, if appropriate, the date of priority of the application for the corresponding patent, he or she was already producing the product, or using the procedure that constitutes the invention in the country. That person shall have the right to continue producing the product and using the procedure as he or she had been doing, but this right may only be transferred or assigned together with the establishment or enterprise in which such production or use was being made. This exception shall not apply if the person acquired knowledge of the invention by unfair means.]

[5.4. Each Party may provide in its legislation that the rights conferred to patent holders shall not prevent unauthorized third parties from producing, in necessary and sufficient quantity, and use the patented product or the product produced using the patented procedure and to perform all the other acts necessary for the purposes of approving the marketing of products. Marketing thereof shall be done following the expiry of the patent.]

[5.4. Where a Party permits the use of a patented invention to generate information required by a regulatory authority to obtain approval to market a product, such Party shall limit such use to acts reasonably performed to generate information to demonstrate that a product is scientifically equivalent to a previously approved product, provided, however, that:

- a) where the grant of the patent precedes the approval for marketing of the product subject to the patent, the Party shall extend the term of the patent by a period sufficient to confer a reasonable term of exclusivity;
- b) any product produced under this authority shall not be commercially used, sold or offered for sale in the Party or exported outside the territory of the Party except as reasonably performed for obtaining marketing approval; and

- c) the patent owner shall be provided notice of the identity of any entity that includes data generated under this authority in an application for marketing approval based on the previously approved product that seeks the authority to market the product prior to expiration of the patent.]

#### **Article 6. Other Use<sup>14</sup>Without Authorization of the Right Holder**

[6.1. Each Party shall apply Article 31 of the TRIPS Agreement, maintaining the right to determine the grounds or reasons for authorizing use by third parties without the authorization of the right holder, that are different from the limitations and exceptions established in this Chapter.]

[6.1. Where a Party permits use of the subject matter of a patent without the authorization of a patent owner by the Government of the Party or by a private entity acting on behalf of the Government of the Party, such authorization shall comply with the following conditions:

- a) The authorization shall be granted only for public non-commercial purposes or in situations of a declared national emergency or other situations of extreme urgency.
- b) The authorization shall be limited to the making, using or importing of the patented invention solely to satisfy the requirements of the Government use, and shall not entitle a private party acting on behalf of the Government to sell products produced pursuant to such authorization to a party other than the Government, or to export the product outside the territory of the Party.
- c) The patent owner shall be provided with reasonable and entire compensation for such use and manufacture.
- d) No Party shall require the patent owner to transfer undisclosed information or technical "know how" related to a patented invention that has been subjected to involuntary use authorization.

No Party shall grant authorizations to third parties to use the subject matter of the patent without the consent of the patent owner, other than in circumstances specified in Article 5 (Exceptions), unless to remedy a practice determined after judicial or administrative process to be anti-competitive under the competition law of the Party. Each Party recognizes that an intellectual property right does not necessarily confer market power upon its owner.]

[6.2. On expiration of a three (3) year period following a patent grant, or four (4) years following the application for a patent, whichever is longer, each Party may grant a compulsory license mainly for the industrial manufacture of the product covered by the patent, or for full use of the patented process, at the request of any interested party, but only if, at the time of the request, the patent had not been exploited in the Party in which the license is sought, or if the exploitation of the invention had been suspended for more than one (1) year.

- a) Compulsory licenses shall not be granted if patent owners are able to give valid reasons for their failure to act, which may be reasons of *force majeure* or an act of God, in accordance with the domestic provisions in effect in each Party.

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<sup>14</sup> ["Other use" refers to use other than that allowed under Article 5 (Exceptions to Rights Conferred).]

- b) A compulsory license shall be granted only if, prior to applying for it, the proposed user has made efforts to obtain a contractual license from the patent holder on reasonable commercial terms and conditions and that such efforts were not successful within a reasonable period of time.
- c) Following the declaration by a Party of the existence of public interest, emergency, or national security considerations, and only for so long as those considerations exist, the patent may be subject to compulsory licensing at any time. In that case, the competent national office shall grant the licenses that are applied for. The owner of the patent so licensed shall be notified as soon as is reasonably possible.
- d) Each Party shall specify the scope or extent of the compulsory license and, in particular, the term for which it is granted, the subject matter of the license, and the amount of remuneration and the conditions for its payment.
- e) The grant of a compulsory license for reasons of public interest shall not reduce the right of the patent owner to continue exploiting it.
- f) Each Party shall refuse termination of a compulsory license if and when the conditions that led to the granting of the license are likely to recur.
- g) Each Party shall grant a license, upon request by the owner of a patent whose exploitation necessarily requires the use of another patent, and that right holder has been unable to secure a contractual license to the other patent on reasonable commercial terms. That license shall subject to the following conditions:
  - i) the invention claimed in the second patent shall involve an important technical advance of considerable economic significance in relation to the invention claimed in the first patent;
  - ii) the owner of the first patent shall be entitled to a cross-license on reasonable terms to use the invention claimed in the second patent; and,
  - iii) the license authorized in respect of the first patent shall be non-assignable except with the assignment of the second patent.
- h) The provisions of this article shall be applied to cases covered by Subsection B.2.1 (Intellectual Property Rights-Control of Anticompetitive Practices in Contractual Licenses) of the present Chapter.]

[6.2. Each Party shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which may result from the exercise of the exclusive right to conferred by the patent, for example, failure to work.]

[6.3. A compulsory license may not be applied for on the ground of failure to work or insufficient working before the expiration of a period of four (4) years from the date of filing of the patent application or three (3) years from the date of the grant of the patent, whichever period expires last; it shall be refused if the patentee justifies his inaction by legitimate reasons. Such a compulsory license shall be non-exclusive and shall not be transferable, even in the form of the grant of a sub-license, except with that part of the enterprise or goodwill which exploits such license.]

[6.4. Each Party has the right to grant other uses without the authorization of the right holder, with said uses understood to be compulsory licenses, as well as the freedom to determine the bases on which said licenses are granted.]

[6.5. Each Party has the right to determine what constitutes a national emergency or other circumstance of extreme urgency [, with the understanding that public health crises, including those related to HIV/AIDS, tuberculosis, malaria, and other epidemics, may constitute national emergencies.] ]

[6.6. For the purpose of determining what is understood to be reasonable commercial terms and conditions, the particular circumstances of each case must be taken into account as well as the average royalty for the sector in question in licensing agreements between independent parties.]

#### **[Article 7. Exhaustion of Rights]**

[7.1. A patent shall not confer on its owner the right to proceed against a third party making commercial use of a product protected by the patent once that product has been introduced into the commerce of any country by the owner or another person authorized by, or with economic ties to the owner of the patent.

For the purposes of the preceding paragraph, two (2) persons shall be deemed to have economic ties when one of the persons is able to exercise a decisive influence on the other, either directly or indirectly, with respect to the exploitation of the patent, or when a third party is able to exert such influence over both persons.]

[7.1. This Chapter shall not affect the right of each Party to determine the conditions under which exhaustion of rights shall operate with regard to any products placed legitimately on the market by the patent holder or by an authorized third party.

However, each Party undertakes to review its domestic laws within a maximum period of five (5) years from entry into force of this Agreement with a view to adopting at least the principle of regional exhaustion *vis a vis* all countries signatories to this Agreement.]

#### **Article 8. Revocation/Forfeiture**

[8.1. Each Party shall apply Article 32 of the TRIPS Agreement.]

[8.2. Each Party may revoke [or forfeit] a patent only when grounds exist that would have justified a refusal to grant the patent.]

[Administrative proceedings provided by a Party that permit a third party to challenge a finding that a patent complies with requirements of the patent law of the Party shall be limited to grounds that would have justified a refusal of the grant of the patent. Where such proceedings include opposition proceedings, opposition proceedings shall not be made available prior to the grant of the patent.]

#### **Article 9. Term of Protection.**

[9.1. The term of protection available shall not end before the expiration of a non-renewable period of twenty (20) years, counted from the filing date.]

[9.1. Each Party shall apply Article 33 of the TRIPS Agreement.]

[9.2. Each Party, at the request of the patent owner, shall extend the term of a patent to compensate for unreasonable delays that occur in granting the patent. For the purposes of this paragraph, an unreasonable delay shall at least include a delay in the issuance of the patent of more than four (4) years from the date of filing of the application in the Party, or two (2) years after a request for examination of the application has been made, whichever is later, provided that periods of time attributable to actions of the patent applicant need not be included in the determination of such delays.]

[9.3. Where a Party provides for the grant of a patent on the basis of a patent granted in another country, that Party, at the request of the patent owner, shall extend the term of a patent granted under such procedure by a period equal to the period of the extension, if any, provided in respect of the patent granted by such other country.]

#### **Article 10. Procedural Issues**

10.1. Each Party shall ensure that procedures for the granting of patents are sufficiently clear, and respect the principles of due process.

[10.2. Each Party shall establish a system for patenting inventions, which shall include at least:

- a) measures to ensure that applications in process are treated confidentially until they are published;
- b) publication of the patent application;
- c) submission of observations or opposition on behalf of third parties;
- d) the option to request that patents granted in breach of the rules in force be declared null and void or be cancelled.]

#### **Article 11. Conditions on Patent Applicants**

[11.1. Each Party shall apply Article 29 of the TRIPS Agreement.]

**[Subsection B.2.f. [Traditional Knowledge and Access to Genetic Resources under the Intellectual Property Framework][Relationship between the Protection of Traditional Knowledge and Intellectual Property, as well as the Relationship between Access to Genetic Resources and Intellectual Property] [The Protection of Traditional Knowledge, Access to Genetic Resources, and Intellectual Property]]**

#### **Article 1. [Application] [General principles]**

[1.1. Each Party shall ensure that the protection granted by intellectual property rights shall be accorded while safeguarding and respecting their rights over their genetic resources, as well as the traditional knowledge of their indigenous communities and local communities. Each Party shall provide for a definition of local communities in its national legislation.]

[1.1. The Parties recognize the past, present, and future contributions made by indigenous, Afro-American, and local communities to the development of biological and genetic resources and, in general, the contribution of their knowledge, innovations, and traditional practices to the culture and economic and social development of nations. Thus, the Parties agree to establish adequate and effective *sui generis* or other protection systems, on such traditional knowledge, innovations, and practices associated or not with biological and genetic resources.]

[1.2. The relationship between the protection of traditional knowledge of indigenous communities and local communities and intellectual property as well as the relationship between access to genetic resources and intellectual property shall comply with the provisions of the Convention on Biological Diversity, the commitments undertaken by each Party in the different international agreements addressing this subject matter and the national legislation of the country of origin of such knowledge or resources.<sup>15</sup>]

[1.2. Each Party has sovereign rights to its biological and genetic resources and their derivatives and, consequently, determines the conditions to access thereof, in accordance with the principles and provisions contained in the Convention on Biological Diversity and in the pertinent national and international legislation.]

[1.3. The biological and genetic resources subject to such access will be provided by the country of origin thereof or by the provider country that had acquired such rights lawfully, in accordance with the relevant national and international legislations. In no event shall this access affect the sovereign rights of States, particularly the rights of the country of origin over their biological and genetic resources.]

[1.3. In recognition of the sovereign rights of each Party over its natural resources and traditional knowledge, the power to regulate access to such genetic resources and traditional knowledge is vested in each Party's national law. Each Party shall grant protection to the genetic resources and traditional knowledge of indigenous and local communities by means of an effective system, guaranteeing, at a minimum, a fair and equitable remuneration for access to, and/or the use of such resources or knowledge by third parties.]

[1.4. Each Party may provide for limited exceptions to the rights conferred under paragraphs 1.2 and 1.3 according to its national legislation.]

## **Article 2. [Conditions, objectives, and implementation]**

[2.1. Access to biological and genetic resources and to the traditional knowledge, innovations, and practices of indigenous, Afro-American, and local communities shall be conditioned to the prior informed consent of the Parties and their indigenous, Afro-American, and local communities that provide those resources or that traditional knowledge, innovations, and practices, as the case may be.]

[2.2. The Parties shall ensure, among others, compensation for such access and a fair and equitable distribution of the benefits derived from the use of such biological and genetic resources, or their derivatives, and such traditional knowledge, innovations, and practices, whether or not they are associated with the biological and genetic resources referred to above.]

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<sup>15</sup> ["Country of origin of genetic resources" means the country that possesses those genetic resources in "in-situ" conditions (Article 2, Convention on Biological Diversity).]

[2.3. Each Party shall take the political, legal, and administrative measures necessary to fully meet the conditions set out above, which shall include respecting the right of other Parties over their biological and genetic resources and over the traditional knowledge, innovations, and practices of their indigenous, Afro-American, and local communities, whether or not they are associated with said resources.]

**Article 3. [Relationship with patents on inventions and other intellectual property rights]**

[3.1. Each Party shall ensure that intellectual property rights are granted provided that the rights over their biological and genetic resources and the traditional knowledge, innovations, and practices of their indigenous, Afro-American, or local communities, as well as those of the other Contracting Parties, are safeguarded and respected. For those purposes, each Party shall adopt the necessary political, legal, and administrative measures.]

[3.2. The granting of patents or other intellectual property rights on inventions or other creations that have been developed on the basis of biological and genetic material, or their derivatives, and/or from the traditional knowledge, innovations, and practices of indigenous, Afro-American, or local communities, shall be subject to them, provided that those resources had been accessed in accordance with the provisions of the Convention on Biological Diversity and of the national and international legislation.]

[3.2. The granting of patents on inventions that have been developed on the basis of material obtained from genetic resources, or from the traditional knowledge of indigenous communities and local communities of each Party, shall be subject to the acquisition of that material in accordance with national law of the country of origin of such knowledge or resources.]

[3.3. Each Party, upon implementing and enforcing intellectual property rights, shall demand the dissemination or disclosure of the following elements, among others:

- a) The genetic resources used;
- b) The country of origin of the genetic resources used;
- c) The traditional knowledge, innovations, and practices, whether or not they are associated with the biological and genetic resources;
- d) The source of the traditional knowledge, innovations, and practices, whether or not they are associated to the biological and genetic resources;
- e) Proof of prior informed consent.]

[3.4. National authorities on intellectual property shall include in their search systems for patents information regarding biological and genetic materials, or their derivatives, of the Parties or the traditional knowledge, innovations, or practices of their indigenous, Afro-American, or local communities. Furthermore, they shall take into account, in the corresponding examinations, the documented information on these issues that might be accessible or had been forwarded by the other Parties' competent authorities.]

**[Subsection B.2.g. Utility Models]**

**[Article 1. Utility Models]**

[1.1. A utility model shall be defined as any new shape, configuration or arrangement of components of any device, tool, implement, mechanism or other object, or any part thereof, that permits improved or different operation, use, or manufacture of the object incorporating it, or that endows it with any utility, advantage, or technical effect that it did not previously have.]

[1.1. A utility model shall be defined as any new shape, configuration or arrangement of components of any device, tool, implement, mechanism or other object, or any part thereof, insofar as they effect a functional improvement to its use or manufacture and industrially applicable.]

[1.1. Subject to the provisions of Article 3 of Subsection B.2.e. (Exceptions to Patentability), each Party shall make utility models available for any inventions/innovations, whether products or processes, in all fields of technology, provided that they are new and are capable of industrial application.]

[1.2. Utility models shall be protected by patents or utility model certificates.]

[1.3. The provisions on patents for inventions included in this Chapter shall be applicable to utility models when relevant.]

**[Article 2. Term of Protection]**

[2.1. Each Party shall protect utility models, for a period of at least ten (10) years, counted from the filing date.]

**[Article 3. Exceptions]**

[3.1. [Each Party may exclude de following from protection by utility model patent or certificate] [The following may not be granted a utility model patent or certificate], among others:

- a) Procedures;
- b) Chemical, metallurgical or any other type of substance or composition; and,
- c) Matters excluded from patent protection.]

[3.2. Each Party may establish limitations and exceptions to the rights of utility model owners provided that such exceptions do not unreasonably conflict with a normal exploitation of the protected models and do not unreasonably prejudice the legitimate interests of the owner of the protected model, taking account of the legitimate interests of third parties.]

**[Subsection B.2.h.Industrial Designs]**

**[Article 1. Requirements for Protection]**

[1.1 Each Party shall provide for the protection of industrial designs pursuant to Article 25 of the TRIPS Agreement.]

**[Article 2. Prohibitions and Exceptions]**

[2.1. Each Party may establish prohibitions and exceptions to registration provided that they are not inconsistent with obligations from regional or multilateral agreements on intellectual property to which it is a party.]

**[Article 3. Duration of protection]**

[3.1. Each Party shall protect industrial designs, for a period of at least ten (10) years, counted from the filing date.]

[3.2. Each Party shall endeavor to provide for in their laws at least a five (5) year renewal.]

**[Article 4. Rights conferred]**

[4.1. Each Party shall apply Article 26.1 of the TRIPS Agreement.]

**[Article 5. Exhaustion of Rights]**

[5.1. Registration of an industrial design shall not confer the right to act against a third party making commercial use of a product embodying or copying the design once it has been introduced into the commerce of any country by the right holder or any other person authorized or with economic ties to the right holder.

For purposes of the preceding paragraph, two (2) persons shall be considered to have economic ties when one of the persons is able to exert a decisive influence over the other, either directly or indirectly, with respect to the exploitation of the industrial design, or when a third party is able to exert that influence over both persons.]

[5.1. This Chapter shall not affect the authority of each Party to determine the conditions under which the exhaustion of rights related to products legitimately introduced in the market by, or with the authorization of, the right holder shall apply.

However, each Party undertakes to review its domestic legislation within a period not exceeding five (5) years after the entry into force of this Agreement, in order to adopt, at a minimum, the principle of regional exhaustion in regard to all Parties.]

**[Subsection B.2.i. Rights of Breeders of Plant Varieties]**

**[Article 1. General Obligations]**

[1.1. Each Party shall recognize and guarantee protection of the rights of breeders of new plant varieties through the issuance of a breeder's certificate or registration.]

[Each Party shall encourage research activities and technology transfer related to the breed of new plant varieties.]

[1.1. Each Party shall grant protection to all plant varieties through patents, through an effective *sui generis* system or through a combination thereof. An effective *sui generis* system is understood to be the breeder's rights system established in the International Convention for the Protection of New Varieties of Plants (UPOV), 1978 or 1991 Acts, in accordance with the national legislation of each Party.]

**[Article 2. Genera and Species to be Protected]**

[2.1. The scope of application of the provisions on Rights of Breeders of Plant Varieties shall cover all botanical genera and species [, provided that their cultivation, possession or use are not prohibited for reasons of human, animal or plant health][and shall apply, in general, to entire plants, including any type of flower, fruit or seed, and any other part of plants that can be used as material for reproduction or multiplication].]

**[Article 3. Conditions of Protection]**

[3.1. Each Party shall grant breeder's certificates or registration to the creator of a plant variety, provided it is new, uniform, distinct and stable, and that it has been given a denomination which will be its generic designation.]

[3.2. A variety shall be deemed to be new, or novel, if the propagating or multiplication material, or harvested product, has not been sold or otherwise disposed of to third parties, by or with the consent of the breeder or his assignee, for purposes of commercially exploiting the variety.]

[3.3. Novelty shall be deemed to have been lost when:

- a) Exploitation has begun at least one (1) year before the date of filing the application for a breeder's certificate, or claimed priority date, if sale or disposal took place within the territory of any Party;
- b) Exploitation has begun at least four (4) years before, or in the case of trees or vines, earlier than six (6) years before the date of filing the application for a breeder's certificate, or claimed priority date, if sale or disposal took place in the territory other than that of Party.]

[3.4. Novelty shall not be deemed to have been lost by the sale or disposal to third parties, among other things, when those acts:

- a) are the result of an abuse that affects the interest of the breeder or his successor in title;
- b) are part of an agreement to transfer the right in the variety, provided that the variety has not been physically disposed of to a third party;
- c) are part of an agreement under which a third party, on behalf of the breeder, increased supplies of the material of reproduction or multiplication;
- d) are part of an agreement under which a third party undertakes field or laboratory testing, or small-scale processing tests in order to evaluate the variety;
- e) involve harvested material obtained as a byproduct or surplus product of the variety or from the activities mentioned in subparagraphs c) and d) of this paragraph; or,

- f) are performed in any other unlawful manner.]

[3.5. The variety shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application, or any priority claimed.

The filing of an application for the granting of a breeder's certificate or for the entering of another variety in an official register of varieties, in any country, shall be deemed to render that other variety a matter of common knowledge from the date of the application, provided that the application leads to the granting of a breeder's right or to the entering of the said other variety in the official register of varieties, as the case may be.]

[3.6. A variety shall be deemed to be uniform if, subject to the variation that may be expected from the particular features of its reproduction, multiplication or propagation, it is sufficiently uniform in its relevant characteristics.]

[3.7. The variety shall be deemed to be stable if its essential characteristics remain unchanged from generation to generation, and at the end of each particular cycle of reproduction, multiplication or propagation.]

#### **[Article 4. Rights Conferred]**

[4.1. The grant of a breeder's certificate shall confer on the owner thereof the right to prevent third parties, without his consent, from carrying out the following acts with respect to the material of reproduction, propagation or multiplication of the protected variety:

- a) production, reproduction, multiplication or propagation;
- b) conditioning for the purposes of reproduction, multiplication or propagation;
- c) offering for sale;
- d) selling or any other act that implies introduction into the market for commercial purposes, of the material of reproduction, propagation or multiplication;
- e) exporting;
- f) importing;
- g) stocking for any of the purposes mentioned in the preceding paragraphs;
- h) commercial use of ornamental plants, or parts of plants, as multiplication material for the purpose of producing ornamental and fruit plants or parts of plants, or cut flowers;
- i) the performance of the acts referred to in the previous paragraphs in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorized use of material of reproduction or multiplication of the protected variety, shall require authorization from the breeder, unless the owner has had reasonable opportunity to exercise his right in relation to the said material of reproduction or multiplication.

The breeder's certificate shall also confer on its owner the rights established in the preceding paragraphs with respect to varieties that are not clearly distinguishable from the protected variety, within the meaning of paragraph 3.5 of this Subsection (Distinctness), and in respect of varieties whose production requires the repeated use of the protected variety.

The competent national authority may confer on the owner, the right to prevent third parties from performing, without his consent, the acts specified in the previous paragraphs, with respect to varieties essentially derived from the protected variety, except where the latter variety is itself an essentially derived variety.]

**[Article 5. Exceptions]**

[5.1. A breeder's right shall not confer on its owner the right to prevent third parties from using the protected variety when such use is made:

- a) privately, for non-commercial purposes;
- b) for experimental purposes; and
- c) for the purpose of breeding and exploiting a new variety, except in the case of a variety essentially derived from a protected variety. Any such new variety may be registered in the name of its breeder.]

[5.2. Authorization by the breeder shall not be required for the utilization of the variety as an initial source of variation for the purpose of creating other varieties. The authorization to market such plant varieties shall be subject to the laws of each Party. Likewise, such authorization shall be required when the repeated use of the variety is necessary for the commercial production of another variety.]

[5.3. A breeder's right shall not be infringed by a person who stocks and sows for its own use, or for sale as raw material or food, the product of his cultivation of the protected variety. Commercial use of the material of multiplication, reproduction or propagation, including entire plants and parts of plants of fruit, ornamental and forest species, is excluded from this article.]

[5.3. Parties may restrict the breeder's right in order to permit farmers to use for propagating or multiplication purposes, on their own holdings, the product of the harvest of the protected variety.]

**[Article 6. Exhaustion of Breeder's Rights]**

[6.1. A breeder's right may not be invoked in respect of acts indicated in Article 4 of Subsection B.2.i. (Rights Conferred), when the material of the protected variety has been sold or otherwise marketed by the owner or with his consent unless such acts:

- a) involve further reproduction, multiplication or propagation of the protected variety, subject to the restriction established in Article 9 of Subsection B.2.i.(Restrictions/National Security-Public Interest);
- b) involve an export of the material of the protected variety, which enables its reproduction, to a country which does not protect varieties of the plant species to which the variety belongs,

except where the exported material is destined for human, animal or industrial consumption.]

**[Article 7. Measures Regulating Commerce]**

[7.1. Where necessary, each Party may adopt measures for the regulation or control, in the territory, of the production or marketing, importation or exportation of the material of reproduction or multiplication of the variety, provided that such measures do not imply disregard for the breeder's rights recognized by this Chapter, nor hinder the exercise thereof.]

**[Article 8. Licensing and Assignment]**

[8.1. The holder of breeder's rights may assign or grant licenses for the exploitation of the variety.]

[8.1. The breeder's right shall be marketable, transferable and inheritable. The owner of the right may grant licenses to third parties for the exploitation of the protected varieties.]

**[Article 9. Restrictions/National Security-Public Interest]**

[9.1. In order to ensure adequate exploitation of the protected variety, in exceptional cases of national security or public interest, each Party may declare the said variety freely available, subject to equitable remuneration to the breeder.

Each Party shall determine the amount of any such remuneration after hearing arguments from the interested parties and expert opinion, based on the extent of the exploitation of the licensed variety.]

**[Article 10. Term of Protection]**

[10.1. The right conferred on the breeder shall be for a period of no less than [fifteen (15)][twenty (20)] years from the date of issue of the title of protection. For vines, forest trees, fruit trees, [and ornamental trees,] including, in each case, their root stocks, the period of protection shall be no less than [eighteen (18)][twenty-five (25)] years from the date of issue of the title of protection.]

**[Article 11. Variety Denomination]**

[11.1. Each Party shall ensure that no rights in the designation registered as the denomination of the variety shall hamper the free use of the denomination in connection with the variety, even after expiration of the breeder's certificate.]

**[Article 12. Maintenance of Rights]**

[12.1. The owner of a registered variety shall be obliged to maintain it and replace it, as appropriate, throughout the period for which the breeder's certificate is valid.]

## **Subsection B.2.j. Undisclosed Information**

### **Article 1. Protection of undisclosed information**

[1.1. In the course of ensuring effective protection against unfair competition, as provided in Article 10*bis* of the Paris Convention (1967), each Party shall protect:

- a) undisclosed information in accordance with Article 39.2 of the TRIPS Agreement;
- b) data submitted to governments or governmental agencies in accordance with Article 39.3 of the TRIPS Agreement.]

[1.2. If a Party requires the submission of information concerning the safety and efficacy of a pharmaceutical or agricultural chemical product prior to permitting the marketing of such product, such Party shall not permit third parties not having the consent of the party providing the information to market the same or a similar product on the basis of the approval granted to the party submitting such information for a period of at least five (5) years from the date of approval.<sup>16</sup>]

[1.3. If a Party provides a means of granting approval to market products specified in paragraph 1.2 on the basis of the grant of an approval for marketing of the same or similar product in another Party, the Party shall defer the date of any such approval to third parties not having the consent of the party providing the information in the other Party for a period of at least five (5) years from the date of approval in the Party or the date of approval in the other Party, whichever is later.]

[1.4. Where a product is subject to a system of marketing approval pursuant to paragraphs 1.2 or 1.3 and is also subject to a patent in the Party:

- a) the Party shall not approve an application to market a product on the basis of information in an earlier marketing approval for the same product where that application has been filed by a party other than the recipient of the original marketing approval or with his consent, and shall not otherwise authorize a third party to market the same product, prior to the expiration of the patent; and
- b) the Party shall not alter the term of protection specified in paragraphs 1.2 and 1.3 in the event that the patent expires on a date earlier than the end of the term of such protection.
- c) In addition, if the product is subject to a patent in one Party as well as in another Party, the second Party shall extend the term of the patent within its territory to expire no earlier than the date of expiration of the patent in the first Party.]

### **[Article 2. Rights Conferred]**

[2.1. Each Party shall provide, in its legislation, that any natural or legal person that considers itself to be affected by an act of unfair competition may bring legal action, enabling the competent tribunal to

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<sup>16</sup> [Where a Party, on the date of its implementation of the TRIPS Agreement, had in place a system for protecting pharmaceutical or agricultural products not involving new chemical entities from unfair commercial use which conferred a period of protection shorter than that specified in paragraph 1.2 that Party may retain such system notwithstanding the obligations of said paragraph.]

determine the legality or illegality of the act and obtain relief for any damages that the act might have caused.]

**[Subsection B.2.k. Unfair Competition]**

**[Article 1. Unfair competition]**

[1.1. Each Party is bound to assure to nationals of other Parties effective protection against unfair competition.]

[1.2. [Any act of competition contrary to the honest practices in industrial or commercial matters constitutes an act of unfair competition. The following acts, *inter alia*, shall be considered contrary to honest commercial practices: deliberate breach of contract, fraud, breach of confidence, and inducement to infringe. The following in particular shall be prohibited:]

[Any act in relation to industrial property carried out in the business domain that is contrary to honest practices and usage shall be considered as an act of unfair competition. The following acts, *inter alia*, constitute acts of unfair competition in relation to industrial property:]

- a) all acts of such a nature as to create confusion, by any means whatever, with the establishment, the goods, services or the industrial or commercial activities of a competitor;
- b) false allegations in the course of trade, of such a nature as to discredit the establishment, goods, or industrial or commercial activities of a competitor;
- c) indications or allegations the use of which in the course of trade, could mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity of the goods;]

[1.3. Each Party undertakes to establish administrative and judicial, penal and civil remedies to prevent or punish acts considered unfair competition.]

**[Subsection B.2.l. Anti-competitive Practices in Contractual Licenses]**

**[Article 1. Anti-competitive practices in contractual licenses]**

[1.1. Each Party shall apply Article 40 of the TRIPS Agreement [*mutatis mutandis*].]

**Subsection B.3.Enforcement**

**Article 1. [General Obligations] [General Provisions]**

[1.1.Each Party confirms the rights and obligations in force, with regard to enforcement procedures, pursuant to the provisions of the TRIPS Agreement.]

[1.2. Each Party shall apply Article 41 of the TRIPS Agreement.]

[1.3. Each Party shall provide that decisions on the merits of a case in judicial and administrative enforcement proceedings shall:

- a) [preferably] be in writing and state the reasons on which the decisions are based;
- b) be made available at least to the parties in a proceeding without undue delay; and
- c) be based only on evidence [in respect of which parties were offered the opportunity to be heard] [presented in conformity with the rules of due process].]

[1.3. Decisions on the merits of a case which under the domestic laws or practices of the Party are given general applicability shall be in writing and shall state the [legal and/or factual] reasons on which decisions are based.]

[1.4. Each Party shall provide notification of laws, regulations and provisions regarding this matter to the FTAA's Committee on Intellectual Property. Final judicial decisions and administrative rulings of general application shall be published or shall be made available to the public in a manner that allows governments and rights holders to have prima facie knowledge thereof.]

[1.4. Each Party shall ensure that all laws, regulations, procedures and practices governing the protection or enforcement of intellectual property rights, and all final judicial decisions and administrative rulings of general applicability pertaining to the enforcement of such rights, shall be in writing and shall be published, in a national language in such a manner as to enable governments and right holders to become acquainted with them and so that the system for protecting and enforcing intellectual property rights shall become transparent.]

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

[1.6. Each Party shall make available to the general public information regarding its efforts to provide effective enforcement of intellectual property rights in its civil, administrative and criminal system, including any statistical information that each Party may collect for such purposes.]

[1.7. Nothing in this Article and in Articles 2 through 5 of Subsection B.3 (Enforcement) shall require a Party to establish a judicial system for the enforcement of intellectual property rights distinct from that Party's system for the enforcement of laws in general nor does it affect the capacity of Parties to enforce their law in general. Similarly, it does not create any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.]

[1.8. It is understood that decisions made by each Party on the distribution of enforcement resources shall not excuse a Party from complying with the provisions of this Agreement.]

[1.9. For the purposes of Subsection B.3 (Enforcement), the term "right holder" shall include [exclusive][or non exclusive] licensees [according to each Party's national legislation] as well as federations and associations having the legal standing to assert such rights[; the term "[exclusive][or non exclusive] licensee" shall include the [exclusive][or non exclusive] licensee of any one or more of the rights comprised in a given intellectual property].]

[1.9. For the purposes of Subsection B.3 (Enforcement), the term “right holder” shall include licensees, exclusive or non exclusive, duly authorized to assert intellectual property rights in accordance to each Party’s national legislation.]

[1.10. For the purposes of this Chapter:

- a) "counterfeit trademark goods" shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation;
- b) “pirated copyright goods” shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an Article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.]

## **Article 2. [Civil and Administrative Procedures and Remedies]**

[2.1. Each Party shall apply Articles 42 to 49 of the TRIPS Agreement.]

[2.1. Each Party shall make available to right holders civil judicial [and] [or] administrative procedures for the enforcement of any intellectual property right provided in this Chapter. Each Party shall provide that:

- a) defendants have the right to written notice that is timely and contains sufficient detail, including the basis of the claims;
- b) parties in a proceeding are allowed to be represented by [independent] legal counsel;
- c) the procedures do not include imposition of overly burdensome requirements concerning mandatory personal appearances;
- d) all parties in a proceeding are duly entitled to substantiate their claims and to present relevant evidence; and
- e) the procedures include a means to identify and protect confidential information.]

[2.2. Each Party shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right covered by this Chapter. Such rights include the prohibition against the unauthorized circumvention of technological measures and harm to the integrity of rights management information set forth in Article 23 of Subsection B.2.c. (Copyright and Related Rights) of this Chapter. Redress for violations of these prohibitions shall include all of the relief required to be granted for copyright infringement under this Article, including, without limitation, the right to provisional measures and adequate compensation for the harm caused to the author or right holder by such unauthorized circumvention or harm to the integrity of rights management information.]

[2.3. Each Party shall provide that its judicial authorities shall have the authority

- a) where a party in a proceeding has presented reasonably available evidence sufficient to support its claims and has specified evidence relevant to the substantiation of its claims that is within the control of the opposing party, to order the opposing party to produce such evidence, subject in appropriate cases to conditions that ensure the protection of confidential information;
- b) to make preliminary or final determinations, affirmative or negative, where a party in a proceeding voluntarily and without good reason refuses access to, or otherwise does not provide relevant evidence under that party's control within a reasonable period, or significantly impedes a proceeding relating to an enforcement action, on the basis of the evidence presented, including the complaint or the allegation presented by the party adversely affected by the denial of access to evidence, subject to providing the parties an opportunity to be heard on the allegations or evidence;
- c) to order a party in a proceeding to desist from an infringement, including to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of an intellectual property right, which order shall be enforceable at least immediately after customs clearance of such goods;
- d) to order the infringer of an intellectual property right to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of the infringement where the infringer knew [or had reasonable grounds to know] that it was engaged in an infringing activity;
- e) to order an infringer of an intellectual property right to pay the right holder's expenses, which may include appropriate attorney's fees; and
- f) to order a party in a proceeding at whose request measures were taken and who has abused enforcement procedures to provide adequate compensation to any party wrongfully enjoined or restrained in the proceeding for the damages suffered because of such abuse and to pay that party's expenses, which may include appropriate attorney's fees.

With respect to the authority referred to in subparagraph c), no Party shall be obliged to provide such authority in respect of protected subject matter that is acquired or ordered by a person before that person knew or had reasonable grounds to know that dealing in that subject matter would entail the infringement of an intellectual property right.

With respect to the authority referred to in subparagraph d), each Party may, at least with respect to copyrighted works and sound recordings, authorize the judicial authorities to order recovery of profits or payment of pre-established damages, or both, even where the infringer did not know or had no reasonable grounds to know that it was engaged in an infringing activity.]

[2.3. In civil judicial proceedings, the judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's intellectual property right by an infringer engaged in infringing activity, as well as the profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. Injury to the right holder shall be based upon the value of the infringed-upon item or service, or other equivalent measure for valuing authorized goods or services.]

[2.4. In civil judicial proceedings, each Party shall, at least with respect to works protected by copyright or neighbouring rights, or in cases of trademark counterfeiting, establish or maintain in place pre-established damages upon the election of the rightholder. Such pre-established damages must be in an amount sufficiently high enough to deter future infringement and to compensate the right holder for the harm caused by the infringement.]

[2.5. In no event shall a right holder who has been successful in establishing infringement be required to pay court costs or extraordinary costs based on the actions or failure to act of a third party.]

[2.6. Each Party shall provide that, in order to create an effective deterrent to infringement, its judicial authorities shall have the authority to order that:

- a) goods that they have determined to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any injury caused to the right holder, or, unless this would be contrary to constitutional requirements in force, destroyed; and
- b) materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements [and to prevent any damage to the right holder, or be destroyed, provided that this is not contrary to existing constitutional provisions].]

[In considering whether to issue a judicial order, judicial authorities shall take into account the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of other persons [including those of the right holder]. In regard to counterfeit goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, to permit the release of goods from customs, other than in exceptional cases [, such as those where the authority disposes of them as a donation to charitable organizations].]

[2.6. In civil judicial proceedings, at the right holder's request, goods that have been found to be pirated or counterfeit shall be destroyed, except in exceptional cases. The judicial authorities shall also have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, promptly destroyed or, in exceptional cases, without compensation of any sort, be disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements. In regard to counterfeit trademarked goods, the simple removal of the trademark unlawfully affixed shall not be sufficient to permit the release of goods into the channels of commerce.]

[2.7. Each Party shall provide that, where a civil remedy can be ordered as a result of administrative procedures on the merits of a case, such procedures shall conform to principles equivalent in substance to those set out in this Article.]

[2.8. Each Party shall provide that a civil judicial proceeding regarding the infringement of any intellectual property right covered in this Chapter may be instituted by the right holder or its exclusive licensee in its respective territory.<sup>17]</sup>

[2.9. In civil judicial proceedings, the judicial authorities shall have the authority to order the infringer to identify third parties that are involved in any violation of the intellectual property right and to provide this information to the right holder. [Judicial authorities shall have the authority to fine or imprison in appropriate cases persons who fail to abide by orders issued by such authorities.]]

[2.10. In civil cases involving copyright or related rights, each Party shall provide that the natural person or legal entity whose name is indicated as the author, producer, performer, or publisher of the work, performance or phonogram in the usual manner, shall, in the absence of proof to the contrary, be presumed to be the designated right holder in such work, performance or phonogram. It shall be presumed, in the absence of proof to the contrary, that the copyright or related right subsists in such subject matter. Such presumptions shall pertain in criminal cases until the defendant comes forward with credible evidence putting in issue the ownership or subsistence of the copyright or related right.]

### **Article 3. [Provisional Measures]**

[3.1. Each Party shall apply Article 50 of the TRIPS Agreement.]

[3.2. Each Party shall provide that its judicial authorities shall have the authority to order provisional measures *inaudita altera parte*, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed. Requests for provisional measures *inaudita altera parte* shall be acted upon and executed [within ten (10) days], except in exceptional circumstances.]

[3.3. The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a reasonable security or equivalent assurance set at a level so as not to unreasonably deter recourse to such procedures. In the event that judicial or other authorities appoint experts, technical or otherwise, that must be paid by the plaintiffs, such costs shall be closely related to the quantity of work to be performed or, if applicable, standardized fees and shall not unreasonably deter recourse to such relief.]

### **Article 4. [Border Measures]<sup>18]</sup>**

[4.1. Each Party shall apply Article 51 to 60 of the TRIPS Agreement.]

[4.1. Each Party shall adopt legislation on border measures, in order to provide customs authorities the power to inspect or hold goods for the purpose of suspending their shipment or preventing their free circulation, where, in the judgment of the competent authorities, there is convincing evidence of possible violations of intellectual property rights. It is understood that there shall be no obligation to apply such

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<sup>17</sup> [For purposes of this Chapter, an exclusive licensee shall include the exclusive licensee of any one or more of the exclusive rights comprised in a given intellectual property.]

<sup>18</sup> [Where a Party has dismantled substantially all controls over movement of goods across its border with another Party with which it forms part of a customs union, it shall not be required to apply the provisions of this Section at that border.]

procedures to imports of goods put on the market in another country by or with the consent of the right holder, or to goods in transit.]

[4.2. Any right holder initiating procedures for suspension by the customs authorities of the release of suspected counterfeit trademark or pirated copyright goods, into free circulation shall be required to provide adequate evidence to satisfy the competent authorities that, under the laws of the country of importation, there is *prima facie* an infringement of the right holder's intellectual property right and to supply sufficient information that may reasonably be expected to be within the right holder's knowledge to make the suspected goods reasonably recognizable by the customs authorities.]

[4.3. The competent authorities shall have the authority to require an applicant to provide a reasonable security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. Such security or equivalent assurance shall not unreasonably deter recourse to these procedures.]

[4.4. Where the competent authorities have made a determination that goods are counterfeit or pirated, a Party shall grant the competent authorities the authority to inform the right holder of the names and addresses of the consignor, the importer and the consignee, and of the quantity of the goods in question.]

[4.5. [According to its national legislation] each Party shall provide that the competent authorities may initiate border measures *ex officio*, without the need for a formal complaint from a private party or right holder.]

[4.6. Goods that have been found to be pirated or counterfeit by the competent authorities shall be destroyed, except in exceptional cases[, unless this would be contrary to existing constitutional requirements]. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient to permit the release of goods into the channels of commerce. In no event shall the competent authorities be allowed to export such counterfeit or pirated goods.]

[4.7. A Party may exclude from the application of paragraphs 5.1. through 5.7 of Subsection B.3 (Enforcement), small quantities of goods of a non-commercial nature contained in traveler's personal luggage or sent in small consignments that are not repetitive.]

## **Article 5. [Criminal Procedures]**

[5.1. Each Party shall apply Article 61 of the TRIPS Agreement.]

[5.1. Each Party shall provide criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or infringement of copyrights or neighboring rights on a commercial scale. Each Party shall provide that significant willful infringements of copyrights or neighboring rights that have no direct or indirect motivation of financial gain shall be considered willful infringement on a commercial scale.

In criminal procedures, remedies available shall include imprisonment and/or monetary fines sufficiently high to deter future acts of infringement and with a policy to remove the monetary incentive to the infringer. Each Party shall further ensure that such fines are imposed by judicial authorities at levels that actually deter future infringements.]

[5.2. Each Party shall provide that its judicial authorities may order the seizure [, forfeiture and destruction] of infringing goods and of any related materials and implements the predominant use of which has been in the commission of the offense [, and documentary evidence, even where such product is not specifically named in a search warrant. Each Party shall further provide that its judicial authorities shall order the forfeiture and destruction of all such infringing goods, materials and implements except in exceptional cases. All such seizure, forfeiture and destruction shall be without compensation to the defendant of any kind].]

[5.2. Each Party shall provide that its judicial authorities shall have the authority to order the seizure of suspected counterfeit or pirated goods, any related materials and implements used in the commission of the offense, any assets traceable to the infringing activity, and documentary evidence, regardless of whether such items are specifically named in the search order.]

[5.3. Each Party shall provide that its judicial authorities shall have the authority to order the forfeiture of any assets traceable to the unlawful activity, and the forfeiture or destruction of all counterfeit and pirated goods, and at least in cases of piracy any related materials and implements used in the commission of the offense. All such forfeiture and destruction shall be without compensation to the defendant of any kind.]

[5.4. Each Party shall provide that its judicial authorities shall take into account, when ordering the seizure, forfeiture and destruction of infringing goods and any materials and implements the predominant use of which has been in the commission of the offense, the proportionality between the severity of the infringement and the measures ordered, as well as the interests of other persons, including those of the right holder. In exceptional cases, when it is possible to eliminate from fraudulent goods the likelihood of association with the original goods, competent authorities may dispose of them [,as a donation to charitable organizations].]

[5.5. Each Party shall provide that its authorities may initiate legal action *ex officio*, without the need for a formal complaint by a private party or right holder.]

#### **[Article 6. Technological Measures]**

[6.1. Each Party shall provide adequate legal protection and effective legal remedies against any of the following acts, when undertaken for economic gain:

- a) The broadcast and rebroadcast, by any means or process, and the communication to the public, of literary and artistic works, performances and phonograms, carried out in violation of the rights of the right holders;
- b) The alteration, removal or the rendering inoperable, in any way, of technical devices designed to impair or limit reproduction of a work or protected production;
- c) The alteration, removal or rendering inoperable, in any way, of encrypted signals designed to limit the communication to the public of works, productions or broadcasts or limit their reproduction;
- d) The removal or alteration, without authorization, of any rights management information;
- e) The distribution, importation for distribution, broadcast, communication or making available to the public, without authorization, of works, performances or copies of fixed

performances or broadcasts, knowing that rights management information, encrypted signals and technical devices have been removed or altered without authorization.]

[6.2. No Party shall be obliged to provide that the acts described in paragraph 6.1 be made criminal offenses if the civil remedies available are sufficient and adequate.]

## **Section C Procedures and Institutions**

### **Article 1. Transparency**

[1.1. Each Party shall ensure that all laws, regulations, [and procedures] governing the protection or enforcement of intellectual property rights, and all final judicial decisions and administrative rulings of general applicability pertaining to the subject matter of this Chapter, shall be in writing and shall be published, in a national language in such a manner as to enable the public to become acquainted with them and so that the system for protecting and enforcing intellectual property rights shall become transparent.]

[1.2. Procedures governing the filing, prosecuting, and cancellation/opposition/invalidation of applications for the protection of intellectual property shall be set out clearly in writing and made publicly available. Such procedures shall include names and contact information for specific entities involved in the filing, prosecuting, and cancellation/opposition/invalidation of applications for the protection of intellectual property.]

### **Article 2. [Treatment of the differences in the level of development and size of the economies][Technical Cooperation]**

[2.1. Each Party shall implement, on mutually agreed terms and conditions, between donor and recipient countries, technical and financial cooperation to the Parties to the Agreement that so request.]

[2.1. Parties shall provide each other on mutually agreed terms with technical assistance and shall promote cooperation between their competent authorities.]

[2.2. The cooperation provided for in this Article may include, *inter alia*, the establishment or expansion of national offices and entities competent in these areas; the training of technical and/or administrative staff in the offices of a Party, the exchange of technical information and/or bibliography[, the harmonization of criteria and procedures among the different countries, etc.].]

[2.3. In order to implement mechanisms for undertaking technical cooperation, account shall be taken of the differences in levels of development among the Parties.]

[2.4. Through cooperation, [to the extent possible, each Party shall] [each Party may] offer to companies and institutions in its territory incentives designed to promote and encourage the transfer of technology and know how to other Parties to this Agreement in order to enable them to establish a solid, competitive and viable technological base.]

[2.4. [Developed country] Parties shall offer to companies and institutions within their jurisdictions incentives that promote and encourage technology transfer to other Parties to this Agreement in order to enable them to establish a solid, competitive and viable technological base. Such incentives shall be notified to the Committee on Intellectual Property.]

[2.5. [Developed country] Parties shall report each year to the Committee on Intellectual Property the technical cooperation that they have entered into with other Parties, in particular with those Parties with smaller economies. These reports shall include indications of the success of the incentive provided for under Article 2.4.]

[2.6. Each Party shall conclude cooperation agreements, to, *inter alia*:

- a) support efforts designed to promote public and private investment and development in the different territories of each Party;
- b) Foster the dissemination of information on the possibilities for intellectual-property-development-related investment;
- c) Help small and medium-size enterprises to prepare research and development projects, the results of which may eventually be protected by intellectual property rights and obtain, under the best conditions possible, adequate financing for them;
- d) Foster promotion and dissemination, within various spheres, of the issues related to the protection of intellectual property rights in all its aspects;
- e) Favor policies for the promotion and dissemination of technological innovation;
- f) Carry out programs of regional intergovernmental assistance.]

[2.7. The provisions included in Article 4.5. of Subsection B.1 (Obligations and Commitments.) – transfer of technology – shall be applicable to this Section.]

**Article 3. [Cooperation to eliminate the trade of goods that infringe upon intellectual property rights]**

[3.1. Each Party shall apply Article 69 of the TRIPS Agreement.]

**[Article 4. Transitional Arrangements]**

[4.1. No [developing country] Party shall be obliged to apply the provisions of this Chapter, before the expiry of a general period of one (1) year following the date of entry into force of this Agreement .]

[4.2. If a [developing country] Party, is undertaking structural reform of its intellectual property system and facing special problems in the preparation or implementation of intellectual property laws and regulations, it shall be entitled to delay for a further period of two (2) years the date of application, as defined in paragraph 4.1, of the provisions of this Chapter, other than Articles 1 (National Treatment) and 2 (Most Favored Nation Treatment) of Subsection B.1 (Obligations and Commitments.).]

[4.3 Any Party obliged by this Chapter to extend intellectual property protection to areas or sectors not so protectable in its territory on the general date of application of this Agreement, may delay the application of the provisions providing for extended protection for an additional period of five (5) years.]

**Article 5. [Committee on Intellectual Property]**

[5.1. The Committee on Intellectual Property shall be comprised, in an equitable manner, of representatives of each Party. The primary function of the Committee shall be to find the most appropriate means of applying and coordinating the provisions set forth in this Chapter.]

**Article 6. [Protection of Existing Subject Matter]**

[6.1. This Chapter does not give rise to obligations in respect of acts that occurred before the date of application of the relevant provisions of this Chapter for the Party in question.]

[6.1. This Chapter does not give rise to obligations in respect of acts that occurred before the date of implementation of this Agreement for each Party—regardless of whether such acts have concluded or are pending.]

[6.2. Except as otherwise provided for in this Chapter, each Party shall apply this Chapter to all subject matter existing on the date of application of the relevant provisions of this Chapter for the Party in question, and which is protected in a Party on the said date, or which meets or comes subsequently to meet the criteria for protection under the terms of this Chapter. In respect of this paragraph and paragraphs 6.3 and 6.4, a Party's obligations with respect to existing works shall be solely determined under Article 18 of the Berne Convention and with respect to the rights of producers of sound recordings in existing sound recordings shall be determined solely under Article 18 of that Convention, as made applicable under this Chapter.]

[6.3. Except as required under paragraph 6.2, a Party shall not be required to restore protection to subject matter that, on the date of application of the relevant provisions of this Chapter for the Party in question, has fallen into the public domain in its territory.]

[6.3. There shall be no obligation to restore protection to subject matter which on the date of application of this Chapter for the Party in question, has become part of the public domain.]

[6.4. Any acts in respect of specific objects embodying protected subject matter which become infringing under the terms of legislation in conformity with this Chapter, and which were commenced or in respect of which a significant investment was made, before the date of ratification of this Agreement by that Party, any Party may provide for a limitation of the remedies available to the right holder as to the continued performance of such acts after the date of application of this Agreement for that Party. In such cases, the Party shall, however, at least provide for payment of equitable remuneration.]

[6.5. No Party shall be obliged to apply the provisions of Article 6 or Article 18(e) of Subsection B.2.c. (Copyright) with respect to originals or copies purchased prior to the date of application of the relevant provisions of this Chapter for that Party.]

[6.6. In the case of intellectual property rights for which protection is conditional upon registration, applications for protection that are pending on the date of application of the relevant provisions of this Chapter for the Party in question shall be permitted to be amended to claim any enhanced protection provided under the provisions of this Chapter. Such amendments shall not include new matter.]