

27 Feb 2018

*This document contains the consolidated text as it stands at the end of the XXXIInd round of negotiations (21 February – 2 March 2018) on Intellectual Property Rights in the Trade Part of the EU-Mercosur Association Agreement. This is without prejudice to the final outcome of negotiations. Both sides reserve the right to make subsequent modifications to their proposals.*

**WORKING DOCUMENT: MERCOSUR - EU 27 Feb 2018**  
**MCS EU Subject to final decisions**

**[Chapter on Intellectual Property Rights**

**Section 1 – General Provisions and Principles**

**Article 1**

*General Provisions*

1. The Parties reaffirm the rights and obligations under the WTO Agreement on Trade Related Aspect of Intellectual Property Rights, and any other multilateral agreement related to intellectual property to which they are Parties.
2. The Parties shall be free to determine the appropriate method of implementing the provisions of this Chapter within their own legal system and practice, in a manner consistent with the objectives and principles of the TRIPS Agreement.

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**Article 2**

*Objectives*

1. The objectives of this Chapter are to:
  - a) Facilitate access, production and commercialisation of innovative and creative products and foster trade and investment between the Parties contributing to a more sustainable, equitable and inclusive economy for the Parties;
  - b) Achieve an adequate and effective level of protection and enforcement of intellectual property rights that provides incentives and rewards to innovation while contributing to the effective transfer and dissemination of technology and favouring social and economic welfare and the balance between the rights of the holders and the public interest;
  - c) Foster measures that will help the Parties to promote research and development, and access to knowledge, including to a rich public domain.

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**Article 3**

*Nature and Scope of Obligations*

2. [MCS: For the purposes of this Agreement, intellectual property rights refer to all categories of intellectual property that are the subject of sections 1 through 7 of Part II of the TRIPS Agreement.]

[EU: and / or Article [ ] through [ ] of this Chapter]

3. Protection of intellectual property includes protection against unfair competition as referred to in Article 10bis of the Paris Convention for the Protection of Industrial Property (Stockholm Act 1967).
4. Nothing shall prevent a Party from adopting measures necessary 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, provided that such measures are consistent with the provisions of this Chapter.
5. This Chapter does not create any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and enforcement of law in general.
7. No Party shall be obliged to implement in its law more extensive protection than is required by this Chapter. This Chapter does not preclude the Parties from applying provisions of domestic law introducing higher standards for the protection and enforcement of intellectual property, provided that they do not violate the provisions of this Chapter.

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**Article 4**  
*Principles*

1. Each Party recognises that the protection and enforcement of intellectual property rights can and must be done in a manner conducive to economic, social and scientific progress. Each Party shall ensure the enforcement of intellectual property rights within its own legal system and practice.
2. In formulating or amending its laws and regulations, each Party may establish exceptions and flexibilities permitted by the multilateral instruments to which the Parties are Signatories.
3. [MCS: The provisions in this Chapter shall be implemented in a manner supportive of the United Nations Sustainable Development Goals (SDGs).] [EU: The Parties support the achieving of the United Nations Sustainable Development Goals (SDGs)]
4. The Parties recognise the importance of a robust, rich, and accessible public domain.  
*MOVE TEXT TO THE COOPERATION SECTION*
5. The Parties recognise the importance of the declaration on the TRIPS Agreement and Public Health, adopted on 14 November 2001 (hereinafter referred to as the “Doha Declaration”) by the Ministerial Conference of the WTO. In interpreting and implementing the rights and obligations under this Chapter, the Parties shall ensure consistency with the Doha Declaration.
6. The Parties shall implement Article 31bis of the TRIPS Agreement, as well as the Annex and Appendix to the Annex related thereto, which entered into force on January 23, 2017.
7. The Parties recognise that technology transfer contributes to the strengthening of national capabilities with the aim to establish a sound and viable technological base and innovative capacity.
8. The Parties support the World Health Assembly Resolution WHA 60.28 and the Pandemic Influenza Preparedness (PIP) Framework adopted on The Sixty-fourth World Health Assembly.

9. The Parties recognise the importance of promoting the implementation of Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property, adopted by the World Health Assembly on 24 of May 2008 (Resolution WHA 61.21 as amended by Resolution WHA 62.16), [MCS: and take note of the recommendations of the Report of the WHO Consultative Expert Working Group on Research and Development: Financing and Coordination (CEWG).]

10. [~~EU: The Parties also recognise the importance of implementing the recommendations made by the United Nations Secretary-General's High Level Panel on Access to medicines report released in September 2016 including, but not limited to, the requirement for the patent applicant to inform the relevant international non-proprietary names for the medical products it relates to.~~] (MERCOSUR can delete if EU accepts 13.6)

11. The Parties acknowledge the Development Agenda recommendations, adopted in 2007 by the General Assembly of the World Intellectual Property Organization (WIPO).

13. The Parties recognise the sovereign right of States over their natural resources and the access to their genetic resources in accordance with the Convention on Biological Diversity of 1992 (henceforth referred to as CBD). No provision in this Chapter shall prevent the Parties from adopting or maintaining measures to promote the conservation of biological diversity, the sustainable utilisation of its components and the fair and equitable benefit sharing arising from the utilisation of genetic resources, in conformity with that Convention.

14. The Parties recognize the impact of information and communication technologies on the usage of literary and artistic works, artistic performances, phonogram productions and broadcasts and, therefore, the need to ensure transparency as well as to provide adequate protection of copyright and related rights in the digital environment.

16. Where the acquisition of an intellectual property right is subject to the right being granted or registered, each Party shall make best efforts to ensure the procedures for granting or registration of the right are conducive to the granting or registration within a reasonable period of time so as to avoid unwarranted curtailment of the period of protection.

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*[EU: Article X.4*  
**National Treatment**

[EU: Each Party shall accord to the nationals of another Party treatment no less favourable than that it accords to its own nationals with regard to the protection<sup>1</sup> of intellectual property, subject to the exceptions already provided for in Article 3 and 5 of the TRIPS Agreement [MCS: and elsewhere in this Chapter] ~~THE EXCLUSION OF THE PREVIOUS VERSION SUBJECT TO UE ACCEPTANCE OF MCS ADDITION~~

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<sup>1</sup> [EU: For the purposes of Articles xxx and xxx "protection" shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Title]

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**[MCS: Article 5***Protection of Biodiversity and Traditional knowledge*

1. The Parties recognise the importance and value of biological diversity and its components and of the associated traditional knowledge, innovations and practices of indigenous and local communities<sup>2</sup>. The Parties furthermore reaffirm their sovereign rights over their natural resources and recognise their rights and obligations as established by the Convention of Biological Diversity of 1992 (henceforth referred to as CBD) with respect to access to genetic resources, and to the fair and equitable sharing of benefits arising out of the utilisation of these genetic resources.
2. The Parties reaffirm Article 8(j) of the CBD and recognise the past, present and future contribution of indigenous and local communities to the conservation and sustainable use of biological diversity and all of its components and, in general, the contribution of the traditional knowledge<sup>3</sup> of their indigenous and local communities to the culture and to the economic and social development of nations.
3. In accordance with Article 15 paragraph 7 of the CBD, the Parties reaffirm their obligation to take measures with the aim of sharing in a fair and equitable way the benefits arising from the utilization of genetic resources [or of their derivatives<sup>4</sup>]. The Parties also recognise that [EU: mutually agreed terms may include] benefit-sharing obligations [EU: in relation to intellectual property rights ~~shall include commercialization of products originating from licensed intellectual property rights~~] arising from the use of genetic resources or associated traditional knowledge [EU: ~~and shall be on mutually agreed terms~~].
4. MERCOSUR and the EU shall collaborate in further clarifying the issue and concept of misappropriation of genetic resources and associated traditional knowledge, innovation and practices so as to find, as appropriate and in accordance with the provisions of international and domestic law, measures to address this issue.
5. The Parties shall cooperate, subject to domestic legislation and international law, to ensure that intellectual property rights are supportive of, and do not run counter to, their rights and obligations under the CBD, in so far as genetic resources and associated traditional knowledge of the indigenous and local communities located in their respective territories are concerned. The Parties reaffirm their rights and obligations under Article 16 paragraph 3 of the CBD in relation to countries providing genetic resources, to take measures with the aim to provide access to and transfer of technology which makes use of such resources, upon mutually agreed terms. This provision shall apply without prejudice to the rights and obligations under Article 31 of the TRIPS Agreement.
6. The Parties [EU: acknowledge the usefulness of requiring ~~shall require~~] the disclosure of the origin or source of genetic resources and associated traditional knowledge in patent

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<sup>2</sup> For the purposes of article 5, "indigenous and local communities" may include descendants of enslaved Africans and small scale farmers.

<sup>3</sup> Without prejudice to the implementation of this Chapter, the Parties acknowledge that the concept of traditional knowledge is discussed in relevant international fora.

<sup>4</sup> ~~EU will revert if it is acceptable.~~

applications, considering that this contributes to the transparency about the uses of genetic resources and associated traditional knowledge. ~~[EU: It also enhances the traceability of the use of the resources or knowledge and builds mutual trust among all stakeholders involved in access and benefit sharing.]~~

7. ~~[EU: The Parties agree that benefits arising from the commercialization of products originating from the utilization of genetic resources or associated traditional knowledge, including those developed from the utilization of digital sequence information, shall be shared in a fair and equitable way with the country of origin of such resource.]~~

8. \_\_\_\_\_.

9. Recognising the special nature of agricultural biodiversity, its distinctive features and problems needing distinctive solutions, the parties agree that access to genetic resources for food and agriculture shall be subject to specific treatment in accordance with the International Treaty on Plant Genetic Resources for Food and Agriculture (2001).

10. The Parties may, by mutual agreement, review this Article subject to the results and conclusions of multilateral discussions.

11. The contracting parties shall not register as trademarks: common names associated with the biodiversity, ~~traditional knowledge associated with genetic resources<sup>5</sup> and traditional cultural expressions~~. This prohibition shall be applicable only when these common names are indications concerning the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of the service, or other characteristics of goods or services.]

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#### **Article 6** *Exhaustion*

1. Each Party shall be free to establish its own regime for exhaustion of intellectual property rights subject to the provision of the TRIPS Agreement.

2. In the area of copyright and related rights, exhaustion of rights applies only to the distribution to the public by sale or otherwise of the original of tangible works or tangible copies thereof.

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#### **Article 7** *Technology Transfer and Technical Cooperation*

1. Subject to their resources and domestic policies, the Parties shall encourage access and transfer of technology between enterprises and/or institutions established in each other's territory. Particular attention shall be paid to the conditions necessary to create an adequate enabling environment to promote technology transfer, on mutually agreed terms and conditions and taking into account the legitimate interests of the IPR holders.

3. The Parties are encouraged to exchange information related to public domain technologies in their territory.

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<sup>5</sup> Without prejudice to the implementation of this Chapter, the Parties acknowledge that the concept of traditional knowledge is discussed in relevant international fora.

6. The Parties shall encourage mechanisms for the participation of entities and experts of their respective systems of science, technology and innovation, in projects and joint research, development and innovation networks, with the purpose of strengthening their capacities building in science, technology and innovation. Those mechanisms may include:

- a) joint research, innovation and technological development activities as well as educational and research projects;
- b) visits, training and exchanges of scientists, researchers, interns, and technical experts;
- c) joint organisation of scientific seminars, conferences, symposia and workshops, as well as the participation of MERCOSUR and EU experts in those activities;
- d) joint research, development, and innovation networks;
- e) exchange and sharing of equipment and materials;
- f) promotion of the evaluation of joint work, and the dissemination of results; and
- g) any other activity agreed upon by the Parties.

7. The Parties should consider establishing mechanisms for the exchange of information about research, development and innovation projects financed from public and private resources.

8. The Parties shall facilitate and promote the use of incentives granted to research and academic institutions and enterprises in its territory for the transfer of technology to institutions and enterprises from the signatory MERCOSUR and the EU in order to enable them to establish a viable technological base.

#### **Article 7.2**

##### *Access to medicines*

~~1. [EU: The Parties agree to strengthen the public-funded health research and development capacities and increase investments in health research and development for diseases disproportionately affecting the Parties, in particular Type II and Type III diseases and the specific research and development needs of developing countries in relation to Type I diseases.<sup>6</sup>~~

~~1. The parties agree to capacity building, mutual advice and support and technology transfer. The parties are requested to identify appropriate actions to address barriers to technology development and transfer encountered by Parties, and to promote the creation of patent pools to ensure access to technologies.]~~

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#### **Article 8**

##### *Competition and Intellectual Property*

The Parties shall prohibit any practices or terms and conditions in licensing and other agreements involving intellectual property rights that distort competition and/or have adverse effects on trade and/or impede the transfer of technology.

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### **Section 2- Standards Concerning Intellectual Property Rights**

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<sup>6</sup>For the purposes of this Chapter, disease Types I, II and III shall be understood by reference to the categories created by the Commission on Macroeconomics and Health of the World Health Organization and accepted by the Consultative Expert Working Group on Research and Development: Financing and Coordination in its 2012 report.

**Article 9**  
*Copyright and related rights*

**Article 9.1**  
*International Treaties*

The Parties reaffirm their rights and obligations under the following international agreements taking into consideration that treaties are not binding on those that are not Parties to them:

- a) The Berne Convention for the Protection of Literary and Artistic Works ('the Berne Convention');
- b) The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (hereinafter referred to as the "Rome Convention"); and,
- c) The Marrakesh Treaty to facilitate access for persons who are blind, visually impaired, or otherwise print disabled.
- d) The WIPO Copyright Treaty, adopted in Geneva on 20 December 1996; and
- e) The WIPO Performances and Phonograms Treaty, adopted in Geneva on 20 December 1996.
- f) Beijing Treaty on Audiovisual Performances.

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**Article 9.2**  
*Authors*

Each Party shall provide for authors the exclusive right to authorise or prohibit:

1. Direct or indirect, temporary<sup>7</sup> or permanent reproduction by any means and in any form, in whole or in part of their works;
2. Any form of distribution to the public by sale or otherwise of the original of their works or of copies thereof;
3. Any communication to the public of their works, by wire or wireless means. For the purposes of this Chapter, streaming shall [EU: may] considered communication to the public.
4. The making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them. Parties shall be

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<sup>7</sup> For the purposes of Article 9, the term "temporary" means reproduction for a limited period and does not include incidental or ephemeral reproduction. By "incidental" or "ephemeral" we understand the type of reproduction having the sole purpose of making a work accessible instead of making a copy. Acts of reproduction which are an integral and essential part of a process and whose sole purpose is to enable

- a transmission in a network between third parties by an intermediary, or
- a lawful use of a work or other subject-matter to be made, and which have no independent economic significance.

free to use the term “communication to the public right” or “distribution right” adapted and according to their domestic law, with regard to works on demand or the making available right.

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**Article 9.3**  
*Performers*

Each Party shall provide for performers the exclusive right to authorise or prohibit:

1. The fixation<sup>8</sup> of their performances;
2. The direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part of fixations of their performances;
3. The distribution to the public, by sale or otherwise, of the fixations of their performances.
4. The broadcasting by wireless means, and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation. This article also applies for broadcasting by wire means when the legislation of a Party allows it.
5. The making available to the public of fixations of their performances in such a way that members of the public may access them from a place and at a time individually chosen by them. Parties shall be free to use the term “communication to the public right” or “distribution right” adapted and according to their domestic law, with regard to works on demand or the making available right.

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**Article 9.4<sup>9</sup>**  
*Producers of phonograms*

Each Party shall provide for phonogram producers the exclusive right to authorise or prohibit:

1. The direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part of their phonograms;
2. The distribution to the public, by sale or otherwise, of their phonograms, including copies thereof;
3. [EU: According to the domestic law of the Parties], the broadcasting by wire or wireless means, and the communication to the public of their phonograms. [EU: ~~Subject to domestic legislation Parties may grant exclusive rights as regard the broadcasting and communication to the public of phonograms published for commercial purposes, to performers and producers of phonograms.~~]
4. The making available to the public of their phonograms in such a way that members of the public may access them from a place and at a time individually chosen by them. Parties shall

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<sup>8</sup> Fixation means the embodiment of sounds or images, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device.

<sup>9</sup> For the purposes of Article 9, subject to domestic legislation, each Party may grant exclusive rights, as regards the broadcasting and communication to the public of phonograms published for commercial purposes, to performers and producers of phonograms.



be free to use the term “communication to the public right” or “distribution right” adapted and according to their domestic law, with regard to communication of their phonograms on demand or the making available right.

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**Article 9.5**  
*Broadcasting Organisations*

Each Party may stipulate the legal requirements in their domestic laws as to what is to be considered a Broadcasting Organisation and also shall provide them with the exclusive right to authorise or prohibit:

1. The fixation of their broadcasts;
  2. The direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part, of fixations of their broadcasts;
  3. ~~[EU: Subject to the domestic legislation of the parties, the communication to the public of their broadcasts;]~~
  4. The making available to the public, by wire or wireless means, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite in such a way that members of the public may access them from a place and at a time individually chosen by them. Parties shall be free to use the term “communication to the public right” or “distribution right” adapted and according to their domestic law, with regard to the communication of the fixation of their broadcast on demand or the making available right.
  5. The distribution to the public, by sale or otherwise, of fixations of their broadcasts, and
  6. The rebroadcasting of their broadcasts [EU: ~~by wire or wireless means~~ by wireless means, or where the domestic legislation so provides by wire means], as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.
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**Article 9.6**  
*Right to remuneration for broadcasting and communication to the public*

1. The Parties shall provide a right in order to ensure that a remuneration is paid by the user to the performers and producers of phonograms, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public.
2. The Parties shall provide either that the remuneration be claimed from the user by the performer or by the producer of a phonogram or by both. The Parties may enact legislation that, in the absence of an agreement between performers and producers of phonograms, sets the terms according to which performers and producers of phonograms shall share such remuneration.

**Article 9.7**  
*Term of protection*

1. The rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention shall run for the life of the author and not less than 50 years or for 70 years where the domestic legislation of the Parties so provides, after the author's death. With respect to photographic and cinematographic works the Parties will establish the term of protection according to their domestic laws.
2. In the case of a work of joint authorship, the term referred to in paragraph 1 shall be calculated from the death of the last surviving author.
3. In the case of anonymous or pseudonymous works, the term of protection shall run for not less than 50 years or for 70 years where the domestic legislation of the Parties so provides, after the work is lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, or if the author discloses his identity during the period referred to in the first sentence, the term of protection applicable shall be that laid down in paragraph 1.
4. The rights of performers in a performance otherwise than in a phonogram shall expire not less than fifty years after the date of the performance.
5. The rights of performers and producers of phonograms shall expire not less than 50 years or for 70 years where the domestic legislation of the Parties so provides after the fixation is lawfully published or lawfully communicated to the public. According to their domestic law, the Parties may adopt effective measures in order to ensure that the profit generated during the 20 years of protection beyond 50 years are shared fairly between the performers and producers.
6. The term of protection of the rights of the broadcasting organisations shall be at least 20 years from the first broadcast, or 50 years if the domestic legislation of the Parties allows.
7. The terms laid down in this Article shall be calculated from the 1st January of the year following the event.
8. The terms of protection may exceed the periods provided for in this Article.

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*Article X.12*  
**Resale Right**

1. Each Party may provide, for the benefit of the author of graphic or plastic art, a resale right, defined as an inalienable right, which cannot be waived, even in advance, to receive a percentage of the price obtained from any resale of that work, after the first transfer of that work by the author.
2. The right referred to in paragraph 1 may apply to all acts of resale involving as sellers, buyers or intermediaries art market professionals, such as salesrooms, art galleries and, in general, any dealers in works of art.

3. Each Party may provide that the right referred to in paragraph 1 may not apply to acts of resale where the seller has acquired the work directly from the author less than three years before that resale and when the resale price does not exceed a minimum amount.
  4. Each Party may provide that authors who are nationals of third countries and their successors in title may enjoy the resale right in accordance with the Agreement and the legislation of the Party concerned only if the legislation of the country of which the author or his/her successor in title is a national permits resale right protection in that country for authors from the Party concerned and their successors in title.
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#### **Article 9.8**

##### *Cooperation on collective management of rights*

1. The Parties agree to promote cooperation, transparency and non-discrimination of collective management organisations, in particular as regards the revenues they collect, deductions applied to such income, the use of the royalties collected, the distribution policy and their repertoire, including in the digital environment.
  2. The Parties hereby undertake to ensure that where a collective management organisation established in the territory of a Party represents a collective management organisation established in the territory of another Party in a representation agreement, the representative organisation does not discriminate against entitled members of the represented organisation.
  3. The representing collective management organisation must pay accurately, regularly, diligently, and in full transparency, the amounts owed to the collective management organisation and provide the represented organisation information on the amounts of revenue collected on its behalf and the deductions made.
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#### **Article 9.9**

##### *Exceptions and limitations*

1. Each Party shall provide for exceptions and limitations to the exclusive rights only in certain special cases which do not conflict with a normal exploitation of the subject matter and do not unreasonably prejudice the legitimate interests of the right holders.
  2. The Parties shall provide that temporary acts of reproduction which are transient or incidental, which are an integral and essential part of a technological process and the sole purpose of which is to enable:
    - (a) A transmission in a network between third parties by an intermediary; or
    - (b) A lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right.
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*Article X.15*  
***Technological Protection Measures***

Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by right holders in connection with the exercise of their rights under this Agreement and that restrict acts which are not authorised by the right holders concerned or permitted by law.

The Parties, (EU: where permissible in accordance to their domestic law) shall (EU may) ensure that right holders make available to the beneficiary of an exception or limitation the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation.

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**Article 9.10**  
*Obligations concerning Rights Management Information*

1. The Parties shall provide adequate legal protection against any person knowingly performing without authority any of the following acts:

- (a) The removal or alteration of any electronic rights-management information;
- (b) The distribution, importation for distribution, broadcasting, communication or making available to the public of works or other subject-matter protected under this Agreement from which electronic rights-management information has been removed or altered without authorisation, if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright or any related rights.

2. For the purposes of this article "rights-management information" means any information provided by right holders which identifies the work or other subject-matter referred to in this Agreement, the author or any other right holder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information.

3. The subparagraph 1 shall apply when any of these items of information is associated with a copy of, or appears in connection with the communication to the public of, a work or other subject-matter referred to in this Article.

4. The Parties shall ensure that this protection shall not harm non-infringing uses.

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**Article 10**  
*Trademarks*

*Article X.17*  
**International Agreements**

Each Party:

- (a) shall comply with the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, done at Nice on 15 June 1957, as amended on 28 September 1979 (“Nice Classification”)<sup>10</sup>; and,
- (b) shall make best efforts to comply with the Protocol related to the Madrid Agreement concerning the International Registration of Marks, adopted at Madrid on 27 June 1989, as last amended on 12 November 2007.

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**Article 10.1**  
*Registration Procedure*

1. The Parties shall establish a system for the registration of trademarks in which each final negative decision, including the partial refusal of registration issued by the relevant trademark administration, shall be notified in writing and duly reasoned and open to challenge.
2. The Parties shall provide for the possibility to oppose applications to register trademarks or, where appropriate, the registration of trade marks. Such opposition proceedings shall be adversarial.
3. The Parties shall provide a publicly available electronic database of applications and registrations of trademarks.

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**Article 10.2**  
*Rights conferred by a trademark*

The registered trademark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:

- (a) Any sign which is identical with the trademark in relation to goods or services which are identical with those for which the trademark is registered;
- (b) Any sign where, because of its identity with, or similarity to, the trademark and the identity or similarity of the goods or services covered by the trademark and the sign, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association between the sign and the trademark.

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<sup>10</sup> This obligation only applies to trademarks registered after the date of adoption of the Nice classification criteria or of accession to the instrument.

**Article 10.3**  
*Well-known Trademarks*

1. Article 6bis of the Paris Convention (1967) shall apply, *mutatis mutandis*, to services. In determining whether a trademark is well-known, Members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark.
  2. Article 6bis of the Paris Convention (1967) shall apply, *mutatis mutandis*, to goods or services which are not similar to those in respect of which a trademark is registered, 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 registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.
  3. For the purpose of giving effect to protection of well-known trademarks, as referred to in Article 6bis of the Paris Convention and paragraphs 2 and 3 of Article 16 of the TRIPS Agreement, each Party shall take into due consideration the principles established in the Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks adopted by the Assembly of the Paris Union for the Protection of Industrial Property and the General Assembly of the WIPO at the Thirty-Fourth Series of Meetings of the Assemblies of the Member States of WIPO on 20 to 29 September 1999.
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**Article 10.5**  
*Invalidation of the registration application in bad faith*

A trade mark shall be liable to be declared invalid where the application for registration of the trademark was made in bad faith by the applicant. The Parties may also provide that such a trademark shall not be registered.

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**Article 10.6**  
*Exceptions to the Rights Conferred by a Trademark*

1. Each Party shall provide for limited exceptions to the rights conferred by a trademark such as the fair use of descriptive terms, including in the case of geographical indications, and they may provide other limited exceptions, provided such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.
  2. The trademark shall not entitle the owner to prohibit a third party from using:
    - (a) Their own name or address where that third party is a natural person;
    - (b) Indications concerning the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of the service, or other characteristics of goods or services;
    - (c) The trademark where it is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts; provided he uses them in accordance with honest practices in industrial or commercial matters.
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**Article 11**  
*Designs*

*EU: Article X.24*

**International Agreements**

Each Party shall make the best efforts to comply with the Geneva (1999) Act of the Hague Agreement Concerning the International Registration of Industrial Designs done at Geneva on 2 July 1999.

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**Article 11.1**  
*Protection of Registered Designs*

1. Each Party shall provide for the protection of independently created designs that are new and original<sup>11</sup>. This protection shall be provided by registration and shall confer an exclusive right upon their holders in accordance with the provisions of this article.
  2. The holder of a registered design shall have at least the right to use and prevent third parties not having the owner's consent at least from using and notably making, offering for sale, selling, putting on the market, importing, exporting, stocking such a product or using articles bearing or embodying the protected design when such acts are undertaken for commercial purposes, unduly prejudice the normal exploitation of the design, or are not compatible with fair trade practice.
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**Article 11.2**  
*Term of Protection*

The duration of protection available, including renewals, shall amount to at least 15 years from the date of filing the application.

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**Article 11.3**  
*Protection Conferred to Unregistered Designs*

Each Party may establish legal means to prevent the use of unregistered designs, according to their domestic law.

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**Article 11.4**  
*Exceptions and Exclusions*

1. Each Party may establish limited exceptions to the protection of designs, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected

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<sup>11</sup> For the purpose of this Article, a Party may consider that a design having individual character is original.

designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design, taking account of the legitimate interests of third parties.

2. Design protection shall not extend to designs dictated essentially by technical or functional considerations.

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**Article 11.5**

*Relationship to Copyright*

A design shall also be eligible for protection under the law of copyright of a Party when this protection is provided for by its legislation and the requirements are met, as from the date on which the design was created or fixed in any form. The extent to which, and the conditions under which, such a protection is conferred, including the level of originality required, shall be determined by each Party.

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**Article 12\***

*Geographical Indications*

**\* Parties referred to are the EU and Mercosur as such**

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**Article 12.1**

*Protection of Geographical Indications*

1. This Article applies to the recognition and protection of geographical indications originating in the territory of the Parties.
2. The Parties shall take the necessary measures to implement the protection of geographical indications referred to in paragraph 1 in their territories, determining the appropriate method for such implementation within their own legal system and practice.
3. The established geographical indications of a Party to be protected by the other Party shall only be subject to this Article if they are protected as geographical indications in the territory of the Party of origin in accordance with its system of registration and protection of geographical indications.
4. The Parties, having examined both the legislation of the other Party referred to in Annex I to this Article and the geographical indications of the other Party listed in Annex II, and having completed an objection procedure or public consultation related to the geographical indications of the other Party listed in Annex II, undertake to protect since the date of entry into force of the Agreement those geographical indications in accordance with the level of protection laid down in [the Article 12.3] this Article.

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*Article 12.2*

**Addition of new Geographical Indications**

1. [The Parties agree on the possibility to add in Annex II new geographical indications or existing geographical indications not included in the Agreement, the latter on an exceptional basis, to be protected pursuant to a mutually agreed decision taken by the [Joint Committee] set



up in accordance with Article 12.7 and after having completed the steps described in Article 12.1.4 to the satisfaction of both Parties.]

*PROVISIONS OF THIS ARTICLE ARE SUBJECT TO FINAL DECISION AT CHIEF NEGOTIATORS' LEVEL.*

### **Article 12.3**

#### *Scope of Protection for Geographical Indications*

1. For the geographical indications listed in Annex II each Party shall provide the legal means, according to its domestic legislation, for interested parties to prevent:

(a) The use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin, in a manner which misleads the public as to the geographical origin of the good;

(b) Any other use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention for the Protection of Industrial Property (1967) done at Stockholm on 14 July 1967.

2. For the geographical indications listed in Annex II, the Parties shall also provide the legal means according to its domestic legislation, for interested parties to prevent:

- any direct or indirect commercial use of a protected name for comparable products not complying with the product specification of the protected name, or that exploits the reputation of a geographical indication;
- the use of a geographical indication not originating in the place indicated by the geographical indication, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as "kind", "type", "style", "imitation" or the like;
- against any misuse, imitation or deceiving use of a protected name of a geographical indication; or against any false or misleading indication to a protected name of a geographical indication; or against any practice liable to mislead the consumer as to the true origin, provenance and nature of the product.

3. Regarding the relationship between trademarks and geographical indications, the Parties agree on the following:

a. Where a geographical indication is protected under this Article, the Parties shall refuse the registration of a trademark for the same or a similar product, the use of which would contravene this Article, provided that an application for registration of the trademark was submitted after the date of application for protection of the geographical indication on the territory concerned. Trademarks registered in breach of this subparagraph shall be invalidated according to the legislation of the Parties.

b. For geographical indications listed in Annex II at the date of entry into force of the Agreement, the date of submission of the application for protection referred to in paragraph 3(a)

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*Limited*  
*Without prejudice*

shall be the date of the publication of the opposition procedure or public consultation in the respective territories.

c. [For geographical indications referred to in Article 12.2, the date of submission of the application for protection shall be the date of the transmission of a request to another Party to protect a geographical indication.]

d. Without prejudice to paragraph 3(e), the Parties shall protect the geographical indications referred to in Annex II also where a prior trademark exists. A prior trademark shall mean a trademark, which has been applied for, registered or established by use, if that possibility is provided for by the legislation concerned, in good faith in the territory of one Party before the date on which the application for protection of the geographical indication is submitted by the other Party under this Agreement.

Such trademark may continue to be used, renewed and be subject to variations which may require the filing of new trademark applications, notwithstanding the protection of the geographical indication, provided that no grounds for the trademark's invalidity or revocation exist in the legislation on trademarks where the trademark has been registered or established.

Neither the prior trademark nor the geographical indication shall be used in a way that would mislead the consumer as to the nature of the intellectual property right concerned.

e. The Parties shall not be obliged to protect a geographical indication in the light of a famous, reputed or well-known trademark, where the protection is liable to mislead the consumer as to the true identity of the product.

4. Nothing shall prevent the use by a Party, with respect to any product, of a customary name of a plant variety or an animal breed, existing in the territory of that Party as of the date of entry into force of this Agreement.<sup>12</sup>

5. Nothing shall prevent the use by a Party of an individual component of a multi-component term that is protected as a geographical indication in the territory of that Party if such individual component is a term customary in the common language as the common name for the associated good.<sup>13</sup>

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6. [In the case that the name of a geographical indication constitutes a term commonly used, the GI may be protected without prejudice of the term still being used in the common language.]

7. If a translation of a geographical indication is identical with or contains within it a term customary in common language as the common name for a product in the territory of a Party, or if a geographical indication is not identical with but contains within it such a term, the provisions of this Article shall not prejudice the right of any person to use that term in association with that product.

8. Regarding homonymous geographical indications, the Parties agree on the following:

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<sup>12</sup> The Parties define via a side letter the plants varieties and animal breeds the use of which shall not be prevented.

<sup>13</sup> The Parties define via a side letter the terms for which protection is not sought/granted.

a. In the case of existing or future homonymous geographical indications of the Parties for products falling within the same product category<sup>14</sup>, both will coexist *per se*, and each Party shall determine the practical conditions under which the homonymous indications in question shall be differentiated from each other, taking into account the need to ensure equitable treatment of the producers concerned and that consumers are not misled.

b. Where a Party, in the context of negotiations with a third country proposes to protect a geographical indication from that third country, and the name is homonymous with a geographical indication from the other Party, the latter shall be informed and be given the opportunity to comment before the name is protected.

c. [MCS: 3. Where a Party, in the context of negotiations with a third country obtains recognition to protect a geographical indication, and the name is homonymous with a trade mark or a generic name which is used by the other Party to export a good to that third country, the said recognition shall not prevent the continuation of the use of the generic name in that third country.]

9. [For the geographical indications listed in Annex II, the level of protection is agreed by the Parties, as it indicated in each case.]

10. [Protected geographical indications listed in Annex II shall not become generic in the territories of the Parties.] *MERCOSUR WILL PROVIDE ADDITIONAL TEXT*

11. There shall be no obligation under this Chapter to protect geographical indications which are not or cease to be protected in their place of origin.

12. The provisions of this Chapter shall not prejudice the right of any person to make commercial use of that person's name or the name of that person's predecessor in business, except where such name is used in such a manner as to mislead the public.

#### Exceptions

[MCS: 5. Nothing in this Article shall prevent the use by nationals of MERCOSUR countries within or without the territory of each Party of a geographical indication of the European Union with respect to goods for which the relevant indication is identical with the term customary in common language as the common name for such goods in the territory of MERCOSUR countries.]

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#### *Article 12.4*

#### **[EU: Right of Use of Geographical Indications**

1. A geographical indication under this Agreement may be used by any operator marketing

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<sup>14</sup> In accordance with the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, done at Nice on 15 June 1957, and its amendments.

agricultural products, foodstuffs, wines, aromatised wines or spirit drinks which conform to the corresponding specification.

2. [Once a geographical indication is protected under this agreement, the use of such protected name shall not be subject to any registration of users, or further charges.] *UNDER CONSIDERATION MCS*

3. [Indications, abbreviations and symbols referring to the geographical indication may only be used in relation to the product protected or registered in the respective territories and produced in conformity with the corresponding product's specification or regulation.] *UNDER CONSIDERATION MCS*

*Article 12.5*

**Enforcement of Protection**

The Parties shall provide the legal means for interested parties to seek enforcement of the protection provided for in Articles 12.3 via appropriate administrative action by public authorities and via judicial steps, within their own legal system and practise.

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*Article 12.6*

**General Rules**

1. Import, export and marketing of products corresponding to the names referred to in Annex II shall be conducted in compliance with the laws and regulations applying in the territory of the Party in which the products are placed on the market. [MCS: For wine products and spirits imported from MERCOSUR listed in Annex II, the existence in the EU of traditional expressions used on the label, cannot impede or restrict the placed in the EU market of those MERCOSUR products.]

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*Article 12.7*

**[Joint Committee], cooperation and transparency**

1. The Parties agree to set up a [Joint Committee] consisting of representatives of the European Union and MERCOSUR countries with the purpose of monitoring the development of this Article and of intensifying their co-operation and dialogue on geographical indications.

2. The [Joint Committee] adopts its decisions by consensus. It can determine its own rules of procedure. It shall meet at the request of either of the Parties, alternatively in the European Union and in the MERCOSUR countries, at a time and a place and in a manner (which may include by videoconference) mutually determined by the Parties, but no later than 90 days after the request.

3. The [Joint Committee] shall also see to the proper functioning of this Article and may consider any matter related to its implementation and operation. In particular, it shall be responsible for:

- (a) taking decisions amending Annex I as regards the references to the law applicable in the Parties,

(b) taking decisions modifying Annex II as regard to geographical indications and exchanging information for that purpose,

(c) exchanging information on legislative and policy developments on geographical indications and any other matter of mutual interest in the area of geographical indications.

Parties shall notify each other if a geographical indication listed in Annex II ceases to be protected in the territory of the Party concerned. Following such notification, the Joint Committee shall modify Annex II in accordance with Article 12.7.3(b) to end the protection under this Agreement.

Only the Party in which the product originates is entitled to request the end of the protection under this Article of a geographical indication listed in Annex II.

4. Parties shall, either directly or through the [Joint Committee], remain in contact directly on all matters relating to the implementation and the functioning of this Article. In particular, a Party may request from the other Party information relating to product specifications and their amendments, as well as contact points for control provisions.

5. A product specification referred to in this agreement shall be the one approved, including any amendments also approved, by the authorities of the Party in the territory from which the product originates.

6. Parties may make publicly available the product specifications or a summary thereof corresponding to the geographical indications of the other Party protected pursuant to this Article, in Portuguese, Spanish or English.

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*ANNEX I*  
*Legislation of the Parties*

**1. ARGENTINA**

GI

Ley 25.380 - Indicación Geográfica y Denominación de Origen de productos agrícolas y alimentarios

Ley 25.966 - Modificatoria de la Ley N° 25.380

Resolución 546/2011 - Aprobación de signos distintivos

Resolución 587/2010 - Registro de Indicaciones Geográficas y Denominaciones de Origen de productos agrícolas y alimentarios

Decreto reglamentario 556/2009 - Reglamenta la Ley 25.380 y su modificatoria

GI wines and spirits

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*Without prejudice*

Ley 25.163 - Vinos y bebidas espirituosas de origen v nico

Decreto Reglamentario N  57/2004

Resoluci n C 11/04 (INV)

Resoluci n C 35/02 - Publicaci n edictos, conforme ley en vigencia (INV)

Resoluci n C 8/03 – Registro, protecci n y derecho al uso de una DOC (INV)

## **2. BRAZIL**

Instru o Normativa N  25/2013 (Instituto Nacional da Propriedade Industrial)

## **3. PARAGUAY**

Ley N  4.923 – De indicaciones geogr ficas y denominaciones de origen

## **4. URUGUAY**

Ley N  17.011 – Ley de marcas

Decreto Reglamentario N  34/999 – Reglamentaci n de la ley de marcas

## **5. EUROPEAN UNION**

Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012, with its implementing rules, on quality schemes for agricultural products and foodstuffs.

Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 on the common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007.

Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 and its implementing acts.

Regulation (EU) No 251/2014 of the European Parliament and of the Council of 26 February 2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products and repealing Council Regulation (EEC) No 1601/1991.

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## *ANNEX II*

### *Geographical indications of products as referred to in Article 12.1*

**Agricultural products, processed agricultural products, fish and fishery products other than wines, spirits and aromatised wines of the European Union to be protect in the Mercosur countries:**

Member State of the European Union Name to be protected/ / product type

[...]

**Agricultural products, processed agricultural products, fish and fishery products other**

than wines, spirits and aromatised wines of the Mercosur countries to be protect in the European Union:

*[MCS: \* once the registration procedure is concluded in Paraguay, in accordance with its domestic legislation, the following GIs shall be recognized by the EU]*

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*ANNEX II...*

**Geographical indications of products as referred to in Article 12.1**

**Wines, spirits and aromatised wines of the European Union to be protected in the Mercosur countries:**

Member State of the European Union Name to be protected / / product type

**Wines, spirits and aromatised wines of the Mercosur countries to be protected in the European Union**

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**Article 13**

*Patents*

**MCS: Article 13.1**

*International treaties*

The Parties shall [EU: comply with] [MCS: make best efforts to adhere to] the Patent Cooperation Treaty.

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**EU proposal to replace current articles X44 and X45 in the working document with MCS.**

**[Administrative Authorisation**

[Each Party shall provide for an adequate and effective mechanism to compensate the patent owner for the reduction in the effective patent life resulting from unreasonable delays in the granting of the first marketing authorisation in its respective territory. Such compensation may be in the form of an extension of the duration of the patent protection. The Parties may limit this extension to [...] years.]

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**MCS: Article 13.2**

*Patent procedure*

1. Each Party shall make best efforts to process patent applications in an efficient and timely manner, with a view to avoiding delays. [EU: OK in principle but placement will be discussed]
2. *The Parties shall require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art and may require the applicant to indicate the best mode for carrying out the invention*

known to the inventor at the filing date or, where priority is claimed, at the priority date of the application. [art. 29 TRIPS]

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**[MCS: Article 13.4**  
*Exceptions and limitations*

The rights conferred by a patent shall not extend to any of the following:

- a) acts done privately and for non-commercial purposes;
- b) acts done for educational purposes relating to the subject-matter of the patented invention;
- c) acts done for research and experimental purposes relating to the subject-matter of the patented invention;
- d) the use of patented biological material for the purpose of breeding, or discovering and developing other plant varieties;
- e) the acts, studies, tests and trials related or in connection with an application and/or a procedure to obtain an authorization to place pharmaceutical, veterinarian or agrochemical products on the market, and the consequential practical requirements;
- f) the preparation by a pharmacy, for individual cases, of a medicine in accordance with a medical prescription or acts concerning the medicine so prepared;
- g) Temporary transit of patented products in the national territory of the Parties;
- h) *Bona fide* prior use;
- i) Personal use of patented medical products;
- j) Any other exception permitted under Article 30 of the TRIPS Agreement.]

[EU: Reference to Art. 30 TRIPS is needed] [MCS: may be replaced by wording art. 30 TRIPS depending on further discussions]

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**MCS: Article 13.5**  
*Accountability to Civil Society*

[Each Party shall make their best efforts to improve and make more transparent and efficient the management and procedure for the granting of patents. To that end, each Party should monitor, evaluate and publicly inform in a clear and comprehensive way how the patent office is performing in terms of promotion of innovation, transfer of technology, access to health and, more generally, serving the public interest.] [EU: will propose new wording]

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**[Article 13.6**  
*Disclosure*

The Parties shall require that the applicant for a patent shall disclose the invention in a manner sufficiently clear and complete. The Parties shall require that the applicant for a patent relating to a pharmaceutical product or process must inform, if existent by the time of the application or afterwards as soon as included at the WHO Drug Information, the International Non-proprietary Name (INN) associated to the product or process.] [EU: considers this issue covered by language being discussed in art. 13.2.2]

[Placeholder: MERCOSUR will introduce additional text on this article]

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[Article 13.7  
*Patent Opposition*

The Parties shall make best efforts ~~are free~~ to establish systems of pre- and/or post-grant opposition systems, including through *inter parte* procedures. Oppositions may be based, *inter alia*, on lack of novelty, inventive step or industrial applicability; non-patentable subject matter; subject matter offensive to public interest or morality; and insufficient disclosure, including lack of written description and enablement.] [EU: prefers to delete this article]

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*SUB-SECTION 6*

*Plant Varieties*

*Article X.46*

**International Agreements**

Each Party shall protect plant varieties rights, in accordance with the International Convention for the Protection of New Varieties of Plants adopted in Paris on 2 December 1961, as revised in Geneva on November 10, 1972, and on October 23, 1978 (1978 UPOV ACT) or on March 19, 1991 (1991 UPOV ACT), and shall cooperate to promote the Protection of Plant Varieties.

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**Article 14**

*Undisclosed information*

1. The Parties agree that undisclosed know-how and business information refers to those formally binding agreements constituted among public organizations, the private sector and/or scientific and technological institutions with the aim of establishing (a) conditions, rights, and obligations related to the economic exploitation of knowledge, information and (b) techniques related to products and processes of production, which are under possession of the assignor organization.
2. This Chapter does not require a Party to disclose information that would otherwise be contrary to its law or exempt from disclosure under its law concerning access to information and privacy.
3. Each Party shall protect undisclosed test or other data related to safety and efficacy of pharmaceutical products and agricultural chemical products, in accordance with Article 39 of the TRIPS Agreement and its domestic legislation.

*SUB-SECTION 7*

*Protection of Undisclosed Information*

*Article X.47*

**Scope of protection of trade secrets**

1. In fulfilling its obligation under Article X.2.1 to comply with the TRIPS Agreement, and in particular paragraphs 1 and 2 of Article 39 of the TRIPS Agreement, each Party

shall provide for appropriate civil judicial procedures and remedies for any person lawfully in control of a trade secret to prevent, and obtain redress for, the acquisition, use or disclosure of a trade secret whenever carried out in a manner contrary to honest commercial practices.

2. For the purpose of this subsection:
  - (a) 'trade secret' means information that:
    - (i) 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;
    - (ii) has commercial value because it is secret; and
    - (iii) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.
  - (b) 'trade secret holder' means any natural or legal person lawfully controlling a trade secret.
3. For the purpose of this subsection, at least the following conducts shall be considered contrary to honest commercial practices:
  - (a) the acquisition of a trade secret without the consent of the trade secret holder, whenever carried out by unauthorised access to, appropriation of, or copying of any documents, objects, materials, substances or electronic files, lawfully under the control of the trade secret holder, containing the trade secret or from which the trade secret can be deduced;
  - (b) the use or disclosure of a trade secret whenever carried out, without the consent of the trade secret holder, by a person who is found to meet any of the following conditions:
    - (i) having acquired the trade secret unlawfully;
    - (ii) being in breach of a confidentiality agreement or any other duty not to disclose the trade secret; or
    - (iii) being in breach of a contractual or any other duty to limit the use of the trade secret.
  - (c) the acquisition, use or disclosure of a trade secret whenever carried out by a person who, at the time of the acquisition, use or disclosure, knew or ought, under the circumstances, to have known that the trade secret had been obtained directly or indirectly from another person who was using or disclosing the trade secret unlawfully within the meaning of point (b), including when a person induced another person to carry out the actions referred to in point (b).
4. Nothing in this subsection shall be understood as requiring any Party to consider any of the following conducts as contrary to honest commercial practices:
  - (a) independent discovery or creation by a person of the relevant information;

- (b) reverse engineering of a product by a person who is lawfully in possession of it and who is free from any legally valid duty to limit the acquisition of the relevant information;
  - (c) acquisition, use or disclosure of information required or allowed by the relevant domestic law;
  - (d) use by employees of their experience and skills honestly acquired in the normal course of their employment.
5. Nothing in this subsection shall be understood as restricting freedom of expression and information, including media freedom as protected in the jurisdiction of each of the Parties.
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*Article X.48*

**Civil judicial procedures and remedies of trade secrets**

1. Each party shall ensure that the any person participating in the civil judicial proceedings referred to in Article 11.1 (scope of protection of trade secrets) or who has access to documents which form part of those legal proceedings, is not permitted to use or disclose any trade secret or alleged trade secret which the competent judicial authorities have, in response to a duly reasoned application by an interested party, identified as confidential and of which they have become aware as a result of such participation or access.
2. In the civil judicial proceedings referred to in Article 11.1 (scope of protection of trade secrets), each Party shall provide that its judicial authorities have the authority at least to:
  - (a) order provisional measures, as set out in the respective domestic laws and regulations, to prevent the acquisition, use or disclosure of the trade secret in a manner contrary to honest commercial practices;
  - (b) order injunctive relief to prevent the acquisition, use or disclosure of the trade secret in a manner contrary to honest commercial practices;
  - (c) order the person that knew or ought to have known that he, she or it was acquiring, using or disclosing a trade secret in a manner contrary to honest commercial practices to pay the trade secret holder damages appropriate to the actual prejudice suffered as a result of the unlawful acquisition, use or disclosure of the trade secret;
  - (d) take specific measures to preserve the confidentiality of any trade secret or alleged trade secret produced in civil proceedings relating to the alleged acquisition, use and disclosure of a trade secret in a manner contrary to honest commercial practices. Such specific measures may include, in accordance with their respective domestic law, the possibility of restricting access to certain documents in whole or in part; of restricting access to hearings and their corresponding records or transcript; and of making available a non-confidential version of judicial decision in which the passages containing trade secrets have been removed or redacted.

- (e) impose sanctions on parties, or other persons subject to the court's jurisdiction for violation of judicial orders concerning the protection of a trade secret or alleged trade secret produced in that proceedings.
3. The Parties shall not be required to provide for the judicial procedures and remedies referred to in Article 11.1 (scope of protection of trade secrets) when the conduct contrary to honest commercial practices is carried out, in accordance with their relevant domestic law, to reveal misconduct, wrongdoing or illegal activity or for the purpose of protecting a legitimate interest recognised by law.

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**EU proposal to replace current articles X.49 and X.50 in the working document with MCS.**

**[Protection of Undisclosed Information**

1. In order to implement Article 39 of the TRIPS Agreement, and in the course of ensuring effective protection against unfair competition as provided for in Article 10bis of the Paris Convention, each Party shall protect confidential information and data submitted to government or governmental agencies in accordance with this Article.

2. If a Party requires, as a condition for approving the marketing of pharmaceutical or agrochemical products [MCS: which utilize new chemical entities], the submission of undisclosed test or other data, the origination of which involves a considerable effort, the Party shall protect such data against unfair commercial use. In addition, each Party shall protect such data against disclosure, except where necessary to protect the public [MCS: or unless steps are taken to ensure that the data are protected against unfair commercial use]. This is without prejudice to any applicable legally binding provisions governing access of the public to documents and freedom of information.

3. Each Party shall provide that for data referred to in paragraph 2 that is submitted to the Party after the date of entry into force of this Agreement, no other applicant for marketing approval may, without permission of the person that submitted the data, rely on that data in support of an application for marketing approval during a reasonable period, which shall normally mean not less than five years for pharmaceuticals and not less than ten years for agrochemicals from the date on which the Party granted approval to the person that produced the data for approval to market its product. This is without prejudice to additional periods of protection which either Party may recognise in accordance with its legislation.]

[MCS: 3. Aspects related to the submission of undisclosed test or other data, as a condition for approving the marketing of pharmaceutical or agrochemical products, and the protection of such data against unfair commercial use shall be a matter of mutual consultations/joint work.]

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**Section 3**  
*Civil Enforcement of intellectual property rights*

*Article X.51*  
**General obligations**

1. The Parties reaffirm their commitments under the TRIPS Agreement and in particular of Part III thereof, and shall ensure the enforcement of intellectual property rights in accordance with their domestic law and within their own legal system and practice.
2. For the purposes of Articles... through..., unless otherwise provided, intellectual property rights refer to Article 3.2 of this Chapter.
3. Procedures<sup>15</sup> adopted, maintained, or applied to implement the provisions of this Chapter shall be effective, fair and equitable shall not be unnecessarily complicated or costly, or entail unreasonable time limits or unwarranted delays, and shall act as a deterrent to further infringements. Each Party shall take into account the need for proportionality among the infringement, the rights of all parties involved, the interests of third parties, and the applicable measures, remedies and penalties.
4. Procedures concerning the enforcement of intellectual property rights 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.
5. It is understood that this sub-section does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general and according to domestic law, nor does it affect the capacity of the Parties to enforce their law in general. Nothing in this sub-section creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.

[MCS: 6. Parties agree that this Section does not create any judicial procedure nor any right that could be directly invoked and/or applied in intellectual property procedures without further implementation by domestic law.] *PARTIES AGREE THAT THIS ISSUE SHOULD BE ADDRESSED IN GENERAL/INSTITUTIONAL/ PROVISIONS*

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*Article X.52*  
**Persons Entitled to Apply for Procedures**

Each Party shall recognise as persons entitled to seek application of the procedures concerning the enforcement of intellectual property rights referred to in this Section and in Part III of the TRIPS Agreement, in accordance with the domestic law where the procedure takes place at least :

- (a) the holders of intellectual property rights;
- (b) exclusive licensees, in so far as authorized by the right holders; and,
- (c) intellectual property collective rights management bodies which are legally and expressly recognised as having a right to represent holders of intellectual property rights.

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<sup>15</sup> For the purposes of this Section, procedures also include measures and remedies.

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*SUB-SECTION 2**Civil and Administrative Enforcement**Article X.53***Evidence**

1. Each Party shall ensure that, the competent judicial authorities may, on application by a party which has presented reasonably available evidence to support his claims that his intellectual property right has been infringed or is about to be infringed, order prompt and effective provisional measures to preserve relevant evidence in respect of the alleged infringement, subject to the protection of confidential information<sup>16</sup>.
2. Such measures may include, the detailed description, with or without the taking of samples, or the physical seizure, of the alleged infringing goods, and, in appropriate cases, the documents relating thereto, subject to the protection of confidential information.
3. Each Party shall take the measures necessary, in cases of trademark counterfeiting or copyright piracy on a commercial scale<sup>17</sup>, to enable the competent judicial authorities to order, where appropriate, on application by a party, and when necessary to determine the existence and extent of an infringement, the communication of relevant banking, financial or commercial documents under the control of the opposing party, subject to the protection of confidential information.
4. Each Party shall ensure that the measures to preserve evidence shall be subject to the lodging by the applicant of adequate security or an equivalent assurance intended to ensure compensation for any prejudice suffered by the defendant.
5. Where the measures to preserve evidence are revoked, or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by those measures.

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*Article X.54***Right of Information**

1. Each Party may /~~[EU: shall]~~ ensure that, in cases of ~~[EU: an infringement of intellectual property right] [EU: wilful trademark counterfeiting or copyright piracy on a commercial scale]~~ and in response to a justified and proportionate request of the claimant, ~~[EU: in so far as permitted by and in accordance with the provisions of the domestic law]~~, the competent judicial authorities may order the infringer and/or any other person which is party to a litigation to provide relevant information on the origin and distribution networks of the infringing goods or services.

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<sup>16</sup> For the purposes of this Article confidential information may include personal data.

<sup>17</sup> A Party may extend the application of this paragraph to other intellectual property rights.

- (a) "Any other person" in this paragraph means a person who was:
    - (i) found in possession of the goods;
    - (ii) found to be using the services;
    - (iii) found to be providing on a commercial scale services used in activities; or
    - (iv) indicated by the person referred to in subparagraph (i) to (iii) as being involved in the production, manufacture or distribution of the goods or the provision of the services.
  - (b) Relevant information may include information regarding any person involved on a commercial scale in the infringement or alleged infringement and regarding the means of production and distribution networks of the goods or services.
2. This Article shall apply without prejudice to other statutory provisions which:
- (a) grant the right holder rights to receive fuller information;
  - (b) govern the use in civil or criminal proceedings of the information communicated pursuant to this Article;
  - (c) govern responsibility for misuse of the right of information;
  - (d) afford an opportunity for refusing to provide information which would force the person referred to in paragraph 1 to admit his own involvement or that of his close relatives; or
  - (e) govern the protection of confidentiality of information sources or the processing of personal data.
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*Article X.55*

**Provisional and Precautionary Measures**

1. Each Party shall ensure that the judicial authorities may, at the request of the applicant, issue against the alleged infringer an interlocutory injunction intended to prevent any imminent infringement of an intellectual property right, or to forbid, on a provisional basis and subject, where appropriate, to a recurring penalty payment where provided for by domestic law, the continuation of the alleged infringements of that right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the right holder. An interlocutory injunction may also be issued, under the same conditions, against an intermediary whose services are being used by a third party to infringe an intellectual property right. For the purposes of this Article, "intermediaries" include internet service providers.

EU alternative to this first paragraph:

Each Party shall provide that its judicial authorities have the authority to order prompt and effective provisional and precautionary measures, including an interlocutory injunction, against a party, or where appropriate, against a third party over whom the relevant judicial authority exercises jurisdiction, to prevent an infringement of an

intellectual property right from occurring, and in particular, to prevent infringing goods from entering into the channels of commerce.

2. An interlocutory injunction may also be issued to order the seizure or delivery up of goods suspected of infringing an intellectual property right, so as to prevent their entry into or movement within the channels of commerce.
3. In the case of an alleged infringement committed on a commercial scale, the Parties shall ensure that, if the applicant demonstrates circumstances likely to endanger the recovery of damages, the judicial authorities may order the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his bank accounts and other assets. To that end, the competent authorities may order the communication of bank, financial or commercial documents, or appropriate access to the relevant information.

*Article X.55*

**Provisional and Precautionary Measures**

The Parties reaffirm their commitments under Article 50 of the TRIPS Agreement.

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*Article X.56*

**Remedies**

1. Each Party shall ensure that the competent judicial authorities may order, at the request of the applicant and without prejudice to any damages due to the right holder by reason of the infringement, and without compensation of any sort, the destruction or at least the definitive removal from the channels of commerce, of goods that they have found to be infringing. Such goods may be used for the public interest. The judicial authorities shall also have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements. In considering such requests, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account.
  2. The competent judicial authorities of each Party shall have the authority to order that those measures be carried out at the expense of the infringer, unless particular reasons are invoked for not doing so.
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*Article X.57*

**Injunctions**

Each Party shall ensure that, when a judicial decision finds an infringement, the competent judicial authorities may issue against the infringer or, where appropriate, against a third party over whom the relevant judicial authority exercises jurisdiction an injunction aimed at prohibiting the continuation of the infringement.

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*Article X.58*  
**Alternative Measures**

[MCS: 1. Each Party shall / [EU: may] provide that the judicial authorities, in appropriate cases and upon request of the person liable to be subject to the measures provided for in Article X.56 (Remedies) and/or in this Article X.57 (Injunctions), may order pecuniary compensation to be paid to the injured party instead of applying the measures provided for in Article X.56 (Remedies) and/or in this Article X.57 (Injunctions), if it is found that the former acted unintentionally and without negligence, or if execution of the measures in question would cause him disproportionate harm or if pecuniary compensation to the injured party appears reasonably satisfactory [EU: <sup>18</sup> ~~or if such measures will disserve public interest.~~]

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*Article X.59*  
**Damages**

1. Each Party shall ensure that the judicial authorities have the authority to, upon request of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the right holder damages appropriate to the actual prejudice suffered by him/her as a result of the infringement. When the competent judicial authorities set the damages:
    - (a) they [MCS: may]/shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits<sup>19</sup> made by the infringer and, when applicable, elements other than economic factors, such as the moral prejudice caused to the right holder by the infringement; or
    - (b) as an alternative to (a), they may, in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.
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*Article X.60*  
**Legal Costs**

Each Party shall provide that its judicial authorities, where appropriate, have the authority to order, at the conclusion of civil judicial proceedings concerning the enforcement of intellectual property rights, that the prevailing party be awarded payment by the losing party of legal costs and other expenses, as provided for under that Party's law.

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<sup>18</sup> [EU: In deciding what is "reasonably satisfactory" the judge may take into consideration the public interest.]

<sup>19</sup> [EU: "Unfair profits" are those derived from the infringement.]

*Article X.61*

**Publication of Judicial Decisions**

The Parties shall ensure in cases of infringement of an intellectual property right that, unless this would be out of proportion to the seriousness of the infringement, the judicial authorities may order the publication of the decision.

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*Article X.62*

**Presumption of Authorship or Ownership**

In at least provisional measures requested in civil proceedings involving copyright, each Party shall provide for a presumption that, in the absence of proof to the contrary, the person or entity whose name is indicated as the author or related right holder of the work or subject matter in the usual manner is the designated right holder in such work or subject matter.

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*Article X.63*

**Public awareness**

The Parties shall take the necessary measures to enhance public awareness of protection of intellectual property including educational and dissemination projects on the use of intellectual property as well as on the enforcement of intellectual property rights.

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*[EU : SECTION D*

***BORDER ENFORCEMENT***

*Article X.64*

**Consistency with GATT and TRIPS Agreement**

In implementing border measures for the enforcement of intellectual property rights by customs, whether or not covered by this Section, the Parties shall ensure consistency with their obligations under the GATT and TRIPS agreements and, in particular, with Article V of GATT agreement, Article 41 and Section 4 of the Part III of TRIPS agreement.

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*Article X.65*

**Border Measures**

1. With respect to goods under customs control, each Party shall adopt or maintain procedures under which a right holder may submit applications requesting customs authorities to suspend the release or detain goods suspected of, at least, trademark counterfeiting or copyright piracy on a commercial scale (hereinafter referred to as "suspect goods"). The Parties shall evaluate the application of these measures for goods suspected of infringing a geographical indication.
2. There shall be no obligation to apply the procedures set forth in this Section to goods in transit.

3. Each Party shall encourage the use of electronic systems for the management by customs of the applications granted or recorded.
4. Customs authorities shall inform the applicant within a reasonable period whether they have accepted the application.
5. Parties shall provide for such application/recording to apply to multiple shipments when so allowed in accordance with the provisions of the domestic law.
6. Each Party may provide that their customs authorities have the authority, with respect to goods under customs control, to act upon their own initiative to suspend the release of or detain suspect goods.
7. Customs authorities may use risk analysis to identify suspect goods.
8. Each Party may have in place administrative or judicial procedures, in accordance with the provisions of the domestic law, allowing for the destruction of goods involved in trademark counterfeiting or copyright piracy on a commercial scale, where the persons concerned agree or do not oppose to the destruction. In the event that such goods are not destroyed, each Party shall ensure that they are disposed of outside commercial channels in such a manner to avoid any harm to the right holder.
9. [There shall be no obligation to apply this Article to import of goods put on the market in another country by or with the consent of the right holders. A Party may exclude from the application of this Article goods of a non-commercial nature contained in travellers' personal luggage.]
10. The customs authorities of each Party shall maintain a regular dialogue and promote cooperation with the relevant stakeholders and with other authorities involved in the enforcement of the intellectual property rights referred to in paragraph 1.
11. The Parties agree to cooperate in respect of international trade in suspect goods and, in particular, to share information on such trade.
12. [EU: Without prejudice to other forms of cooperation, the Protocol [2] on Mutual Administrative Assistance in Customs Matters will be applicable with regard to] [EU: ~~wilful trademark counterfeiting or copyright piracy on a commercial scale~~] [EU: to breaches of legislation on intellectual property rights], for the enforcement of which the customs authorities are competent in accordance with this Article.
13. [EU: A Committee shall be in charge of ensuring the proper functioning and implementation of this Article, in particular providing for the framework for organising cooperation.]

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*Article X.66*

**Relationship with Dispute Resolution Chapter**

The dispute settlement procedures provided for in Title [Dispute Resolution] shall not apply to this Title [] [Intellectual Property Rights]”.

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**Article 16**  
*Cooperation*

1. The Parties agree to cooperate with a view to supporting implementation of the commitments and obligations undertaken under the IPR Chapter as well as 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.

2. Subject to Title XX (Economic and Sector Cooperation) and in accordance with the provisions of Title XX (Financial Cooperation, with Anti-Fraud Provisions) of this Agreement, areas of cooperation include the following activities, but not limited to them:

- a) The exchange of information on the legal framework concerning intellectual property rights and relevant rules of protection and enforcement;
- b) The exchange of information on the legal framework and practices related to intellectual property and competition law;
- c) The exchange of experience between the Parties on legislative progress;
- d) The exchange of experience between the Parties on the enforcement of intellectual property rights;
- e) Exchange of experiences between the Parties on enforcement at central and sub-central level by customs, police, administrative and judiciary bodies;
- f) Coordination to prevent exports of trademarks counterfeit goods, including with other countries;
- g) Coordination among Competition Authorities to prevent anticompetitive practices such as, abuse in the exercise of intellectual property rights and dominant position, the resort to practices that unreasonably restrain trade, sham litigation and pay-for-delay agreements;
- h) Technical assistance, capacity-building; exchange and training of personnel;
- i) The protection and defence of intellectual property rights and the dissemination of information in this regard, inter alia, business circles and civil society;
- j) Public awareness of consumers and right holders; enhancement of institutional cooperation, particularly between the intellectual property offices;
- k) Actively promoting awareness and education of the general public on policies concerning intellectual property rights;
- l) Formulation of effective strategies to identify key audiences and communication programmes to increase consumer and media awareness on the impact of intellectual property abuse and violations;
- m) Mutual cooperation between the intellectual property offices, research and academic institutions and private enterprises from the different Parties to facilitate the access of all specialised databases for the purposes of specialised searches.

[MCS: The Parties shall explore new and existing mechanisms to facilitate technology transfer to strengthen national capabilities]

The Parties agree to collaborate on the application of the CBD and related instruments, and on the domestic frameworks on access to genetic resources and associated traditional knowledge, innovations and practices.

### **Cooperation and Transparency**

1. The Parties agree to cooperate with a view to supporting implementation of the commitments and obligations undertaken under this Chapter.
2. The Parties shall draw on the following modalities, among others, with respect to cooperation on intellectual property rights protection and enforcement matters. The areas of cooperation include the following activities, but are not limited to:
  - (a) The exchange of information on the legal framework concerning intellectual property rights and relevant rules of protection and enforcement;
  - (b) The exchange of experience between the Parties on legislative progress;
  - (c) The exchange of experience between the Parties on the enforcement of intellectual property rights;
  - (d) The exchange of experiences between the Parties on enforcement at central and sub-central level by customs, police, administrative and judiciary bodies;
  - (e) Coordination to prevent exports of counterfeit goods, including with other countries;
  - (f) Technical assistance, capacity building; exchange and training of personnel;
  - (g) The protection and defence of intellectual property rights and the dissemination of information in this regard in, inter alia, business circles and civil society;
  - (h) Public awareness of consumers and right holders; enhancement of institutional cooperation, particularly between the intellectual property offices;
  - (i) Actively promoting awareness and education of the general public on policies concerning intellectual property rights;
  - (j) Regarding public-private collaboration engaging with SMEs, including at SME-focused events or gatherings, regarding protecting and enforcing intellectual property rights and reducing infringement;
  - (k) Formulation of effective strategies to identify audiences and communication programmes to increase consumer and media awareness on the impact of intellectual property violations, including the risk to health and safety and the connection to organised crime;
  - (l) Facilitation of voluntary stakeholder initiatives to reduce intellectual property rights infringement, including over the internet and in other marketplaces.
3. [Without prejudice to paragraph 1 and 2 and to supplement them if necessary, the Parties agree to establish a Sub-Committee on Intellectual Property to follow up on the implementation of the provisions of this Title and any other relevant issue. This Sub-Committee shall be co-chaired by officials of both Parties and will meet at least once per year, except if the Parties agree otherwise. These meetings shall be carried out through any agreed means, including by video conference. The Sub-Committee on Intellectual

27 Feb 2018

*Limited*  
*Without prejudice*

Property will adopt its decisions by consensus. It may also adopt specific rules of procedure, by consensus.]

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