



# Secret TPP treaty: Advanced Intellectual Property chapter for all 12 nations with negotiating positions

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Consolidated Text

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## Description

This is the confidential draft treaty chapter from the Intellectual Property group of the Trans-Pacific Partnership (TPP) talks between the United States, Japan, Mexico, Canada, Australia, Malaysia, Chile, Singapore, Peru, Vietnam, New Zealand and Brunei Darussalam. The treaty is being negotiated in secret by delegations from each of the 12 countries, who together account for 40% of global GDP. The chapter covers proposed international obligations and enforcement mechanisms for copyright, trademark and patent law, and includes the combined positions of all of the parties as they were by the end of August 2013. The document was produced and distributed to the Chief Negotiators on August 30, 2013, after the 19th Round of Negotiations at Bandar Seri Begawan, Brunei.

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**COVER PAGE**

**INTELLECTUAL PROPERTY [RIGHTS] CHAPTER**

**CONSOLIDATED TEXT**

## CHAPTER QQ<sup>1</sup>

### {INTELLECTUAL PROPERTY RIGHTS / INTELLECTUAL PROPERTY}

#### {GENERAL PROVISIONS}

##### {Section A: General Provisions}

#### Article QQ.A.1: {Definitions}

For the purposes of this Chapter:

**Intellectual property**<sup>2</sup> refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II of the TRIPS Agreement [<sup>3</sup>].

#### Article QQ.A.2: {Objectives}<sup>4</sup>

[NZ/CL/PE/VN/BN/MY/SG/CA<sup>5</sup>/MX<sup>6</sup> propose; US/JP oppose: The objectives of this Chapter are:

- a. Enhance the role of intellectual property in promoting economic and social development, particularly in relation to the new digital economy, technological innovation, the [PE: generation,] transfer and dissemination of technology and trade;
- b. reduce impediments to trade and investment by promoting deeper economic integration through effective and adequate creation, utilization, protection and enforcement of intellectual property rights, taking into account the different levels of economic development and capacity as well as differences in national legal systems;

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

<sup>2</sup> Negotiators' Note: NZ/SG supports a definition for Intellectual Property which mirrors TRIPS Article 1.2 subject to confirmation of treatment of plant varieties rights.

<sup>3</sup> [AU/PE: For the purpose of this Chapter "intellectual property" also includes rights in plant varieties.]

<sup>4</sup> Negotiators' Note: AU supports including objectives but is still considering the drafting and scope of this article.

<sup>5</sup> Negotiators' Note: CA supports this provision in principle, but is reviewing the proposal.

<sup>6</sup> Negotiators' Note: MX will reflect further on the additional subparagraphs (g) and (h).

- c. maintain a balance between the rights of intellectual property holders and the legitimate interests of users and the community in subject matter protected by intellectual property.
- d. protect the ability of Parties to identify, promote access to and preserve the public domain;
- e. Ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade;
- f. Promote operational efficiency of intellectual property systems, in particular through quality examination procedures during the granting of intellectual property rights.]

[NZ/CA/SG/CL/MY/VN propose. g. The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

h. Support each Party's right to protect public health, including by facilitating timely access to affordable medicines.]

**[Article QQ.A.2bis: {Principles}]**

[NZ/CA/SG/CL/MY propose: 1. Each Party may, in formulating or amending its laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to its socio-economic and technological development, provided that such measures are consistent with the provisions of this Chapter.

2. Each Party may adopt or maintain appropriate measures, provided that they are consistent with the provisions of this Chapter, to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

3. Each Party may adopt or maintain, consistently with the other provisions of this Chapter, appropriate measures to prevent or control practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market.]]

### **Article QQ.A.3: {General Provisions}**

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

### **Article QQ.A.4: {Declaration on the TRIPS Agreement and Public Health}**

The Parties affirm their commitment to the *Declaration on the TRIPS Agreement and Public Health* (WT/MIN(01)/DEC/2).

### **Article QQ.A.5: {Understandings Regarding Certain Public Health Measures<sup>7</sup>}**

The Parties have reached the following understandings regarding this Chapter:

(a) The obligations of this Chapter do not and should not prevent a Party from taking measures to protect public health by promoting access to medicines for all, in particular concerning cases such as HIV/AIDS, tuberculosis, malaria, [US oppose: chagas] and other epidemics as well as circumstances of extreme urgency or national emergency. Accordingly, while reiterating their commitment to this Chapter, the Parties affirm that this Chapter can and should be interpreted and implemented in a manner supportive of each Party's right to protect public health and, in particular, to promote access to medicines for all.<sup>8</sup>

(b) In recognition of the commitment to access to medicines that are supplied in accordance with the Decision of the General Council of 30 August 2003 on the Implementation of Paragraph Six of the Doha Declaration on the TRIPS Agreement and Public Health (WT/L/540) and the WTO General Council Chairman's statement accompanying the Decision (JOB(03)/177, WT/GC/M/82) [SG/BN/VN/PE/CL/CA/MY/NZ/US/AU<sup>9</sup>/MX/JP: , as well as the Decision on the Amendment of the TRIPS Agreement, adopted by the General Council, 6

<sup>7</sup> Negotiators' Note: JP is reflecting further on this paragraph.

<sup>8</sup> Negotiators' Note: AU is still considering the drafting and scope of this paragraph.

<sup>9</sup> Negotiators' Note: AU is considering the drafting of the language.

December 2005 US/MY propose: and the WTO General Council Chairperson's statement accompanying the Decision (WT/GC/M/100)] (collectively, the "TRIPS/health solution"), this Chapter does not and should not prevent the effective utilization of the TRIPS/health solution.

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

#### **Article QQ.A.6: {Existing Rights and Obligations / International Agreements}**

1. [US: Further to Article –AA.2,] the Parties affirm their existing rights and obligations with respect to each other under the TRIPS Agreement [CL/PE: and any other multilateral agreements relating to intellectual property to which they are party] [MX propose: The TRIPS Agreement is incorporated into and made part of this Agreement, *mutatis mutandis*.][CA Propose: 1. Except as otherwise provided in this Chapter, nothing in this Chapter shall be construed as a limitation to the flexibilities, exceptions and limitations set out on the TRIPS Agreement and any other multilateral agreement relating to intellectual property to which they are party.]

[CL/NZ propose; US/AU/JP/MX oppose: 2. Nothing in this Chapter shall derogate from existing rights and obligations that Parties have to each other under the TRIPS Agreement or other multilateral agreements, such as those concluded or administered under the auspices of the World Intellectual Property Organization (WIPO), the World Health Organization (WHO) and United Nations Educational, Scientific and Cultural Organization (UNESCO).]<sup>10</sup>

[CA propose; MX/US oppose: 2. Except as otherwise provided in this Chapter, the Parties shall interpret this Chapter in such a way as to be [complementary to / compatible with] their rights and obligations under multilateral treaties concluded or administered under the auspices of the World Trade Organization (WTO), the World Intellectual Property Organization (WIPO), the World Health Organization (WHO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) to which they are party, especially with regards to measures aimed at protecting public

<sup>10</sup> Negotiators' Note: Parties to discuss paragraphs 1, 2 and 3 with legal group to consider possible redundancy with General Provisions and receive advice on resolution.

health and protecting equal access to knowledge and food.]

[CL/NZ/VN/BN/MY/PE:<sup>11</sup> 3. [Except as otherwise provided in this Chapter,] Nothing in this Chapter shall be construed as a limitation to the flexibilities, exceptions and limitations set out on the TRIPS Agreement and any other multilateral agreement relating to intellectual property to which they are party, especially with regards to measures aimed at protecting equal access to knowledge, food and public health.]]

[US/AU propose; CL/NZ/MY/PE/BN/VN/CA/JP/MX<sup>12</sup> oppose:<sup>13</sup> 4. Each Party shall ratify or accede to the following agreements by the date of entry into force of this Agreement:

- (a) *Patent Cooperation Treaty* (1970), as amended in 1979;
- (b) *Paris Convention for the Protection of Industrial Property* (1967);
- (c) *Berne Convention for the Protection of Literary and Artistic Works* (1971);
- (d) *Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite* (1974);
- (e) *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks* (1989);
- (f) *Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure* (1977), as amended in 1980;
- (g) *International Convention for the Protection of New Varieties of Plants* [MX propose: (1961) as revised in 1972, 1978 or] (1991) (UPOV Convention);
- (h) *Singapore Treaty on the Law of Trademarks* (2006);
- (i) *WIPO Copyright Treaty* (1996); and
- (j) *WIPO Performances and Phonograms Treaty* (1996).]

<sup>11</sup> Negotiators' Note: Delegations are considering the relationship between this proposal and the general non-derogation provision in Article [ ]. Proponent delegations other than VN are prepared to consider addition of the opening clause shown in brackets if it aids in forming a consensus.

<sup>12</sup> Negotiators' Note: MX is flexible if the obligation is on a best endeavor basis.

<sup>13</sup> Negotiators' Note: SG has no substantive objection to this paragraph and will follow consensus.

[US/AU/NZ/PE/CA/JP/SG/MX<sup>14</sup> propose: 5. Each Party shall notify the WTO of its acceptance of the Protocol amending the TRIPS Agreement done at Geneva on December 6, 2005.]

[US/SG propose; CL/MY/NZ/PE//VN/BN/CA/JP/MX<sup>15</sup> oppose: 6. Each Party shall make all reasonable efforts to ratify or accede to the following agreements by the date of entry into force of the Agreement:

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

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

#### Article QQ.A.7: {National Treatment}

<sup>16</sup>. In respect of all categories of intellectual property covered in this Chapter, each Party shall accord to nationals [<sup>17</sup>] of the other Party treatment no less favorable than it accords to its own nationals with regard to the protection [<sup>18</sup>] [NZ/BN/MY/CA/JP/SG/VN oppose: and enjoyment of such intellectual property

<sup>14</sup> Negotiators' Note: MY/BN do not object in principle subject to further domestic internal consultations or procedures and greater clarity regarding views of other Parties. SG/CL has no substantive objection to this paragraph and will follow consensus. VN are continuing domestic procedures for consideration of the Protocol.

<sup>15</sup> Negotiators' Note: AU considering drafting of this provision.

<sup>16</sup> Negotiators' Note: JP reserves its position pending the outcome of Article QQ.A.1.

<sup>17</sup> [US/AU/SG/PE: For purposes of Articles [QQ.A.7.1-2\_\_\_(NT & Judicial/Admin Procedures) \_QQ.D.2.a\_\_(GIs/Nationals), and (QQ.G.14.1 Performers/Phonograms/Related Rights,) a **national of a Party** shall [US propose: include] [US oppose: also mean], in respect of the relevant right, an entity of that Party that would meet the criteria for eligibility for protection provided for in the agreements listed in [Article QQ.A.6.4] and the TRIPS Agreement.]

<sup>18</sup> [US/AU/SG/PE/MY/VN/BN/NZ/MX/CL propose: For purposes of paragraphs 1 and 2 “protection” shall include matters affecting the availability, acquisition, scope, maintenance, and enforcement of intellectual property rights as well as matters affecting the use of intellectual property rights specifically covered by this Chapter. Further, for purposes of paragraph 1[and 2], “protection” also includes the prohibition on circumvention of effective technological measures set out in Article QQ.G.10 and the rights and obligations concerning rights management information set out in Article QQ.G.13] Negotiators' Note: [CL/SG/PE/MY/VN/BN/NZ/MX: reserves its position with regards to the second sentence, depending on the outcome of the technological protection measure/rights management information] [Parties to determine whether this footnote shall refer to paragraph 1, or paragraphs 1 and 2.]

rights, and any benefits derived from such rights.][NZ/VN/BN/MY/CL/PE/JP/SG<sup>19</sup> propose<sup>20</sup>; US/AU<sup>21</sup> oppose: of intellectual property, subject to the exceptions provided in the TRIPS Agreement and in those multilateral agreements concluded under the auspices of WIPO.] [CL/AU/NZ/BN/PE<sup>22</sup> propose: With respect to secondary uses of phonograms by means of analog communications and free over-the-air radio broadcasting, however, a Party may limit the rights of the performers and producers of the other Party to the rights its persons are accorded within the jurisdiction of the other Party.]<sup>23</sup>

[VN: Articles 3 and 5 of the TRIPS shall apply with necessary modifications to the protection of intellectual property in this Chapter.]

2. A Party may derogate from paragraph 1 [*national treatment*] in relation to its judicial and administrative procedures, including requiring a national of the other Party to designate an address for service of process in its territory, or to appoint an agent in its territory, provided that such derogation is:

- (a) necessary to secure compliance with laws and regulations that are not inconsistent with this Chapter; and
- (b) not applied in a manner that would constitute a disguised restriction on trade.

[CL:3 Paragraphs 1 and 2 do] [US: Paragraph [X *national treatment/judicial and administrative procedures*] does] not apply to procedures in multilateral agreements concluded under the auspices of WIPO relating to the acquisition or maintenance of intellectual property rights.

#### **Article QQ.A.8:** {Most-Favoured-Nation Treatment}

[PE/CL: With regards to the protection and defence of intellectual property referred to in this chapter, any advantage, favour, privilege or immunity granted by a Party to the nationals of any other country will be accorded immediately and unconditionally to the nationals of the other Parties. The exceptions to this obligation shall be in conformity with the pertinent dispositions referred to in articles 4 and 5 of the TRIPS Agreement.]

<sup>19</sup> Negotiators' Note: SG/CL is flexible on either approach to National Treatment.

<sup>20</sup> Negotiators' Note: NZ notes its proposed text may not be necessary depending on outcome of following two paragraphs. CA supports in principle and is considering further the drafting of this provision.

<sup>21</sup> Negotiators' Note: AU can be flexible on either approach to National Treatment.

<sup>22</sup> Negotiators' Note: MY/SG/PE support in principle. CP/JP is considering further.

<sup>23</sup> Negotiators' Note: MX is considering its position in relation to the whole paragraph.

[VN: Articles 4 and 5 of the TRIPS shall apply with necessary modifications to the protection of intellectual property in this Chapter.]

#### **Article QQ.A.9: {Implementation of this Chapter}**

[CL/NZ/VN/AU/BN/SG/PE/MY/MX/CA<sup>24</sup> propose; US/JP oppose: 1. Nothing in this Chapter shall prevent a Party from adopting appropriate measures to prevent: (a) the abuse of intellectual property rights by right holders or the resort to practices that unreasonably restrain trade or adversely affect the international transfer of technology; and (b) anticompetitive practices that may result from the abuse of intellectual property rights; provided that such measures are consistent with this Agreement. [PE propose; CL/AU oppose: Nothing in this Chapter shall be construed to reduce the protection that the Parties agree on or have agreed on in benefit of the conservation or sustainable use of biodiversity.]]

#### **Article QQ.A.10: {Transparency}**

[NZ/AU<sup>25</sup>/US/SG<sup>26</sup>/MY/PE/VN/JP/MX propose: 1. [US: Further to Article \_\_\_\_ (Publication), and with the object of making the protection and enforcement of intellectual property rights transparent,] Each Party shall ensure that its laws, regulations and procedures [VN: or administrative rulings of general application] concerning the protection and enforcement of intellectual property rights [US: are in writing and are] [US oppose: shall be] published<sup>[27]</sup>, or where such publication is not [US/PE oppose: practical] [US/PE: practicable], are made publicly available [US/AU/NZ: in a national language in such a manner as to enable [AU oppose: governments and right holders] [AU: interested persons and Parties] to become acquainted with them.] [US/AU/NZ oppose: in at least the national language of that Party or in the English language.]]<sup>28</sup>

<sup>24</sup> Negotiators' Note: CA can support consensus on the first sentence.

<sup>25</sup> Negotiators' Note: AU/NZ/CL/SG/BN/MY/JP is reviewing this provision in light of discussion in Legal and Institution Group. CA understands that a similar provision has already been agreed upon in the Transparency chapter.

<sup>26</sup> [SG/MY: Negotiators Note: Subject to the acceptance of provision concerning the disclosure of confidential information that will impede law enforcement.]

<sup>27</sup> [US: A Party may satisfy requirement for publication by making the law, regulation, or procedure available to the public on the Internet.]

<sup>28</sup> Text from Legal and Institution Group inserted for comparison purposes: *Each Party shall ensure that its laws, regulations, procedures, and administrative rulings of general application with respect to any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them.*

[NZ/AU/SG/MY/CA<sup>29</sup>/MX/CL propose; VN/PE oppose: 2. Each Party shall endeavour to make available on the Internet [AU/NZ:

- (a) its laws, regulations, procedures, and administrative rulings of general application concerning the protection and enforcement of intellectual property rights; and]
- (b) [JP oppose: those details of patent, trademark, design, plant variety protection and geographical indication applications that are open to public inspection under national law.]]

[US/MX propose; BN oppose: 4<sup>30</sup>. Nothing in this Chapter shall require a Party to disclose confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest [PE oppose: or would prejudice the legitimate commercial interests of particular enterprises, public or private ].]<sup>31</sup>

**Article QQ.A.11:** {Application of Agreement to Existing Subject Matter and Prior Acts}

[US propose: 1. Except as it otherwise provides, including in Article QQ.G.8\_\_ (Berne 18/TRIPS 14.6), this Chapter gives rise to obligations in respect of all subject matter existing at the date of entry into force of this Agreement that is protected on that date in the territory of the Party where protection is claimed, or that meets or comes subsequently to meet the criteria for protection under this Chapter.<sup>32</sup>]

2. <sup>33</sup> [CL/NZ/PE/MY/BN/VN/CA/MX oppose: Except as otherwise provided in this Chapter, including Article QQ.G.8\_\_\_\_ (Berne 18/TRIPS 14.6),] a Party shall not be required to restore protection to subject matter that on the date of entry into force of

<sup>29</sup> Negotiators' Note: CA supports in principle pending clarification of what is meant by "open to public inspection" in sub-paragraph (b).

<sup>30</sup> Negotiators note: AU/MY/CA/JP/MX: support inclusion of a provision regarding disclosure of confidential information but would prefer to see such a provision located in a chapter dealing with general provisions and exceptions.

<sup>31</sup> Text from LII Group inserted for comparison purposes: [LII Group: **Article CCC.6: Disclosure of Information.** Nothing in this Agreement shall be construed as requiring a Party to furnish or allow access to confidential information the disclosure of which would impede law enforcement, otherwise be contrary to the public interest, or prejudice the legitimate commercial interests of particular enterprises, public or private. FN: AU/NZ/MY: For the purposes of this paragraph, the public interest includes, for example, compliance with legislative or constitutional provisions regarding privacy.]

<sup>32</sup> Negotiators' Note: AU/NZ/CL/SG/PE/MY/BN/VN/JP/MX/CA/US reserve positions pending final outcome of Chapter. All Parties agree to revisit this provision at the conclusion of this chapter.

<sup>33</sup> Negotiators' Note: JP will follow consensus on this paragraph.

this Agreement has fallen into the public domain in its territory.

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

#### **Article QQ.A.12: {International Exhaustion of Rights}**

[CL/MY/NZ/VN/SG/BN/PE propose; US/AU/JP/MX oppose: The Parties are encouraged to establish international exhaustion of rights.]

#### **Article QQ.A.13: {Public Domain}**

[CL/VN/PE propose: Each Party shall endeavour to provide relevant information to disseminate public domain, including appropriate tools that help to identify the [CL: extension] [VN: expiration] of the terms of protection of intellectual property rights.]

[CL/VN propose: 1. The Parties recognize the importance of a rich and accessible public domain for their societies and the need that public domain material shall be free for its use by all persons.

2. For purposes of paragraph 1, each Party shall endeavor to:
- a) identify subject matter that has fallen into the public domain within their respective jurisdictions;
  - b) promote access to the public domain; and
  - c) preserve the public domain.

3. Actions to achieve the purposes referred to in paragraph 2, may include the development of publicly accessible data bases of registered rights, guidelines and other tools to enhance access to material in the public domain.

4. Each Party shall make its best efforts to promote cooperation among the Parties to identify and facilitate access to subject matter that has fallen into the public domain and share updated information related to right holders and terms of protection.]

[CL/VN Alternative Proposal:

1. The Parties recognize the importance of a rich and accessible public domain for their societies and the need that public domain material shall be free for its use by all persons.

2. For this purpose, Parties may include the development of publicly accessible data bases of registered rights, guidelines and other tools to enhance access to material in the public domain.
3. Each Party shall make its best efforts to promote cooperation among the Parties to identify and facilitate access to subject matter that has fallen into the public domain and share updated information related to right holders and terms of protection.]

## COOPERATION

**Note: We have not introduced braces into this section because party attributions are not clear based on the text.**

### **Section B: Cooperation**

#### **Article QQ.B.1: {Contact Points}**

Each Party shall designate at least one contact point for the purpose of cooperation under this section.

#### **Article QQ.B.2: [NZ/CL/SG/VN/MY/BN/MX propose: Cooperation in the implementation of international agreements**

[NZ/CL/SG/BN/AU/MY/PE/VN/MX propose: 1. [AU/US oppose: Where a Party is a member of any of the following agreements, that Party shall, where appropriate and upon request by another Party, support that Party in implementing any of the following agreements] [AU/CA/JP/SG: A Party may seek to cooperate with other Parties to support its accession to, and implementation of, the agreements X-X ]:

(a) *Patent Cooperation Treaty*;

[PE/CA oppose: (b) *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks*;

(c) *Singapore Treaty on the Law of Trademarks*]; and

(d) *Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks*.]

[JP/SG/PE propose: (e) *International Convention for the Protection of New Varieties of Plants (1991) (UPOV Convention)*]

[AU: 2. Each Party shall endeavor to provide such cooperation as appropriate and upon request.]

#### **Article QQ.B.3 {Cooperation Activities}**

[AU/CL/NZ/PE/SG/BN/MX/VN/MY/US/CA propose: The Parties shall endeavour to cooperate on the subject matter covered by this Chapter through appropriate coordination, training and exchange of information between the intellectual property offices, [or other relevant institutions]<sup>34</sup>, of the Parties. Cooperation may cover such areas as:

- (a) developments in domestic and international intellectual property policy
- (b) intellectual property administration and registration systems
- (c) education and awareness relating to intellectual property
- (d) intellectual property issues relevant to:
  - a. small and medium-sized enterprises
  - b. science, technology & innovation activities[PE propose: , which may include generation, transfer and dissemination of technology.]
- (e) policies involving the use of intellectual property for research, innovation and economic growth
- (f) such other areas as may be agreed among [AU/NZ oppose: the] Parties.]

#### **Article QQ.B.4: {Patent Cooperation}**

[[AU/CL/MY/NZ/SG/PE/VN/CA/MX/BN/JP propose: In order to improve quality and efficiency in the Parties' patent systems,] The Parties shall endeavour to [US/SG propose: cooperate] [US oppose: establish a framework for cooperation] among their respective patent offices to facilitate the [AU/CL/MY/NZ/SG/PE/VN/CA/MX/BN/JP oppose: exploitation] [AU/CL/MY/NZ/SG/PE/VN/CA/MX/BN/JP propose: sharing and use] of search and examination work of other Parties. This may include:

- (a) making search and examination results available to the patent offices of other Parties, and
  - (b) exchanges of information on quality assurance systems and quality standards relating to patent searching and examination;
- [JP propose; CL/PE oppose: (c) implementing and promoting the Patent Prosecution Highway;]

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<sup>34</sup> Negotiators' Note: CA is reflecting on the notion of the meaning of relevant authorities.

[CL/AU/MY/NZ/SG/PE/VN/CA/MX/BN oppose: which may, among other things, facilitate work sharing.]<sup>35</sup><sup>36</sup>

[JP proposal: 2. In the course of the cooperation referred to Paragraph 1, the Parties are encouraged not to require the applicants to submit search and examination results, including cited documents, made available by the patent offices of other Parties, with a view to reducing the procedural costs of the applicants.]

**Article QQ.B.5:** Cooperation activities and initiatives undertaken under this Chapter shall be subject to the availability of resources, and on request and on terms and conditions mutually agreed upon between the Parties involved.[VN propose: , including the technical assistance for developing countries.]

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<sup>35</sup> Negotiators' Note: US consulting experts on wording of provision.

<sup>36</sup> Negotiators' Note: US and JP can go along with the consensus.

## **{TRADEMARKS}**

### **{Section C: Trademarks}**

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

[NZ/US/AU/CL/PE/SG/CA/JP/MY<sup>37</sup> propose: 1. [VN/BN/MX oppose: No] Party may require, as a condition of registration, that a sign be visually perceptible, [VN/BN/MX oppose: nor may a Party] [VN/BN/MX propose: and] deny registration of a trademark solely on the ground that the sign of which it is composed is a sound [CL/CA/JP/MY oppose: or a scent] [CL/CA/MX/MY propose: Each Party may provide trademark protection for scents].] A Party may require a concise and accurate description, or graphical representation, or both, as applicable, of the trademark.

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

1. Each Party shall provide that trademarks shall include collective marks and certification marks. A Party is not obligated to treat certification marks as a separate category in its domestic law, provided that such marks are protected.

Each Party [JP/MX propose: may][ JP oppose: shall] also provide that signs that may serve as geographical indications are eligible for protection under its trademark system [<sup>38</sup>]<sup>39</sup>[PE/NZ/MX/CL/BN/AU/US/JP/SG oppose; VN propose<sup>40</sup>: A Party may provide that Signs descriptive of geographical origin of goods or services, including geographical indication as defined in Article 22 of the TRIPS Agreement, may not be protected as trademarks other than collective and certification marks, unless they have acquired distinctiveness through use.]

[US/PE/MX<sup>41</sup>/SG propose; AU/NZ/ VN/BN/MY/CL/CA oppose: 2. Pursuant to Article 20 of the TRIPS Agreement, each Party shall ensure that its measures mandating the use of the term customary in common language as the common name for a good or service (“common name”) including, inter alia, requirements concerning

<sup>37</sup> Negotiators' Note: MY supports this article subject to further domestic implementation.

<sup>38</sup> [JP propose: For clarity a Party may require that a sign has acquired distinctiveness through use, where the sign consists only of names of place.]

<sup>39</sup> For purposes of this Chapter, **geographical indication** means indications that identify a good as originating in the territory of a party, or a region or locality in that territory, where a given quality, reputation, or other characteristic of the good is essentially attributable to its geographical origin. Consistent with this definition, any sign or combination of signs shall be eligible for protection under one or more of the legal means for protecting GIs, or a combination of such means.

<sup>40</sup> Negotiators' Note: CA/MY is flexible on this proposal.

<sup>41</sup> Negotiators' Notes: PE/MX/SG will go with consensus on this paragraph.

the relative size, placement or style of use of the trademark in relation to the common name, do not impair the use or effectiveness of trademarks used in relation to such good or service. <sup>[42]</sup><sup>[43]</sup><sup>[44]</sup>

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

Each Party shall provide that the owner of a registered trademark shall have the exclusive right to prevent third parties not having the owner's consent from using in the course of trade identical or similar signs, [PE/MY/VN/CA/MX oppose<sup>45</sup>: including subsequent geographical indications,] for goods or services that are related to those goods or services in respect of which the owner's trademark is registered, where such use would result in a likelihood of confusion.

In the case of the use of an identical sign, [PE/MY/SG/CL/CA/MX/VN oppose<sup>46</sup>: including a geographical indication,] for identical goods or services, a likelihood of confusion shall be presumed.

### **Article QQ.C.4:**

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

[VN propose; AU/US/NZ/SG/MY/CL/PE/CA/JP/BN oppose: The owner of a registered trademark shall not have the right to prevent third parties from using geographical indications or other signs descriptive of goods and services even though they are identical or similar to the trademark unless such use would result in confusion.]<sup>47</sup>

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

1. No Party may require as a condition for determining that a trademark is well-known that the trademark has been registered in the Party or in another jurisdiction,

<sup>42</sup> [PE/US propose: For greater certainty, the existence of such measures does not per se, amount to impairment.]

<sup>43</sup> Negotiators' Note: MX is still reflecting on this provision. JP is considering this provision.

<sup>44</sup> [SG propose: this provision is not intended to affect the use of common names of pharmaceutical products in prescribing medicine.]

<sup>45</sup> Negotiators' Note: JP is considering this provision.

<sup>46</sup> Negotiators' Note: JP is considering this provision.

<sup>47</sup> Negotiators' Note: MX will go with consensus with this paragraph.

included on a list of well-known trademarks, or given prior recognition as a well-known trademark.

2. Article 6bis of the Paris Convention for the Protection of Industrial Property (1967) shall apply, *mutatis mutandis*, to goods or services that are not identical or similar to those identified by a well-known trademark,<sup>[48]</sup> [BN oppose: whether registered or not<sup>49</sup>,] provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the trademark, and provided that the interests of the owner of the trademark are likely to be damaged by such use.

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

[US/BN/CL/PE/MX/CA/JP/NZ/SG/VN propose; AU/MY oppose: 4<sup>50</sup>. Each Party shall [PE/BN/MX/CA<sup>51</sup> propose: according to domestic laws] provide for appropriate measures to refuse or cancel the registration and prohibit the use of a trademark that is identical or similar to a well-known trademark, [SG/VN propose: as being already well-known before the registration or use of the first-mentioned trademark,] for related goods or services, if the use of that trademark is likely to cause confusion [CA/SG/VN oppose:<sup>52</sup> or to deceive or risk associating the trademark with the owner of the well-known trademark, or constitutes unfair exploitation of the reputation of the well-known trademark.]]

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

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

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

<sup>48</sup> [US/CA/CL/MX/SG/NZ/VN/BN/AU/MY propose: Where a Party determines whether a mark is well-known in the Party, the Party need not require that the reputation of the trademark extend beyond the sector of the public that normally deals with the relevant goods or services.]

<sup>49</sup> Negotiators' Note: MY support subject to domestic implementation.

<sup>50</sup> Negotiators' Note: Parties reviewing the scope of this paragraph intersessionally.

<sup>51</sup> Negotiators' Note: CA is flexible on this language, subject to its final attribution of this paragraph.

<sup>52</sup> Negotiators' Note: JP is considering this provision.

- (b) providing the opportunity for the applicant to respond to communications from the competent authorities, to contest an initial refusal, and to appeal judicially any final refusal to register a trademark;
- (c) providing an opportunity to oppose the registration of a trademark or to seek cancellation<sup>53</sup> of a trademark; and
- (d) requiring that administrative decisions in oppositions and cancellation proceedings be reasoned and in writing. Written decisions may be provided electronically.

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

Each Party shall provide:

- (a) a system for the electronic application for, and maintenance of, trademarks; and
- (b) a publicly available electronic information system, including an online database, of trademark applications and of registered trademarks.

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

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

- [CA oppose: (a) registrations and the publications of applications indicate the goods and services by their names, grouped according to the classes established by the Nice Classification<sup>54</sup>; and]
- (b) goods or services may not be considered as being similar to each other on the ground that, in any registration or publication, they are classified

<sup>53</sup> For greater certainty, cancellation for purposes of this Section may be implemented through nullity or revocation proceedings.

<sup>54</sup> Parties that rely on translations of the Nice Classification are required to follow updated versions of the Nice Classification to the extent that official translations have been issued and published.

in the same class of the Nice Classification. Conversely, each Party shall provide that goods or services may not be considered as being dissimilar from each other on the ground that, in any registration or publication, they are classified in different classes of the Nice Classification.

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

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

**Article QQ.C.10<sup>55</sup>:** No Party may require recordal of trademark licenses:

a. to establish the validity of the license;

[US/CA/NZ/SG/JP/AU propose; VN/MX/BN/PE/CL/MY oppose: b. as a condition for the right of a licensee to join infringement proceedings initiated by the holder, or to obtain by way of such proceedings damages resulting from an infringement of the trademark which is subject to the license; or

c. as a condition for use of a trademark by a licensee, to be deemed to constitute use by the holder in proceedings relating to the acquisition, maintenance and enforcement of trademarks.]

#### **Article QQ.C.11: {International Exhaustion of Rights}**

[CL/NZ/SG/VN/PE/MY/BN/AU/CA/MX propose; US/JP oppose: The Parties are encouraged to establish international exhaustion of trademark rights. For this purpose, the registration of a trademark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in any country under that trademark by the proprietor or with his consent.]

#### **Article QQ.C.12: {Domain Names on the Internet}**

1.<sup>56</sup> In order to address the problem of trademark [VN/MX propose: geographical indication and trade name] cyber-piracy, each Party shall adopt or maintain a system

<sup>55</sup> Negotiators' Note: AU supports this article ad referendum.

<sup>56</sup> Negotiators' Note: AU supports this paragraph ad referendum.

for the management of its country-code top-level domain (ccTLD) that provides:

- (a) an appropriate procedure for the settlement of disputes, based on, or modelled along the same lines as, the principles established in the Uniform Domain-Name Dispute-Resolution Policy, or that is: (i) designed to resolve disputes expeditiously and at low cost, (ii) fair and equitable, (iii) not overly burdensome, and (iv) does not preclude resort to court litigation;
- (b) online public access to a reliable and accurate database of contact information concerning domain-name registrants<sup>57</sup>;

in accordance with each Party's laws regarding protection of privacy<sup>58</sup> and personal data.<sup>59</sup>

2. [PE/SG/CL/AU/NZ/MY/BN/CA oppose; US/VN/JP/MX propose: Each party shall provide [VN: oppose adequate and effective] [VN propose: appropriate] remedies against the registration trafficking<sup>60</sup>, or use in any ccTLD, with a bad faith intent to profit, of a domain name that is identical or confusingly similar to a trademark [VN/MX propose: , geographical indication or trade name].]

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<sup>57</sup> Negotiators' Note: Brunei can accept this provision pending completion of its database.

<sup>58</sup> Negotiators' Note: US seeks further clarification on the scope of application of privacy data.

<sup>59</sup> Negotiators' Note: AU/CL/MY/NZ/US/SG/JP support contingent on understanding that TPP will include a general provision related to privacy/disclosure of information; issues.

<sup>60</sup> Negotiators' Note: JP seeks clarification as to whether "registration" is deemed to be synonymous with "acquiring the right to use" and reserves its position pending clarification of the term "trafficking".

## **{GEOGRAPHICAL INDICATIONS}**

### **{Section D: Geographical Indications}**

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

The Parties recognize that [US propose; CL/PE/CA/MX/SG/MY/BN/VN/JP oppose: , subject to Article QQ.C.2(1),<sup>61</sup> (*Gls eligible for protection as trademarks*)] geographical indications may be protected through a trademark or sui generis system or other legal means.

**Article QQ.D.2:** Where a Party provides administrative procedures for the protection or recognition of geographical indications, through a system of trademarks or a sui generis system, the Party shall with respect to applications for such protection or petitions for such recognition:

- (a) accept those applications or petitions without requiring intercession by a Party on behalf of its nationals<sup>62</sup>;
- (b) process those applications or petitions without imposition of overly burdensome formalities;
- (c) ensure that its regulations governing the filing of those applications or petitions are readily available to the public and clearly set out the procedures for these actions;
- (d) make available information sufficient to allow the general public to obtain guidance concerning the procedures for filing applications or petitions and the processing of those applications or petitions in general; and allow applicants, petitioners, or their representatives to ascertain the status of specific applications and petitions;
- (e) ensure that those applications or petitions are published for opposition and provide procedures for opposing geographical indications that are the subject of applications or petitions; and

<sup>61</sup> Negotiators' Note: [JP is still considering this issue depending on the outcome of discussions on Article QQ.C.2][AU/NZ: will go with consensus.]

<sup>62</sup> Subparagraph (a) shall also apply to judicial procedures that protect or recognize a geographical indication.

- (f) provide for cancellation, annulment, or revocation of the protection or recognition afforded to a geographical indication<sup>63</sup>

**Article QQ.D.3:** Each Party shall, whether protection or recognition is provided to a geographical indication through [SG/CA/MY oppose: its domestic measures] [SG/CA/MY propose: the system referred to in article QQ.D.2] [CL/PE/MY/SG/VN/BN/CA/MX oppose<sup>64</sup>: or pursuant to an agreement with another government or government entity], provide a process that allows interested persons to object to the protection or recognition of a geographical indication, [CA oppose: and for protection or recognition to be<sup>65</sup> refused annulled<sup>66</sup> or, [AU propose: where appropriate,] cancelled] [MY/VN/SG/MX oppose<sup>67</sup>: , at least on the following grounds:

- (i) the geographical indication is likely to cause confusion with a trademark or geographical indication that is the subject of a pre-existing good faith pending application or registration in the territory of such Party<sup>68</sup>;
- (ii) [BN oppose: the geographical indication is likely to cause confusion with a pre-existing trademark or geographical indication, the rights to which have been acquired in accordance with the Party's law<sup>69</sup>]; and
- (iii) the geographical indication is a term customary in common language as the common name for such goods or services in that Party's territory.]]

**Article QQ.D.4:** [US propose;<sup>70</sup> CL/PE/NZ/AU/SG/MY/MX/CA/BN/VN oppose: No Party shall, whether pursuant to an agreement with a government or a governmental

<sup>63</sup> Negotiators' Note: Parties are considering the different terms used in this provision along with similar issues that have cropped up in C6 and D3.

<sup>64</sup> Negotiators' Note: JP is considering this language.

<sup>65</sup> Negotiators' Note: JP is considering this provision depending on the meaning of this Article.

<sup>66</sup> Negotiators' Note: subject to legal clarification on consistency of the term cancellation etc.

<sup>67</sup> Negotiators' Note: JP is considering this provision including Note to (i) and (ii).

<sup>68</sup> [US/NZ/BN propose; CL/PE/SG/MX/MY oppose: For greater certainty, the Parties acknowledge that a geographical indication that is likely to cause confusion with a pre-existing trademark or with another geographical indication should be refused protection, even if that geographical indication is a translation or modification of a geographical indication that the Party already protects.] [US alternative propose; PE/MX/SG/MY/CL oppose: For greater certainty, the Parties acknowledge that, where a translation or a modification of a geographical indication is likely to cause confusion with a pre-existing trademark or geographical indication, it should be refused protection.]

<sup>69</sup> [US/AU propose: For greater certainty, the Parties acknowledge that the prior trademarks referred to in Article QQ.D.3 include well-known trademarks.]

<sup>70</sup> Negotiators' Note: JP is considering this provision.

entity or otherwise:

(a) in the case of geographical indications for goods other than wines or spirits, prohibit third parties from using or registering translated versions of the geographical indication;<sup>[71]</sup> or

(b) prohibit third parties from using a term that is evoked by the geographical indication.]

**Article QQ.D.5:** [NZ/AU/BN/US propose;<sup>72</sup> VN/PE/SG/CL/MY/CA/MX oppose: A Party may provide the means to protect a geographical indication against use in translation by third parties only if such use would, with respect to a geographical indication for goods other than wines and spirits:

- (a) give rise to a likelihood of confusion with a prior trademark or geographical indication in the territory of that Party;
- (b) mislead the public as to the geographical origin of the good; or
- (c) constitute an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967).

**Article QQ.D.6:** [US/NZ/AU/CL/SG propose;<sup>73</sup> MX/VN/PE/MY oppose: If a Party grants protection or recognition to a geographical indication through the systems described in Article QQ.D.2 or through an agreement with another government or government entity, such protection or recognition shall commence no earlier than [CL oppose: (i) the filing date in the Party<sup>[74]</sup>,] (ii) the date on which such agreement enters into force, or (iii) if a Party implements such protection or recognition on a date after entry into force of the agreement, on that later date<sup>75</sup>.]

**Article QQ.D.7:** [NZ/AU/US propose;<sup>76</sup> PE/CL/VN/SG/MY/BN/CA/MX oppose:

<sup>71</sup> [US: For greater certainty, nothing in this Agreement shall prohibit a Party from barring third parties from using or registering translations of geographical indications if: (1) such uses give rise to a likelihood of confusion [JP oppose: , and (2) the geographical indications became protected through means other than an agreement between a Party and a government or governmental entity].] Negotiators' Note: JP proposes to move this footnote before subparagraph (a), so that it covers subparagraph (b) as well.

<sup>72</sup> Negotiators' Note: JP is considering this provision.

<sup>73</sup> Negotiators' Note: JP is considering this provision.

<sup>74</sup> [NZ propose: for greater certainty the filing date reference in Article QQ.D.6 includes the priority filing date under the Paris Convention, where applicable.]

<sup>75</sup> Negotiators' Note: CA to consider; BN can go along with consensus: VN/BN maintains opposition to reference to agreement with another government, etc.

<sup>76</sup> Negotiators' Note: JP is considering this provision.

No Party shall preclude the possibility that a term that it recognized as a trademark or geographical indication may become a term customary in the common language as the common name for the associated goods or services.]

**Article QQ.D.8:** [CL/PE/AU/US/NZ/MX/CA/VN/JP propose <sup>77</sup> ; BN oppose: In determining whether a term is the term customary in the common language as the common name for the relevant goods or services in a Party's territory, a Party's authorities shall have the authority to take into account how consumers understand the term in that Party's territory. Factors relevant to such consumer understanding may include [SG/CL/PE/MX/VN propose: if appropriate]:

- (a) whether the term is used to refer to the type of product in question, as indicated by competent sources such as dictionaries, newspapers, and relevant websites;
- (b) how the product referenced by the term is marketed and used in trade in the territory of that Party; and
- (c) [CL/PE/MX/CA oppose<sup>78</sup>: whether the term is used in relevant international standards to refer to a class or type of product].]

**Article QQ.D.9:** [NZ/AU/US/VN/BN/CL propose<sup>79</sup>; PE/MY/MX oppose: An individual component of a multi-component term that is protected as a geographical indication in a Party shall remain available for the public to use in that Party if the individual component is a term customary in the common language as the common name for the associated goods.]

[SG propose<sup>80</sup>: For greater certainty, nothing in this section shall require a Party to apply its provisions in respect of any individual component contained in a GI for which that individual component is identical with the term customary in common language as the common name of such goods in the territory of that Party.]

**Article QQ.D.10:** [US propose;<sup>81</sup> AU/CL/SG/PE/MY/NZ/BN/VN/MX/CA oppose: The existence of a geographical indication shall not be a ground upon which a Party

<sup>77</sup> Negotiators' Note: CA reserves its right to revisit this article once the Geographical Indication provisions have been agreed upon. MY/SG still considering this provision.

<sup>78</sup> Negotiators' Note: JP is considering this provision.

<sup>79</sup> Negotiators' Note: CA is reflecting on both proposals. JP is considering this provision.

<sup>80</sup> Negotiators' Note: MY/PE supports SG proposal in principle but is reflecting on language.

<sup>81</sup> Negotiators' Note: JP is considering this provision.

may:

- (a) refuse a trademark owner's otherwise permissible request to renew the registration of its trademark; or
- (b) refuse a trademark owner's request to register an otherwise permissible modification of its registered trademark.]

**Article QQ.D.11:** [CL/SG/BN/VN/MX propose<sup>82</sup>; AU/PE/US/NZ/CA/JP oppose:  
**List of Geographical Indications**

The terms listed in Annex [...] are recognized as geographical indications of the respective Party, within the meaning of paragraph 1 of Article 22 of the TRIPS Agreement. Subject to domestic laws [<sup>83</sup>], in a manner that is consistent with the TRIPS Agreement, such terms will be protected as geographical indications in the territories of the other Parties.]

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

[NZ/CL/VN/MY/BN/SG/MX propose<sup>84</sup>; PE/US/AU oppose: 1. Each Party may provide protection to homonymous geographical indications. Where a Party provides protection to homonymous geographical indications, that Party may, where necessary, lay down the practical conditions of use to make a distinction between the homonymous geographical indications, taking into account the need to ensure equitable treatment of the producers concerned and that consumers are not misled.]

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

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

**Article QQ.D.13: {Country Names}**

<sup>82</sup> Negotiators' Note: VN supports subject to this list of GIs in the Annex.

<sup>83</sup> [CL/BN/SG propose: For greater certainty, the Parties acknowledge that geographical indications will be recognized and protected in the Parties only to the extent permitted by and according to the terms and conditions set out in their respective domestic laws.]

<sup>84</sup> Negotiators' Note: CA is continuing to reflect on this provision but notes concerns regarding scope and operation. JP is considering this provision.

[CL/AU/NZ/SG/BN/VN/MY/PE/CA/MX/JP propose<sup>85</sup>: The Parties shall provide the legal means for interested parties to prevent commercial use of country names of the Parties in relation to goods in a manner which misleads consumers as to the origin of such goods.]

**Article QQ.D.14:** [US propose<sup>86</sup>; CL/PE/VN/MY/CA oppose: Each Party shall permit the use, and as appropriate, allow the registration, of signs or indications that identify goods other than wines or spirits, and that reference a geographical area that is not the place of origin of the goods, unless such use is misleading, would constitute an act of unfair competition, or would cause a likelihood of confusion with a prior trademark or geographical indication that identifies the same or similar goods. The foregoing shall not be understood to prevent a Party from denying registration of such a sign or indication on other grounds, provided such denial does not derogate from the provisions of the Paris Convention and the TRIPS Agreement.]

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<sup>85</sup> Negotiators' Note: US supports the principle reflected in this Article, but has concerns about limiting the Article just to names of countries.

<sup>86</sup> Negotiators' Note: AU/ NZ/ SG/ BN reflecting on reformulated proposal. JP is considering this provision.

**{PATENTS/ UNDISCLOSED TEST OR OTHER DATA/ TRADITIONAL  
KNOWLEDGE}**

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

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

1. Subject to the provisions of paragraph 2 and 3, each Party shall make patents available for any invention, whether a product or process, in all fields of technology, provided that the invention is new, involves an inventive step, and is capable of industrial application.<sup>87</sup> [US/AU propose; <sup>88</sup> CL/MY/PE/SG/VN/BN/NZ/CA/MX oppose: The Parties confirm that:

(a) patents shall be available for any new uses or methods of using a known product],

[US/JP propose; CL/MY/PE/SG/VN/BN/AU/NZ/CA/MX oppose: (b) a Party may not deny a patent solely on the basis that the product did not result in enhanced efficacy of the known product when the applicant has set forth distinguishing features establishing that the invention is new, involves an inventive step, and is capable of industrial application.]

2. Each Party may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to nature or the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

3. [US: Consistent with paragraph 1] each Party [US propose; AU/NZ/VN/BN/CL/PE/MY/SG/CA/MX oppose: shall make patents available for inventions for the following] [NZ/CL/PE/MY/AU/VN/BN/SG/CA/MX propose: may also exclude from patentability]:

(a) plants and animals, [NZ/CL/PE/MY/AU/VN/BN/SG/CA/MX propose: other than microorganisms];

<sup>87</sup> For purposes of this [Section] Article, a Party may deem the terms “inventive step” and “capable of industrial application” to be synonymous with the terms “non-obvious” and “useful”, respectively. In determinations regarding inventive step (or non-obviousness), each Party shall consider whether the claimed invention would have been obvious to a person skilled or having ordinary skill in the art having regard to the prior art.

<sup>88</sup> Negotiators' Note: JP is considering this provision.

[JP oppose: (b) diagnostic, therapeutic, and surgical methods for the treatment of humans or animals [US propose; AU/SG/MY/NZ/CL/PE/VN/BN/CA/MX oppose: if they cover a method of using a machine, manufacture, or composition of matter]; [NZ/CL/PE/MY/AU/VN/BN/SG/CA/MX propose:] and

(c) essentially biological processes for the production of plants or animals, other than non-biological and microbiological processes for such production.]

[MX propose: (d) and the diagrams, plans, rules and methods for carrying out mental processes, playing games or doing business, and mathematical methods as such; software as such; methods to present information as such; and aesthetic creations and artistic or literary works.]

[NZ/CA/SG/CL/MY propose: *ALT 3*. Each Party may also exclude from patentability:

- (a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals; and
- (b) plants and animals other than microorganisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Parties shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof.]

## **Article QQ.E.2: {Patentable Subject Matter}**

Each Party shall<sup>89</sup> disregard at least information contained in public disclosures used to determine if an invention is novel or has an inventive step if the public disclosure<sup>[90]</sup> <sup>[91]</sup><sup>92</sup>:

<sup>89</sup> Negotiator's Note: NZ/VN accept *ad referendum* pending confirmation on scope of publication and duration of grace period.

<sup>90</sup> [CA/SG/JP propose: A Party shall not be required to disregard information contained in [gazettes related to intellectual properties or] patent applications made available to the public by a patent office unless erroneously published or unless the application was filed without the consent of the inventor or their successor in title by a third party who obtained the information directly or indirectly from the inventor.]

<sup>91</sup> For greater certainty, a Party may limit application of this provision to disclosures made by or obtained directly or indirectly from the inventor or joint inventor. [PE/US/MY/SG/AU propose: For greater certainty, a Party may provide that, for purposes of this article information obtained directly or indirectly from the patent applicant may be information contained in the public disclosure that was authorized by, or derived from, the patent applicant.]

<sup>92</sup> Negotiators' Note: Parties will continue to work to resolve the drafting of footnotes 61 & 62 (2<sup>nd</sup> sentence) intersessionally.

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

and

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

**Article QQ.E.3:** [US: Without prejudice to Article 5A (3) of the Paris Convention,] Each Party shall provide that a patent may be cancelled, revoked or nullified only on grounds that would have justified a refusal to grant the patent. A Party may also provide that fraud, misrepresentation, or inequitable conduct may be the basis for cancelling, revoking, or nullifying a patent or holding a patent unenforceable. [AU/CL/MY/NZ/BN/CA/MX/VN propose<sup>93</sup>; US/JP oppose: A Party may also provide that a patent may be cancelled, revoked or nullified on the basis that the patent is used in a manner determined to be anti-competitive in a judicial [VZ/CA/MX propose: or administrative] proceeding] [AU/CL/CA/MX propose: US oppose; consistent with Article 5A(3) of the Paris Convention.]

**Article QQ.E.4:** <sup>94</sup>

**Article QQ.E.4: {Opposition to Grant of Patent}**

[NZ/CA/SG/CL/MY propose: Each Party shall provide a procedure for third persons to oppose the grant of a patent, either before or after the grant of a patent, or both.]

**Article QQ.E.5: {Exceptions}**

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

**Article QQ.E.5bis: {Regulatory Review Exception}**

[NZ/CA/SG/CL/MY propose: Consistent with [Article QQ.E.5 (Exceptions)], each Party may provide that a third person may do an act that would otherwise infringe a patent if the act is done for purposes connected with the collection and submission of data in order to comply with the regulatory requirements of that Party or another

<sup>93</sup> Negotiator's Note: PE and SG are flexible with both options.

<sup>94</sup> US withdraw Article QQ.E.4 ad referendum pending confirmation from capital.

country, including for purposes connected with marketing or sanitary approval.]

#### **Article QQ.E.5<sup>ter</sup>: {Experimental Use of a Patent}**

[NZ/CA/SG/CL/MY propose: 1. Consistent with [Article QQ.E.5 (Exceptions)], each Party may provide that a third person may do an act that would otherwise infringe a patent if the act is done for experimental purposes relating to the subject matter of a patented invention.

2. For the purposes of this Article, experimental purposes may include, but need not be limited to, determining how the invention works, determining the scope of the invention, determining the validity of the claims, or seeking an improvement of the invention (for example, determining new properties, or new uses, of the invention).]

#### **Article QQ.E.5<sup>quater</sup>: {Other Use Without Authorisation of the Right Holder}**

[NZ/CA/SG/CL/MY propose: Nothing in this Chapter shall limit a Party's rights and obligations under Article 31 of the TRIPS Agreement or any amendment thereto.]

#### **Article QQ.E.6: {Patent filing}**

1 Each Party shall provide that where an invention is made independently by more than one inventor, and separate applications claiming that invention are filed with or for the relevant authority of the Party, any patent granted for the claimed invention shall be granted on the application [US/VN/MX propose; AU/NZ/CL/MY/CA/PE oppose: which has been found to be patentable and] which has the earliest filing or, if applicable, priority date [AU/NZ/PE/BN/CL/CA<sup>95</sup> propose;<sup>96</sup> US/VN/MY/MX/SG oppose: and which is published].[US: <sup>97</sup>]

**Article QQ.E.7:** Each Party shall provide patent applicants with at least one opportunity to make amendments, corrections, and observations in connection with their applications<sup>98</sup>.

<sup>95</sup> Negotiator's note: CA reserves its position on Articles QQ.E.6, QQ.E.11 and QQ.E.12 pending clarification of the definition of publish/published.

<sup>96</sup> Negotiators' Note: JP is considering this provision.

<sup>97</sup> [US: A Party may limit application of this provision to patent applications in which there is at least one claim to new subject matter filed after the entry into force of this Agreement.] Negotiators' Note: JP is considering this provision.

<sup>98</sup> Each Party may provide that such amendments do not go beyond the scope of the disclosure of the invention as of the filing date.

**Article QQ.E.8:** [US/AU/PE/VN propose;<sup>99</sup> CL/MY/BN/NZ/CA/SG/MX<sup>100</sup> oppose: Each Party shall provide that a disclosure of a claimed invention shall be considered to be sufficiently clear and complete if it provides information that allows the invention to be made and used by a person skilled in the art, without undue experimentation, as of the filing date.]

**Article QQ.E.9:** [US/PE/AU propose; <sup>101</sup> CL/VN/MY/BN/NZ/CA/SG/MX oppose: Each Party shall provide that a claimed invention [AU oppose: is] [AU propose: shall be] sufficiently supported by its disclosure [AU oppose: if the disclosure reasonably conveys to a person skilled in the art that the applicant was in possession of the claimed invention] as of the filing date.]

**Article QQ.E.10:** [US/AU/MX propose;<sup>102</sup> SG/CL/MY/VN/PE/BN/NZ/CA oppose: Each Party shall provide that a claimed invention is [US/AU propose: useful] [MX propose: industrially applicable] if it has a specific [MX propose: and], substantial, [MX oppose: and credible] utility.]

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

[AU/PE/NZ/MY/CL/VN/US/CA/MX/JP: 1. Each Party shall publish [US/MX oppose: or make available for public inspection] any patent application promptly after the expiry of 18 months from its filing date or, if priority is claimed, from its priority date, unless the application has been published earlier or has been withdrawn, abandoned or refused [CA propose: , without leaving any rights outstanding].]<sup>103</sup>

[AU/PE/NZ/CL/VN/CA/MX propose; MY oppose: 2. Each Party shall provide that an applicant may request the early publication of an application prior to the expiry of the period mentioned above.]

**Article QQ.E.12:** [US/AU<sup>104</sup>/CA/SG/PE/CL/NZ/JP propose; MY/BN/VN/MX oppose: For published<sup>105</sup> patent applications and issued patents, each Party shall make available to the public [US/PE/CA propose: at least] the following information: submitted [US/SG/PE propose: to that Party's competent authorities] in accordance

<sup>99</sup> Negotiators' Note: JP is considering this provision.

<sup>100</sup> Negotiator's Note: MX/SG are willing to accept the article provided that the sentence “without undue experimentation” is deleted.

<sup>101</sup> Negotiators' Note: JP is considering this provision.

<sup>102</sup> Negotiators' Note: JP is considering this provision.

<sup>103</sup> Negotiator's note: SG/BN/US/MY is not fundamentally opposed, but considering how their concerns over exceptions will be addressed. US support for this provision is contingent upon resolution of exceptions under U.S. law. JP is considering the issue of exceptions.

<sup>104</sup> Negotiator's Note: AU is considering the issue of “in the possession of the competent authority”.

<sup>105</sup> Negotiator's Note CA: Publish includes making available for public inspection.

with [US/SG/PE propose: their] requirements [US/SG/PE oppose: of the Party's competent authorities] [AU/CA/CL propose: in their possession] [US/SG/PE propose: and] in connection with the prosecution of such patent applications and patents:

(a) search and examination results, [JP oppose: including any relevant prior art search histories];

(b) [SG/PE/CL/US/NZ/AU/JP propose: non confidential]<sup>106</sup> communications from applicants; and

(c) patent and non-patent related literature citations submitted by applicants, and relevant third parties.]

#### **Article QQ.E.X: {Exhaustion of Rights}**

[CL propose: The Parties are encouraged to establish international exhaustion of patent rights. For this purpose, the registration of a patent shall not entitle its holder to prevent third parties from making, using, offering for sale, selling or importing a product protected by that patent, which has been put in the market in any country by the patent holder or with his consent.]

#### **Article QQ.E.XX**

[US propose; CA/NZ/JP oppose: Each Party, at the request of the patent owner, shall adjust the term of a patent to compensate for unreasonable delays that occur in the granting of the patent. For purposes of this subparagraph, an unreasonable delay at least shall include a delay in the issuance of the patent of more than four years from the date of filing of the application in the territory of the Party, or two years after a request for examination of the application has been made, whichever is later. Periods attributable to actions of the patent applicant need not be included in the determination of such delays. Any patent term adjustment under this article shall confer all of the exclusive rights of a patent subject to the same limitations and exceptions that would otherwise apply to the patent absent any adjustment of the patent term.]

#### **Article QQ.E.13<sup>107 108</sup>: {Exceptions / Regulatory Review Exception}**

<sup>106</sup> Negotiator's Note: AU is still considering whether this would include personal information.

<sup>107</sup> Negotiator's Note: CA/MX/AU is still considering the options in this provision.

<sup>108</sup> [MX propose: For greater clarity, the duration of the regulatory review exception will be subject to each Party's national legislation.]

[US/NZ/PE/CA/MX/JP propose: Consistent with paragraph [QQ.E.5] (patent exceptions and limitations), each Party shall permit] [CL/SG/MY/AU/VN/BN propose: Where a Party permits] a third person to use the subject matter of a subsisting patent to [US/NZ/PE/AU/MX/VN/BN/JP] propose: generate information necessary to] support an application for [AU/CA/MX/VN/BN propose: regulatory or] marketing approval [CL/NZ/PE/SG/MY/AU/CA/MX/VN/BN propose: or sanitary permit] of a [AU/CA/VN/BN oppose: pharmaceutical] product [PE propose: or agricultural chemical product], [US/NZ/PE/SG/MY/MX/JP propose: and shall further] [CL/AU/CA/VN/BN propose: that Party may also] provide that any product produced under such authority [CL/AU/CA/VN/BN propose: may be] [US/NZ/PE/SG/MY/MX/JP propose: shall not be] made, [CA propose: constructed,] [CL/PE/VN/BN propose: offered for sale], [PE/VN/BN propose: imported,] used, or sold in its territory [US/NZ/PE/SG/MY/MX/JP propose: other than] for purposes related to [US/NZ/PE/AU/MX/VN/BN/JP propose: generating such information to support an application for] meeting [AU/CA/MX/VN/BN propose: regulatory or] marketing approval [CL/NZ/PE/SG/MY/AU/CA/MX/VN/BN propose: or sanitary permit] requirements of that Party [NZ/SG/MY/AU/CA/MX/CL/VN/BN propose: or another country].

[US/SG/MY/PE/MX/CL propose;<sup>109</sup> NZ/AU/CA/VN/BN oppose: If the Party permits exportation of such a product, the Party shall provide that the product shall only]] [NZ/CA/BN propose: Each Party shall permit a product to] [AU/VN propose: Each Party may permit such a product to] be exported outside its territory [US/NZ/PE/AU/MX/VN/BN propose: for purposes of generating information] to support an application for meeting [AU/CA/MX/VN/BN propose: regulatory or] marketing approval [CL/NZ/SG/MY/PE/AU/CA/MX/VN/BN propose: or sanitary approval] requirements of that Party [CL/NZ/SG/MY/AU/CA/MX/VN/BN propose: or another country].

**Article QQ.E.14:** [US propose;<sup>110</sup> AU/NZ/CL/PE/MY/SG/BN/VN/CA/MX oppose: 6.

- (a) Each Party shall make best efforts to process patent applications and marketing approval applications expeditiously with a view to avoiding unreasonable or unnecessary delays.
- (c) Each Party, at the request of the patent owner, shall make available an adjustment of the patent term of a patent which covers a new pharmaceutical product<sup>111</sup> or a patent that covers a method of making or

<sup>109</sup> Negotiators' Note: JP is considering this provision.

<sup>110</sup> Negotiators' Note: JP is considering this provision.

<sup>111</sup> [US: For greater certainty, **new pharmaceutical product** in subparagraphs 6 (c)-(e) means a product that at

using a pharmaceutical product, to compensate the patent owner of unreasonable curtailment of the effective patent term as a result of the marketing approval process.

- (d) In implementing subparagraph 6(c), a Party may:
  - (i) limit the applicability of subparagraph 6(c) to a single patent term adjustment for each new pharmaceutical product that is being reviewed for marketing approval;
  - (ii) require the basis for the adjustment to be the first marketing approval granted to the pharmaceutical product in that Party; and
  - (iii) limit the period of the adjustment to no more than 5 years.
- (e) In implementing subparagraph 6(c), and as a condition for providing the adjustment set forth in subparagraph 6(c) for a new pharmaceutical product approved consistent with Article 9.2(b) or Article 9.2(d), a Party may require an applicant that has submitted an application for marketing approval consistent with Article 9.2(b) or Article 9.2(d) to commence the process of obtaining marketing approval for that new pharmaceutical product in the Party within [X] years of the date of the first marketing approval of the same pharmaceutical product in another Party.<sup>112</sup>
- (f) Any adjustment under subparagraph 6(c) shall confer all of the exclusive rights, subject to the same limitations and exceptions, of the patent claims of the product, its method of use, or its method of manufacture in the originally issued patent as applicable to the product and the approved method of use of the product.]] ]

**Article QQ.E.16:** <sup>113</sup> [US: *Pharmaceutical Products*

least contains a new chemical entity that has not been previously approved as a pharmaceutical product [JP propose: for human use] in the territory of the Party.]

<sup>112</sup> [US: Negotiator's Note: For purposes of paragraph 6(e) of Article 8 and paragraphs 4 and 6 of Article 9, the length of the [X]-year period should: enhance certainty regarding access to innovative and generic pharmaceutical products for all; provide incentives for innovation; provide incentives for the diffusion of pharmaceutical products within the TPP region; respect commercial considerations; and account for special challenges in developing and commercializing such products throughout the region (*e.g.*, challenges faced by smaller or less experienced applicants, or the time that an applicant may need to assess additional safety or efficacy implications of marketing a product, such as to assess such implications in jurisdictions where risks may differ from those faced in markets where the product has previously been approved).]

<sup>113</sup> Negotiators' Note: CA reserves its position and seeks to develop its understanding of these provisions further

*Submission of Information or Evidence Concerning the Safety or Efficacy of a New Pharmaceutical Product*

[US propose; AU/PE/VN/NZ/CL/MY/SG/BN oppose: 1. (a) If a Party requires or permits, as a condition for granting marketing approval for a new pharmaceutical product, the submission of information concerning the safety or efficacy of the product, the origination of which involves a considerable effort, the Party shall not, without the consent of a person previously submitting such safety or efficacy information to obtain marketing approval in the territory of the Party, authorize a third person to market a same or a similar product based on:

- (i) the safety or efficacy information previously submitted in support of the marketing approval; or
- (ii) evidence of the existence of the marketing approval,

for at least five years from the date of marketing approval of the new pharmaceutical product in the territory of the Party.

- (b) If a Party requires or permits, in connection with granting marketing approval for a new pharmaceutical product, the submission of evidence concerning the safety or efficacy of a product that was previously approved in another territory, such as evidence of prior marketing approval in the other territory, the Party shall not, without the consent of a person previously submitting the safety or efficacy information to obtain marketing approval in the other territory, authorize a third person to market a same or a similar product based on:

- (i) the safety or efficacy information submitted in support of a prior marketing approval in the other territory; or
- (ii) evidence of the existence of a prior marketing approval in the other territory,

for at least five years from the date of marketing approval of the new pharmaceutical product in the territory of the Party.

*Submission of New Clinical Information or Evidence relating to a Pharmaceutical Product that Includes a Chemical Entity that has been Previously Approved for Marketing in Another Pharmaceutical Product*

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to the discussion in Singapore. JP is still considering its position on Article QQ.E.16. to E.22.

- (c) If a Party requires or permits, as a condition of granting marketing approval for a pharmaceutical product that includes a chemical entity that has been previously approved for marketing in another pharmaceutical product, the submission of new clinical information that is essential to the approval of the pharmaceutical product containing the previously approved chemical entity, other than information related to bioequivalency, the Party shall not, without the consent of a person previously submitting such new clinical information to obtain marketing approval in the territory of the Party, authorize a third person to market a same or a similar product based on:
- (i) the new clinical information previously submitted in support of the marketing approval; or
  - (ii) evidence of the existence of the marketing approval that was based on the new clinical information,

for at least three years from the date of marketing approval based on the new clinical information in the territory of the Party.

- (d) If a Party requires or permits, in connection with granting marketing approval for a pharmaceutical product of the type specified in subparagraph (c), the submission of evidence concerning new clinical information for a product that was previously approved based on that new clinical information in another territory, other than evidence of information related to bioequivalency, such as evidence of prior marketing approval based on new clinical information, the Party shall not, without the consent of a person previously submitting such new clinical information to obtain marketing approval in the other territory, authorize a third person to market a same or a similar product based on:
- (i) the new clinical information submitted in support of a prior marketing approval in the other territory; or
  - (ii) evidence of the existence of a prior marketing approval that was based on the new clinical information in the other territory,

for at least three years from the date of marketing approval based on the new clinical information in the territory of the Party.]

[US: *Additional Provisions relating to Pharmaceutical Products*

2. Notwithstanding paragraph 2 above, a Party may take measures to protect

public health in accordance with:

- (a) the Declaration on the TRIPS Agreement and Public Health (WT/MIN(01)/DEC/2) (the “Declaration”);
- (b) any waiver of any provision of the TRIPS Agreement granted by WTO Members in accordance with the WTO Agreement to implement the Declaration and in force between the Parties; and
- (c) any amendment of the TRIPS Agreement to implement the Declaration that enters into force with respect to the Parties.

3. A Party that requires or permits an applicant to obtain approval for marketing a new pharmaceutical product in its territory by relying, in whole or in part, on the prior approval of the pharmaceutical product by the regulatory authority in another territory may, as a condition for providing the period of data protection specified in subparagraph 2(b) or 2(d), require an applicant that has submitted an application for marketing approval consistent with said subparagraphs to commence the process of obtaining marketing approval for that pharmaceutical product within [X] years of the date of first marketing approval of the same pharmaceutical product in another Party.

#### **Article QQ.E.17:**

1. Where a Party requires or permits, as a condition of approving the marketing of a pharmaceutical product, persons, other than the person originally submitting safety or efficacy information, to rely on that information or on evidence concerning safety or efficacy information for a product that was previously approved, such as evidence of prior marketing approval in another territory, each Party shall:<sup>114</sup>

- (a) provide a transparent and effective system to:
  - (i) identify a patent or patents covering an approved pharmaceutical product or its approved method of use; and
  - (ii) provide notice to a patent holder of the identity of another person who intends to market, during the term of the identified patent or patents, a product that is the same as, or similar to, the approved pharmaceutical product referenced in subparagraph 5(a)(i).

<sup>114</sup> For greater certainty, the Parties recognize that this paragraph does not imply that the marketing approval authority should make patent validity or infringement determinations.

- (b) unless such other person agrees to defer the marketing of the product until after the expiration of an identified patent, ensure that a patent holder may seek, prior to granting of marketing approval to an allegedly infringing product, available remedies by providing:
  - (i) an automatic delay of the grant of marketing approval that remains in place for a period of time designed to ensure sufficient opportunity to adjudicate<sup>115</sup> disputes concerning the validity or infringement of allegedly infringed patents; and
  - (ii) judicial or administrative procedures, including effective provisional measures, to allow for the timely adjudication of disputes concerning the validity or infringement of an allegedly infringed patent.
- (c) If such other person's product has been found to infringe a valid patent identified pursuant to subparagraph (a), provide measures that operate to prohibit the unauthorized marketing of that product prior to the expiration of the patent.
- (d) when a Party delays the grant of marketing approval consistent with subparagraph 5(b)(i), provide an effective reward, consistent with the provisions of this Agreement, for the successful challenge of the validity or applicability of the patent.<sup>116</sup>

2. In implementing subparagraph 5(b)(i), and as a condition for providing the automatic delay of the grant of marketing approval specified in subparagraph 5(b)(i) for a new pharmaceutical product approved consistent with subparagraph 2(b) or 2(d), a Party may require that an applicant that has submitted an application for marketing approval consistent with subparagraph 2(b) or 2(d) to commence the process of obtaining marketing approval for that new pharmaceutical in the Party within [X] years of the date of first marketing approval of the pharmaceutical product in another Party.

**Article QQ.E.18:** Where a Party provides for a period of data protection for a pharmaceutical product of more than [5+Y] years pursuant to subparagraph 2(a) or 2(b) of this Article, that Party is not required to implement for that pharmaceutical product

<sup>115</sup> [Negotiator's Note: As used in Article 9.5(b)(i), "adjudicate" does not mean final adjudication.]

<sup>116</sup> A Party may comply with paragraph 5(d) by providing a period of marketing exclusivity in appropriate circumstances to the first such other person or persons to challenge a patent.

subparagraphs 2(c), 2(d) (*3-year data protection in connection with submission of new clinical information*), 5(b)(i) (*automatic delay of marketing approval*) or 5(d) of this Article (*reward for the successful challenge of the validity or applicability of a patent*).

**Article QQ.E.19:** Where a Party chooses to apply subparagraph 6(e) of Article 8 and paragraphs 4 and 6 of this Article, the following provisions shall apply:

- (a) a Party shall permit an applicant to commence the process of obtaining marketing approval by providing the regulatory authority of the Party information supporting approval of the new pharmaceutical product in the Party that is available to the person at the time the request is made, such as evidence of the prior approval of the product in another Party. It is understood that, while a Party may impose reasonable additional requirements or deadlines as a condition of authorizing the person to market the pharmaceutical product in its territory, satisfaction of those additional requirements or deadlines or the granting of approval shall be recognized by the Party as necessarily occurring after the commencement of the marketing approval process within the meaning of subparagraph 6(e) of Article 8 and paragraphs 4 and 6 of this Article; and
- (b) a Party may not refuse to grant approval of a new pharmaceutical product on the basis of a failure of an applicant for marketing approval to satisfy the requirements of subparagraph 6(e) of Article 8 or paragraphs 4 and 6 of this Article.

**Article QQ.E.20:** [Placeholder for specific provision applying to biologics].]

[US: *General Provisions relating to Pharmaceutical Products and Agricultural Chemical Products*

**Article QQ.E.21:** For purposes of this Article, a new pharmaceutical product means a product that does not contain a chemical entity that has been previously approved in the territory of the Party for use in a pharmaceutical product [JP propose: for human use].<sup>117</sup>

**Article QQ.E.22:** Subject to paragraph 3 (*protection of public health*), when a product is subject to a system of marketing approval in the territory of a Party pursuant to paragraph 1 or 2 and is also covered by a patent in the territory of that Party, the Party shall not alter the term of protection that it provides pursuant to paragraph 1 or 2

<sup>117</sup> For greater certainty, the Parties understand that the term “**pharmaceutical product**” as used in this Chapter includes biologic products.

in the event that the patent protection terminates on a date earlier than the end of the term of protection specified in paragraph 1 or 2.]]

**Article QQ.E.XX.1: {Measures to Encourage Timely Entry of Pharmaceutical Products}**

[NZ/CA/SG/CL/MY/VN propose: Each Party may adopt or maintain measures to encourage the timely entry of pharmaceutical products to its market.]

**Article QQ.E.XX.2: {Patent Quality and Efficiency}**

[NZ/CA/SG/CL/MY/VN propose: 1. Each Party shall endeavour to improve quality and efficiency in its patent system.

2. Each Party shall endeavour to enhance its patent registration system by maintaining examination procedures, cancellation procedures and, where provided, opposition procedures that consistently provide high quality rights for granted patents, and endeavour to simplify and streamline its administration system for the benefit of all users of the system and the public as a whole.]

**Article QQ.E.XX.3: {Processing Efficiency}**

[NZ/CA/SG/CL/MY/VN propose: 1. Each Party shall endeavour to process applications for patents, and applications for marketing, regulatory or sanitary approval of pharmaceutical products, in an efficient and timely manner.

2. Each Party may provide a procedure for patent applicants to apply to expedite the examination of their patent application.

3. If there are unreasonable delays in a Party's processing of applications for patents, or processing of applications for marketing, regulatory or sanitary approval of pharmaceutical products, the Party shall endeavour to address those delays.]

**Article QQ.E.XX.4: {Protection of Undisclosed Data}**

[NZ/CA/SG/CL/MY/VN propose: 1. Where a Party requires, as a condition of marketing, regulatory or sanitary approval for pharmaceutical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, that Party shall protect such data against unfair commercial use. In addition, each Party shall protect such data against disclosure,

except where necessary to protect the public or unless steps are taken to ensure that the data is protected against unfair commercial use.

2. Each Party may provide that the protection of data under paragraph 1, *inter alia*:

- (a) is limited to undisclosed test or other data, the origination of which involves a considerable effort;
- (b) is limited to pharmaceutical products that do not contain a new chemical entity that has been previously approved for marketing in the Party;
- (c) is limited to pharmaceutical products which utilize a new chemical entity;
- (d) is available only once per pharmaceutical product;
- (e) is not available for new uses or indications, new dosage forms or methods of making a pharmaceutical product;
- (f) is limited to a period of time as determined by the Party; or
- (g) may be waived to facilitate the marketing, regulatory or sanitary approval of a pharmaceutical product that is the subject of a voluntary or compulsory license, or a licence otherwise issued pursuant to the TRIPS Agreement.

3. Each Party may take measures to protect public health in accordance with:

- (a) the Declaration on the TRIPS Agreement and Public Health (WT/MIN(01)/DEC/2) (the “Declaration”);
- (b) any waiver of any provision of the TRIPS Agreement granted by WTO Members in accordance with the WTO Agreement to implement the Declaration and in force between the Parties; and
- (c) any amendment of the TRIPS Agreement to implement the Declaration that enters into force with respect to the Parties.]

#### **Article QQ.E.XX.5: {Publication of Regulatory Approval}**

[NZ/CA/SG/CL/MY/VN propose: Each Party shall endeavour to promptly make public the granting of marketing, regulatory or sanitary approval of pharmaceutical products.]

### **Article QQ.E.XXX {Agricultural Chemical Products}**

[US/SG/PE/MX/JP propose<sup>118</sup> ; NZ/VN oppose: 1.

(a) If a Party requires [AU/CL/MX oppose: or permits], as a condition of granting marketing approval [CL/MX propose: or sanitary permit] for a new agricultural chemical product [CL/MX propose; JP oppose: which utilize new chemical entity], the submission of [CL/MX propose: undisclosed] [AU oppose: information] [AU propose; JP oppose: undisclosed test or other data] concerning safety or efficacy of the [CL/MX oppose: product] [CL/MX propose; JP oppose: new chemical entity], the Party shall not, without the consent of [AU oppose: a person that previously submitted such] [AU propose: the person who provided the] [CL/MX oppose: safety or efficacy] information [AU oppose: to obtain marketing approval in the Party, authorize another] [AU propose: , permit third persons] to [CL/MX oppose: market] a [CL/MX oppose: same or a similar] product based on:

[SG oppose: (i) [CL/MX propose; JP oppose: undisclosed information concerning][AU oppose: the safety or efficacy information submitted in support of the marketing approval] [CL/MX propose: or sanitary permit][AU propose; JP oppose: that undisclosed test or other data]; or]

[CL/MX oppose: (ii) [AU oppose: evidence of the existence of] the marketing approval,]

[MX oppose: for [AU oppose: at least] ten years from the date of marketing approval [AU oppose: in the territory of] [AU propose: by] the Party.] [MX propose: Where origination of such data involve considerable efforts,<sup>119</sup> ] [CL/MX propose; JP oppose: Each Party shall protect such information against disclosure except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use]

<sup>118</sup> Negotiators' Note: AU/CA/MY/CL/BN can support the inclusion of provisions on agriculture chemical but still considering the scope and drafting of the protection. CA is also considering the duration of the protection.

<sup>119</sup> Negotiator's Note: MX: Placeholder for definition for "considerable efforts".

[CL/MX oppose: (b) If a Party [AU oppose: requires or permits, in connection with] [AU propose: permits, as a condition of ] granting marketing approval for a new agricultural chemical product, the submission of evidence concerning the safety or efficacy of a product that was previously approved in another territory, such as evidence of prior marketing approval [AU oppose: in the other territory ]; the Party shall not, without the consent of [AU oppose: a person that] [AU propose: the person who] previously submitted [AU oppose: the safety or efficacy] information [AU propose: concerning safety or efficacy] to obtain marketing approval in another territory, [AU oppose: authorize another] [AU propose: permit third persons] to market a same or a similar product based on:

- [SG oppose: (i) [AU oppose: the safety or efficacy] information [AU propose: concerning safety or efficacy] submitted [AU oppose: in support of] [AU propose: to obtain] the prior marketing approval in the other territory; or]
- (ii) evidence of [AU oppose: the existence of a] prior marketing approval in the other territory,

for [AU oppose: at least] ten years from the date of marketing approval [AU oppose: of the new product in the territory of the Party].]

[PE propose<sup>120</sup>: In order to receive protection under subparagraph (b), a Party may require that the person providing the information in the other territory seek approval in the territory of the Party within five years after obtaining marketing approval in the other territory.]

[MX propose<sup>121</sup>: Where a Party relies on a marketing approval granted by another Party, the reasonable period of exclusive use of the data submitted in connection with obtaining the approval relied on shall begin with the date of the first marketing approval relied on.]

[CL/MX oppose: 2. For purposes of this Article, a new agricultural chemical product is one that [AU oppose: contains] [AU propose: does not contain] a chemical entity that has [AU oppose: not] been previously approved [AU propose: for marketing] in the [AU oppose: territory of the] Party [AU oppose: for use in an agricultural chemical product].]

<sup>120</sup> Negotiators' Note: JP is considering this provision.

<sup>121</sup> Negotiators' Note: JP is considering this provision.

**[NOTE: ARTICLES ORIGINALLY LABELED AS QQ.E.23-24 HAVE BEEN MOVED TO QQ.A.4-5]**

**Article QQ.E.23 <sup>122</sup>: [PE/NZ/MX/SG: Proposed joint text for the Intellectual Property Chapter on Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources]**

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

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

[PE/NZ/BN/MY/MX/VN propose; AU/SG/CL oppose: 3. Where national legislation [MY/BN propose: or policies] establishes such requirements, the Parties recognise that users of genetic resources [NZ/CA oppose: and their derivatives] [ <sup>123</sup> ] or traditional knowledge associated with genetic resources [NZ/CA oppose: and their derivatives] [NZ propose: may] [PE/MY propose: shall]:

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

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

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

[PE/NZ/MX/CL/VN propose; SG oppose: 4. The parties recognize that:

<sup>122</sup> Negotiators' Note: CA/US position is that QQ.E.23 provisions should be addressed in the Environment Chapter. The US/JP opposes the inclusion of this proposal in this Chapter.

<sup>123</sup> [MX propose; CL oppose: For greater certainty "derivative" means a naturally occurring biochemical compound resulting from the genetic expression or metabolism of biological or genetic resources, without human manipulation, even if does not contain functional units of heredity.]

(a) information about genetic resources [NZ/CL/AU/CA oppose: and their derivatives] and traditional knowledge [CL oppose: associated with genetic resources [NZ/AU/CA oppose: and their derivatives]] can be useful in assessing patent applications against existing eligibility criteria; and

(b) the intellectual property system is one possible means to protect the traditional knowledge [CL oppose: associated with genetic resources [NZ/AU/CA oppose: and their derivatives]] and traditional cultural expressions of indigenous and local communities.]

[PE/NZ/MX/CL propose; SG oppose: 5. The Parties affirm that they will promote quality patent examination of applications concerning genetic resources and traditional knowledge [CL oppose: associated with genetic resources [NZ/AU/CA oppose: and their derivatives]] to ensure that the eligibility criteria for patentability are satisfied. This may include:

(a) in determining prior art, ensuring that readily available documented information related to genetic resources [NZ/CL/AU/CA oppose: and their derivatives] or traditional knowledge [CL oppose: associated with genetic resources [NZ/AU/CA oppose: and their derivatives]] is taken into account;

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

(c) where applicable and appropriate, the use of databases or digital libraries containing traditional knowledge [CL oppose: associated genetic resources [NZ/AU/CA oppose: and their derivatives]]; and

(d) cooperation in the training of patent examiners in the examination of patent applications related to genetic resources [NZ/CL/AU/CA oppose: and their derivatives] and traditional knowledge [CL oppose: associated with genetic resources [NZ/AU/CA oppose: and their derivatives]].]

[PE/NZ/AU/MX/MY/BN/VN/CL propose; SG oppose: 6. Subject to each Party's international obligations [AU/MY/BN/VN/CL oppose: the Parties affirm that they will endeavour to][AU/MY/BN/VN/CL propose: each Party may] establish appropriate measures to protect traditional knowledge and [MY oppose: traditional cultural expressions].]

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

provisions established in paragraph 3.]

[PE/NZ/MX/SG/MY/BN/VN propose: 8. The Parties shall, through their respective agencies responsible for intellectual property, cooperate to enhance understanding of how the intellectual property system can deal with issues associated with traditional knowledge, traditional cultural expressions and genetic resources. *[This text is a place holder, to be reconsidered depending on the outcome of the cooperation section of the IP chapter]]]*

[JP propose: **{INDUSTRIAL DESIGNS}**]

**{Section F: Industrial Designs}**

**Article QQ.F.1: {Partial Design}**

Each Party shall ensure that adequate and effective protection is provided to industrial designs, including to designs of a part of an article, regardless of whether or not the part can be separated from the article.]

## **{COPYRIGHT AND RELATED RIGHTS}**

### **{Section G: Copyright and Related Rights [<sup>124</sup>]}**

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

1. Each Party shall provide<sup>125</sup> that authors, [NZ oppose: performers], and producers of phonograms<sup>126</sup> have the right<sup>127</sup> to authorize or prohibit all reproductions of their works, [NZ oppose: performances], and phonograms, [<sup>128</sup>] in any manner or form,<sup>[129]</sup> [VN/CA/NZ oppose: permanent or temporary (including temporary storage in electronic form)] [<sup>130</sup>] [<sup>131</sup>] [VN propose: it shall be a matter for national legislation to determine exceptions and limitations under which the right may be exercised].

#### **Article QQ.G.2: {Copyright}**

Without prejudice to Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii), and 14bis(1) of the Berne Convention, each Party shall provide to authors the exclusive right to authorize or prohibit the communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such

<sup>124</sup> Negotiator's Note: MX is still reflecting the coverage of related rights in this chapter.

<sup>125</sup> The Parties reaffirm that it is a matter for each Party's law to prescribe that works in general or any specified categories of works, performances and phonograms shall not be protected by copyright or related rights unless they have been fixed in some material form.

<sup>126</sup> References to "authors, performers, and producers of phonograms" refer also to any successors in interest.

<sup>127</sup> With respect to copyrights and related rights in this Chapter, the "right to authorize or prohibit" and the "right to authorize" refer to exclusive rights.

<sup>128</sup> [US/AU/PE/CA/CL/MX/SG/MY/NZ/VN propose: With respect to [PE/CL/MX oppose: copyright and] related rights in this Chapter, a "performance" means a performance fixed in a phonogram unless otherwise specified.]

<sup>129</sup> [VN/BN/CA propose: The reproduction right, as set out in Article 9 of the Berne Convention [CA propose: and articles 7 and 11 of the WPPT], and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works [CA propose: , performances and phonograms] in digital form. It is understood that the storage of a protected work [CA propose: , performance or phonogram] in digital form in an electronic medium constitutes a reproduction within the meaning of [CA propose: the articles referenced in this footnote] [CA oppose: Article 9 of the Berne Convention].]

<sup>130</sup> [CL/NZ/MY/BN/JP propose: It is consistent with this Agreement to provide exceptions and limitations for temporary acts of reproduction which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable (a) a lawful transmission in a network between third parties by an intermediary; or (b) a lawful use of a work; and which have no independent economic significance.] [Negotiators Note: Discussions indicated no substantive objection to the concept, however, Parties continue to consider whether the footnote is required, where it might best be placed, and how it should be drafted.]

<sup>131</sup> [CA/JP propose: It is a matter for each Party's law to determine when a given act constitutes a temporary reproduction for the purposes of copyright and related rights.]

a way that members of the public may access these works from a place and at a time individually chosen by them.<sup>132</sup>

### Article QQ.G.3: {Copyright and Related Rights}

[US/AU/PE/NZ/SG/CL/MX propose; VN/MY/BN/JP oppose: Each Party shall provide to authors, [NZ/MX oppose: performers,] and producers of phonograms the right to authorize or prohibit the importation<sup>133</sup> into that Party's territory of copies<sup>134</sup> of the work [PE oppose: [NZ/MX: oppose: performance,] or phonogram] made without authorization, [PE/AU/NZ/CA/SG/CL/MX/JP oppose: or made outside that Party's territory with the authorization of the author, performer, or producer of the phonogram.<sup>135</sup>] ] ]<sup>136</sup>

### Article QQ.G.4: {Right of Distribution}

Each Party shall provide to authors, [NZ/MX oppose: performers,] and producers of phonograms the right to authorize or prohibit the making available to the public of the original and copies<sup>137</sup> of their works, [NZ/MX oppose: performances,] and phonograms through sale or other transfer of ownership.<sup>138</sup>

<sup>132</sup> It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Chapter or the Berne Convention. It is further understood that nothing in this Article precludes a Party from applying Article 11 *bis*(2) of the Berne Convention.

<sup>133</sup> [NZ propose: For the purpose of this paragraph importation may exclude importation for private or domestic use.]

<sup>134</sup> [PE/NZ propose: The expressions “copies” in this paragraph refers exclusively to fixed copies that can be put into circulation as tangible copies]. [Negotiators' Note: US can support the concept subject to final drafting.] [JP propose: A Party may comply with its obligations under this paragraph by legislating in the Party's law that such importation, for the purpose of distribution, is deemed to be infringement.] Negotiator's Note: With this footnote, Japan can withdraw its opposition in the first line of QQ.G.3.

<sup>135</sup> [US: With respect to copies of works and phonograms that have been placed on the market by the relevant right holder, the obligations described in Article [QQ.G.3] apply only to books, journals, sheet music, sound recordings, computer programs, and audio and visual works (i.e., categories of products in which the value of the copyrighted material represents substantially all of the value of the product). Notwithstanding the foregoing, each Party may provide the protection described in Article [QQ.G.3] to a broader range of goods.]

<sup>136</sup> [Negotiator's Note: The US is considering the relationship between this provision and other proposals regarding the exhaustion of IP rights, as well as other TPP countries' legal regimes.]

<sup>137</sup> The expressions “copies” and “original and copies” subject to the right of distribution in this paragraph refer exclusively to fixed copies that can be put into circulation as tangible objects [US/CA/SG oppose: , i.e., for this purpose, “copies” means physical copies.]

<sup>138</sup> [AU/VN/PE/NZ/BN/MY/SG/CA/CL/MX/JP propose: Nothing in this Agreement shall affect a Party's right to determine the conditions, if any, under which the exhaustion of this right applies after the first sale or other transfer of ownership of the original or a copy of their works, performances, or phonograms with the authorization of [CA/SG propose: the author, performer or producer] [CA/SG oppose: the right holder].] (Negotiator's Note: VN prefers this to be in the text as opposed to a footnote).

**Article QQ.G.5:** Each Party shall provide that in cases where authorization is needed from both the author of a work embodied in a phonogram and a performer or producer owning rights in the phonogram, the need for the authorization of the author does not cease to exist because the authorization of the performer or producer is also required. Likewise, each Party shall provide that in cases where authorization is needed from both the author of a work embodied in a phonogram and a performer or producer owning rights in the phonogram, the need for the authorization of the performer or producer does not cease to exist because the authorization of the author is also required.

**Article QQ.G.6:** [US/AU/PE/SG/CL/MX propose; VN/BN/NZ/MY/CA/JP oppose: Each Party shall provide that, where the term of protection of a work (including a photographic work), performance, or phonogram is to be calculated:

- (a) on the basis of the life of a natural person, the term shall be not less than the life of the author and [MX propose: 100] [MX oppose: 70] years after the author's death; and
- (b) on a basis other than the life of a natural person, the term shall be:
  - (i) not less than [US propose; CL oppose: 95] [AU/PE/SG/CL propose: 70] [MX propose: 75] years from the end of the calendar year of the first authorized publication of the work, performance, or phonogram, or
  - (ii) failing such authorized publication within [US propose; CL oppose: 25] [SG/PE/AU/CL propose: 50] years from the creation of the work, performance, or phonogram, not less than [US propose; CL oppose: 120] [AU/PE/SG/CL propose: 70] years from the end of the calendar year of the creation of the work, performance, or phonogram.]

**Article QQ.G.7: {Term of Protection for Copyright and Related Rights}**

[NZ/BN/MY/VN/CA/JP propose; US/AU/SG/MX oppose: The term of protection of a work, performance or phonogram shall be determined according to each Party's domestic law and the international agreements to which each Party is a party.]

**Article QQ.G.8:**

Each Party shall apply Article 18 of the *Berne Convention for the Protection of Literary and Artistic Works* (1971) (Berne Convention) and

[PE/SG/NZ/BN/US/VN/CL/MY/MX<sup>139</sup>: the corresponding provision in] Article 14.6 of the TRIPS Agreement, *mutatis mutandis*, to [CA oppose: the subject matter, rights, and obligations] [CA propose; US oppose: rights of authors, performers and producers of phonograms] in [Section G].

#### QQ.G.8:

[CA/JP/SG/BN/NZ/PE/CL/VN/AU<sup>140</sup> **propose:** Each Party shall apply, *mutatis mutandis*, Article 18 of the Berne Convention for the Protection of Literary and Artistic Works (1971) to the rights of authors, performers and producers of phonograms in [Section G]. A Party may provide for conditions, limitations, exceptions and reservations to the extent permitted in Article 14.6 of the TRIPS Agreement.]

**Article QQ.G.9:** Each Party shall provide that for copyright and related rights, any person acquiring or holding any economic right<sup>141</sup> in a work, [SG/BN/NZ/MY/VN/CL oppose: performance,] or phonogram:

- (a) may freely and separately transfer that right by contract; and
- (b) by virtue of a contract, including contracts of employment underlying the creation of works, [BN/SG/MY/VN/NZ/CL oppose: performances,] and phonograms, shall be able to exercise that right in that person's own name and enjoy fully the benefits derived from that right.

[CL: (c) Each Party may establish:

- (i) which specific contracts underlying the creation of works or phonograms shall, in the absence of a written agreement, result in a transfer of economic rights by operation of law; and
- (ii) reasonable limits to the provisions in [paragraph 2(a)] [*cross reference to QQ.G.9(a)-(b)*] to protect the interests of the original right holders, taking into account the legitimate interests of the transferees.]

#### Article QQ.G.X

<sup>139</sup> [Negotiators' Note: AU/CA agree in principle but will reflect further on the language.]

<sup>140</sup> Negotiators' Note: AU supports this article ad referendum.

<sup>141</sup> For greater certainty, this provision does not affect the exercise of moral rights.

No Party may subject the enjoyment and exercise of the rights of authors, performers and producers of phonograms provided for in this Chapter to any formality.

**Article QQ.G.10: {Copyright and Related Rights / Technological Protection Measures}**<sup>142</sup>

[US/AU/SG/PE/MX<sup>143 144 145</sup> propose; MY/VN/BN/JP oppose<sup>146</sup>: (a) In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers, and producers of phonograms use in connection with the exercise of their rights<sup>147</sup> and that restrict unauthorized acts in respect of their works, performances, and phonograms, each Party shall provide that any person who:

- (i) knowingly, [CL oppose: or having reasonable grounds to know]<sup>148</sup>, circumvents without [CL oppose: authority] [CL propose: authorization] any effective technological measure that controls access to a protected work, performance, phonogram, [PE/CA/CL oppose: or other subject matter]; or
- (ii) manufactures, imports, distributes, [CL oppose: offers [CA/CL propose: for sale or rental] to the public, provides, or otherwise traffics<sup>149</sup> in] devices, products, or components, [CL oppose: or offers to the public] or provides services, that:
  - (A) are promoted, advertised<sup>150</sup>, or marketed by that person, [PE/SG/CL oppose: or by another person acting in concert with that person and with that person's knowledge,] for the purpose of circumvention of any effective technological measure,
  - (B) have only a limited commercially significant purpose or use other than to circumvent any effective technological

<sup>142</sup> Negotiators' Note: Article QQ.H.4.15 should be discussed after discussions on this issue.

<sup>143</sup> Negotiator's Note: MX supports this provision in principle.

<sup>144</sup> Negotiator's Note: CA supports this provision in principle pending outcome of discussions on exceptions.

<sup>145</sup> Negotiator's Note: CL is considering pending the outcome of the language of this proposal.

<sup>146</sup> Negotiator's Note: NZ reserves its position on article QQ.G.10 pending the outcome of exceptions and limitations on TPMs protection. JP is considering a possibility of producing its proposal on Technological Protection Measures.

<sup>147</sup> Negotiator's Note: CA reserves its position pending the clarification of the meaning of "rights".

<sup>148</sup> Negotiator's Note: CA pending clarification of criminal remedies.

<sup>149</sup> Negotiator's Note: CA reserves its position pending clarification of "traffics".

<sup>150</sup> Negotiator's Note: CA reserves its position pending clarification of the terms "promoted" and "advertised."

measure, or

- (C) are primarily designed, produced, or performed for the purpose of [CA oppose: enabling or facilitating] the circumvention of any<sup>151</sup> effective technological measure,

shall be liable and subject to the remedies set out in Article [12.12]<sup>152 153</sup>. [CL propose: If the conduct is carried out in good faith without knowledge that the conduct in prohibited, a Party may exempt acts prohibited under this subparagraph that are carried out in connection with a nonprofit library, archive or educational institution]. Each Party shall provide for criminal procedures and penalties to be applied when any person, other than a nonprofit <sup>154</sup> library, [CA/CL propose: museum,] archive, educational institution, or [CA/CL oppose: public noncommercial broadcasting entity,] [CA propose: any other nonprofit entity as determined by a Party's law] is found to have engaged [CA oppose: willfully and for purposes of commercial advantage [CL oppose: or private financial gain]] [CA propose: knowingly and for commercial purposes] in any of the foregoing activities. [SG/AU/PE/CL <sup>155</sup> oppose: Such criminal procedures and penalties shall include the application to such activities of the remedies and authorities listed in subparagraphs (a), (b), and (f) of Article [15.5]<sup>156</sup> as applicable to infringements, *mutatis mutandis*. <sup>157</sup>][CL propose: No Party is required to impose civil or criminal liability for a person who circumvents any effective technological measure that protects any of the exclusive rights of copyright or related rights in a protected work, but does not control access to such work].

(b) In implementing subparagraph (a), no Party shall be obligated to require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as the product does not otherwise violate any measures implementing subparagraph (a).

[CL oppose: (c) Each Party shall provide that a violation of a measure

<sup>151</sup> Negotiator's Note: CA reserves its position pending clarification of "any".

<sup>152</sup> Negotiator's Note: CA seeks clarification as to whether article "12.12" is meant to refer to article QQ.H.4(15).

<sup>153</sup> Negotiator's Note: CA reserves its position pending outcome of discussion of provision QQ.H.4(15).

<sup>154</sup> Negotiator's Note: CA seeks clarification if nonprofit applies to all institutions.

<sup>155</sup> Negotiator's Note: CA seeks clarification of the intention of this sentence.

<sup>156</sup> Negotiator's Note: CA seeks clarification as to whether article "15.15" is meant to refer to article QQ.H.7(7). CA reserves position pending clarification of QQ.H.7(7).

<sup>157</sup> [US/AU: For purposes of greater certainty, no Party is required to impose liability under Articles [9 and 10] for actions taken by that Party or a third party acting with the authorization or consent of that Party.] [Negotiator's Note: CA seeks clarification of this footnote.]

implementing this paragraph is independent of any infringement that might occur under the Party's law on copyright and related rights.]

(d) <sup>158</sup> Each Party shall confine exceptions and limitations to measures implementing subparagraph (a) [CL oppose: to the following activities,] [CL propose: certain special cases that do not impair the adequacy of legal protection of the effectiveness of legal remedies against the circumvention of effective technological measures] [CL oppose: which shall be applied to relevant measures in accordance with subparagraph (e)]:

- (i) [CA oppose: noninfringing reverse engineering activities with regard to a lawfully obtained copy of a computer program, carried out in good faith with respect to particular elements of that computer program that have not been readily available to the person engaged in those activities <sup>159</sup>, for the sole purpose of achieving interoperability of an independently created computer program with other programs<sup>160</sup>] [CA propose: reverse engineering activities with regard to a lawfully obtained copy of a computer program, for the sole purpose of achieving interoperability of the program or any other program];
- (ii) [CA oppose: noninfringing good faith activities, carried out by an appropriately qualified researcher who has lawfully obtained a copy, [CL oppose: unfixed] performance, or display of a work, performance, or phonogram and who has made a good faith effort to obtain authorization for such activities, to the extent necessary for the sole purpose of research consisting of identifying and analyzing flaws and vulnerabilities of [CL propose: encryption] technologies<sup>161</sup> [CL oppose: for scrambling and descrambling of information]] [CA propose: activities with regard to a lawfully obtained copy of a work, performance, or phonogram for the sole purpose of encryption research] ;
- (iii) the inclusion of a component or part for the sole purpose of preventing the access of minors to inappropriate online content in a technology, product, service, or device that itself is not prohibited under the measures

<sup>158</sup> Negotiator's Note: CA is considering these limitations.

<sup>159</sup> [CL propose: For greater certainty, elements of a computer program are not readily available to a person seeking to engage in non-infringing reverse engineering when they cannot be obtained from literature on the subject, from the copyright holder, or from sources in the public domain.]

<sup>160</sup> [CL propose: Such activity occurring in the course of research and development is not excluded in this exception.]

<sup>161</sup> [CL propose: Such activity occurring in the course of research and development is not excluded from this exception.]

implementing subparagraph (a)(ii)<sup>162</sup>;

- (iv) [CA oppose: noninfringing good faith activities that are authorized by the owner of a computer, computer system, or computer network for the sole purpose of testing, investigating, or correcting the security of that computer, computer system, or computer network] [CA propose: security testing activities that are authorized by the owner or administrator of a computer, computer system or computer network for the sole purpose of testing, investigating, or correcting the security of that computer, computer system or computer network];
  - (v) [CA oppose: noninfringing activities for the sole purpose of identifying and disabling a capability to carry out undisclosed collection or dissemination of personally identifying information reflecting the online activities of a natural person in a way that has no other effect on the ability of any person to gain access to any work] [CA propose: activities for the sole purpose of identifying or disabling a capacity to carry out collection or dissemination of personally identifying information];
  - (vi) lawfully authorized activities carried out by government employees, agents, or contractors for the purpose of law enforcement, intelligence, essential security, or similar governmental purposes<sup>163</sup>;
  - (vii) access by a nonprofit library, [CA propose: museum,] archive, or educational institution to a work, performance, or phonogram not otherwise available to it, for the sole purpose of making acquisition decisions; and
- [CA propose: (viii) activities for the sole purpose of making a work, performance or phonogram perceptible to a person with a perceptual disability.
- (ix) activities for the sole purpose of making an ephemeral reproduction of a work, performance or phonogram,
  - (x) circumvention of a technological measure on a radio apparatus for the sole purpose of gaining or facilitating access to a telecommunication service by means of the radio apparatus]

<sup>162</sup> Negotiator's Note: CA reserves its position.

<sup>163</sup> Negotiator's Note: CA needs to reflect further on this paragraph.

- (viii) [CA oppose: noninfringing uses [SG oppose: of a work, performance, or phonogram] in a particular class of works, [SG oppose: performances, or phonograms] when an actual or likely adverse impact on those noninfringing uses [CL propose: or exceptions or limitations to copyright or related rights with respect to users] is [PE oppose: credibly demonstrated] [PE propose: found] [CL propose: demonstrated or recognized] in a legislative or administrative review or proceeding [SG oppose: by substantial evidence]; provided that [AU/PE oppose: any limitation or exception adopted in reliance upon this clause shall have effect for a renewable period of not more than three [SG propose: four] years] [AU/PE propose: any such review or proceeding is conducted at least once every four years] from the date of conclusion of such review or proceeding.]

[CA propose: (xi) Each Party may provide further exceptions and limitations to measures implementing subparagraph (a) in relation to non infringing uses as determined through a legislative, regulatory, judicial, or administrative process in accordance with the Party's law, following due consideration of the actual or potential adverse impact on those non infringing uses.]

(e)<sup>164</sup> The exceptions and limitations to measures implementing subparagraph (a) for the activities set forth in subparagraph [4.9(d)] may [CL oppose: only] be applied as follows[CL oppose: , and only to the extent that they do not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological measures]:

- (i) Measures implementing subparagraph (a)(i) may be subject to exceptions and limitations with respect to each [CL propose: situations and] activity set forth in subparagraph (d).
- (ii) Measures implementing subparagraph (a)(ii), as they apply to effective technological measures that control access to a work, performance, or phonogram, may be subject to exceptions and limitations with respect to activities set forth in subparagraph (d) (i), (ii), (iii), (iv), and (vi).
- (iii) Measures implementing subparagraph (a)(ii), as they apply to effective technological measures that protect any copyright or

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<sup>164</sup> Negotiator's Note: CA is considering paragraph (e) pending the outcome on discussions on limitations and exceptions.

any rights related to copyright, may be subject to exceptions and limitations with respect to activities set forth in subparagraph (d) (i) and (vi).

(f) <sup>165</sup> **Effective technological measure** means any [CA propose: effective] technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, [PE/CL/CA oppose: or other protected subject matter,] or protects [CA oppose: any copyright or any rights related to copyright] [CA propose: rights related to a work, performance or phonogram]. [CL propose: and cannot, in a usual case be circumvented accidentally.]

**Article QQ.G.11:** [SG/CL propose<sup>166</sup>: Nothing in this agreement shall require any Party to restrict the importation or domestic sale of a device that does not render effective a technological measure the sole purpose of which is to control market segmentation for legitimate copies of cinematographic film or computer program, and is not otherwise a violation of law.]

**Article QQ.G.12<sup>167</sup>: {Technological Protection Measures}**

[CL/NZ/PE/VN/MY/BN/JP propose; AU/US oppose:

1. [PE/SG oppose: Each Party [VN propose: may] [VN oppose: shall] provide legal protections and remedies against the circumvention of effective technological protection measures in their domestic copyright laws where circumvention is for purposes of infringing the exclusive rights of copyright [NZ oppose: or related rights] owners.]

2. Each Party may provide that such protections and remedies shall not hinder or prevent uses of copyright or related rights protected material that are permitted under exceptions or limitations to the exclusive rights of copyright [NZ oppose: and related rights] owners, or the use of materials that are in the public domain.

[PE/SG: It is understood that nothing in this Article prevents a Party from adopting effective and necessary measures to ensure that a beneficiary may enjoy limitations and exceptions provided in that Party's national law, in accordance with Article QQG16, where technological measures have been applied to a work, performance or

<sup>165</sup> Negotiator's Note: CA is considering paragraph (f).

<sup>166</sup> Negotiators' Note: NZ/PE/CA/AU/MX/MY/BN/VN support in principle pending drafting consultations.

<sup>167</sup> Negotiator's note: SG/CA/MX is willing to consider a more flexible approach to TPM provisions.

phonogram, and the beneficiary has legal access to that work, performance or phonogram particularly in circumstances such as where appropriate and effective measures have not been taken by rights holders in relation to that work, performance or phonogram to enable the beneficiary to enjoy the limitations and exceptions under that Party's national law.<sup>168</sup>]

3. Subject to each Party's international obligations, the Parties affirm that they may establish provisions to facilitate the exercise of permitted acts where technological measures have been applied.]

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

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

- (a) each Party [VN oppose: shall] [VN: may] provide [VN oppose: that] [VN: legal remedies against] any person who without authority, and knowing, or, with respect to civil remedies, having reasonable grounds to know, that it would induce, enable, facilitate, or conceal an infringement of [CA oppose: any] [CA propose: the] copyright or related right [VN oppose: ,] [VN: :]
  - (i) knowingly removes or alters any [CA/JP propose: electronic] rights management information;
  - (ii) [MY/BN/VN/CA/JP oppose: distributes or imports for distribution rights management information knowing that the rights management information has been altered without authority; or]
  - (iii) [CA propose: knowingly] distributes, imports for distribution, broadcasts, communicates or makes available to the public copies of works, [CL/NZ/MY/SG/VN oppose: performances,] or phonograms, knowing that [CA/JP propose: electronic] rights management information has been removed or altered without authority [VN oppose: ,] [VN: .]

[VN oppose: shall be liable and subject to the remedies set out in Article

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<sup>168</sup> Negotiator's Note: MY/VN/CL does not object in principle but needs to reflect further on the language.

[QQ.H.4(15)<sup>169</sup>].<sup>170</sup> Each Party [CA/MX/JP propose: may] [CA/MX oppose: shall] provide for criminal procedures and penalties to be applied when any person, other than a nonprofit library, archive, [CA propose: museum,] [MY: or] educational institution [MY/CA oppose: , or [CL oppose: public noncommercial] broadcasting entity] [CA propose: any other nonprofit entity as determined by a Party's law.] [CL: established without a profit-making purpose], is found to have engaged [CA oppose: willfully and for purposes of commercial advantage or private financial gain] [CA propose: knowingly and for commercial purposes] in any of the foregoing activities. [MY/CA propose: Each Party may provide that these criminal procedures and penalties do not apply to any other nonprofit entity as determined by a Party's law.] [AU/SG/PE/CL/MY/NZ/BN/CA/MX/JP oppose: Such criminal procedures and penalties shall include the application to such activities of the remedies and authorities listed in subparagraphs (a), (b) and (f) of Article [15.5] as applicable to infringements, *mutatis mutandis*.]]

[SG/NZ/CL/MY/BN/VN/CA/JP oppose: (b) each Party shall confine exceptions and limitations to measures implementing subparagraph (a) to lawfully authorized activities carried out by [MX propose: the] government [MX oppose: employees, agents, or contractors] for the purpose of law enforcement, intelligence, essential security, or similar governmental purposes.]

(c) **Rights management information** means:

- (i) [AU/MY/CA/JP propose: electronic] information that identifies a work, [NZ/MY oppose: performance,] or phonogram, the author of the work, [NZ/MY oppose: the performer of the performance,] or the producer of the phonogram; or the owner of any right in the work, [NZ/MY oppose: performance,] or phonogram;
- (ii) [AU/MY/CA/JP: electronic] information about the terms and conditions of the use of the work, [NZ/MY oppose: performance,] or phonogram ; or
- (iii) any [AU/MY/CA/JP: electronic] numbers or codes that represent such information,

when any of these items [CA propose: of information] is attached to a copy

<sup>169</sup> Negotiator's Note: CL/MY/NZ/BN/JP positions pending outcome of this provision.

<sup>170</sup> Negotiator's Note: NZ/JP is considering the scope of obligations under this paragraph.

of the work, [NZ/MY oppose: performance,] or phonogram or appears in connection with the communication or making available of a work, [NZ/MY oppose: performance] or phonogram, to the public.

(d) For greater certainty, nothing in this paragraph shall obligate a Party to require the owner of any right in the work, performance, or phonogram to attach rights management information to copies of the work, performance, or phonogram, or to cause rights management information to appear in connection with a communication of the work, performance, or phonogram to the public.

#### **Article QQ.G.14: {Related Rights}**

1. Each Party shall accord the rights provided for in this Chapter with respect to [NZ/BN/MY oppose: performers and] producers of phonograms to the [NZ/BN/MY oppose: performers and] producers of phonograms who are nationals<sup>171</sup> of another Party and to [NZ/BN/MY oppose: performances or] phonograms first published or first fixed in the territory of another Party<sup>172</sup>. A [NZ/BN/MY oppose: performance or] phonogram shall be considered first published in the territory of a Party in which it is published within 30 days of its original publication.<sup>[173][174]</sup>

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

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

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

- (a) Each Party shall provide to [NZ oppose: performers and] producers of phonograms the right to authorize or prohibit [BN oppose: the broadcasting or]

<sup>171</sup> Negotiator's Note: CA reserves its position pending the outcome of FN10 (Art. QQ.A.7).

<sup>172</sup> For greater certainty, in this paragraph with respect to performances or phonograms first published or first fixed in the territory of a Party, a Party may apply the criterion of publication, or alternatively, the criterion of fixation, or both.

<sup>173</sup> For purposes of this Article, fixation means the finalization of the master tape or its equivalent.

<sup>174</sup> [JP propose: A Party may comply with its obligations under this paragraph by legislating that performers and producers of phonograms are protected to the extent provided for in Article 3 of WPPT and/or Paragraph 3 of Article 1 of the TRIPS Agreement.

any communication to the public of their [NZ oppose: performances or] phonograms, by wire or wireless means, including the making available to the public of those [NZ oppose: 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.]

[US/CL/PE/MX/SG/MY/NZ/AU/VN/BN propose: (b) Notwithstanding subparagraph (a) and Article [QQ.G.16.1] [*exceptions and limitations – 3 step test*], the application of this right to analog transmissions and [SG/VN/BN oppose: non-interactive], free over-the-air [CL/PE/MX oppose: analog and digital] broadcasts, and exceptions or limitations to this right for such activity, shall be a matter of each Party's law.]

[US/AU/SG/CL/PE/VN/MY propose: (c) Each Party may adopt limitations to this right in respect of other noninteractive transmissions in accordance with Article [QQ.G.16.1] [*exceptions and limitations – 3 step test*], provided that the limitations do not [CL/PE oppose: unreasonably] prejudice the right of the performer or producer of phonograms to obtain equitable remuneration].

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

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

Where, upon the data of signature of this Agreement, the right in subparagraph (a) has not been implemented by a Party, the requirement may be satisfied by providing a right to a single equitable remuneration for the direct or indirect use of phonograms published<sup>175</sup> for commercial purposes for broadcasting or for any communication to the public.<sup>176</sup>]

<sup>175</sup> The term “published” in this paragraph includes phonograms that are made available in accordance with Article 15(4) of the WPPT.

<sup>176</sup> Where a Party has availed itself of the option contained in Article 15(3) of the World Intellectual Property Organization Performances and Phonograms Treaty (WPPT), the obligation contained in [QQ.A.X – national treatment] does not apply to the extent that a Party makes use of a reservation taken under that Article.]”

**Article QQ.G.15:** For purposes of this [Article QQ.G.1 and Article QQ.G.3 – 18 ], the following definitions apply with respect to performers and producers of phonograms:

- (a) **broadcasting** means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also “broadcasting”; transmission of encrypted signals is “broadcasting” where the means for decrypting are provided to the public by the broadcasting organization or with its consent<sup>177</sup>;
- (b) **communication to the public** of a performance or a phonogram means the transmission to the public by any medium, other than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of paragraph [3], “communication to the public” includes making the sounds or representations of sounds fixed in a phonogram audible to the public;
- (c) **fixation** means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced, or communicated through a device;
- (d) **performers** means actors, singers, musicians, dancers and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore;
- (e) **phonogram** means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;
- (f) **producer of a phonogram** means the person who, or the legal entity which, takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds; and
- (g) [CA propose:<sup>178</sup>]**publication of a performance or a phonogram** means the offering of copies of the performance or the phonogram to the public,

<sup>177</sup> [US/SG propose ; CA/MX/CL/MY/VN/BN/CL oppose: For greater certainty, “broadcasting” does not include transmissions over computer networks or any transmissions where the time and place of reception may be individually chosen by members of the public.]

<sup>178</sup> Negotiator's Note; CA is considering the need for a deeming provision similar to article 15 (4) of WPPT.

with the consent of the rightholder, and provided that copies are offered to the public in reasonable quantity.

#### **Article QQ.G.16 {Limitations and Exceptions}<sup>179</sup>**

#### **Article QQ.G.X**

1. With respect to Section G, each Party shall confine limitations or exceptions to exclusive rights 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.
2. Article QQ.G.X.1 neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the TRIPS Agreement, Berne Convention [VN propose: Rome Convention,] the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty.<sup>180</sup>

#### **Article QQ.G.Y**

Each Party shall endeavor to achieve an appropriate balance in its copyright and related rights system, *inter alia* by means of limitations or exceptions that are consistent with Article QQ.G.X, including those for the digital environment, giving due consideration to legitimate purposes such as, but not limited to, criticism, comment, news reporting, teaching, scholarship, research [CL/MY propose<sup>181</sup>: , education, ] [CL propose: and persons with disabilities] [US/MY/SG/CA/PE/BN/MX/VN propose: , as well as facilitating access to published works for persons who are blind, visually impaired, or otherwise print disabled]<sup>182 183</sup>.

#### **Article QQ.G.Z**

<sup>179</sup> Negotiators' Note: CA supports a provision on limitations and exceptions and is reflecting further.

<sup>180</sup> Negotiators' Note: Delegations are considering the relationship between Article QQ.G.X.2 and new multilateral agreements concluded under the auspices of WIPO and the agreements listed in Article QQ.G.X.2. Delegations will work to resolve this issue in Article QQ.A.6 (General Provisions – relationship to other agreements) or elsewhere.

<sup>181</sup> Negotiator's Note: SG/CA/PE/BN/NZ/AU is flexible on the inclusion of the word 'education' as the notion is already significantly covered by teaching, scholarship and research. US/MX believe the word 'education' is covered by teaching, scholarship and research, but is considering further.

<sup>182</sup> FN: For purposes of greater clarity, a use that has commercial aspects may in appropriate circumstances be considered to have a legitimate purpose under Article QQ.G.Y.

<sup>183</sup> Negotiator's Note: NZ/AU is flexible on either options referring to persons with disabilities.

[CL/NZ/MY propose<sup>184</sup>: It is consistent with this Agreement to provide exceptions and limitations for temporary acts of reproduction which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable (a) a lawful transmission in a network between third parties by an intermediary; or (b) a lawful use of a work; and which have no independent economic significance.]

#### **Article QQ.G.17: {International Exhaustion of Rights}**

[CL/NZ/SG/MY/BN/VN/PE/MX<sup>185</sup> propose; AU/US oppose: The Parties are encouraged to establish international exhaustion of rights.]

[CA propose: Nothing in this Chapter shall affect the freedom of the Parties to determine whether and under what conditions the exhaustion of copyright and related rights applies.]

#### **Article QQ.G.18: {Collective Management}**

The Parties recognize the important role of collective management societies for copyright and related rights in collecting and distributing royalties<sup>186</sup> based on practices that are fair, efficient, transparent and accountable, and which may include appropriate record keeping and reporting mechanisms.

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<sup>184</sup> Negotiator's Note: Delegations are considering the appropriate placement of this issue under right of reproduction or L & E. There continue to be discussions regarding this issue and delegations have diverging views.

<sup>185</sup> Negotiators' Note: CA reserves its position pending the outcome of discussions elsewhere in this Chapter.

<sup>186</sup> For greater certainty, royalties may include equitable remuneration.

## **{ENFORCEMENT}**

### **{Section H: Enforcement}**

#### **Article QQ.H.1: {General Enforcement / General Obligations Relating to the Enforcement of Law [<sup>187</sup>] of Intellectual Property Rights}**

1. Each Party shall ensure that enforcement procedures as specified in this section, are available under its law [CL/SG/CA/BN/PE/MX/VN propose: and its legal system] so as to permit effective action against any act of infringement of intellectual property rights covered by this Chapter, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to future infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

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

[CL/VN/PE/AU/MY/BN/NZ/SG/MX/CA propose: 3. This Section does not create any obligation:

- (a) to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of each Party to enforce their law in general, or
- (b) with respect to the distribution of resources as between the enforcement of intellectual property rights and the enforcement of law in general.]

[US/SG propose<sup>188</sup>; BN/VN/PE/MY/NZ/MX/CA oppose: 4. The Parties understand that the distribution of enforcement resources shall not excuse that Party from complying with this Section<sup>189</sup>.]

#### **Article QQ.H.2: {Presumptions}**

<sup>187</sup> [CL propose: For greater certainty, law may include enforcement procedures established under Parties legal systems.]

<sup>188</sup> Negotiators' Note: AU/CL can support if there is emerging consensus on this issue.

<sup>189</sup> Negotiators' Note: The reference to Section is intended to include enforcement-related provisions throughout the Chapter.

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

- (a) for a presumption [US/CA propose: <sup>190</sup>] that, in the absence of proof to the contrary, the person whose name is indicated in the usual manner [CL/VN/BN/AU/MX/CA/SG/PE/NZ propose: <sup>191</sup>] as the author, performer, producer [CA oppose: , or publisher] of the work, performance, or phonogram [CA propose: , or as applicable, the publisher] is the designated right holder in such work, performance, or phonogram; and
- (b) for a presumption that, in the absence of proof to the contrary, the copyright or related right subsists in such subject matter.

[US/BN/MY/NZ/SG/CA propose; 2 AU/PE/CL/VN/MX oppose<sup>192</sup>: In civil, [BN/MY oppose: administrative,] and criminal proceedings involving trademarks, each Party shall provide for a rebuttable presumption that a registered trademark is valid.

[BN/SG/MY oppose<sup>193</sup>: In civil or administrative patent enforcement proceedings, each Party shall provide for a rebuttable presumption that each claim in a patent substantively examined and granted by the competent authority satisfies the applicable criteria of patentability in the territory of the Party <sup>194</sup>].]

### **Article QQ.H.3: {Enforcement Practices With Respect to Intellectual Property Rights}**

1. Each Party shall provide that final judicial decisions and administrative rulings of general application pertaining to the enforcement of intellectual property rights shall [SG/BN/MY/CA propose: preferably] be in writing and [MY oppose: shall] [MY/CA propose: may] state [VN/SG/BN/MY/CA oppose: any relevant findings of fact and] the reasoning or the legal basis on which the decisions and rulings are based. Each

<sup>190</sup> [US/CA/MY propose: For greater certainty, a Party may implement this Article on the basis of sworn statements or documents having evidentiary value, such as statutory declarations. A Party may also provide that such presumptions are rebuttable presumptions that may be rebutted by evidence to the contrary.]

<sup>191</sup> Each Party may establish the means by which it shall determine what constitutes the “usual manner” for a particular physical support.

<sup>192</sup> Negotiators' Note: JP is considering this provision.

<sup>193</sup> Negotiators' Note: JP is considering this provision.

<sup>194</sup> Negotiators' Note: AU/MX/US/PE will consider options to address concerns intersessionally and will involve the wider group.

Party shall also provide that such decisions and rulings shall be published [<sup>195</sup>] or, where publication is not practicable, otherwise made available to the public, in a national language in such a manner as to enable interested persons and Parties to become acquainted with them.

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

3. Each Party [US/AU/PE/NZ/CL/MX/CA/JP/SG/BN/VN propose: shall] [MY propose: may] publish or otherwise make available to the public information on its efforts to provide effective enforcement of intellectual property rights in its civil, administrative and criminal systems, such as statistical information that the Party may collect for such purposes.

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

1. Each Party shall make available to right holders <sup>196</sup> civil judicial procedures concerning the enforcement of any intellectual property right <sup>197</sup> covered in this Chapter.

2 Each Party shall provide [<sup>198</sup>] that in civil judicial proceedings its judicial authorities have the authority at least to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered [PE oppose: because of an infringement of that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity.] [SG/PE/AU/NZ/MY/CL/CA/MX/BN/VN oppose: <sup>199</sup>]

<sup>195</sup> [US: A Party may satisfy the requirement for publication by making the decision or ruling available to the public on the Internet.]

<sup>196</sup> For the purposes of this Article, the term “right holder” shall include those authorized licensees, federations and associations that have the legal standing and authority to assert such rights. The term “authorized licensee” shall include the exclusive licensee of any one or more of the exclusive intellectual property rights encompassed in a given intellectual property.

<sup>197</sup> Negotiators' Note: AU/US/JP would like to consider this proposal in tandem with the definition of intellectual property rights in this Chapter.

<sup>198</sup> [AU/NZ/MY/CA/JP/SG propose: A Party may also provide that the right holder may not be entitled to either of the remedies set out in 2 and 2bis in the case of a finding of non-use of a trademark] [JP/AU/SG/CA/MY propose: it is understood that there is no obligation for a Party to provide for the possibility of the remedies in 2 and 2bis to be ordered in parallel.]

<sup>199</sup> [US propose: In the case of patent infringement, damages adequate to compensate for the infringement shall not be less than a reasonable royalty.] [Negotiators' note: JP can go along with consensus.]

2bis. At least in cases of copyright or related rights infringement and trademark counterfeiting, each Party shall provide that, in civil judicial proceedings, its judicial authorities have the authority to order the infringer to pay the right holder the infringer's profits that are attributable to the infringement.<sup>[200]</sup>

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

[US/CA/BN/AU/JP/MX/NZ/PE/VN propose: 3.<sup>201</sup> Each Party shall provide that its judicial authorities have the authority to order injunctive relief that conforms to the provisions of Article 44 of the TRIPS Agreement, *inter alia*, to prevent goods that involve the infringement of an intellectual property right from entering into the channels of commerce [VN propose: in that Party's Jurisdiction].]<sup>202</sup>

[CL/PE/BN//VN propose;<sup>203</sup> US/NZ oppose: 4. Each Party shall ensure that its judicial authorities shall have the authority to order a party at whose request measures were taken and who has abused enforcement procedures to provide the party wrongfully enjoined or restrained adequate compensation for the injury suffered because of such abuse.]<sup>204</sup>

## Article QQ.H.4.X

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

- (a) pre-established damages, which shall be available upon the election of the right holder; or
- (b) additional damages<sup>205</sup>.

<sup>200</sup> [CA propose: A Party may exclude from the application of this Article cases of Copyright or related rights infringement where an infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity or where an infringer is a non-profit entity.][JP propose: A Party may presume those profits to be the amount of damages referred to in the preceding paragraph.]

<sup>201</sup> Negotiators' Note: AU supports this paragraph ad referendum.

<sup>202</sup> Negotiators' Note: CL/MY/SG will revert back intersessionally.

<sup>203</sup> Negotiators' Note: JP is considering this provision.

<sup>204</sup> Negotiators' Note: MY support the principle but are still considering the need for this proposal in the context of Article 48 of TRIPS. SG/MX/VN/AU/CA can go along with the consensus.

<sup>205</sup> For greater certainty, additional damages may include exemplary or punitive damages.

(2)<sup>206</sup> In civil judicial proceedings, with respect to trademark counterfeiting, each Party [US propose: shall] [NZ/MY/BN/JP propose: may] also establish or maintain a system that provides for one or more of the following:

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

(3) Pre-established damages shall be set out in an amount that would be sufficient to compensate the right holder for the harm caused by the infringement [VN oppose: , and with a view to deterring future infringements].

(4) In awarding additional damages, judicial authorities shall have the authority to award such additional damages as they consider appropriate, having regard to all relevant matters, including the [seriousness / extent / blatancy of the infringing conduct]<sup>207</sup> and the need to deter similar infringements in the future.

#### ARTICLE QQ.H.4.Y

[US propose; SG/PE/VN/CA/CL/NZ/MY/BN/AU/MX/JP oppose: 6. In civil judicial proceedings concerning patent infringement, each Party shall provide that its judicial authorities shall have the authority to increase damages to an amount that is up to three times the amount of the injury found or assessed.<sup>208</sup> ]

7. Each Party shall provide that its judicial authorities, [PE oppose: where appropriate,] [CA propose:<sup>209</sup>] [PE propose: except in exceptional circumstances] have the authority to order, at the conclusion of civil judicial proceedings concerning infringement of at least copyright or related rights, [CA/MX/US propose: patents and] [CA/MX/US oppose: or] trademarks, that the prevailing party be awarded payment by the losing party of court costs or fees and appropriate attorney's fees, or any other expenses as provided for under that Party's law.

9<sup>210</sup>. In civil judicial proceedings concerning copyright or related rights infringement

<sup>206</sup> Negotiator's Note: AU is still considering this paragraph.

<sup>207</sup> Negotiators' Note: Parties are considering the drafting choice of the word that represent the concept of seriousness.

<sup>208</sup> No Party shall be required to apply this paragraph to actions for infringement against a Party or a third party acting with the authorization or consent of a Party.

<sup>209</sup> [CA propose: For the purposes of this Article, where appropriate shall not be limited to exceptional cases.]

<sup>210</sup> Negotiators note: NZ share view of the article but would rather see it placed some other place; MX is considering this issue in light of Article QQ.H.4.13; JP proposes to move paragraph. 9 to Article QQ.H.5. Otherwise, JP will support VN proposal.

and trademark counterfeiting, each Party shall provide that its judicial authorities shall have the authority [VN propose: , at the right holder's request,] to order [VN propose: as provisional measures] the seizure or other taking into custody of suspected infringing goods, materials and implements relevant to the infringement, and, at least for trademark counterfeiting, documentary evidence relevant to the infringement.

10<sup>211</sup>. Each Party shall provide that in civil judicial proceedings:

- (a) At least with respect to pirated copyright goods and counterfeit trademark goods, each Party shall provide that, in civil judicial proceedings, at the right holder's request, its judicial authorities have the authority to order that such infringing goods be [VN propose: disposed of outside the channel of commerce or] destroyed, except in exceptional circumstances, without compensation of any sort.
- (b) Each Party shall further provide that its judicial authorities have the authority to order that materials and implements that have been used in the manufacture or creation of such infringing goods, be, without undue delay and without compensation of any sort, destroyed or disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements.
- (c) in regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional circumstances, to permit the release of goods into the channels of commerce.

11<sup>212</sup>. Without prejudice to its law governing privilege, the protection of confidentiality of information sources, or the processing of personal data, each Party shall provide that, in civil judicial proceedings concerning the enforcement of intellectual property rights, its judicial authorities have the authority, upon a justified request [VN: propose<sup>213</sup>] of the right holder, to order the infringer or, in the alternative, the alleged infringer, to provide to the right holder or to the judicial authorities, at least for the purpose of collecting evidence, relevant information as provided for in its applicable laws and regulations that the infringer or alleged infringer possesses or controls. Such information may include information regarding any person involved in any aspect of the infringement or alleged infringement and regarding the means of production or the channels of distribution of the infringing or allegedly infringing goods or services, including the identification of third persons alleged to be involved

<sup>211</sup> Negotiator's Note: MX supports this in principle but needs to reflect on this pending discussions on paragraph QQ.H.4.13.

<sup>212</sup> Negotiator's Note: MX is still considering this proposal.

<sup>213</sup> VN propose: A request for an order under this paragraph may be considered as unjustified in case such order would be out of proportion to the seriousness of the infringement.

in the production and distribution of such goods or services and of their channels of distribution.

12. Each Party shall provide that in relation to a civil judicial proceeding concerning the enforcement of intellectual property rights, its judicial or other authorities have the authority to impose sanctions on a party, counsel, experts, or other persons subject to the court's jurisdiction, for violation of judicial orders concerning the protection of confidential information produced or exchanged in connection with such a proceeding.<sup>214</sup>

13. To the extent that any civil remedy [VN propose; MX oppose:<sup>215</sup>] can be ordered as a result of administrative procedures on the merits of a case, each Party shall provide that such procedures conform to principles equivalent in substance to those set out in this Article (civil and administrative proceedings)

14. In the event that a Party's judicial or other authorities appoint technical or other experts in civil proceedings concerning the enforcement of intellectual property rights and require that the parties to the litigation bear the costs of such experts, that Party should seek to ensure that such costs are reasonable and related appropriately, *inter alia*, to the quantity and nature of work to be performed and do not unreasonably deter recourse to such proceedings.

[US/AU/SG propose; BN/VN/MX/JP oppose:<sup>216</sup> 15. In civil judicial proceedings concerning the acts described in Article 4.[9] (TPMs) and Article 4.[10] (RMI), each Party shall provide that its judicial authorities shall, at the least, have the authority to:

- (a) impose provisional measures, including seizure or other taking into custody of devices and products suspected of being involved in the prohibited activity;
- (b) [US/SG propose; NZ/AU/MY oppose: provide an opportunity for the right holder to elect between actual damages it suffered (plus any profits attributable to the prohibited activity not taken into account in computing those damages) or pre-established damages;] [AU/NZ/PE propose: order damages of the type available for the infringement of copyright]
- (c) order [NZ propose: , where appropriate,] payment to the prevailing party at the conclusion of civil judicial proceedings of court costs and fees, and

<sup>214</sup> Negotiators' Note: PE/MX are considering the need for this proposal.

<sup>215</sup> [For greater certainty, civil remedies do not include administrative measures, decisions or any other actions taken by administrative authorities.]

<sup>216</sup> Negotiators' Note: PE/MY/NZ/CL/CA reserve their positions pending resolution of related provisions regarding TPM and RMI.

appropriate attorney's fees, by the party engaged in the prohibited conduct; and

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

[US/AU/SG/NZ/MY/CL/CA propose [US propose: No Party shall make damages available under this paragraph] [AU/SG/NZ/MY/CL/CA propose: A Party may provide that damages shall not be available] against a [MY oppose: nonprofit] library, archives, educational institution, [CA propose: museum, or any other nonprofit entity as determined by a Party's law] [CA oppose: or public noncommercial broadcasting entity ] [MY oppose: that sustains the burden of proving that such entity was not aware and had no reason to believe that its acts constituted a prohibited activity].]]<sup>217</sup>

[NZ/CA/SG/CL/MY propose: 16. Each Party may adopt or maintain measures to discourage vexatious or unreasonable proceedings, including those involving pharmaceutical products that are subject to marketing, regulatory or sanitary approval.]

#### **Article QQ.H.5: {Provisional Measures}**

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

2. Each Party shall provide that its judicial authorities have the authority to require the applicant, with respect to provisional measures, to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant's right is being infringed or that such infringement is imminent, [VN//PE: and that any delay in the issuance of such measures is likely to cause irreparable harm to the right holders, or there is a demonstrable risk of evidence being destroyed,] and to order the applicant to provide a security or equivalent assurance set at a level sufficient to protect the defendant and to prevent abuse. Such security or equivalent assurance shall not unreasonably deter recourse to such procedures.

#### **Article QQ.H.6: {Special Requirements Related to Border Enforcement<sup>218</sup> / Special Requirements related to Border Measures} [<sup>219</sup>]**

<sup>217</sup> Negotiator's Note: This will be discussed in relation to provisions regarding TPM and RMI.

<sup>218</sup> Negotiators Note: The scope of border measures in this section will be confined to counterfeit trademark goods, pirated copyright goods. The US proposal for inclusion of, confusingly similar trademark goods is still under negotiation and Parties have different views on this proposal.

<sup>219</sup> [CA propose: It is understood that there shall be no obligation to apply the procedures set forth in this Article to goods put on the market in another country by or with the consent of the right holder.]

1. Each Party shall provide that any right holder initiating procedures for its competent authorities to suspend release of suspected counterfeit [SG/BN/MY/VN/CA oppose: or confusingly similar] trademark goods, or pirated copyright goods<sup>220</sup> into free circulation is required to provide adequate evidence to satisfy the competent authorities that, under the law{s} of the [CA/NZ/MX/US/PE/AU oppose: country of importation] [CA/NZ/MX/US/PE/AU<sup>221</sup> propose: Party providing the procedures], there is *prima facie* an infringement of the right holder's intellectual property right and to supply sufficient information that may reasonably be expected to be within the right holder's knowledge to make the suspected goods <sup>222</sup>reasonably recognizable by its competent authorities. The requirement to provide such information shall not unreasonably deter recourse to these procedures.

1bis. Each Party shall provide for applications to suspend the release of, or to detain, any suspect goods <sup>223</sup> [SG/VN oppose: under customs control <sup>224</sup> in its territory.] [SG/VN propose: that are imported into the territory of the Party<sup>225</sup>] A Party may provide that, at the request of the right holder, an application to suspend the release of, or to detain, suspect goods may apply to selected points of entry [US/CA/JP/MX <sup>226</sup> propose; CL/SG/VN oppose: and exit] under customs control.]<sup>227</sup> <sup>228</sup> [US/AU/CA/JP/NZ propose; MX /PE/CL/MY/SG/VN/BN oppose: Each Party shall provide that applications [NZ oppose: shall] remain in force [NZ propose: for the period requested by the right holder but not exceeding five years, or] for a period of not less than one year from the date of application, or the period that the good is protected by copyright or the relevant trademark registration is valid, whichever is shorter.[NZ propose: A Party may provide that its competent authorities have the authority to suspend or invalidate an application when there is due cause.]

<sup>220</sup> For purposes of Article 14:

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

<sup>221</sup> Negotiators' Note: AU supports this ad referendum.

<sup>222</sup> Negotiators' Note: Need to clean up terminology in H.6 relating to 'goods' and 'merchandise'.

<sup>223</sup> Negotiators' Note: MY/CA/SG/AU/VN/BN: suspect goods need to be defined and revert back.

<sup>224</sup> Negotiators' Note: CA/MY/AU: Customs controls need to be defined and revert back.

<sup>225</sup> [SG propose: the requirement to provide for such application is applicable to the obligation to provide procedures referred to in Article QQ.H.6.1.]

<sup>226</sup> Negotiators' Note: AU/PE can support consensus.

<sup>227</sup> Negotiators' Note: MY/SG/VN/BN are considering this first clause.

<sup>228</sup> Negotiators' Note: Parties are considering the need for a footnote to deal with the scope of this clause.

2. Each Party shall provide that its competent authorities have the authority to require a right holder initiating procedures to suspend the release of suspected counterfeit [BN/SG/MY/VN/CA oppose: or confusingly similar] trademark goods, or pirated copyright goods, to provide a reasonable security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. Each Party shall provide that such security or equivalent assurance shall not unreasonably deter recourse to these procedures. A Party may provide that such security may be in the form of a bond conditioned to hold the defendant harmless from any loss or damage resulting from any suspension of the release of goods in the event the competent authorities determine that the article is not an infringing good.

3. Without prejudice to a Party's laws pertaining to privacy or the confidentiality of information, where its competent authorities have detained or suspended the release of goods that are suspected of being counterfeit or pirated, a Party may provide that its competent authorities have the authority to inform the right holder [CA/VN propose: who has filed a request for assistance] [MY/CA/BN/PE/VN oppose: promptly] [MY/CA/PE<sup>229</sup> /BN/SG/VN propose: within a reasonable period] of the names and addresses of the consignor, exporter, consignee or importer, a description of the merchandise, quantity of the merchandise, and, if known, the country of origin of the merchandise.: Where a Party does not provide such authority to its competent authorities when suspect goods are detained or suspended from release, it shall provide [US/VN propose: , at least in cases of imported goods,] its competent authorities with the authority to provide the foregoing information to the right holder [SG/VN oppose: within 30 days<sup>230</sup>] [SG/VN propose: within a reasonable period] of the seizure or determination that the goods are counterfeit or pirated, whichever is earlier.

[US/PE/AU/SG/MY/CL/CA/BN/JP propose; NZ/VN/MX oppose: 4. Each Party shall provide that its competent authorities may initiate border measures *ex officio*<sup>231</sup> with respect to [AU propose: merchandise that is] imported, [MY/CL/AU/PE/BN oppose: exported,] [CL/AU/PE propose; SG oppose: destined for export,] [AU/MY/SG/CA/BN/CL oppose: or in-transit merchandise, [PE oppose: <sup>232</sup> ] [PE/SG/MY/CL/CA/BN oppose: or [AU oppose: merchandise] [US propose: entering into or exiting from] [US oppose: in] free trade zones], that is suspected of being

<sup>229</sup> Negotiators' Note: CA would need to include minor amendments on disclosure.

<sup>230</sup> For purposes of this Article, "days" shall mean "business days".

<sup>231</sup> For greater certainty, the parties understand that *ex officio* action does not require a formal complaint from a private party or right holder [MY/BN propose: , provided that they have acquired *prima facie* evidence that intellectual property rights are being infringed].

<sup>232</sup> For purposes of this Article, **in-transit merchandise** means goods under "Customs transit" and goods "transhipped," as defined in the *International Convention on the Simplification and Harmonization of Customs Procedures* (Kyoto Convention).

counterfeit [SG/PE/MY/CA/BN oppose: or confusingly similar] trademark goods, or pirated copyright goods.]

5. Each Party shall adopt or maintain a procedure by which its competent authorities may determine, within a reasonable period of time after the initiation of the procedures described under Article QQ.H.6(1)<sup>233</sup> whether the suspect goods infringe an intellectual property right. Where a Party provides administrative procedures for the determination of an infringement, it [VN<sup>234</sup> propose: may] [VN oppose: shall] also provide its authorities with the authority to impose administrative penalties, which may include monetary penalties or the seizure of the infringing goods, following a determination that the goods are infringing.

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

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

8. Each Party shall include in the application of this Article goods of a commercial nature sent in small consignments. A Party may exclude from the application of this Article small quantities of goods of a non-commercial nature contained in travellers' personal luggage.<sup>235</sup>

#### **Article QQ.H.7: {Criminal Procedures and Remedies / Criminal Enforcement}**

1. Each Party shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright or related rights piracy

<sup>233</sup> Negotiators' Note: US to revisit after the decision on scope of application *ex officio*.

<sup>234</sup> Negotiators' Note: VN can accept "shall" option if the scope of Border control is confined to trademarks counterfeit and copyright pirated goods.

<sup>235</sup> For greater certainty, a Party may also exclude from the application of this Article small quantities of goods of a non-commercial nature sent in small consignments.

on a commercial scale.

2. [US/AU/SG/PE propose; CL/VN/MY/NZ/CA/BN/MX oppose: Willful copyright or related rights piracy on a commercial scale includes:

- (a) significant willful copyright or related rights infringements that have no direct or indirect motivation of financial gain; and
- (b) willful infringements for purposes of commercial advantage or [AU/SG/PE/JP oppose: private] financial gain.[AU/SG/PE/CA/JP oppose: <sup>236</sup>]]

Each Party shall treat willful importation [SG/MX/BN/MY/VN oppose: or exportation ] of counterfeit trademark goods [VN oppose: or pirated copyright goods] on a commercial scale as unlawful activities subject to criminal penalties.<sup>237</sup>

[US propose; AU/BN/MY/NZ/SG/CL/VN/PE/CA/MX/JP oppose: 3. Each Party shall also provide for criminal procedures and penalties to be applied, even absent willful trademark counterfeiting or copyright or related rights piracy, at least in cases of knowing trafficking in:

- (a) labels or packaging, of any type or nature, to which a counterfeit trademark <sup>238</sup> has been applied, the use of which is likely to cause confusion, to cause mistake, or to deceive; and
- (b) counterfeit or illicit labels<sup>239</sup> affixed to, enclosing, or accompanying, or

<sup>236</sup> [US propose; AU/SG/PE/CA/JP oppose: For greater certainty, “financial gain” for purposes of this Article includes the receipt or expectation of anything of value.]

<sup>237</sup> [US/CA propose; JP oppose: A Party may comply with this obligation in relation to [JP: importation and] exportation of pirated [JP: copyright] goods through its measures concerning distribution.] [JP alternatively propose: A Party may comply with its obligation relating to importation and exportation of counterfeit trademark goods or pirated copyright goods by providing for distribution, sale or offer for sale of such goods on a commercial scale as unlawful activities subject to criminal penalties.]

<sup>238</sup> US: Negotiator's Note: For greater certainty, the definition of “counterfeit trademark goods” in footnote [12] shall be used as context for this Article.

<sup>239</sup> US: For purposes of this Article, “illicit label” means a genuine certificate, licensing document, registration card, or similar labeling component:

- (A) that is used by the copyright owner to verify that a phonogram, a copy of a computer program or literary work, a copy of a motion picture or other audiovisual work, or documentation or packaging for such phonogram or copies is not counterfeit or infringing of any copyright; and
- (B) that is, without the authorization of the copyright owner—

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

or

(ii) in connection with a genuine certificate or licensing document, knowingly falsified in order to designate a

designed to be affixed to, enclose, or accompany the following:

- (i) a phonogram,
  - (ii) a copy of a computer program or a literary work,
  - (iii) a copy of a motion picture or other audiovisual work,
  - (iv) documentation or packaging for such items; and
- (c) counterfeit documentation or packaging for items of the type described in subparagraph (b).]

[NZ/AU/BN/MY/US/CA/SG/MX/JP propose; PE/CL/VN oppose: 4. Each Party shall provide for criminal procedures and penalties to be applied in cases of willful importation<sup>240</sup> and domestic use, in the course of trade and on a commercial scale, of labels or packaging<sup>241</sup>:

- (a) to which a mark has been applied without authorization which is identical to, or cannot be distinguished from, a trademark registered in its territory; and
- (b) which are intended to be used in the course of trade on goods or in relation to services which are identical to goods or services for which such trademark is registered.]

[US propose; CA/JP oppose: Each Party shall further ensure that criminal penalties and procedures are applied in cases of knowing trafficking in illicit labels<sup>242</sup> affixed,

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higher number of licensed users or copies than authorized by the copyright owner, unless that certificate or document is used by the copyright owner solely for the purpose of monitoring or tracking the copyright owner's distribution channel and not for the purpose of verifying that a copy or phonogram is noninfringing.

<sup>240</sup> A Party may comply with its obligation relating to importation of labels or packaging through its measures concerning distribution.

<sup>241</sup> A Party may comply with its obligations under this paragraph by providing for criminal procedures and penalties to be applied to attempts to commit a trademark offence.

<sup>242</sup> US: For purposes of this Article, "illicit label" means a genuine certificate, licensing document, registration card, or similar labeling component:

- (A) that is used by the copyright owner to verify that a phonogram, a copy of a computer program or literary work, a copy of a motion picture or other audiovisual work, or documentation or packaging for such phonogram or copies is not counterfeit or infringing of any copyright; and
- (B) that is, without the authorization of the copyright owner—

- (i) distributed or intended for distribution not in connection with the phonogram or copies to which such labeling component was intended to be affixed by the respective copyright owner; or
- (ii) in connection with a genuine certificate or licensing document, knowingly falsified in order to designate a higher number of licensed users or copies than authorized by the copyright owner, unless that certificate or document is used by the copyright owner solely for the purpose of monitoring or tracking the copyright owner's distribution channel and not for the purpose of verifying that a copy or phonogram is noninfringing.

enclosing, or accompanying, or designed to be affixed to, enclose, or accompany phonograms, copies of computer programs, literary works, motion pictures, or other audiovisual works.]

5. [AU/NZ/SG/MY/ CA/US propose; PE/VN/BN/MX/CL oppose: [US/CA propose: Each] [US/CA oppose: A] Party [SG/NZ/CL oppose: shall] [SG/NZ/CL/JP: may] provide criminal procedures and penalties [US/CA oppose: , in appropriate cases, ] for the [US/CA propose: knowing and] unauthorized copying [MY: or recording] [US propose; CA/JP oppose: or transmittal] of [US/CA propose: a [JP propose: first-run] cinematographic work, or any part thereof,] [US/CA oppose: cinematographic works] from a performance in a [CA oppose: motion picture exhibition facility generally open to the public] [CA/JP propose: movie theater].]

6. With respect to the offenses for which this Article requires the Parties to provide for criminal procedures and penalties, Parties shall ensure that criminal liability for aiding and abetting is available under its law.

7. With respect to the offences described in Article QQ.H.7[1]-[4] above, each Party shall provide:

- (a) penalties that include sentences of imprisonment as well as monetary fines sufficiently high to provide a deterrent to future acts of infringement, consistently with the level of penalties applied for crimes of a corresponding gravity;<sup>243</sup>
- (b)<sup>244</sup> that its judicial authorities shall have the authority, when determining penalties, to account for the seriousness of the circumstances, which may include those that involve threats to, or effects on, health or safety;<sup>245</sup>
- (c) that its judicial [VN propose: or other] authorities shall have the authority to order the seizure of suspected counterfeit trademark goods or pirated copyright goods, any related materials and implements used in the commission of the alleged offense, documentary evidence relevant to the alleged offense [MY oppose: , and assets<sup>246</sup> derived from, or obtained directly [VN oppose: or indirectly] through the alleged infringing activity].

<sup>243</sup> It is understood that there is no obligation for a Party to provide for the possibility of imprisonment and monetary fines to be imposed in parallel.

<sup>244</sup> Negotiator's Note: CL/PE/MX/CA is still considering pending consultation with capital.

<sup>245</sup> A Party may also account for such circumstances through a separate criminal offense.

<sup>246</sup> Negotiators' Note: CA/BN/VN are reflecting on the definition of "assets".

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

- (d) that its judicial authorities shall have the authority to order the forfeiture, at least for serious offenses, of any assets derived from, or obtained directly [VN oppose: or indirectly] through the infringing activity;
- (e) that its judicial authorities shall have the authority to order the forfeiture or destruction of:
  - (i) all counterfeit trademark goods or pirated copyright goods; and
  - (ii) materials and implements [CA/VN/MX propose: predominantly] [CA/VN/MX oppose: that have been] used in the creation of pirated copyright goods or counterfeit trademark goods; and

[CL/PE/VN/BN/SG/AU/CA/MX/JP oppose: (iii) any other articles consisting of a counterfeit trademark].

In cases where counterfeit trademark goods and pirated copyright goods are not destroyed, the [MY oppose: judicial] [MY/SG/CL/AU/PE/MX/VN/JP: competent<sup>247</sup>] authorities shall ensure that, except in exceptional circumstances, such goods shall be disposed of outside the channels of commerce in such a manner as to avoid causing any harm to the right holder. Each Party shall further provide that forfeiture or destruction under this subparagraph and subparagraph (c) <sup>248</sup> shall occur without compensation of any kind to the defendant;

- [US/NZ propose; BN/SG/MY/CL/PE/AU/VN/CA/MX/JP oppose: (f) that its judicial authorities have the authority to order the seizure or forfeiture of assets the value of which corresponds to that of the assets derived from, or obtained directly or indirectly through, the infringing activity];
- (g) that its judicial or other competent authorities shall have the authority to release or, in the alternative, provide access to, goods, material, implements, and other evidence held by the authority to a right holder for

<sup>247</sup> Negotiators Note: The use of the term “competent/judicial” in this subparagraph will be revisited.

<sup>248</sup> Negotiators' Note: The cross reference to subparagraph (c) will be revisited during legal scrubbing.

civil<sup>249</sup> infringement proceedings.

[US/NZ/PE/SG/BN/CL/AU/MY/CA/MX propose: VN/JP oppose: (h) that its competent authorities may act upon their own initiative to initiate a legal action without the need for a formal complaint by a private party or right holder].

#### **Article QQ.H.8 {Trade Secrets}**

1.<sup>250</sup>[CL propose: In the course of ensuring effective protection against unfair competition as provided in Article 10*bis* of the Paris Convention] Parties shall ensure that natural and legal persons have the legal means to prevent trade secrets lawfully in their control from being disclosed to, acquired by, or used by others (including state commercial enterprises)<sup>251</sup> without their consent in a manner contrary to honest commercial practices.[<sup>252</sup>] As used in this Chapter, trade secrets encompass, at a minimum, undisclosed information as provided for in Article 39.2 of the TRIPS Agreement.

[US/MX/CA/NZ/JP<sup>253</sup> propose; SG/MY/PE/VN/CL/AU<sup>254</sup>/BN oppose: 2. Each Party shall provide for criminal procedures and penalties at least in cases in which a trade secret relating to a product in national or international commerce is misappropriated, or disclosed, willfully and without authority for purposes of commercial advantage or financial gain, and with the intent to injure the owner of such trade secret.]

#### **Article QQ.H.9: {Protection of Encrypted Program-Carrying Satellite Signals/Protection of Encrypted Program-Carrying Satellite and Cable Signals}**

1. Each Party shall make it a [CL/MX propose: civil or,] [VN propose: administrative or] criminal offense to:

(a) manufacture, assemble, modify, import, export, sell, lease, or otherwise

<sup>249</sup> A Party may also provide such authority in connection with administrative infringement proceedings.

<sup>250</sup> Negotiators' Note: AU supports this paragraph ad referendum.

<sup>251</sup> Negotiators' Note: BN seeks further clarification on "state commercial enterprise".

<sup>252</sup> [US: For greater certainty, a Party may treat disclosure of a trade secret to that Party's authorities in connection with providing evidence of an alleged violation of that Party's law as not contrary to honest commercial practices.][AU propose: for the purposes of this paragraph "a manner contrary to honest commercial practices" shall mean at least practices such as breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.]

<sup>253</sup> Negotiators' Note: CA/MX/NZ/JP supports in principle subject to final drafting.

<sup>254</sup> Negotiators' Note: AU opposes this paragraph ad referendum.

distribute a tangible or intangible device or system, knowing[CL <sup>255</sup>]  
[CL/JP oppose: or having reason to know] that the device or [CL oppose:  
system is primarily of assistance] [CL propose: system's principal  
function is solely to assist] in decoding an encrypted program-carrying  
satellite [CL/VN/SG/PE/CA/MX oppose: or cable] signal without the  
authorization of the lawful distributor of such signal<sup>256</sup>; and

[US/AU/NZ/PE/MY/SG/MX/VN/CA/CL propose, BN/JP oppose: (b) [VN  
oppose: [CA propose: except in circumstances where the lawful  
distributor has not made the signal available to persons in the area where  
the decoding occurs,] willfully receive<sup>257</sup> [CL oppose: and make use of,]  
[<sup>258</sup>] or] willfully further distribute a program-carrying signal that  
originated as an encrypted satellite [PE/SG/MX/VN/CL/CA oppose: or  
cable] signal knowing that it has been decoded without the authorization  
of the lawful distributor of the signal, [PE/SG/MX/VN/CL/CA oppose:  
or if the signal has been decoded with the authorization of the lawful  
distributor of the signal, willfully to further distribute the signal for  
purposes of commercial advantage knowing that the signal originated as  
an encrypted program-carrying signal and that such further distribution  
is without the authorization of the lawful signal distributor.] ]

[US/AU/PE/NZ/MX/CL <sup>259</sup> propose<sup>260</sup>, MY/BN/VN/CA oppose: 2. Each Party shall  
provide for civil remedies, [CL/MX oppose: including compensatory damages,] for  
any person injured by any activity described in paragraph [1], including any person  
that holds an interest in the encrypted programming signal or its content.]

#### **Article QQ.H.10: {Special Measures Relating to Enforcement in the Digital Environment}**

[US/AU/CA/SG/NZ/PE propose, VN/ oppose: 1. Each Party shall ensure that  
enforcement procedures, to the extent set forth in the civil and criminal enforcement  
sections of this Chapter, are available under its law so as to permit effective action  
against an act of trademark, copyright or related rights infringement which takes place

<sup>255</sup> [CL propose: For purposes of paragraph 1, knowledge may be demonstrated through reasonable evidence, taking into account the facts and circumstances surrounding the alleged illegal act.]

<sup>256</sup> [CA/AU/SG propose: The obligation regarding export may be met by making it a criminal offence to possess and distribute such a device or system.]

<sup>257</sup> [CA propose: willfully receiving may mean operating a radio apparatus so as to receive an encrypted signal].

<sup>258</sup> [US propose; CL/AU oppose: For greater certainty, “make use of” includes viewing of the signal, whether private or commercial].

<sup>259</sup> Negotiators' Note: CL position will depend on the outcome of paragraph 1(a).

<sup>260</sup> Negotiators' Note: SG agrees in principle but will reflect further on the language.

in the digital environment, including expeditious remedies to prevent infringement and remedies which constitute a deterrent to further infringement.]<sup>261</sup>

**Article QQ.H.11: {Government Use of Software / Government Use of Software and Other Materials Protected by Copyright or Related Rights}**

Each Party<sup>262</sup> shall adopt or maintain appropriate laws, regulations, policies, orders, government-issued guidelines, or administrative or executive decrees providing that its [US/AU/CA/MY/VN/MX propose: central <sup>263</sup> ] government agencies use only non-infringing<sup>264</sup> computer software [US/AU/CA/MX propose:; SG/CL/PE/NZ/MY/BN/VN oppose: and other materials protected by copyright or related rights] in a manner authorized by law and by the relevant license. These measures shall apply to the acquisition and [PE/CA oppose: management] [PE/CA propose: use] of such software [PE/CL/BN/SG/NZ/MY/VN oppose: and other materials] for government use.

**Article QQ.H.12<sup>265</sup>:** [US propose: Notwithstanding Article QQ.G.16 [limitations and exceptions] and Article QQ.G.14.3(b) [over the air broadcasting reference], no Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the right holder or right holders of the content of the signal and, if any, of the signal.<sup>266</sup>]

<sup>261</sup> Negotiator's Note: MX/MY/CL/BN are still considering this provision.

<sup>262</sup> Negotiators' Note: CA confirming with government procurement people.

<sup>263</sup> Negotiators' Note: CA support for central depends on how it is defined throughout the agreement.

<sup>264</sup> Negotiators' Note: SG/CL/MY/BN/VN subject to consideration of parallel importation issues.

<sup>265</sup> Negotiators' Note: delegations are still considering this proposal, and are also reflecting on the placement of this proposal in the Chapter.

<sup>266</sup> [US: For purposes of this Article and for greater certainty, retransmission within a Party's territory over a closed, defined, subscriber network that is not accessible from outside the Party's territory does not constitute retransmission on the Internet.]

## {SECTION I: INTERNET SERVICE PROVIDERS}

### Article QQ.I.1:<sup>267</sup> {Internet Service Provider Liability}

[CL/BN/NZ/MY/VN/CA/SG/MX propose; AU/US oppose: 1.<sup>268</sup> Each Party shall limit the liability of, or the availability of remedies against, internet service providers<sup>269</sup> [when acting as intermediaries<sup>270</sup>], for infringement of copyright or related rights that take place on or through communication networks, in relation to the provision or use of their services.]

[CA propose: 2. Limitations referred to in the previous paragraph shall cover at least the following functions:

- a. mere conduit, which consist of the provision of the means to transmit information provided by a user, or the means of access to a communication network;
- b. hosting of information at the request of a user of the hosting services;
- c. caching carried out through an automated process, when the internet service provider:
  - i. does not modify information other than for technical reasons;
  - ii. ensures that any directions related to the caching of information that are specified in a manner widely recognized and used by industry are complied with; and
  - iii. does not interfere with the use of technology that is lawful and widely recognized and used by the industry in order to obtain data on the use of information;
- d. providing an information location tool, by making reproductions of copyright material in an automated manner, and communicating the reproductions.]

[CA propose: 3. Qualification by an internet service provider for the limitations as to each function in the previous paragraph shall be considered separately from qualification for the limitations as to each other function. Eligibility for the limitations in the previous paragraph may not be conditioned on the internet service provider monitoring its service, or affirmatively seeking facts indicating infringing activity.]

<sup>267</sup> Negotiators' Note: JP is still considering its positions on this Section.

<sup>268</sup> Negotiator's Note: PE is still considering its position on paragraphs 1, 2 and the new paragraph 3 presented by CA.

<sup>269</sup> Each Party may determine, within its domestic law, what constitutes an internet service provider.

<sup>270</sup> Negotiator's Note; NZ is still considering this phrase.

[CL/BN/NZ/VN/MX propose; AU/US/SG/MY oppose: 2. <sup>271</sup> <sup>272</sup> The framework in Paragraph 1 [CA oppose: will only apply if an internet service provider meets conditions, including] [CA/CL/VN propose; NZ/MX oppose: shall be accompanied in a Party's law by]:

(a) [CA/NZ/CL/VN/MX propose: procedures for notifications of claimed infringement and for] removing or disabling access to infringing material [CA/CL/MX oppose: upon notification from the right holder through a procedure established by each Party]; and]

[CA/NZ/CL/VN<sup>273</sup> propose: (b) legal incentives for internet service providers to comply with these procedures, or remedies against internet service providers who fail to comply.]]

[CA propose: 4. Each Party shall provide legal incentives for internet service providers to comply, or remedies against internet service providers who fail to comply, with any procedures established in each party's law for:

- (a) effective notifications of claimed infringement; or
- (b) removing or disabling access to infringing material residing on its networks.]

[CA/CL/VN<sup>274</sup>] propose: [CA oppose: 3.] [CA propose: 5.] The framework in Paragraph 1 will not apply to the extent that an internet service provider provides a service primarily for the purpose of enabling acts of copyright or related right infringement.]

[CA propose: 6. This Article is without prejudice to the availability in a Party's law of other defences, limitations and exceptions to the infringement of copyright or related rights. This Article shall not affect the possibility of a court or administrative authority, in accordance with Parties' legal systems, or requiring the internet service provider to terminate or prevent an infringement.]

[US/AU/SG/NZ/PE propose; BN/VN/CA/MX oppose: 1. [SG/MY oppose<sup>275</sup>: For the purpose of providing enforcement procedures that permit effective action against any act of copyright<sup>276</sup> infringement covered by this Chapter, including expeditious

<sup>271</sup> Negotiators' Note: VN to consider this provision further.

<sup>272</sup> Negotiator's Note: BN is considering its reactions to the proposals presented by CA on paragraphs 2 and 3.

<sup>273</sup> Negotiator's Note: MX is considering its reactions to paragraph 2b and 3.

<sup>274</sup> Negotiator's Note: NZ is considering its reactions to paragraph 3.

<sup>275</sup> Negotiator's Note: NZ proposes to look at the placement of this paragraph vis a vis its placement elsewhere in the text.

<sup>276</sup> For purposes of this paragraph, "copyright" includes related rights. Negotiators' Note: The placement of the

remedies to prevent infringements and criminal and civil remedies] each Party shall provide, consistent with the framework set out in this Article:

- (a) [MY/VN oppose: legal incentives for service providers to cooperate with copyright owners in deterring the unauthorized storage and transmission of copyrighted materials; and]
- (b) limitations in its law [MY/NZ/SG propose: on the liability of, or on the remedies] [NZ/MY/VN oppose: regarding the scope of remedies <sup>277</sup> ] available against service providers for copyright infringements that they do not control, initiate or direct, and that take place through systems or networks controlled or operated by them or on their behalf, as set forth in this subparagraph (b).<sup>278</sup> [PE propose: <sup>279</sup>]
  - (i) [MY/VN oppose: These limitations shall preclude monetary relief and provide reasonable restrictions on court-ordered relief to compel or restrain certain actions for the following functions, [NZ oppose: and shall be confined to those functions]]<sup>280</sup>:
    - (A) transmitting, routing, or providing connections for material without modification of its content[CL propose:<sup>281</sup>], or the [MY oppose: intermediate and] transient storage of such material in the course thereof;
    - (B) caching carried out through an automatic process;
    - (C) storage, at the direction of a user, of material residing on a system or network controlled or operated by or for the service provider<sup>282</sup>; and
    - (D) referring or linking users to an online location by using information location tools, including hyperlinks and directories.
  - (ii) These limitations shall apply only where the service provider does not initiate the transmission of the material, and does not select the

footnote will depend on the outcome of the chapeau of this paragraph.

<sup>277</sup> [NZ propose: For the avoidance of doubt, limitations regarding the scope of remedies available can be implemented through limitations on the liability of internet service providers.]

<sup>278</sup> This subparagraph is without prejudice to the availability of defenses to copyright infringement that are of general applicability.

<sup>279</sup> [PE propose: For greater clarity, the failure of an ISP to qualify for the limitations in subparagraph (b) does not itself result in liability.]

<sup>280</sup> [US/PE/SG/AU propose; CL/NZ/VN oppose: A Party may request consultations with the other Parties to consider how to address under this paragraph functions of a similar nature that a Party identifies after the entry into force of this Agreement.]

<sup>281</sup> [CL/MY/SG/NZ/AU/PE/US propose: Such modification does not include modifications made as part of a technical process.]

<sup>282</sup> [CL/MY/SG/NZ/AU/US propose: For greater certainty, such storage of material may include e-mails and their attachments stored in the provider's server and web pages residing on the provider's server.]

material or its recipients (except to the extent that a function described in clause (i)(D) in itself entails some form of selection).

- (iii) Qualification by a service provider for the limitations as to each function in clauses (i)(A) through (D) shall be considered separately from qualification for the limitations as to each other function[CL oppose: , in accordance with the conditions for qualification set forth in clauses (iv) through (vii)]
- (iv) With respect to functions referred to in clause (i)(B), the limitations shall be conditioned on the service provider:
  - [CL/MY oppose: (A) permitting access to cached material in significant part only to users of its system or network who have met conditions [NZ propose: imposed by the originator of the material] on user access to that material;]
  - (B) <sup>283</sup>complying with rules concerning the refreshing, reloading, or other updating of the cached material when specified by the [CL oppose: person making the material available online] [CL propose: supplier of the material] in accordance with a relevant industry standard data communications protocol for the system or network through which that person makes the material available that is generally accepted in the Party's territory;
  - (C) <sup>284</sup>not interfering with technology used <sup>285</sup>at the originating site consistent with industry standards generally accepted in the Party's territory to obtain information about the use of the material, and not modifying its content in transmission to subsequent users; and
  - (D) [MY oppose: expeditiously] removing or disabling access, on receipt of an effective notification of claimed infringement, to cached material that has been removed or access to which has been disabled at the originating site.
- (v) With respect to functions referred to in clauses (i)(C) and (D), the limitations shall be conditioned on the service provider:
  - (A) not receiving a financial benefit directly attributable to the infringing activity, in circumstances where it has the right and ability to control such activity;
  - (B) [MY oppose: expeditiously] removing or disabling access to the material residing on its system or network on obtaining actual knowledge of the infringement or becoming aware of facts or circumstances from which the infringement was apparent, such as

<sup>283</sup> Negotiator's Note: MY needs to reflect further on this provision.

<sup>284</sup> Negotiator's Note: MY will reflect further on this provision.

<sup>285</sup> CL/SG/NZ/AU/US/PE propose: A Party may require that such technology shall be used in a lawful manner.]

through effective notifications of claimed infringement in accordance with clause (ix); [NZ oppose: and

(C ) publicly designating a representative to receive such notifications.]

[MY/NZ oppose: (vi) Eligibility for the limitations in this subparagraph shall be conditioned on the service provider:

(A) adopting and reasonably implementing a policy that provides for termination in appropriate circumstances of the accounts of repeat infringers; and

(B) accommodating and not interfering with standard technical measures accepted in the Party's territory<sup>286</sup> that protect and identify copyrighted material, that are developed through an open, voluntary process by a broad consensus of interested parties<sup>287</sup>, that are available on reasonable and nondiscriminatory terms, and that do not impose substantial costs on service providers or substantial burdens on their systems or networks.]

(vii) Eligibility for the limitations in this subparagraph may not be conditioned on the service provider monitoring its service, or affirmatively seeking facts indicating infringing activity [NZ/MY oppose: , except to the extent consistent with such technical measures.]

[NZ oppose: (viii) If the service provider qualifies for the limitations with respect to the function referred to in clause (i)(A), court-ordered relief to compel or restrain certain actions shall be limited to terminating specified accounts, or to taking reasonable steps to block access to a specific, non-domestic online location.[MY oppose: If the service provider qualifies for the limitations with respect to any other function in clause (i), court-ordered relief to compel or restrain certain actions shall be limited to removing or disabling access to the infringing material, terminating specified accounts, and other remedies that a court may find necessary, provided that such other remedies are the least burdensome to the service provider [CL propose: and users or subscribers] among comparably effective forms of relief. Each Party shall provide that any such relief shall be issued with due regard for the relative burden to the

<sup>286</sup> [CL/SG/NZ/AU/PE/US propose: A Party may require that such standard technical measures shall be used in a lawful manner, and that such measures are subject to approval by relevant authorities.]

<sup>287</sup> [CL/SG/NZ/AU/PE/US propose: A Party may provide that interested parties include copyright owners, service providers or other interested parties, [CL/SG/NZ/AU/US propose: as may be approved by relevant authorities,] as applicable.]

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

[NZ oppose: (ix) For purposes of the notice and take down process for the functions referred to in clauses (i) [CL propose: (B)] (C) and (D), each Party shall establish appropriate procedures in its law or in regulations for effective notifications of claimed infringement, and effective counter-notifications by those whose material is removed or disabled through mistake or misidentification. Each Party shall also provide for monetary remedies against any person who makes a knowing material misrepresentation in a notification or counter-notification that causes injury to any interested party as a result of a service provider relying on the misrepresentation.]

[NZ oppose: (x) If the service provider removes or disables access to material in good faith based on claimed or apparent infringement, each Party shall provide that the service provider shall be exempted from liability for any resulting claims, provided that, in the case of material residing on its system or network, it takes reasonable steps promptly to notify the [CL oppose: person making the material available on its system or network] [CL propose: supplier of the material] that it has done so and, if such person makes an effective counter-notification and is subject to jurisdiction in an infringement suit, to restore the material online unless the person giving the original effective notification seeks judicial relief within a reasonable time.]

(xi) Each Party shall establish an administrative or judicial procedure enabling copyright owners [NZ oppose: who have given effective notification of claimed infringement] to obtain expeditiously from a service provider information in its possession identifying the alleged infringer.

(xii) For purposes of the function referred to in clause (i)(A), **service**

**provider** means a provider of transmission, routing, or connections for digital online communications without modification of their content between or among points specified by the user of material of the user's choosing, [NZ oppose: and for purposes of the functions referred to in clauses (i)(B) through (D) **service provider** means a provider or operator of facilities for online services or network access<sup>288</sup>.]]

**[US/AU/SG propose; CL/MY/NZ/VN/BN/CA/MX/PE oppose: Annex to Article QQ.I.1.3(b)(ix)]**

In meeting the obligations of Article **QQ.I.1.3(b)(ix)**, each Party shall adopt or maintain requirements for: (a) effective written notice to service providers with respect to materials that are claimed to be infringing, and (b) effective written counter-notification by those whose material is removed or disabled and who claim that it was disabled through mistake or misidentification, as set forth in this letter. Effective written notice means notice that substantially complies with the elements listed in section (a) of this letter, and effective written counter-notification means counter-notification that substantially complies with the elements listed in section (b) of this letter.

- (a) Effective Written Notice, by a Copyright<sup>289</sup> Owner or Person Authorized to Act on Behalf of an Owner of an Exclusive Right, to a Service Provider's Publicly Designated Representative<sup>290</sup>

In order for a notice to a service provider to comply with the relevant requirements set out in Article **QQ.I.1.3(b)(ix)**, that notice must be a written communication, which may be provided electronically, that includes substantially the following:

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

<sup>288</sup> [CL/MY/SG/NZ/AU/US/PE propose: As used in subparagraph (xii), a Party may provide that network access includes cases in which network access is provided by another provider.]

<sup>289</sup> All references to copyright in this letter are understood to include related rights, and all references to works are understood to include the subject matter of related rights.

<sup>290</sup> The Parties understand that a representative is publicly designated to receive notification on behalf of a service provider if the representative's name, physical and electronic address, and telephone number are posted on a publicly accessible portion of the service provider's website, and also in a register accessible to the public through the Internet, or designated in another form or manner appropriate for [insert Party name].

identify the copyrighted work(s)<sup>291</sup> claimed to have been infringed;

3. information reasonably sufficient to permit the service provider to identify and locate the material residing on a system or network controlled or operated by it or for it that is claimed to be infringing, or to be the subject of infringing activity, and that is to be removed, or access to which is to be disabled;<sup>292</sup>

4. a statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law;

5. a statement that the information in the notice is accurate;

6. a statement with sufficient indicia of reliability [SG propose:<sup>293</sup>] (such as a statement under penalty of perjury or equivalent legal sanctions) that the complaining party is the [SG/AU oppose: holder] [SG/AU propose: owner] of an exclusive right that is allegedly infringed, or is authorized to act on the owner's behalf; and

7. the signature of the person giving notice.<sup>294</sup>

(b) Effective Written Counter-Notification by a Subscriber<sup>295</sup> Whose Material Was Removed or Disabled as a Result of Mistake or Misidentification of Material

In order for a counter-notification to a service provider to comply with the relevant requirements set out in Article **QQ.I.1.3.(b)(ix)**, that counter-notification must be a written communication, which may be provided electronically, that includes substantially the following:

<sup>291</sup> If multiple copyrighted works at, or linked to from, a single online site on a system or network controlled or operated by or for the service provider are covered by a single notification, a representative list of such works at, or linked to from, that site may be provided.

<sup>292</sup> In the case of notices regarding an information location tool pursuant to paragraph (b)(i)(D) of Article 16.3, the information provided must be reasonably sufficient to permit the service provider to locate the reference or link residing on a system or network controlled or operated by or for it, except that in the case of a notice regarding a substantial number of references or links at a single online site residing on a system or network controlled or operated by or for the service provider, a representative list of such references or links at the site may be provided, if accompanied by information sufficient to permit the service provider to locate the references or links.

<sup>293</sup> [SG propose: To satisfy this requirement, the process to be established shall not be costly or cumbersome. An appropriate electronic mechanism may be used or incorporated in this process.]

<sup>294</sup> A signature transmitted as part of an electronic communication satisfies this requirement.

<sup>295</sup> All referenced to “subscriber” in this letter refer to the person whose material has been removed or disabled by a service provider as a result of an effective notice described in part (a) of this letter.

1. the identity, address, [SG/AU propose: electronic mail address] and telephone number of the subscriber;
2. the identity of the material that has been removed or to which access has been disabled;
3. the location at which the material appeared before it was removed or access to it was disabled;
4. a statement with sufficient indicia of reliability (such as a statement under penalty of perjury or equivalent legal sanctions) that the subscriber [SG/AU propose: is the supplier of the material and] has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material;
5. a statement that the subscriber agrees to be subject to orders of any court that has jurisdiction over the place where the subscriber's address is located, or, if that address is located outside the Party's territory, any other court with jurisdiction over any place in the Party's territory where the service provider may be found, and in which a copyright infringement suit could be brought with respect to the alleged infringement;
6. a statement that the subscriber will accept service of process in any such suit; and
7. the signature of the subscriber.<sup>296</sup>

]]

[CL propose: **Annex [...]**

## **List of Geographical Indications from Chile**

| <b>WINES</b> | <b>Name of Indication</b> |
|--------------|---------------------------|
|              | Valle de Aconcagua        |

<sup>296</sup> A signature transmitted as part of an electronic communication satisfies this requirement.

Alhué  
Valle del Bío Bío  
Buin  
Valle del Cachapoal  
Valle de Casablanca  
Cauquenes  
Chillán  
Chimbarongo  
Valle del Choapa  
Coelemu  
Valle de Colchagua  
Valle de Copiapó  
Valle de Curicó  
Region de Aconcagua  
Region de Atacama  
Region de Coquimbo  
Valle del Claro  
Region del Sur  
Region del Valle Central  
Valle del Elqui  
Valle del Huasco  
Illapel  
Isla de Maipo  
Valle del Itata  
Valle de Leyda  
Valle de Limarí  
Linares  
Valle del Loncomilla  
Valle del Lontué  
Lolol  
Valle del Maipo  
Maria Pinto  
Valle del Marga-Marga  
Valle del Maule  
Marchigue  
Valle del Malleco  
Melipilla  
Molina  
Monte Patria  
Mulchén  
Nancagua

Ovalle  
Paiguano  
Pajarete  
Palmilla  
Panquehue  
Parral  
Pencahue  
Peralillo  
Peumo  
Pirque  
Portezuelo  
Puente Alto  
Punitaqui  
Quillón  
Rancagua  
Valle del Rapel  
Rauco  
Rengo  
Requínoa  
Río Hurtado  
Romeral  
Sagrada Familia  
Valle de San Antonio  
San Juan  
Salamanca  
San Clemente  
San Fernando  
San Javier  
San Rafael  
Santa Cruz  
Santiago  
Talagante  
Talca  
Valle del Teno  
Valle del Tutuvén  
Traiguén  
Vicuña  
Villa Alegre  
Vino Asoleado  
Yumbel

|                     |                                            |                          |
|---------------------|--------------------------------------------|--------------------------|
| <b>SPIRITS</b>      | <b>Name of Indication</b><br>Pisco         | <b>Country</b><br>Chile  |
| <b>AGRICULTURAL</b> | <b>Name of Indication</b><br>Limón de Pica | <b>Country</b><br>Chile] |