

## CHAPTER 20

### INTELLECTUAL PROPERTY RIGHTS

#### Section A: General Provisions

##### Article 20.1: Definitions

1. For the purposes of this Chapter:

**Berne Convention** means the *Berne Convention for the Protection of Literary and Artistic Works*, done at Berne on September 9, 1886, as revised at Paris on July 24, 1971;

**Brussels Convention** means the *Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite*, done at Brussels on May 21, 1974;

**Budapest Treaty** means the *Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure* (1977), done at Budapest on April 28, 1977, as amended on September 26, 1980;

**Declaration on TRIPS and Public Health** means the *Declaration on the TRIPS Agreement and Public Health* (WT/MIN(01)/DEC/2), adopted on November 14, 2001;

**geographical indication** means an indication that identifies 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;

**Hague Agreement** means the *Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs*, done at Geneva on July 2, 1999;

**intellectual property** refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II of the TRIPS Agreement;

**Madrid Protocol** means the *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks*, done at Madrid on June 27, 1989;

**Paris Convention** means the *Paris Convention for the Protection of Industrial Property*, done at Paris on March 20, 1883 as revised at Stockholm on July 14, 1967;

**performance** means a performance fixed in a phonogram, unless otherwise specified;

with respect to copyright and related rights, **right to authorize or prohibit** refers to exclusive rights;

**PLT** means the *Patent Law Treaty* adopted by the WIPO Diplomatic Conference done at Geneva on June 1, 2000;

**Singapore Treaty** means the *Singapore Treaty on the Law of Trademarks*, done at Singapore on March 27, 2006;

**UPOV 1991** means the *International Convention for the Protection of New Varieties of Plants*, done at Paris on December 2, 1961, as revised at Geneva on March 19, 1991;

**WCT** means the *WIPO Copyright Treaty*, done at Geneva on December 20, 1996;

**WIPO** means the World Intellectual Property Organization;

for greater certainty, **work** includes a cinematographic work, photographic work, and computer program; and

**WPPT** means the *WIPO Performances and Phonograms Treaty*, done at Geneva on December 20, 1996.

2. For the purposes of Article 20.8 (National Treatment), Article 20.30 (Administrative Procedures for the Protection or Recognition of Geographical Indications), and Article 20.61 (Related Rights):

a **national** means, in respect of the relevant right, a person of a Party that would meet the criteria for eligibility for protection provided for in the agreements listed in Article 20.7 (International Agreements) or the TRIPS Agreement.

## **Article 20.2: Objectives**

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

## **Article 20.3: Principles**

1. A 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 their socio-economic and technological development, provided that those measures are consistent with the provisions of this Chapter.

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

#### **Article 20.4: Understandings in Respect of this Chapter**

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

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

through their respective intellectual property systems, while respecting the principles of transparency and due process, and taking into account the interests of relevant stakeholders, including right holders, service providers, users, and the public.

#### **Article 20.5: Nature and Scope of Obligations**

1. Each Party shall provide in its territory to the nationals of another Party adequate and effective protection and enforcement of intellectual property rights, while ensuring that measures to enforce intellectual property rights do not themselves become barriers to legitimate trade.

2. A Party may, but shall not be obliged to, provide more extensive protection for, or enforcement of, intellectual property rights under its law than is required by this Chapter, provided that such protection or enforcement does not contravene 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 20.6: Understandings Regarding Certain Public Health Measures**

The Parties affirm their commitment to the Declaration on TRIPS and Public Health. In particular, the Parties have reached the following understandings regarding this Chapter:

- (a) The obligations of this Chapter do not and should not prevent a Party from taking measures to protect public health. Accordingly, while reiterating their commitment to this Chapter, the Parties affirm that this Chapter can and should be interpreted and implemented in a manner supportive of each Party's right to protect public health and, in particular, to promote access to medicines for all. Each Party has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria, and other epidemics, can represent a national emergency or other circumstances of extreme urgency.
- (b) In recognition of the commitment to access to medicines that are supplied in accordance with the Decision of the WTO General Council of August 30, 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), as well as the Decision of the WTO General Council of December 6, 2005 on the *Amendment of the TRIPS Agreement*, (WT/L/641) and the WTO General Council Chairperson's Statement Accompanying the Decision (JOB(05)/319 and Corr. 1, WT/GC/M/100) (collectively, the "TRIPS/health solution"), this Chapter does not and should not prevent the effective utilization of the TRIPS/health solution.
- (c) With respect to the aforementioned matters, if any waiver of a provision of the TRIPS Agreement, or any amendment of the TRIPS Agreement, enters into force with respect to the Parties, and a Party's application of a measure in conformity with that waiver or amendment is contrary to the obligations of this Chapter, the Parties shall immediately consult in order to adapt this Chapter as appropriate in the light of the waiver or amendment.

#### **Article 20.7: International Agreements**

1. Each Party affirms that it has ratified or acceded to the following agreements:
  - (a) *Patent Cooperation Treaty*, as amended on September 28, 1979, and modified on February 3, 1984;
  - (b) Paris Convention;
  - (c) Berne Convention;
  - (d) WCT; and
  - (e) WPPT.

2. Each Party shall ratify or accede to each of the following agreements, if it is not already a party to that agreement, by the date of entry into force of this Agreement:

- (a) Madrid Protocol;
- (b) Budapest Treaty;
- (c) Singapore Treaty;<sup>1</sup>
- (d) UPOV 1991;
- (e) Hague Agreement; and
- (f) Brussels Convention.

3. Each Party shall give due consideration to ratifying or acceding to the PLT, or, in the alternative, shall adopt or maintain procedural standards consistent with the objective of the PLT.

#### **Article 20.8: National Treatment**

1. In respect of all categories of intellectual property covered in this Chapter, each Party shall accord to nationals of another Party treatment no less favorable than it accords to its own nationals with regard to the protection<sup>2</sup> of intellectual property rights.

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

- (a) necessary to secure compliance with laws or regulations that are not inconsistent with this Chapter; and

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<sup>1</sup> A Party may satisfy the obligations in paragraphs 2(a) and 2(c) by ratifying or acceding to either the Madrid Protocol or the Singapore Treaty.

<sup>2</sup> For the purposes of this paragraph, “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 the purposes of this paragraph, “protection” also includes the prohibition on the circumvention of effective technological measures set out in Article 20.66 (Technological Protection Measures) and the provisions concerning rights management information set out in Article 20.67 (Rights Management Information). For greater certainty, “matters affecting the use of intellectual property rights specifically covered by this Chapter” in respect of works, performances, and phonograms, include any form of payment, such as licensing fees, royalties, equitable remuneration, or levies, in respect of uses that fall under the copyright and related rights in this Chapter. The preceding sentence is without prejudice to a Party’s interpretation of “matters affecting the use of intellectual property rights” in footnote 3 of the TRIPS Agreement.

(b) not applied in a manner that would constitute a disguised restriction on trade.

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

### **Article 20.9: Transparency**

1. Further to Article 20.80 (Enforcement Practices with Respect to Intellectual Property Rights), each Party shall endeavor to publish online its laws, regulations, procedures, and administrative rulings of general application concerning the protection and enforcement of intellectual property rights.

2. Each Party shall, subject to its law, endeavor to publish online information that it makes public concerning applications for trademarks, geographical indications, designs, patents, and plant variety rights.<sup>3, 4</sup>

3. Each Party shall, subject to its law, publish online information that it makes public concerning registered or granted trademarks, geographical indications, designs, patents, and plant variety rights, sufficient to enable the public to become acquainted with those registered or granted rights.<sup>5</sup>

### **Article 20.10: Application of Chapter to Existing Subject Matter and Prior Acts**

1. Unless otherwise provided in this Chapter, including in Article 20.63 (Application of Article 18 of the Berne Convention and Article 14.6 of the TRIPS Agreement), this Chapter gives rise to obligations in respect of all subject matter existing at the date of entry into force of this Agreement and that is protected on that date in the territory of a Party where protection is claimed, or that meets or comes subsequently to meet the criteria for protection under this Chapter.

2. Unless provided in Article 20.63 (Application of Article 18 of the Berne Convention and Article 14.6 of the TRIPS Agreement), a Party shall not be required to restore protection to subject matter that on the date of entry into force of this Agreement has fallen into the public domain in its territory.

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<sup>3</sup> For greater certainty, paragraphs 2 and 3 are without prejudice to a Party's obligations under Article 20.23 (Electronic Trademarks System).

<sup>4</sup> For greater certainty, paragraph 2 does not require a Party to publish online the entire dossier for the relevant application.

<sup>5</sup> For greater certainty, paragraph 3 does not require a Party to publish online the entire dossier for the relevant registered or granted intellectual property right.

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 20.11: Exhaustion of Intellectual Property Rights**

Nothing in this Agreement prevents a Party from determining whether or under what conditions the exhaustion of intellectual property rights applies under its legal system.<sup>6</sup>

## **Section B: Cooperation**

### **Article 20.12: Contact Points for Cooperation**

Each Party may designate and notify the other Parties of one or more contact points for the purpose of cooperation under this Section.

### **Article 20.13: Cooperation**

The Parties shall endeavor to cooperate on the subject matter covered by this Chapter, such as through appropriate coordination and exchange of information between their respective intellectual property offices, or other agencies or institutions, as determined by each Party.

### **Article 20.14: Committee on Intellectual Property Rights**

1. The Parties hereby establish a Committee on Intellectual Property Rights (IPR Committee), composed of government representatives of each Party.
2. The IPR Committee shall:
  - (a) exchange information, pertaining to intellectual property rights matters, including how intellectual property protection contributes to innovation, creativity, economic growth, and employment, such as:
    - (i) developments in domestic and international intellectual property law and policy,

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<sup>6</sup> For greater certainty, this Article is without prejudice to any provisions addressing the exhaustion of intellectual property rights in international agreements to which a Party is a party.

- (ii) economic benefits related to trade and other analysis of the contributions arising from the protection and enforcement of intellectual property rights,
  - (iii) intellectual property issues particularly relevant to small and medium-sized enterprises; science, technology, and innovation activities; and to the generation, transfer, and dissemination of technology,
  - (iv) approaches for reducing the infringement of intellectual property rights, as well as effective strategies for removing the underlying incentives for infringement,
  - (v) programs on education and awareness related to intellectual property and building capacity regarding intellectual property rights matters, and
  - (vi) implementation of multilateral intellectual property agreements, such as those concluded or administered under the auspices of WIPO;
- (b) work towards strengthening border enforcement of intellectual property rights through the promotion of collaborative operations in customs and exchange of best practices;
  - (c) exchange information regarding trade secret-related matters, including the value of trade secrets and the economic loss associated with trade secret misappropriation;
  - (d) discuss proposals to enhance procedural fairness in patent litigation, including with respect to choice of venue; and
  - (e) upon request of a Party and in the interest of advancing transparency, endeavor to reach a mutually agreeable solution before taking measures in connection with future requests of recognition or protection of a geographical indication from any other country through a trade agreement.

3. The Parties shall endeavor to cooperate on providing technical assistance regarding trade secret protection to the relevant authorities of non-Parties and identify appropriate opportunities to increase cooperation between the Parties on trade-related intellectual property rights protection and enforcement.

4. The IPR Committee shall meet within one year after the date of entry into force of this Agreement and thereafter as necessary.

## **Article 20.15: Patent Cooperation and Work Sharing**

1. The Parties recognize the importance of improving the quality and efficiency of their respective patent registration systems as well as simplifying and streamlining the procedures and processes of their respective patent offices to the benefit of all users of the patent system and the public as a whole.
2. Further to paragraph 1, the Parties shall endeavor to cooperate among their respective patent offices to facilitate the sharing and use of search and examination work of the Parties. This may include:
  - (a) making search and examination results available to the patent offices of the other Parties;<sup>7</sup> and
  - (b) exchanging information on quality assurance systems and quality standards relating to patent examination.
3. In order to reduce the complexity and cost of obtaining the grant of a patent, the Parties shall endeavor to cooperate to reduce differences in the procedures and processes of their respective patent offices.

## **Article 20.16: Cooperation on Request**

Cooperation activities undertaken under this Chapter are subject to the availability of resources, and on request, and on terms and conditions mutually decided upon between the Parties involved. The Parties affirm that cooperation under this Section is additional to and without prejudice to other past, ongoing, and future cooperation activities, both bilateral and multilateral, between the Parties, including between their respective intellectual property offices.

## **Section C: Trademarks**

### **Article 20.17: Types of Signs Registrable as Trademarks**

No Party shall require, as a condition of registration, that a sign be visually perceptible, nor shall a Party deny registration of a trademark only on the ground that the sign of which it is composed is a sound. Additionally, each Party shall make best efforts to register scent marks. A

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<sup>7</sup> The Parties recognize the importance of multilateral efforts to promote the sharing and use of search and examination results with a view to improving the quality of search and examination processes and to reducing the costs for both applicants and patent offices.

Party may require a concise and accurate description, or graphical representation, or both, as applicable, of the trademark.

#### **Article 20.18: Collective and Certification Marks**

Each Party shall provide that trademarks include collective marks and certification marks. A Party is not required to treat certification marks as a separate category in its law, provided that those marks are protected. Each Party shall also provide that signs that may serve as geographical indications are capable of protection under its trademark system.<sup>8</sup>

#### **Article 20.19: Use of Identical or Similar Signs**

Each Party shall provide that the owner of a registered trademark has the exclusive right to prevent third parties that do not have the owner's consent from using in the course of trade identical or similar signs, including subsequent geographical indications<sup>9</sup> for goods or services that are related to those goods or services in respect of which the owner's trademark is registered, if that use would result in a likelihood of confusion. In the case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed.

#### **Article 20.20: Exceptions**

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

#### **Article 20.21: Well-Known Trademarks**

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

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<sup>8</sup> Consistent with the definition of a geographical indication in Article 20.1 (Definitions), any sign, or combination of signs, shall be eligible for protection under one or more of the legal means for protecting geographical indications, or a combination of those means.

<sup>9</sup> For greater certainty, the Parties understand that this Article should not be interpreted to affect their rights and obligations under Articles 22 and 23 of the TRIPS Agreement.

2. Article 6bis of the Paris Convention shall apply, *mutatis mutandis*, to goods or services that are not identical or similar to those identified by a well-known trademark,<sup>10</sup> whether registered or not, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the trademark, and provided that the interests of the owner of the trademark are likely to be damaged by that use.

3. The Parties recognize the importance of the *Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks* as adopted by the Assembly of the Paris Union for the Protection of Industrial Property and the General Assembly of WIPO at the Thirty-Fourth Series of Meetings of the Assemblies of the Member States of WIPO September 20 to 29, 1999.

4. Each Party shall provide for appropriate measures to refuse the application or cancel the registration and prohibit the use of a trademark that is identical or similar to a well-known trademark,<sup>11</sup> for identical or similar goods or services, if the use of that trademark is likely to cause confusion with the prior well-known trademark. A Party may also provide those measures including in cases in which the subsequent trademark is likely to deceive.

#### **Article 20.22: Procedural Aspects of Examination, Opposition, and Cancellation**

Each Party shall provide a system for the examination and registration of trademarks that includes among other things:

- (a) communicating to the applicant in writing, which may be by electronic means, the reasons for any refusal to register a trademark;
- (b) providing the applicant with an opportunity to respond to communications from the competent authorities, to contest any initial refusal, and to make a judicial appeal of any final refusal to register a trademark;
- (c) providing an opportunity to oppose the registration of a trademark and an opportunity to seek cancellation<sup>12</sup> of a trademark through, at a minimum, administrative procedures; and
- (d) requiring administrative decisions in opposition and cancellation proceedings to be reasoned and in writing, which may be provided by electronic means.

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<sup>10</sup> In determining whether a trademark is well-known in a Party, that 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>11</sup> The Parties understand that a well-known trademark is one that was already well-known before, as determined by a Party, the application for, registration of, or use of the first-mentioned trademark.

<sup>12</sup> For greater certainty, cancellation for the purposes of this Section may be implemented through a nullification or revocation proceeding.

### **Article 20.23: Electronic Trademarks System**

Further to Article 20.9.3 (Transparency), each Party shall provide a:

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

### **Article 20.24: 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*, done at Nice, June 15, 1957, as revised and amended (Nice Classification). Each Party shall provide that:

- (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>13</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 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 20.25: Term of Protection for Trademarks**

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

### **Article 20.26: Non-Recordal of a License**

No Party shall require recordal of trademark licenses:

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<sup>13</sup> A Party that relies on translations of the Nice Classification shall follow updated versions of the Nice Classification to the extent that official translations have been issued and published.

- (a) to establish the validity of the licenses; or
- (b) as a condition for use of a trademark by a licensee to be deemed to constitute use by the holder in a proceeding that relates to the acquisition, maintenance, or enforcement of trademarks.

#### **Article 20.27: Domain Names**

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

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

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

2. In connection with each Party's system for the management of ccTLD domain names, appropriate remedies<sup>14</sup> shall be available at least in cases in which a person registers or holds, with a bad faith intent to profit, a domain name that is identical or confusingly similar to a trademark.

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<sup>14</sup> The Parties understand that those remedies may, but need not, include revocation, cancellation, transfer, damages, or injunctive relief.

## **Section D: Country Names**

### **Article 20.28: Country Names**

Each Party shall provide the legal means for interested persons to prevent commercial use of the country name of a Party in relation to a good in a manner that misleads consumers as to the origin of that good.

## **Section E: Geographical Indications**

### **Article 20.29: Recognition of Geographical Indications**

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

### **Article 20.30: Administrative Procedures for the Protection or Recognition of Geographical Indications**

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

- (a) accept those applications or petitions without requiring intercession by a Party on behalf of its nationals;<sup>15</sup>
- (b) process those applications or petitions without imposing overly burdensome formalities;
- (c) ensure that its laws and 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 an applicant, a petitioner, or their representative to ascertain the status of specific applications and petitions;

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<sup>15</sup> This subparagraph also applies to judicial procedures that protect or recognize a geographical indication.

- (e) require that applications or petitions may specify particular translation or transliteration for which protection is being sought;
- (f) examine applications or petitions;
- (g) 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;
- (h) provide a reasonable period of time during which an interested person may oppose the application or petition;
- (i) require that administrative decisions in opposition proceedings be reasoned and in writing, which may be provided by electronic means;
- (j) require that administrative decisions in cancellation proceedings be reasoned and in writing, which may be provided by electronic means; and
- (k) provide for cancellation<sup>16</sup> of the protection or recognition afforded to a geographical indication.

### **Article 20.31: Grounds of Denial, Opposition, and Cancellation<sup>17</sup>**

1. If a Party protects or recognizes a geographical indication through the procedures referred to in Article 20.30 (Administrative Procedures for the Protection or Recognition of Geographical Indications), that Party shall provide procedures that allow interested persons to object to the protection or recognition of a geographical indication, and that allow for that protection or recognition to be refused or otherwise not afforded, at least, on the grounds that the geographical indication is:

- (a) likely to cause confusion with a trademark that is the subject of a pre-existing good faith pending application or registration in the territory of the Party;
- (b) likely to cause confusion with a pre-existing trademark, the rights to which have been acquired in accordance with the Party's law; and

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<sup>16</sup> For greater certainty, for the purposes of this Section, cancellation may be implemented through nullification or revocation proceedings.

<sup>17</sup> A Party is not required to apply this Article to geographical indications for wines and spirits or to applications or petitions for those geographical indications.

- (c) a term customary in common language as the common name<sup>18, 19, 20</sup> for the relevant good in the territory of the Party.

2. If a Party has protected or recognized a geographical indication through the procedures referred to in Article 20.30 (Administrative Procedures for the Protection or Recognition of Geographical Indications), that Party shall provide procedures that allow for interested persons to seek the cancellation of a geographical indication, and that allow for the protection or recognition to be cancelled, at least, on the grounds listed in paragraph 1. A Party may provide that the grounds listed in paragraph 1 apply as of the time of filing the request for protection or recognition of a geographical indication in the territory of the Party.<sup>21</sup>

3. No Party shall preclude the possibility that the protection or recognition of a geographical indication may be cancelled, or otherwise cease, on the basis that the protected or recognized term has ceased meeting the conditions upon which the protection or recognition was originally granted in that Party.

4. If a Party has in place a *sui generis* system for protecting unregistered geographical indications by means of judicial procedures, that Party shall provide that its judicial authorities have the authority to deny the protection or recognition of a geographical indication if any circumstance identified in paragraph 1 has been established.<sup>22</sup> That Party shall also provide a process that allows interested persons to commence a proceeding on the grounds identified in paragraph 1.

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<sup>18</sup> If a Party refuses to protect or recognize a compound geographical indication on the grounds that an individual term of that geographical indication is the common name for the relevant good in the territory of a Party, the Party may withdraw its refusal of protection or recognition if the applicant or registrant agrees to disclaim any claim of exclusive rights to the particular individual term that was the basis for the refusal.

<sup>19</sup> For greater certainty, if a Party provides for the procedures in Article 20.30 (Administrative Procedures for the Protection or Recognition of Geographical Indications) and this Article to be applied to geographical indications for wines and spirits or applications or petitions for those geographical indications, that Party is not required to protect or recognize a geographical indication of any other Party with respect to products of the vine for which the relevant indication is identical with the customary name of a grape variety existing in the territory of that Party.

<sup>20</sup> For greater certainty, a term customary in common language as the common name may refer to a single-component term or individual components of a multi-component term.

<sup>21</sup> For greater certainty, if the grounds listed in paragraph 1 did not exist in a Party's law as of the time of filing of the request for protection or recognition of a geographical indication under Article 20.30 (Administrative Procedures for the Protection or Recognition of Geographical Indications), that Party is not required to apply those grounds for the purposes of paragraphs 2 or 4 of this Article in relation to that geographical indication.

<sup>22</sup> As an alternative to this paragraph, if a Party has in place a *sui generis* system of the type referred to in this paragraph as of the applicable date under Article 20.35.6 (International Agreements), that Party shall at least provide that its judicial authorities have the authority to deny the protection or recognition of a geographical indication if the circumstances identified in paragraph 1(c) have been established.

5. If a Party provides protection or recognition of a geographical indication through the procedures referred to in Article 20.30 (Administrative Procedures for the Protection or Recognition of Geographical Indications) to the translation or transliteration of that geographical indication, that Party shall make available procedures that are equivalent to, and grounds that are the same as, those referred to in paragraphs 1 and 2 with respect to that translation or transliteration.

#### **Article 20.32: Guidelines for Determining Whether a Term is the Term Customary in the Common Language**

With respect to the procedures in Article 20.30 (Administrative Procedures for the Protection or Recognition of Geographical Indications) and Article 20.31 (Grounds of Denial, Opposition, and Cancellation), in determining whether a term is the term customary in common language as the common name for the relevant good in the territory of a Party, that Party's authorities shall have the authority to take into account how consumers understand the term in the territory of that Party. Factors relevant to that consumer understanding may include:

- (a) whether the term is used to refer to the type of good in question, as indicated by competent sources such as dictionaries, newspapers, and relevant websites;
- (b) how the good referenced by the term is marketed and used in trade in the territory of that Party;
- (c) whether the term is used, as appropriate, in relevant international standards recognized by the Parties to refer to a type or class of good in the territory of the Party, such as pursuant to a standard promulgated by the Codex Alimentarius; and
- (d) whether the good in question is imported into the Party's territory, in significant quantities,<sup>23</sup> from a place other than the territory identified in the application or petition, and whether those imported goods are named by the term.

#### **Article 20.33: Multi-Component Terms**

With respect to the procedures in Article 20.30 (Administrative Procedures for the Protection or Recognition of Geographical Indications) and Article 20.31 (Grounds of Denial, Opposition, and Cancellation), an individual component of a multi-component term that is protected as a geographical indication in the territory of a Party shall not be protected in that Party

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<sup>23</sup> In determining whether the good in question is imported in significant quantities, a Party may consider the amount of importation at the time of the application or petition.

if that individual component is a term customary in the common language as the common name for the associated good.

#### **Article 20.34: Date of Protection of a Geographical Indication**

If a Party grants protection or recognition to a geographical indication through the procedures referred to in Article 20.30 (Administrative Procedures for the Protection or Recognition of Geographical Indications), that protection or recognition shall commence no earlier than the filing date<sup>24</sup> in the Party or the registration date in the Party, as applicable.

#### **Article 20.35: International Agreements**

1. If a Party protects or recognizes a geographical indication pursuant to an international agreement, as of the applicable date under paragraph 6, involving a Party or a non-Party and that geographical indication is not protected through the procedures referred to in Article 20.30 (Administrative Procedures for the Protection or Recognition of Geographical Indications)<sup>25</sup> or Article 20.31 (Grounds of Denial, Opposition, and Cancellation), that Party at least shall apply procedures and grounds that are equivalent to those in Article 20.30(f), (g), (h), and (i) (Administrative Procedures for the Protection or Recognition of Geographical Indications) and Article 20.31.1 (Grounds of Denial, Opposition, and Cancellation), as well as:

- (a) make available information sufficient to allow the general public to obtain guidance concerning the procedures for protecting or recognizing the geographical indication and allow interested persons to ascertain the status of requests for protection or recognition;
- (b) to publish online details regarding the terms that the Party is considering protecting or recognizing through an international agreement involving a Party or a non-Party, including specifying whether the protection or recognition is being considered for any translations or transliterations of those terms, and with respect to multi-component terms, specifying the components, if any, for which protection or recognition is being considered, or the components that are disclaimed;
- (c) in respect of opposition procedures, provide a reasonable period of time for interested persons to oppose the protection or recognition of the terms referred to in

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<sup>24</sup> For greater certainty, the filing date referred to in this paragraph includes, as applicable, the priority filing date under the Paris Convention. No Party shall use the date of protection in a country of origin of a geographical indication to establish a priority date in the territory of the Party, unless filed within the Paris Convention priority period.

<sup>25</sup> Each Party shall apply Article 20.32 (Guidelines for Determining Whether a Term is the Term Customary in the Common Language) and Article 20.33 (Multi-Component Terms) in determining whether to grant protection or recognition of a geographical indication pursuant to this paragraph.

subparagraph (b). That period shall allow for a meaningful opportunity for any interested person to participate in an opposition process; and

- (d) inform the other Parties of the opportunity to oppose, no later than the commencement of the opposition period.

2. In respect of international agreements referred to in paragraph 6 that permit the protection or recognition of a new geographical indication, a Party shall:<sup>26, 27</sup>

- (a) apply paragraph 1(b) and apply at least procedures and grounds that are equivalent to those in Article 20.30(f), (g), (h), and (i) (Administrative Procedures for the Protection or Recognition of Geographical Indications) and Article 20.31.1 (Grounds of Denial, Opposition, and Cancellation);
- (b) provide an opportunity for interested persons to comment regarding the protection or recognition of the new geographical indication for a reasonable period of time before that term is protected or recognized; and
- (c) inform the other Parties of the opportunity to comment, no later than the commencement of the period for comment.

3. For the purposes of this Article, a Party shall not preclude the possibility that the protection or recognition of a geographical indication could cease.

4. For the purposes of this Article, a Party is not required to apply Article 20.31 (Grounds of Denial, Opposition, and Cancellation), or obligations equivalent to Article 20.31, to geographical indications for wines and spirits or applications for those geographical indications.

5. The protection or recognition that each Party provides pursuant to paragraph 1 shall commence no earlier than the date on which that agreement enters into force or, if that Party grants that protection or recognition on a date after the entry into force of that agreement, on that later date.

6. No Party shall be required to apply this Article to geographical indications that have been specifically identified in, and that are protected or recognized pursuant to, an international agreement involving a Party or a non-Party, provided that the agreement:

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<sup>26</sup> In respect of an international agreement referred to in paragraph 6 that has geographical indications that have been identified, but have not yet received protection or recognition in the territory of the Party that is a party to that agreement, that Party may fulfil the obligations of paragraph 2 by complying with the obligations of paragraph 1.

<sup>27</sup> A Party may comply with this Article by applying Article 20.30 (Administrative Procedures for the Protection or Recognition of Geographical Indications) and Article 20.31 (Grounds of Denial, Opposition, and Cancellation).

- (a) was concluded, or agreed in principle,<sup>28</sup> prior to the date of conclusion, or agreement in principle, of this Agreement;
- (b) was ratified by a Party prior to the date of ratification of this Agreement by that Party; or
- (c) entered into force for a Party prior to the date of entry into force of this Agreement.

## **Section F: Patents and Undisclosed Test or Other Data**

### **Subsection A: General Patents**

#### **Article 20.36: Patentable Subject Matter**

1. Subject to paragraphs 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>29</sup>

2. A 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 its law. A Party may also exclude from patentability:

- (a) diagnostic, therapeutic, and surgical methods for the treatment of humans or animals;
- (b) animals other than microorganisms, and essentially biological processes for the production of plants or animals, other than non-biological and microbiological processes.

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<sup>28</sup> For the purpose of this Article, an agreement “agreed in principle” means an agreement involving another government, government entity, or international organization in respect of which a political understanding has been reached and the negotiated outcomes of the agreement have been publically announced.

<sup>29</sup> For the purposes of this Section, a Party may deem the terms “inventive step” and “capable of industrial application” to be synonymous with the terms “non-obvious” and “useful”, respectively. In determinations regarding inventive step, or non-obviousness, each Party shall consider whether the claimed invention would have been obvious to a person skilled in the art, or having ordinary skill in the art, having regard to the prior art.

3. A Party may also exclude from patentability plants other than microorganisms. However, consistent with paragraph 1 and subject to paragraph 2, each Party confirms that patents are available at least for inventions that are derived from plants.

#### **Article 20.37: Grace Period**

Each Party shall 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>30</sup>

- (a) was made by the patent applicant or by a person that obtained the information directly or indirectly from the patent applicant; and
- (b) occurred within twelve months prior to the filing date in the territory of the Party.

#### **Article 20.38: Patent Revocation**

1. 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.

2. Notwithstanding paragraph 1, a Party may provide that a patent may be revoked, provided it is done in a manner consistent with Article 5A of the Paris Convention and the TRIPS Agreement.

#### **Article 20.39: Exceptions**

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

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<sup>30</sup> For greater certainty, a Party may limit the application of this Article to disclosures made by, or obtained directly or indirectly from, the inventor or joint inventor. For greater certainty, a Party may provide that, for the 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.

#### **Article 20.40: Other Use Without Authorization of the Right Holder**

The Parties understand that nothing in this Chapter limits a Party's rights and obligations under Article 31 of the TRIPS Agreement, and any waiver of or amendment to that Article that the Parties accept.

#### **Article 20.41: Amendments, Corrections, and Observations**

Each Party shall provide a patent applicant with at least one opportunity to make amendments, corrections, and observations in connection with its application.<sup>31</sup>

#### **Article 20.42: Publication of Patent Applications**

1. Recognizing the benefits of transparency in the patent system, each Party shall endeavor to publish unpublished pending patent applications promptly after the expiration of 18 months from the filing date or, if priority is claimed, from the earliest priority date.
2. If a pending application is not published promptly in accordance with paragraph 1, a Party shall publish that application or the corresponding patent, as soon as practicable.
3. Each Party shall provide that an applicant may request the early publication of an application prior to the expiration of the period referred to in paragraph 1.

#### **Article 20.43: Information Relating to Published Patent Applications and Granted Patents**

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

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

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<sup>31</sup> A Party may provide that those amendments or corrections must not exceed the scope of the disclosure of the invention, as of the filing date.

#### **Article 20.44: Patent Term Adjustment for Unreasonable Granting Authority Delays**

1. Each Party shall make best efforts to process patent applications in an efficient and timely manner, with a view to avoiding unreasonable or unnecessary delays.
2. A Party may provide procedures for a patent applicant to request to expedite the examination of its patent application.
3. If there are unreasonable delays in a Party's issuance of a patent, that Party shall provide the means to, and at the request of the patent owner shall, adjust the term of the patent to compensate for those delays.
4. For the purposes of this Article, an unreasonable delay at least shall include a delay in the issuance of a patent of more than five years from the date of filing of the application in the territory of the Party, or three years after a request for examination of the application has been made, whichever is later. A Party may exclude, from the determination of those delays, periods of time that do not occur during the processing<sup>32</sup> of, or the examination of, the patent application by the granting authority; periods of time that are not directly attributable<sup>33</sup> to the granting authority; as well as periods of time that are attributable to the patent applicant.<sup>34</sup>

#### **Subsection B: Measures Relating to Agricultural Chemical Products**

#### **Article 20.45: Protection of Undisclosed Test or Other Data for Agricultural Chemical Products**

1. If a Party requires, as a condition for granting marketing approval<sup>35</sup> for a new agricultural chemical product, the submission of undisclosed test or other data concerning the safety and

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<sup>32</sup> For the purposes of this paragraph, a Party may interpret processing to mean initial administrative processing and administrative processing at the time of grant.

<sup>33</sup> A Party may treat delays "that are not directly attributable to the granting authority" as delays that are outside the direction or control of the granting authority.

<sup>34</sup> Notwithstanding Article 20.10 (Application of Chapter to Existing Subject Matter and Prior Acts), this Article shall apply to all patent applications filed after the date of entry into force of this Agreement, or the date two years after the signing of this Agreement, whichever is later.

<sup>35</sup> For the purposes of this Chapter, the term "marketing approval" is synonymous with "sanitary approval" under a Party's law.

efficacy of the product,<sup>36</sup> that Party shall not permit third persons, without the consent of the person that previously submitted that information, to market the same or a similar<sup>37</sup> product on the basis of that information or the marketing approval granted to the person that submitted that test or other data for at least 10 years<sup>38</sup> from the date of marketing approval of the new agricultural chemical product in the territory of the Party.

2. If a Party permits, as a condition of granting marketing approval for a new agricultural chemical product, the submission of evidence of a prior marketing approval of the product in another territory, that Party shall not permit third persons, without the consent of the person that previously submitted undisclosed test or other data concerning the safety and efficacy of the product in support of that prior marketing approval, to market the same or a similar product based on that undisclosed test or other data, or other evidence of the prior marketing approval in the other territory, for at least 10 years from the date of marketing approval of the new agricultural chemical product in the territory of the Party.

3. For the purposes of this Article, a new agricultural chemical product is one that contains a chemical entity that has not been previously approved in the territory of the Party for use in an agricultural chemical product.

### **Subsection C: Measures Relating to Pharmaceutical Products**

#### **Article 20.46: Patent Term Adjustment for Unreasonable Curtailment**

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

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<sup>36</sup> Each Party confirms that the obligations of this Article apply to cases in which the Party requires the submission of undisclosed test or other data concerning: (a) only the safety of the product, (b) only the efficacy of the product, or (c) both.

<sup>37</sup> For greater certainty, for the purposes of this Section, an agricultural chemical product is “similar” to a previously approved agricultural chemical product if the marketing approval, or, in the alternative, the applicant’s request for that approval, of that similar agricultural chemical product is based upon the undisclosed test or other data concerning the safety and efficacy of the previously approved agricultural chemical product, or the prior approval of that previously approved product.

<sup>38</sup> For greater certainty, a Party may limit the period of protection under this Article to 10 years.

2. With respect to a pharmaceutical product that is subject to a patent, each Party shall make available an adjustment<sup>39</sup> of the patent term to compensate the patent owner for unreasonable curtailment of the effective patent term as a result of the marketing approval process.

3. For greater certainty, in implementing the obligations of this Article, each Party may provide for conditions and limitations, provided that the Party continues to give effect to this Article.<sup>40</sup>

4. With the objective of avoiding unreasonable curtailment of the effective patent term, a Party may adopt or maintain procedures that expedite the processing of marketing approval applications.

#### **Article 20.47: Regulatory Review Exception**

Without prejudice to the scope of, and consistent with, Article 20.39 (Exceptions), each Party shall adopt or maintain a regulatory review exception for pharmaceutical products that permits a third person to make, use, sell, offer to sell, or import in the territory of that Party a product covered by a subsisting patent solely for purposes related to generating information to meet requirements for marketing approval for the product.

#### **Article 20.48: Protection of Undisclosed Test or Other Data**

1. (a) If a Party requires, as a condition for granting marketing approval for a new pharmaceutical product, the submission of undisclosed test or other data concerning

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<sup>39</sup> For greater certainty, a Party may alternatively make available a period of additional *sui generis* protection to compensate for unreasonable curtailment of the effective patent term as a result of the marketing approval process. The *sui generis* protection must confer the rights conferred by the patent, subject to any conditions and limitations pursuant to paragraph 3.

<sup>40</sup> Such conditions and limitations with respect to paragraph 3 may include, among other things:

- (i) limiting the applicability of paragraph 2 to a single patent term adjustment for each pharmaceutical product that has been granted marketing approval;
- (ii) requiring the adjustment to be based on the first marketing approval granted to the pharmaceutical product in that Party;
- (iii) limiting the period of the adjustment to a maximum of 5 years; and
- (iv) if a Party makes available a period of additional *sui generis* protection, limiting the period of the additional *sui generis* protection to a maximum of 2 years.

the safety and efficacy of the product,<sup>41</sup> that Party shall not permit third persons, without the consent of the person that previously submitted that information,<sup>42</sup> to market the same or a similar<sup>43</sup> product on the basis of:

- (i) that information, or
- (ii) the marketing approval granted to the person that submitted that information,

for at least five years<sup>44</sup> from the date of marketing approval of the new pharmaceutical product in the territory of the Party;<sup>45</sup>

- (b) If a Party permits, as a condition of granting marketing approval for a new pharmaceutical product, the submission of evidence of prior marketing approval of the product in another territory, that Party shall not permit third persons, without the consent of a person that previously submitted the information concerning the safety and efficacy of the product, to market a same or a similar product based on evidence relating to prior marketing approval in the other territory for at least five years from the date of marketing approval of the new pharmaceutical product in the territory of that Party.

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<sup>41</sup> Each Party confirms that the obligations of this Article apply to cases in which the Party requires the submission of undisclosed test or other data concerning: (i) only the safety of the product, (ii) only the efficacy of the product, or (iii) both.

<sup>42</sup> For greater certainty, a Party may deem that such person has provided consent if, after that person is directly notified by a third person that an unexpired applicable patent claiming the approved product or its approved method of use is invalid or is not infringed by the product for which the third person is seeking marketing approval, an infringement action is not initiated against the third person with respect to the patent within 45 days of the notification.

<sup>43</sup> For greater certainty, for the purposes of this Section, a pharmaceutical product is “similar” to a previously approved pharmaceutical product if the marketing approval, or, in the alternative, the applicant’s request for that approval, of that similar pharmaceutical product is based upon the undisclosed test or other data concerning the safety and efficacy of the previously approved pharmaceutical product, or the prior approval of that previously approved product.

<sup>44</sup> For greater certainty, a Party may limit the period of protection under paragraph 1 to five years.

<sup>45</sup> For greater certainty, the Parties understand that the United States may comply with the obligations in subparagraph (a) with respect to “the same or a similar product” through 21 U.S.C. §§ 355(c)(3)(E)(ii) and 355(j)(5)(F)(ii), 42 U.S.C. § 262(k)(7), and the regulations implemented at 21 C.F.R. 314.

2. Each Party shall apply paragraph 1, *mutatis mutandis*,<sup>46</sup> for a period of at least five years to new pharmaceutical products that contain a chemical entity that has not been previously approved in that Party.<sup>47</sup>

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

- (a) the Declaration on TRIPS and Public Health;
- (b) any waiver of a provision of the TRIPS Agreement granted by WTO Members in accordance with the WTO Agreement to implement the Declaration on TRIPS and Public Health and that is in force between the Parties; or
- (c) any amendment of the TRIPS Agreement to implement the Declaration on TRIPS and Public Health that enters into force with respect to the Parties.

#### **Article 20.49: Definition of New Pharmaceutical Product**

For the purposes of Article 20.48.1 (Protection of Undisclosed Test or Other Data), a **new pharmaceutical product** means a pharmaceutical product that does not contain a chemical entity that has been previously approved in that Party.

#### **Article 20.50: Measures Relating to the Marketing of Certain Pharmaceutical Products<sup>48</sup>**

1. If a Party permits, as a condition of approving the marketing of a pharmaceutical product, persons, other than the person originally submitting the safety and efficacy information, to rely on evidence or information concerning the safety and efficacy of a product that was previously approved, such as evidence of prior marketing approval by the Party or in another territory, that Party shall provide:

- (a) a system to provide notice to a patent holder<sup>49</sup> or to allow for a patent holder to be notified prior to the marketing of such a pharmaceutical product, that such other

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<sup>46</sup> A Party that provides a period of at least eight years of protection under paragraph 1 is not required to apply paragraph 2.

<sup>47</sup> For the purposes of paragraph 2, a Party may choose to protect only the undisclosed test or other data concerning the safety and efficacy relating to the chemical entity that has not been previously approved.

<sup>48</sup> Annex 20-A applies to this Article.

<sup>49</sup> For greater certainty, for the purposes of this Article, a Party may provide that a “patent holder” includes a patent licensee or the authorized holder of marketing approval.

person is seeking to market that product during the term of an applicable patent claiming the approved product or its approved method of use;

- (b) adequate time and sufficient opportunity for such a patent holder to seek, prior to the marketing of an allegedly infringing product, available remedies in subparagraph (c); and
- (c) procedures, such as judicial or administrative proceedings, and expeditious remedies, such as preliminary injunctions or equivalent effective provisional measures, for the timely resolution of disputes concerning the validity or infringement of an applicable patent claiming an approved pharmaceutical product or its approved method of use.

2. Further to paragraph 1, that Party may also provide:

- (a) effective rewards for a successful assertion of the invalidity or non-infringement of the applicable patent;<sup>50</sup> and
- (b) procedures, consistent with its obligations under this Chapter, to promote transparency by providing information regarding applicable patents and relevant periods of exclusivity for pharmaceutical products that have been approved in that Party.

### **Article 20.51: Alteration of Period of Protection**

Subject to Article 20.48.3 (Protection of Undisclosed Test or Other Data), if a product is subject to a system of marketing approval in the territory of a Party pursuant to Article 20.45 (Protection of Undisclosed Test or Other Data for Agricultural Chemical Products) or Article 20.48 and is also covered by a patent in the territory of that Party, that Party shall not alter the period of protection that it provides pursuant to Article 20.45 or Article 20.48 in the event that the patent protection terminates on a date earlier than the end of the period of protection specified in Article 20.45 or Article 20.48.

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<sup>50</sup> Effective rewards may include providing a period of marketing exclusivity to the first applicant that successfully asserts the invalidity or non-infringement of the patent in accordance with the Party's marketing approval process.

## **Section G: Industrial Designs**

### **Article 20.52: Protection**

1. Each Party shall ensure adequate and effective protection of industrial designs consistent with Articles 25 and 26 of the TRIPS Agreement.
2. Consistent with paragraph 1, each Party confirms that protection is available for designs embodied in a part of an article.

### **Article 20.53: Non-Prejudicial Disclosures/Grace Period<sup>51</sup>**

Each Party shall disregard at least information contained in public disclosures used to determine if an industrial design is new, original, or, where applicable, non-obvious, if the public disclosure:<sup>52</sup>

- (a) was made by the design applicant or by a person that obtained the information directly or indirectly from the design applicant; and
- (b) occurred within 12 months prior to the filing date in the territory of the Party.

### **Article 20.54: Electronic Industrial Design System**

Each Party shall provide a:

- (a) system for the electronic application for industrial design rights; and
- (b) publicly available electronic information system, which must include an online database of protected industrial designs.

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<sup>51</sup> Articles 20.53 (Non-Prejudicial Disclosures/Grace Period) and 20.54 (Electronic Industrial Design System) apply with respect to industrial design patent systems or industrial design registration systems.

<sup>52</sup> For greater certainty, a Party may limit the application of this Article to disclosures made by, or obtained directly or indirectly from, the creator or co-creator and provide that, for the purposes of this Article, information obtained directly or indirectly from the design applicant may be information contained in the public disclosure that was authorized by, or derived from, the design applicant.

### **Article 20.55: Term of Protection**

Each Party shall provide a term of protection for industrial designs of at least 15 years from either: (a) the date of filing, or (b) the date of grant or registration.

## **Section H: Copyright and Related Rights**

### **Article 20.56: Definitions**

For the purposes of Article 20.57 (Right of Reproduction) and Article 20.59 (Right of Distribution) through Article 20.68 (Collective Management), the following definitions apply with respect to performers and producers of phonograms:

**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” if the means for decrypting are provided to the public by the broadcasting organization or with its consent; “broadcasting” does not include transmission over computer networks or any transmissions where the time and place of reception may be individually chosen by members of the public;

**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;

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

**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;

**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 audio-visual work;

**producer of a phonogram** means a person that 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

**publication** of a performance or phonogram means the offering of copies of the performance or the phonogram to the public, with the consent of the right holder, and provided that copies are offered to the public in reasonable quantity.

#### **Article 20.57: Right of Reproduction**

Each Party shall provide<sup>53</sup> to authors, performers, and producers of phonograms<sup>54</sup> the exclusive right to authorize or prohibit all reproduction of their works, performances, or phonograms in any manner or form, including in electronic form.

#### **Article 20.58: Right of Communication to the Public**

Without prejudice to Article 11(1)(ii), Article 11*bis*(1)(i) and (ii), Article 11*ter*(1)(ii), Article 14(1)(ii), and Article 14*bis*(1) of the Berne Convention, each Party shall provide to authors the exclusive right to authorize or prohibit the communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.<sup>55</sup>

#### **Article 20.59: Right of Distribution**

Each Party shall provide to authors, performers, and producers of phonograms the exclusive right to authorize or prohibit the making available to the public of the original and copies<sup>56</sup> of their works, performances, and phonograms through sale or other transfer of ownership.

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<sup>53</sup> For greater certainty, the Parties understand that it is a matter for each Party's law to prescribe that works, performances, or phonograms in general or any specified categories of works, performances and phonograms are not protected by copyright or related rights unless the work, performance, or phonogram has been fixed in some material form.

<sup>54</sup> References to "authors, performers, and producers of phonograms" refer also to any of their successors in interest.

<sup>55</sup> The Parties understand 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. The Parties further understand that nothing in this Article precludes a Party from applying Article 11*bis*(2) of the Berne Convention.

<sup>56</sup> The expressions "copies" and "original and copies", that are subject to the right of distribution in this Article, refer exclusively to fixed copies that can be put into circulation as tangible objects.

## **Article 20.60: No Hierarchy**

Each Party shall provide that, in cases in which authorization is needed from both the author of a work embodied in a phonogram and a performer or producer that owns rights in the phonogram, the need for the authorization of the:

- (a) author does not cease to exist because the authorization of the performer or producer is also required; and
- (b) performer or producer does not cease to exist because the authorization of the author is also required.

## **Article 20.61: Related Rights**

1. Further to the protection afforded to performers and producers of phonograms as “nationals” under Article 20.8 (National Treatment), each Party shall accord the rights provided for in this Chapter to performances and phonograms first published or first fixed<sup>57</sup> in the territory of another Party.<sup>58</sup> A performance or phonogram is considered first published in the territory of a Party if it is published in the territory of that Party within 30 days of its original publication.

2. Each Party shall provide to performers the exclusive right to authorize or prohibit:
- (a) the broadcasting and communication to the public of their unfixed performances, unless the performance is already a broadcast performance; and
  - (b) the fixation of their unfixed performances.
3. (a) Each Party shall provide to performers and producers of phonograms the exclusive right to authorize or prohibit the broadcasting or any communication to the public of their performances or phonograms, by wire or wireless means<sup>59</sup> and the making available to the public of those performances or phonograms in such a way that members of the public may access them from a place and at a time individually chosen by them.

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<sup>57</sup> For the purposes of this Article, fixation means the finalization of the master tape or its equivalent.

<sup>58</sup> For greater certainty, consistent with Article 20.8 (National Treatment), each Party shall accord to performances and phonograms first published or first fixed in the territory of another Party treatment no less favorable than it accords to performances or phonograms first published or first fixed in its own territory.

<sup>59</sup> For greater certainty, the obligation under this paragraph does not include broadcasting or communication to the public, by wire or wireless means, of the sounds or representations of sounds fixed in a phonogram that are incorporated in a cinematographic or other audio-visual work.

- (b) Notwithstanding subparagraph (a) and Article 20.64 (Limitations and Exceptions), the application of the right referred to in subparagraph (a) to analog transmissions and non-interactive free over-the-air broadcasts, and exceptions or limitations to this right for those activities, is a matter of each Party's law.<sup>60</sup>
- (c) Each Party may adopt limitations to this right in respect of other non-interactive transmissions in accordance with Article 20.64.1 (Limitations and Exceptions), provided that the limitations do not prejudice the right of the performer or producer of phonograms to obtain equitable remuneration.

### **Article 20.62: Term of Protection for Copyright and Related Rights**

Each Party shall provide that in cases in which the term of protection of a 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 70 years after the author's death;<sup>61</sup> and
- (b) on a basis other than the life of a natural person, the term shall be:
  - (i) not less than 75 years from the end of the calendar year of the first authorized publication<sup>62</sup> of the work, performance, or phonogram, or
  - (ii) failing such authorized publication within 25 years from the creation of the work, performance, or phonogram, not less than 70 years from the end of the calendar year of the creation of the work, performance, or phonogram.

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<sup>60</sup> For the purposes of this subparagraph the Parties understand that a Party may provide for the retransmission of non-interactive, free over-the-air broadcasts, provided that these retransmissions are lawfully permitted by that Party's government communications authority; any entity engaging in these retransmissions complies with the relevant rules, orders, or regulations of that authority; and these retransmissions do not include those delivered and accessed over the Internet. For greater certainty this footnote does not limit a Party's ability to avail itself of this subparagraph.

<sup>61</sup> The Parties understand that if a Party provides its nationals a term of copyright protection that exceeds life of the author plus 70 years, nothing in this Article or Article 20.8 (National Treatment) precludes that Party from applying Article 7(8) of the Berne Convention with respect to the term in excess of the term provided in this subparagraph of protection for works of another Party.

<sup>62</sup> For greater certainty, for the purposes of subparagraph (b), if a Party's law provides for the calculation of term from fixation rather than from the first authorized publication that Party may continue to calculate the term from fixation.

### **Article 20.63: Application of Article 18 of the Berne Convention and Article 14.6 of the TRIPS Agreement**

Each Party shall apply Article 18 of the Berne Convention and Article 14.6 of the TRIPS Agreement, *mutatis mutandis*, to works, performances, and phonograms, and the rights in and protections afforded to that subject matter as required by this Section.

### **Article 20.64: Limitations and Exceptions**

1. With respect to this Section, 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. This Article does not reduce or extend the scope of applicability of the limitations and exceptions permitted by the TRIPS Agreement, the Berne Convention, the WCT, or the WPPT.

### **Article 20.65: Contractual Transfers**

Each Party shall provide that for copyright and related rights, any person acquiring or holding an economic right<sup>63</sup> in a work, performance, or phonogram:

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

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<sup>63</sup> For greater certainty, this Article does not affect the exercise of moral rights.

- (b) by virtue of contract, including contracts of employment underlying the creation of works, performances, or phonograms, must be able to exercise that right in that person's own name and enjoy fully the benefits derived from that right.<sup>64</sup>

**Article 20.66: Technological Protection Measures<sup>65</sup>**

1. In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers, and producers of phonograms use in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, performances, and phonograms, each Party shall provide<sup>66</sup> that a person who:

- (a) knowingly, or having reasonable grounds to know,<sup>67</sup> circumvents without authority an effective technological measure that controls access to a protected work, performance, or phonogram;<sup>68</sup> or
- (b) manufactures, imports, distributes, offers for sale or rental to the public, or otherwise provides devices, products, or components, or offers to the public or provides services, that:
  - (i) are promoted, advertised, or otherwise marketed by that person for the purpose of circumventing any effective technological measure,

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<sup>64</sup> Nothing in this Article affects a Party's ability to establish: (i) which specific contracts underlying the creation of works, performances, or phonograms shall, in the absence of a written agreement, result in a transfer of economic rights by operation of law; and (ii) reasonable limits to protect the interests of the original right holders, taking into account the legitimate interests of the transferees.

<sup>65</sup> Nothing in this Agreement requires a Party to restrict the importation or domestic sale of a device that does not render effective a technological measure the only purpose of which is to control market segmentation for legitimate physical copies of a cinematographic film, and is not otherwise a violation of its law.

<sup>66</sup> A Party that, prior to the date of entry into force of this Agreement, maintains legal protections for technological protection measures consistent with Article 20.66.1 (Technological Protection Measures), may maintain its current scope of limitations, exceptions, and regulations regarding circumvention.

<sup>67</sup> For greater certainty, for the purposes of this subparagraph, a Party may provide that reasonable grounds to know may be demonstrated through reasonable evidence, taking into account the facts and circumstances surrounding the alleged illegal act.

<sup>68</sup> For greater certainty, no Party is required to impose civil or criminal liability under this subparagraph for a person that circumvents any effective technological measure that protects any of the exclusive rights of copyright or related rights in a protected work, performance, or phonogram, but does not control access to that work, performance, or phonogram.

- (ii) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure, or
- (iii) are primarily designed, produced, or performed for the purpose of circumventing any effective technological measure,

is liable and subject to the remedies provided for in Article 20.81.18 (Civil and Administrative Procedures and Remedies).<sup>69</sup>

Each Party shall provide for criminal procedures and penalties to be applied when a person, other than a non-profit library, archive,<sup>70</sup> educational institution, or public non-commercial broadcasting entity, is found to have engaged willfully and for the purposes of commercial advantage or financial gain in any of the foregoing activities.

Criminal procedures and penalties listed in subparagraphs (a), (c), and (f) of Article 20.84.6 (Criminal Procedures and Penalties) shall apply, as applicable to infringements *mutatis mutandis*, to the activities described in subparagraphs (a) and (b) of this paragraph.

2. In implementing paragraph 1, 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 measure implementing paragraph 1.

3. Each Party shall provide that a violation of a measure implementing this Article is a separate cause of action, independent of any infringement that might occur under the Party's law on copyright and related rights.

4. Each Party shall confine exceptions and limitations to measures implementing paragraph 1 to the following activities, which shall be applied to relevant measures in accordance with paragraph 5:<sup>71</sup>

- (a) non-infringing 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, for the sole purpose of achieving interoperability of an independently created computer program with other programs;

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<sup>69</sup> For greater certainty, no Party is required to impose liability under this Article and Article 20.67 (Rights Management Information) for actions taken by that Party or a third person acting with authorization or consent of the Party.

<sup>70</sup> For greater certainty, a Party may treat a non-profit museum as a non-profit archive.

<sup>71</sup> A Party may request consultations with the other Parties to consider how to address, under paragraph 4, activities of a similar nature that a Party identifies after the date this Agreement enters into force.

- (b) non-infringing good faith activities, carried out by an appropriately qualified researcher who has lawfully obtained a copy, unfixed performance, or display of a work, performance, or phonogram and who has made a good faith effort to obtain authorization for those activities, to the extent necessary for the sole purpose of research consisting of identifying and analyzing flaws and vulnerabilities of technologies for scrambling and descrambling of information;
- (c) 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 implementing paragraph (1)(b);
- (d) non-infringing 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;
- (e) non-infringing 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;
- (f) lawfully authorized activities carried out by government employees, agents, or contractors for the purpose of law enforcement, intelligence, essential security, or similar governmental purposes;
- (g) access by a nonprofit library, archive, or educational institution to a work, performance, or phonogram not otherwise available to it, for the sole purpose of making acquisition decisions; and
- (h) in addition, a Party may provide additional exceptions or limitations for non-infringing uses of a particular class of works, performances, or phonograms, when an actual or likely adverse impact on those non-infringing uses is demonstrated by substantial evidence in a legislative, regulatory, or administrative proceeding in accordance with the Party's law.

5. The exceptions and limitations to measures implementing paragraph 1 for the activities set forth in paragraph 4 may only be applied as follows, 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 under the Party's legal system:

- (a) measures implementing paragraph (1)(a) may be subject to exceptions and limitations with respect to each activity set forth in paragraph (4);

- (b) measures implementing paragraph (1)(b), 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 paragraphs (4)(a), (b), (c), (d), and (f); and
- (c) measures implementing paragraph (1)(b), as they apply to effective technological measures that protect any copyright or any rights related to copyright, may be subject to exceptions and limitations with respect to activities set forth in paragraphs (4)(a) and (f).

6. **Effective technological measure** means a technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, or phonogram, or protects copyright or rights related to copyright.<sup>72</sup>

#### **Article 20.67: Rights Management Information**<sup>73</sup>

1. In order to provide adequate and effective legal remedies to protect rights management information (RMI), each Party shall provide that any person that, without authority, and knowing, or having reasonable grounds to know, that it would induce, enable, facilitate, or conceal an infringement of the copyright or related right of authors, performers, or producers of phonograms, knowingly:<sup>74</sup>

- (a) removes or alters any RMI;
- (b) distributes or imports for distribution RMI knowing that the RMI has been altered without authority;<sup>75</sup> or
- (c) distributes, imports for distribution, broadcasts, communicates, or makes available to the public copies of works, performances, or phonograms, knowing that RMI has been removed or altered without authority,

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<sup>72</sup> For greater certainty, a technological measure that can, in a usual case, be circumvented accidentally is not an “effective” technological measure.

<sup>73</sup> A Party may comply with the obligations in this Article by providing legal protection only to electronic rights management information.

<sup>74</sup> For greater certainty, a Party may extend the protection afforded by this paragraph to circumstances in which a person engages without knowledge in the acts in subparagraphs (a), (b), and (c), and to other related right holders.

<sup>75</sup> A Party may meet its obligation under this subparagraph if it provides effective protection for original compilations, provided that the acts described in this subparagraph are treated as infringements of copyright in those original compilations.

is liable and subject to the remedies set out in Article 20.81 (Civil and Administrative Procedures and Remedies).

2. Each Party shall provide for criminal procedures and penalties to be applied if a person is found to have engaged willfully and for purposes of commercial advantage or financial gain in any of the activities referred to in paragraph 1.

3. A Party may provide that the criminal procedures and penalties do not apply to a non-profit library, museum, archive, educational institution or public non-commercial broadcasting entity.<sup>76</sup>

4. For greater certainty, nothing prevents a Party from excluding from a measure that implements paragraphs 1 through 3 a lawfully authorized activity that is carried out for the purpose of law enforcement, essential security interests, or other related governmental purposes, such as the performance of a statutory function.

5. For greater certainty, nothing in this Article obligates a Party to require a right holder in a work, performance, or phonogram to attach RMI to copies of the work, performance, or phonogram, or to cause RMI to appear in connection with a communication of the work, performance, or phonogram to the public.

6. **RMI** means:

- (a) information that identifies a work, performance, or phonogram, the author of the work, the performer of the performance, or the producer of the phonogram; or the owner of a right in the work, performance, or phonogram;
- (b) information about the terms and conditions of the use of the work, performance, or phonogram; or
- (c) any numbers or codes that represent the information referred to in subparagraphs (a) and (b),

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

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<sup>76</sup> For greater certainty, a Party may treat a broadcasting entity established without a profit-making purpose under its law as a public non-commercial broadcasting entity.

## **Article 20.68: Collective Management**

The Parties recognize the important role of collective management societies for copyright and related rights in collecting and distributing royalties<sup>77</sup> based on practices that are fair, efficient, transparent, and accountable, which may include appropriate record keeping and reporting mechanisms.

## **Section I: Trade Secrets<sup>78, 79</sup>**

### **Article 20.69: Protection of Trade Secrets**

In the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention, each Party shall ensure that 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-owned enterprises) without their consent in a manner contrary to honest commercial practices.

### **Article 20.70: Civil Protection and Enforcement**

In fulfilling its obligation under paragraphs 1 and 2 of Article 39 of the TRIPS Agreement, each Party shall:

- (a) provide civil judicial procedures<sup>80</sup> for any person lawfully in control of a trade secret to prevent, and obtain redress for, the misappropriation of the trade secret by any other person; and
- (b) not limit the duration of protection for a trade secret, so long as the conditions in Article 20.72 (Definitions) exist.

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<sup>77</sup> For greater certainty, royalties may include equitable remuneration.

<sup>78</sup> For greater certainty, the enforcement obligations and principles set forth in Section J also apply to the obligations in this section, as relevant.

<sup>79</sup> For greater certainty, this Section is without prejudice to a Party's measures protecting good faith lawful disclosures to provide evidence of a violation of that Party's law.

<sup>80</sup> For greater certainty, civil judicial procedures do not have to be federal provided that those procedures are available.

## **Article 20.71: Criminal Enforcement**

1. Subject to paragraph 2, each Party shall provide for criminal procedures and penalties for the unauthorized and willful misappropriation<sup>81</sup> of a trade secret.

2. With respect to the acts referred to in paragraph 1, a Party may, as appropriate, limit the availability of its procedures, or limit the level of penalties available, to one or more of the following cases in which the act is:

- (a) for the purposes of commercial advantage or financial gain;
- (b) related to a product or service in national or international commerce; or
- (c) intended to injure the owner of that trade secret.

## **Article 20.72: Definitions**

For the purposes of this Section:

**trade secret** means information that:

- (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- (b) has actual or potential commercial value because it is secret; and
- (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret;

**misappropriation** means the acquisition, use, or disclosure of a trade secret in a manner contrary to honest commercial practices, including the acquisition, use, or disclosure of a trade secret by a third party that knew, or had reason to know, that the trade secret was acquired in a manner contrary to honest commercial practices.<sup>82</sup> Misappropriation does not include situations in which a person:

- (a) reverse engineered an item lawfully obtained;

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<sup>81</sup> For the purposes of this Article, “willful misappropriation” requires a person to have known that the trade secret was acquired in a manner contrary to honest commercial practices.

<sup>82</sup> For greater certainty, “misappropriation” as defined in this paragraph includes cases in which the acquisition, use, or disclosure involves a computer system.

- (b) independently discovered information claimed as a trade secret; or
- (c) acquired the subject information from another person in a legitimate manner without an obligation of confidentiality or knowledge that the information was a trade secret; and

**manner contrary to honest commercial practices** means 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 that knew, or were grossly negligent in failing to know, that those practices were involved in the acquisition.

#### **Article 20.73: Provisional Measures**

In the civil judicial proceedings described in Article 20.70 (Civil Protection and Enforcement), each Party shall provide that its judicial authorities have the authority to order prompt and effective provisional measures, such as orders to prevent the misappropriation of the trade secret and to preserve relevant evidence.

#### **Article 20.74: Confidentiality**

In connection with the civil judicial proceedings described in Article 20.70 (Civil Protection and Enforcement), each Party shall provide that its civil judicial authorities have the authority to:

- (a) order specific procedures to protect the confidentiality of any trade secret, alleged trade secret, or any other information asserted by an interested party to be confidential; and
- (b) impose sanctions on parties, counsel, expert, or other person subject to those proceedings, related to violation of orders concerning the protection of a trade secret or alleged trade secret produced or exchanged in that proceeding, as well as other information asserted by an interested party to be confidential.

Each Party shall further provide in its law that, in cases in which an interested party asserts information to be a trade secret, its judicial authorities shall not disclose that information without first providing that person with an opportunity to make a submission under seal that describes the interest of that person in keeping the information confidential.

### **Article 20.75: Civil Remedies**

In connection with the civil judicial proceedings described in Article 20.70 (Civil Protection and Enforcement), each Party shall provide that its judicial authorities have the authority at least to order:

- (a) injunctive relief that conforms to Article 44 of the TRIPS Agreement against a person that misappropriated a trade secret; and
- (b) a person that misappropriated a trade secret to pay damages adequate to compensate the person lawfully in control of the trade secret for the injury suffered because of the misappropriation of the trade secret<sup>83</sup> and, if appropriate, because of the proceedings to enforce the trade secret.

### **Article 20.76: Licensing and Transfer of Trade Secrets**

No Party shall discourage or impede the voluntary licensing of trade secrets by imposing excessive or discriminatory conditions on those licenses or conditions that dilute the value of the trade secrets.

### **Article 20.77: Prohibition of Unauthorized Disclosure or Use of a Trade Secret by Government Officials Outside the Scope of Their Official Duties**

1. In civil, criminal, and regulatory proceedings in which trade secrets may be submitted to a court or government entity, each Party shall prohibit the unauthorized disclosure of a trade secret by a government official at the central level of government outside the scope of that person's official duties.
2. Each Party shall provide for in its law deterrent level penalties, including monetary fines, suspension or termination of employment, and imprisonment, to guard against the unauthorized disclosure of a trade secret described in paragraph 1.

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<sup>83</sup> For greater certainty, a Party may provide that the determination of damages is carried out after the determination of misappropriation.

## Section J: Enforcement

### Article 20.78: General Obligations

1. Each Party shall ensure that enforcement procedures as specified in this Section are available under its law so as to permit effective action against an act of infringement of intellectual property rights covered by this Chapter, including expeditious remedies to prevent infringements and remedies that constitute a deterrent to future infringements.<sup>84</sup> 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 confirms that the enforcement procedures set forth in Article 20.81 (Civil and Administrative Procedures and Remedies), Article 20.82 (Provisional Measures), and Article 20.84 (Criminal Procedures and Penalties) shall be available to the same extent with respect to acts of trademark infringement, as well as copyright or related rights infringement, in the digital environment.
3. Each Party shall ensure that its procedures concerning the enforcement of intellectual property rights are fair and equitable. These procedures shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.
4. This Section does not create any obligation:
  - (a) to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of each Party to enforce its 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.
5. In implementing this Section in its intellectual property system, each Party shall take into account the need for proportionality between the seriousness of the infringement of the intellectual property right and the applicable remedies and penalties, as well as the interests of third parties.

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<sup>84</sup> For greater certainty, and subject to Article 44 of the TRIPS Agreement and this Agreement, each Party confirms that it makes those remedies available with respect to enterprises, regardless of whether the enterprises are private or state-owned.

## **Article 20.79: Presumptions**

1. In civil, criminal, and, if applicable, administrative proceedings involving copyright or related rights, each Party shall provide for a presumption<sup>85</sup> that, in the absence of proof to the contrary:

- (a) the person whose name is indicated in the usual manner<sup>86</sup> as the author, performer, or producer of the work, performance, or phonogram, or if applicable the publisher, is the designated right holder in that work, performance, or phonogram; and
- (b) the copyright or related right subsists in that subject matter.

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

3. In connection with the commencement of a civil or administrative enforcement proceeding involving a patent that has been substantively examined and granted by the competent authority of a Party, that Party shall provide that each claim in the patent be considered *prima facie* to satisfy the applicable criteria of patentability in its territory.<sup>87, 88</sup>

## **Article 20.80: 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:

- (a) are in writing and preferably state any relevant findings of fact and the reasoning or the legal basis on which the decisions and rulings are based; and

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<sup>85</sup> 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 these presumptions are rebuttable presumptions that may be rebutted by evidence to the contrary.

<sup>86</sup> For greater certainty, a Party may establish the means by which it shall determine what constitutes the “usual manner” for a particular physical support.

<sup>87</sup> For greater certainty, if a Party provides its administrative authorities with the exclusive authority to determine the validity of a registered trademark or patent, nothing in paragraphs 2 and 3 shall prevent that Party’s competent authority from suspending enforcement procedures until the validity of the registered trademark or patent is determined by the administrative authority. In those validity procedures, the party challenging the validity of the registered trademark or patent shall be required to prove that the registered trademark or patent is not valid. Notwithstanding this requirement, a Party may require the trademark holder to provide evidence of first use.

<sup>88</sup> A Party may provide that this paragraph applies only to those patents that have been applied for, examined, and granted after the entry into force of this Agreement.

- (b) are published<sup>89</sup> or, if 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 infringements of intellectual property rights as well as collecting information on best practices to prevent and combat infringements.

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

### **Article 20.81: Civil and Administrative Procedures and Remedies**

1. Each Party shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right covered in this Chapter.<sup>90</sup>

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

3. Each Party shall provide<sup>91</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 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.

4. In determining the amount of damages under paragraph 3, each Party's judicial authorities shall have the authority to consider, among other things, any legitimate measure of value the right

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<sup>89</sup> For greater certainty, a Party may satisfy the requirement for publication by making the decision or ruling available to the public online.

<sup>90</sup> For the purposes of this Article, the term "right holders" includes those authorized licensees, federations, and associations that have the legal standing and authority to assert those rights. The term "authorized licensee" includes the exclusive licensee of any one or more of the exclusive intellectual property rights encompassed in a given intellectual property.

<sup>91</sup> A Party may also provide that the right holder may not be entitled to any of the remedies set out in paragraphs 3, 5, and 7 if there is a finding of non-use of a trademark. For greater certainty, there is no obligation for a Party to provide for the possibility of any of the remedies in paragraphs 3, 5, 6, and 7 to be ordered in parallel.

holder submits, which may include lost profits, the value of the infringed goods or services measured by the market price, or the suggested retail price.

5. At least in cases of copyright or related rights infringement and trademark counterfeiting, each Party shall provide that, in civil judicial proceedings, its judicial authorities have the authority to order the infringer, at least in cases described in paragraph 3, to pay the right holder the infringer's profits that are attributable to the infringement.<sup>92</sup>

6. In civil judicial proceedings with respect to the infringement of copyright or related rights protecting works, phonograms, or 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 on the election of the right holder; or
- (b) additional damages.<sup>93</sup>

7. In civil judicial proceedings with respect to trademark counterfeiting, each Party shall also establish or maintain a system that provides for one or more of the following:

- (a) pre-established damages, which shall be available on the election of the right holder; or
- (b) additional damages.<sup>94</sup>

8. Pre-established damages referred to in paragraphs 6 and 7 shall be in an amount sufficient to constitute a deterrent to future infringements and to compensate fully the right holder for the harm caused by the infringement.

9. In awarding additional damages referred to in paragraphs 6 and 7, judicial authorities shall have the authority to award those additional damages as they consider appropriate, having regard to all relevant matters, including the nature of the infringing conduct and the need to deter similar infringements in the future.

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

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<sup>92</sup> A Party may comply with this paragraph by presuming those profits to be the damages referred to in paragraph 3.

<sup>93</sup> For greater certainty, additional damages may include exemplary or punitive damages.

<sup>94</sup> For greater certainty, additional damages may include exemplary or punitive damages.

11. If a Party's judicial or other authorities appoint a technical or other expert in a civil proceeding concerning the enforcement of an intellectual property right and require that the parties in the proceeding pay the costs of that expert, that Party should seek to ensure that those costs are reasonable and related appropriately, among other things, to the quantity and nature of work to be performed and do not unreasonably deter recourse to those proceedings.

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

- (a) at least with respect to pirated copyright goods and counterfeit trademark goods, its judicial authorities have the authority, at the right holder's request, to order that the infringing goods be destroyed, except in exceptional circumstances, without compensation of any sort;
- (b) its judicial authorities have the authority to order that materials and implements that have been used in the manufacture or creation of the infringing goods be, without compensation of any sort, promptly destroyed or, in exceptional circumstances, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risk of further infringement; and
- (c) in regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed is not sufficient, other than in exceptional circumstances, to permit the release of goods into the channels of commerce.

13. Without prejudice to its law governing privilege, the protection of confidentiality of information sources, or the processing of personal data, each Party shall provide that, in civil judicial proceedings concerning the enforcement of an intellectual property right, its judicial authorities have the authority, on a justified request of the right holder, to order the infringer or the alleged infringer, as applicable, 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. This information may include information regarding any person involved in any aspect of the infringement or alleged infringement and the means of production or the channels of distribution of the infringing or allegedly infringing goods or services, including the identification of third persons alleged to be involved in the production and distribution of the goods or services and of their channels of distribution.

14. In cases in which a party in a proceeding voluntarily and without good reason refuses access to, or otherwise does not provide relevant evidence under its control within a reasonable period, or significantly impedes a proceeding relating to an enforcement action, each Party shall provide that its judicial authorities shall have the authority to make preliminary and final determinations, affirmative or negative, on the basis of the evidence presented, including the complaint or the allegation presented by the party adversely affected by the denial of access to evidence, subject to providing the parties an opportunity to be heard on the allegations or evidence.

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

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

17. To the extent that a civil remedy can be ordered as a result of administrative procedures on the merits of a case, each Party shall provide that those procedures conform to principles equivalent in substance to those set out in this Article.

18. In civil judicial proceedings concerning the acts described in Article 20.66 (Technological Protection Measures) and Article 20.67 (Rights Management Information):

- (a) each Party shall provide that its judicial authorities have the authority at least to:<sup>95</sup>
  - (i) impose provisional measures, including seizure or other taking into custody of devices and products suspected of being involved in the prohibited activity,
  - (ii) order the type of damages available for copyright infringement, as provided under its law in accordance with this Article,
  - (iii) order court costs, fees or expenses as provided for under paragraph 10, and
  - (iv) order the destruction of devices and products found to be involved in the prohibited activity; and
- (b) a Party may provide that damages are not available against a non-profit library, museum, archive, educational institution, or public non-commercial broadcasting entity, if it sustains the burden of proving that it was not aware or had no reason to believe that its acts constituted a prohibited activity.

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<sup>95</sup> For greater certainty, a Party may, but is not required to, put in place separate remedies in respect of Article 20.66 (Technological Protection Measures) and 20.67 (Rights Management Information), if those remedies are available under its copyright law.

## **Article 20.82: Provisional Measures**

1. Each Party's authorities shall act on a request for relief in respect of an intellectual property right *inaudita altera parte* expeditiously in accordance with that Party's judicial rules.
2. Each Party shall provide that its judicial authorities have the authority to require the applicant for a provisional measure in respect of an intellectual property right to provide any reasonably available evidence in order to satisfy the judicial authority, with a sufficient degree of certainty, that the applicant's right is being infringed or that the infringement is imminent, and to order the applicant to provide security or equivalent assurance set at a level sufficient to protect the defendant and to prevent abuse. That security or equivalent assurance shall not unreasonably deter recourse to those procedures.
3. In civil judicial proceedings concerning copyright or related rights infringement and trademark counterfeiting, each Party shall provide that its judicial authorities have the authority to order the seizure or other taking into custody of suspected infringing goods, materials, and implements relevant to the infringement, and, at least for trademark counterfeiting, documentary evidence relevant to the infringement.

## **Article 20.83: Special Requirements Related to Border Measures**

1. Each Party shall provide for applications to suspend the release of, or to detain, suspected counterfeit or confusingly similar trademark or pirated copyright goods that are imported into the territory of the Party.<sup>96</sup>
2. Each Party shall provide that a right holder, submitting an application referred to in paragraph 1, to initiate procedures for the Party's competent authorities<sup>97</sup> to suspend release into free circulation of, or to detain, suspected counterfeit or confusingly similar trademark or pirated copyright goods, is required to:

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<sup>96</sup> For the purposes of this Article:

- (a) "counterfeit trademark goods" means goods, including packaging, bearing without authorization a trademark that is identical to the trademark validly registered in respect of those goods, or that cannot be distinguished in its essential aspects from such a trademark, and that thereby infringes the rights of the owner of the trademark in question under the law of the Party providing the procedures under this Section; and
- (b) "pirated copyright goods" means 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 when the making of that copy would have constituted an infringement of a copyright or a related right under the law of the Party providing the procedures under this Section.

<sup>97</sup> For the purposes of this Article, unless otherwise specified, competent authorities may include the appropriate judicial, administrative, or law enforcement authorities under a Party's law.

- (a) provide adequate evidence to satisfy the competent authorities that, under the law of the Party providing the procedures, there is *prima facie* an infringement of the right holder's intellectual property right; and
- (b) supply sufficient information that may reasonably be expected to be within the right holder's knowledge to make the suspect goods reasonably recognizable by its competent authorities.

The requirement to provide that information shall not unreasonably deter recourse to these procedures.

3. Each Party shall provide that its competent authorities have the authority to require a right holder submitting an application referred to in paragraph 1 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 does not unreasonably deter recourse to these procedures. A Party may provide that the 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.

4. Without prejudice to a Party's law pertaining to privacy or the confidentiality of information:

- (a) if a Party's competent authorities have detained or suspended the release of goods that are suspected of being counterfeit trademark or pirated copyright goods, that Party may provide that its competent authorities have the authority to inform the right holder without undue delay of the names and addresses of the consignor, exporter, consignee, or importer; a description of the goods; the quantity of the goods; and, if known, the country of origin of the goods;<sup>98</sup> or
- (b) if a Party does not provide its competent authority with the authority referred to in subparagraph (a) when suspect goods are detained or suspended from release, it shall provide, at least in cases of imported goods, its competent authorities with the authority to provide the information specified in subparagraph (a) to the right holder normally within 30 working days of the seizure or determination that the goods are counterfeit trademark goods or pirated copyright goods.

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<sup>98</sup> For greater certainty, a Party may establish reasonable procedures to receive or access that information.

5. Each Party shall provide that its competent authorities may initiate border measures *ex officio* against suspected counterfeit trademark goods or pirated copyright goods under customs control<sup>99</sup> that are:

- (a) imported;
- (b) destined for export;
- (c) in transit;<sup>100</sup> and
- (d) admitted into or exiting from a free trade zone or a bonded warehouse.

6. Nothing in this Article precludes a Party from exchanging, if appropriate and with a view to eliminating international trade in counterfeit trademarked goods or pirated copyrighted goods, available information to another Party in respect of goods that it has examined without a local consignee and that are transshipped through its territory and are destined for the territory of the other Party, to inform that other Party's efforts to identify suspect goods upon arrival in its territory.

7. Each Party shall adopt or maintain a procedure by which its competent authorities may determine within a reasonable period of time after the initiation of the procedures described in paragraphs 1 and 5, whether the suspect goods infringe an intellectual property right. If a Party provides administrative procedures for the determination of an infringement, it may also provide its authorities with the authority to impose administrative penalties or sanctions, which may include fines or the seizure of the infringing goods following a determination that the goods are infringing.

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

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

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<sup>99</sup> For the purposes of this Article, "goods under customs control" means goods that are subject to a Party's customs procedures.

<sup>100</sup> For the purposes of this Article, an "in-transit" good means a good that is under "Customs transit" or "transshipped," as defined in the *International Convention on the Simplification and Harmonization of Customs Procedures* (as amended), done at Kyoto on May 18, 1973, as amended at Brussels on June 26, 1999.

10. This Article applies to 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 travelers' personal luggage.<sup>101</sup>

#### **Article 20.84: Criminal Procedures and Penalties**

1. Each Party shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright or related rights piracy on a commercial scale. In respect of willful copyright or related rights piracy, "on a commercial scale" includes:

- (a) acts carried out for commercial advantage or financial gain; and
- (b) significant acts, not carried out for commercial advantage or financial gain, that have a substantial prejudicial impact on the interests of the copyright or related rights holder in relation to the marketplace.<sup>102, 103</sup>

2. Each Party shall treat willful importation or exportation of counterfeit trademark goods or pirated copyright goods on a commercial scale as unlawful activities subject to criminal penalties.<sup>104</sup>

3. Each Party shall provide for criminal procedures and penalties to be applied in cases of willful importation<sup>105</sup> and domestic use, in the course of trade and on a commercial scale, of a label or packaging:

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<sup>101</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.

<sup>102</sup> The Parties understand that a Party may comply with subparagraph (b) by addressing those significant acts under its criminal procedures and penalties for non-authorized uses of protected works, performances and phonograms in its law.

<sup>103</sup> A Party may provide that the volume and value of any infringing items may be taken into account in determining whether the act has a substantial prejudicial impact on the interests of the copyright or related rights holder in relation to the marketplace.

<sup>104</sup> The Parties understand that a Party may comply with its obligation under this paragraph by providing that distribution or sale of counterfeit trademark goods or pirated copyright goods on a commercial scale is an unlawful activity subject to criminal penalties. The Parties understand that criminal procedures and penalties as specified in paragraphs 1, 2, and 3 are applicable in any free trade zones in a Party.

<sup>105</sup> A Party may comply with its obligation relating to importation of labels or packaging through its measures concerning distribution.

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

4. Each Party shall provide for criminal procedures to be applied against a person who, willfully and without the authorization of the holder<sup>106</sup> of copyright or related rights in a cinematographic work, knowingly uses or attempts to use an audiovisual recording device to transmit or make a copy of the cinematographic work or any part thereof, from a performance of the motion picture or other audiovisual work in a movie theater or other venue that is being used primarily for the exhibition of a copyrighted motion picture. In addition to the criminal procedures, a Party may provide for administrative enforcement procedures.

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

6. With respect to the offenses described in paragraphs 1 through 5, 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, consistent with the level of penalties applied for crimes of a corresponding gravity;<sup>107</sup>
- (b) that its judicial authorities have the authority, in determining penalties, to account for the seriousness of the circumstances, which may include circumstances that involve threats to, or effects on, health or safety;<sup>108</sup>
- (c) that its judicial or other competent authorities have the authority to order the seizure of suspected counterfeit trademark goods or pirated copyright goods, any related materials and implements used in the commission of the alleged offense, documentary evidence relevant to the alleged offense, and assets derived from, or obtained through the alleged infringing activity. If a Party requires identification of items subject to seizure as a prerequisite for issuing a judicial order referred to

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<sup>106</sup> For greater certainty, the theater or venue owner or operator shall be entitled to contact the criminal law enforcement authorities with respect to the suspected commission of the acts referred to in this provision. For greater certainty, nothing in this paragraph expands or diminishes the existing rights and obligations of a theater or venue owner or operator with respect to the cinematographic work.

<sup>107</sup> The Parties understand that there is no obligation for a Party to provide for the possibility of imprisonment and monetary fines to be imposed in parallel.

<sup>108</sup> A Party may also account for those circumstances through a separate criminal offense.

in this subparagraph, 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 have the authority to order the forfeiture, at least for serious offenses, of any assets derived from or obtained through the infringing activity;
- (e) that its judicial authorities have the authority to order the forfeiture or destruction of:
  - (i) all counterfeit trademark goods or pirated copyright goods,
  - (ii) materials and implements that have been predominantly used in the creation of pirated copyright goods or counterfeit trademark goods, and
  - (iii) any other labels or packaging to which a counterfeit trademark has been applied and that have been used in the commission of the offense,

In cases in which counterfeit trademark goods and pirated copyright goods are not destroyed, the judicial or other competent authorities shall ensure that, except in exceptional circumstances, those goods are 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 (d) occur without compensation of any kind to the defendant;

- (f) that its judicial or other competent authorities have the authority to release or, in the alternative, provide access to, goods, material, implements, and other evidence held by the relevant authority to a right holder for civil<sup>109</sup> infringement proceedings; and
- (g) that its competent authorities may act upon their own initiative to initiate legal action without the need for a formal complaint by a third person or right holder.

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

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<sup>109</sup> A Party may also provide this authority in connection with administrative infringement proceedings.

## Article 20.85: Protection of Encrypted Program-Carrying Satellite and Cable Signals

1. Each Party shall make it a criminal offense to:
  - (a) manufacture, assemble,<sup>110</sup> modify, import, export,<sup>111</sup> sell, or otherwise distribute a tangible or intangible device or system knowing or having reason to know<sup>112</sup> that the device or system meets at least one of the following conditions:
    - (i) it is intended to be used to assist, or
    - (ii) it is primarily of assistance,in decoding an encrypted program-carrying satellite signal without the authorization of the lawful distributor<sup>113</sup> of that signal;<sup>114</sup> and
  - (b) with respect to an encrypted program-carrying satellite signal, willfully:
    - (i) receive<sup>115</sup> that signal, or
    - (ii) further distribute<sup>116</sup> that signal,knowing that it has been decoded without the authorization of the lawful distributor of the signal.

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<sup>110</sup> For greater certainty, a Party may treat “assemble” as incorporated in “manufacture.”

<sup>111</sup> The obligation regarding export may be met by making it a criminal offense to possess and distribute a device or system described in this paragraph.

<sup>112</sup> For the purposes of this paragraph, a Party may provide that “having a reason to know” may be demonstrated through reasonable evidence, taking into account the facts and circumstances surrounding the alleged illegal act, as part of the Party’s “knowledge” requirements. A Party may treat “having reason to know” as meaning “willful negligence”.

<sup>113</sup> With regard to the criminal offenses and penalties in paragraphs 1 and 3, a Party may require a demonstration of intent to avoid payment to the lawful distributor, or a demonstration of intent to otherwise secure a pecuniary benefit to which the recipient is not entitled.

<sup>114</sup> For the purposes of this Article, a Party may provide that a “lawful distributor” means a person that has the lawful right in that Party’s territory to distribute the encrypted program carrying signal and authorize its decoding.

<sup>115</sup> For greater certainty and for the purposes of paragraphs 1(b) and 3(b), a Party may provide that willful receipt of an encrypted program carrying satellite or cable signal means receipt and use of the signal, or means receipt and decoding of the signal.

<sup>116</sup> For greater certainty, a Party may interpret “further distribute” as “retransmit to the public”.

2. Each Party shall provide for civil remedies for a person that holds an interest in an encrypted program-carrying satellite signal or its content and that is injured by an activity described in paragraph 1.
3. Each Party shall provide for criminal penalties and civil<sup>117</sup> remedies for willfully:
  - (a) manufacturing or distributing equipment knowing that the equipment is intended to be used in the unauthorized reception of any encrypted program-carrying cable signal; and
  - (b) receiving, or assisting another to receive,<sup>118</sup> an encrypted program-carrying cable signal without authorization of the lawful distributor of the signal.

#### **Article 20.86: Government Use of Software**

1. Each Party recognizes the importance of promoting the adoption of measures to enhance government awareness of respect for intellectual property rights and of the detrimental effects of the infringement of intellectual property rights.
2. Each Party shall adopt or maintain appropriate laws, regulations, policies, orders, government-issued guidelines, or administrative or executive decrees that provide that its central government agencies use only non-infringing computer software protected by copyright and related rights, and, if applicable, only use that computer software in a manner authorized by the relevant license. These measures apply to the acquisition and management of the software for government use.

#### **Article 20.87: Internet Service Providers**

1. For the purpose of Article 20.88 (Legal Remedies and Safe Harbors), an Internet Service Provider is:
  - (a) a provider of services for the transmission, routing, or providing of connections for digital online communications without modification of their content, between or among points specified by a user, of material of the user's choosing, undertaking the function in Article 20.88.2(a) (Legal Remedies and Safe Harbors);  
or

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<sup>117</sup> In providing for civil remedies, a Party may require a demonstration of injury.

<sup>118</sup> A Party may comply with its obligation in respect of "assisting another to receive" by providing for criminal penalties to be available against a person willfully publishing any information in order to enable or assist another person to receive a signal without authorization of the lawful distributor of the signal.

- (b) a provider of online services undertaking the functions in Article 20.88.2(b), Article 20.88.2(c), or Article 20.88.2(d) (Legal Remedies and Safe Harbors).

2. For the purposes of Article 20.88 (Legal Remedies and Safe Harbors), “copyright” includes related rights.

### **Article 20.88: Legal Remedies and Safe Harbors<sup>119</sup>**

1. The Parties recognize the importance of facilitating the continued development of legitimate online services operating as intermediaries and, in a manner consistent with Article 41 of the TRIPS Agreement, providing enforcement procedures that permit effective and expeditious action by right holders against copyright infringement covered under this Chapter that occurs in the online environment. Accordingly, each Party shall ensure that legal remedies are available for right holders to address that copyright infringement and shall establish or maintain appropriate safe harbors in respect of online services that are Internet Service Providers. This framework of legal remedies and safe harbors shall include:

- (a) legal incentives for Internet Service Providers to cooperate with copyright owners to deter the unauthorized storage and transmission of copyrighted materials or, in the alternative, to take other action to deter the unauthorized storage and transmission of copyrighted materials; and
- (b) limitations in its law that have the effect of precluding monetary relief against Internet Service Providers for copyright infringements that they do not control, initiate or direct, and that take place through systems or networks controlled or operated by them or on their behalf.

2. The limitations described in paragraph 1(b) shall include limitations in respect of the following functions:

- (a) transmitting, routing, or providing connections for material without modification of its content or the intermediate and transient storage of that material done automatically in the course of such a technical process;<sup>120</sup>
- (b) caching carried out through an automated process;
- (c) storage, at the direction of a user, of material residing on a system or network controlled or operated by or for the Internet Service Provider; and

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<sup>119</sup> Annex 20-B (Annex to Section J) applies to Articles 20.88.3, 20.88.4, and 20.88.6.

<sup>120</sup> The Parties understand that these limitations shall apply only where the Internet Service Provider does not initiate the chain of transmission of the materials, and does not select the material or its recipients.

- (d) referring or linking users to an online location by using information location tools, including hyperlinks and directories.

3. To facilitate effective action to address infringement, each Party shall prescribe in its law conditions for Internet Service Providers to qualify for the limitations described in paragraph 1(b), or, alternatively, shall provide for circumstances under which Internet Service Providers do not qualify for the limitations described in paragraph 1(b).<sup>121</sup>

- (a) With respect to the functions referred to in paragraphs 2(c) and 2(d), these conditions shall include a requirement for Internet Service Providers to expeditiously remove or disable access to material residing on their networks or systems upon obtaining actual knowledge of the copyright infringement or becoming aware of facts or circumstances from which the infringement is apparent, such as through receiving a notice<sup>122</sup> of alleged infringement from the right holder or a person authorized to act on its behalf.
- (b) An Internet Service Provider that removes or disables access to material in good faith under subparagraph (a) shall be exempt from any liability for having done so, provided that it takes reasonable steps in advance or promptly after to notify the person whose material is removed or disabled.<sup>123</sup>

4. For the purposes of the functions referred to in paragraphs 2(c) and 2(d), each Party shall establish appropriate procedures in its laws or regulations for effective notices of claimed infringement, and effective counter-notices by those whose material is removed or disabled through mistake or misidentification. If material has been removed or access has been disabled in accordance with paragraph 3, that Party shall require that the Internet Service Provider restores the material that is the subject of a counter-notice, unless the person giving the original notice seeks relief through civil judicial proceedings within a reasonable period of time as set forth in that Party's laws or regulations.

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<sup>121</sup> The Parties understand that a Party that has yet to implement the obligations in paragraphs 3 and 4 will do so in a manner that is both effective and consistent with that Party's existing constitutional provisions. To that end, a Party may establish an appropriate role for the government that does not impair the timeliness of the process provided in paragraphs 3 and 4, and does not entail advance government review of each individual notice.

<sup>122</sup> For greater certainty, a notice of alleged infringement, as may be set out under a Party's law, must contain information that:

- (a) is reasonably sufficient to enable the Internet Service Provider to identify the work, performance or phonogram claimed to be infringed, the alleged infringing material, and the online location of the alleged infringement; and
- (b) has a sufficient indicia of reliability with respect to the authority of the person sending the notice.

<sup>123</sup> With respect to the function in paragraph 2(b), a Party may limit the requirements of paragraph 3 related to an Internet Service Provider removing or disabling access to material to circumstances in which the Internet Service Provider becomes aware or receives notification that the cached material has been removed or access to it has been disabled at the originating site.

5. Each Party shall ensure that monetary remedies are available in its legal system against a person that makes a knowing material misrepresentation in a notice or counter-notice that causes injury to any interested party<sup>124</sup> as a result of an Internet Service Provider relying on the misrepresentation.

6. Eligibility for the limitations in paragraph 1 shall be conditioned on the Internet Service Provider:

- (a) adopting and reasonably implementing a policy that provides for termination in appropriate circumstances of the accounts of repeat infringers;
- (b) accommodating and not interfering with standard technical measures accepted in the Party's territory that protect and identify copyrighted material, that are developed through an open, voluntary process by a broad consensus of copyright owners and service providers, that are available on reasonable and nondiscriminatory terms, and that do not impose substantial costs on service providers or substantial burdens on their systems or networks; and
- (c) with respect to the functions identified in paragraphs 2(c) and 2(d), not receiving a financial benefit directly attributable to the infringing activity, in circumstances where it has the right and ability to control such activity.

7. Eligibility for the limitations identified in paragraph 1 shall not be conditioned on the Internet Service Provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with the technical measures identified in paragraph 6(b).

8. Each Party shall provide procedures, whether judicial or administrative, in accordance with its legal system, and consistent with principles of due process and privacy, that enable a copyright owner that has made a legally sufficient claim of copyright infringement to obtain expeditiously from an Internet Service Provider information in the provider's possession identifying the alleged infringer, in cases in which that information is sought for the purpose of protecting or enforcing that copyright.

9. The Parties understand that the failure of an Internet Service Provider to qualify for the limitations in paragraph 1(b) does not itself result in liability. Further, this Article is without prejudice to the availability of other limitations and exceptions to copyright, or any other defenses under a Party's legal system.

10. The Parties recognize the importance, in implementing their obligations under this Article, of taking into account the impact on the right holders and Internet Service Providers.

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<sup>124</sup> For greater certainty, the Parties understand that, "any interested party" may be limited to those with a legal interest recognized under that Party's law.

## Section K: Final Provisions

### Article 20.89: Final Provisions

1. Except as otherwise provided in Article 20.10 (Application of Chapter to Existing Subject Matter and Prior Acts) and paragraphs 2, 3, and 4, each Party shall implement the provisions of this Chapter on the date of entry into force of this Agreement.

2. During the relevant periods set out below, a Party shall not amend an existing measure or adopt a new measure that is less consistent with its obligations under the Articles referred to below for that Party than relevant measures that are in effect on the date of signature of this Agreement.

3. With regard to obligations subject to a transition period, Mexico shall fully implement its obligations under the provisions of this Chapter no later than the expiration of the relevant time period specified below, which begins on the date of entry into force of this Agreement:

- (a) Article 20.7 (International Agreements), UPOV 1991, four years;
- (b) Article 20.45 (Protection of Undisclosed Test or Other Data for Agricultural Chemical Products), five years;
- (c) Article 20.46 (Patent Term Adjustment for Unreasonable Curtailment), 4.5 years;
- (d) Article 20.48 (Protection of Undisclosed Test or Other Data), five years;
- (e) Article 20.70 (Civil Protection and Enforcement), Article 20.73 (Provisional Measures) and Article 20.75 (Civil Remedies), five years; and
- (f) Articles 20.87 (Internet Service Providers) and 20.88 (Legal Remedies and Safe Harbors), three years.

4. With regard to obligations subject to a transition period, Canada shall fully implement its obligations under the provisions of this Chapter no later than the expiration of the relevant time period specified below, which begins on the date of entry into force of this Agreement.

- (a) Article 20.7.2(f) (International Agreements), four years;
- (b) Article 20.44 (Patent Term Adjustment for Unreasonable Granting Authority Delays), 4.5 years; and

(c) Article 20.62(a) (Term of Protection for Copyright and Related Rights), 2.5 years.

## ANNEX 20-A

### ANNEX TO ARTICLE 20.50

1. As an alternative to implementing Article 20.50, and subject to paragraph 2, Mexico may instead maintain a system other than judicial proceedings that precludes, based upon patent-related information submitted to the marketing approval authority by a patent holder or the applicant for marketing approval, or based on direct coordination between the marketing approval authority and the patent office, the issuance of marketing approval to any third person seeking to market a pharmaceutical product subject to a patent claiming that product, unless by consent or acquiescence of the patent holder.
2. If Mexico maintains the system referred to in paragraph 1, Mexico shall ensure that in administrative proceedings under that system:
  - (a) a person of another Party that is directly affected by the proceeding is provided, whenever possible and, in accordance with domestic procedures, with reasonable notice of the initiation of a proceeding, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated and a general description of the issue in question;
  - (b) a person of another Party that is directly affected by the proceeding is afforded a reasonable opportunity to present facts and arguments in support of that person's position prior to any final administrative action, when time, the nature of the proceeding, and the public interest permit; and
  - (c) the procedures are in accordance with its law.

## ANNEX 20-B

### ANNEX TO SECTION J

1. In order to facilitate the enforcement of copyright online and to avoid unwarranted market disruption in the online environment, Articles 20.88.3, 20.88.4, and 20.88.6 (Legal Remedies and Safe Harbors) shall not apply to a Party provided that, as from the date of agreement in principle of this Agreement, the Party continues to:

- (a) prescribe in its law circumstances under which Internet Service Providers do not qualify for the limitations described in Article 20.88.1(b) (Legal Remedies and Safe Harbors);
- (b) provide statutory secondary liability for copyright infringement in cases in which a person, by means of the Internet or another digital network, provides a service primarily for the purpose of enabling acts of copyright infringement, in relation to factors set out in its law, such as:
  - (i) whether the person marketed or promoted the service as one that could be used to enable acts of copyright infringement;
  - (ii) whether the person had knowledge that the service was used to enable a significant number of acts of copyright infringement;
  - (iii) whether the service has significant uses other than to enable acts of copyright infringement;
  - (iv) the person's ability, as part of providing the service, to limit acts of copyright infringement, and any action taken by the person to do so;
  - (v) any benefits the person received as a result of enabling the acts of copyright infringement; and
  - (vi) the economic viability of the service if it were not used to enable acts of copyright infringement;
- (c) require Internet Service Providers carrying out the functions referred to in Article 20.88.2(a) and (c) (Legal Remedies and Safe Harbors) to participate in a system for forwarding notices of alleged infringement, including if material is made available online, and if the Internet Service Provider fails to do so, subjecting that provider to pre-established monetary damages for that failure;

- (d) induce Internet Service Providers offering information location tools to remove within a specified period of time any reproductions of material that they make, and communicate to the public, as part of offering the information location tool upon receiving a notice of alleged infringement and after the original material has been removed from the electronic location set out in the notice; and
- (e) induce Internet Service Providers carrying out the function referred to in Article 20.88.2(c) (Legal Remedies and Safe Harbors) to remove or disable access to material upon becoming aware of a decision of a court of that Party to the effect that the person storing the material infringes copyright in the material.

2. For a Party to which Articles 20.88.3, 20.88.4, and 20.88.6 (Legal Remedies and Safe Harbors) do not apply pursuant to paragraph 1, and in light of, among other things, paragraph 1(b), for the purposes of Article 20.88.1(a), legal incentives shall not mean the conditions for Internet Service Providers to qualify for the limitations provided for in Article 20.88.1(b), as set out in Article 20.88.3.

3. Pursuant to paragraph 1, for a Party to which Articles 20.88.3, 20.88.4, and 20.88.6 (Legal Remedies and Safe Harbors) do not apply:

- (a) the term “modification” in paragraphs 20.87.1(a) and 20.88.2(a) does not include modifications made for solely technical reasons such as division into packets; and
- (b) with regard to paragraph 20.88.7, “except to the extent consistent with the technical measures identified in paragraph 6(b)” does not apply.