

*This **document** is the European Union's (EU) proposal for a legal text on intellectual property in the EU-Indonesia FTA. It has been tabled for discussion with Indonesia. The actual text in the final agreement will be a result of negotiations between the EU and Indonesia.*

**DISCLAIMER:** *The EU reserves the right to make subsequent modifications to this text and to complement its proposals at a later stage, by modifying, supplementing or withdrawing all, or any part, at any time.*

## **CHAPTER [XX]**

### **INTELLECTUAL PROPERTY**

#### **SECTION A**

#### **GENERAL PROVISIONS**

##### *Article X.1*

##### **Objectives**

The objectives of this Chapter are to:

- (a) facilitate the production and commercialisation of innovative and creative products in each Party; and
- (b) achieve an adequate and effective level of protection and enforcement of intellectual property rights.

##### *Article X.2*

##### **Nature and Scope of Obligations**

1. The Parties shall ensure an adequate and effective implementation of the international treaties dealing with intellectual property to which they are parties including the Agreement on Trade-related Aspects of Intellectual Property (hereinafter referred to as "TRIPS Agreement") contained in Annex IC to the WTO Agreement. This chapter shall complement and further specify the rights and obligations of the Parties under the TRIPS Agreement and other international treaties in the field of intellectual property.
2. For the purpose of this Chapter, intellectual property refers at least to all categories of intellectual property that are the subject of Sub-Section 1 (Copyright and Related Rights) to Sub-Section 7 (Plant Varieties) of Section B (Standards Concerning Intellectual Property Rights). The 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 of 20 March 1883, as last revised at Stockholm on 14 July 1967 (hereinafter referred to as “Paris Convention”).

3. 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.

#### *Article X.3*

### **Exhaustion**

Each Party shall provide for a regime of national or regional exhaustion of intellectual property rights<sup>1</sup>.

#### *Article X.4*

### **National Treatment**

1. In respect of all categories of intellectual property covered in this Chapter, each Party shall accord to the nationals of the other Party treatment no less favourable than it accords to its own nationals with regard to the protection of intellectual property rights, subject to the exceptions provided in, respectively, the Paris Convention, the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, as last revised at Paris on 24 July 1971 (hereinafter referred to as “Berne Convention”), the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, done at Rome on 26 October 1961 (hereinafter referred to as “Rome Convention”), or the Treaty on Intellectual Property in Respect of Integrated Circuits, done at Washington, D.C., on May 26, 1989. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement.
2. A Party may avail itself of the exceptions permitted under paragraph 1 in relation to its judicial and administrative procedures, including requiring a national of the other Party to designate an address for service of process in its territory, or to appoint an agent in its territory, provided that such derogation is:
  - (a) necessary to secure compliance with laws or regulations that are not inconsistent with this Chapter; and
  - (b) not applied in a manner that would constitute a disguised restriction on trade.
3. Paragraph 1 and 2 do not apply to procedures provided in multilateral agreements concluded under the auspices of World Intellectual Property Organisation (hereinafter referred to as “WIPO”) relating to the acquisition or maintenance of intellectual property rights.

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<sup>1</sup> 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 the works or of copies thereof.

*SECTION B*

***STANDARDS CONCERNING INTELLECTUAL PROPERTY RIGHTS***

*SUB-SECTION 1*

***Copyright and Related Rights***

*Article X.5*

**International Treaties**

1. The Parties shall comply with the following international agreements:
  - (a) the Berne Convention;
  - (b) the Rome Convention;
  - (c) The WIPO Copyright Treaty, adopted in Geneva on 20 December 1996; and
  - (d) The WIPO Performances and Phonograms Treaty, adopted in Geneva on 20 December 1996.
  
2. The Parties aim to comply with the provisions of the Beijing Treaty on Audiovisual Performances, adopted by the Diplomatic Conference on the Protection of Audiovisual Performances in Beijing, on 24 June 2012, and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, adopted by the Diplomatic Conference to Conclude a Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities in Marrakesh, on June 27, 2013.

*Article X.6*

**Authors**

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

- (a) the direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part, of their works;
- (b) any form of distribution to the public, by sale or otherwise of the original of their works or of copies thereof;

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

*Article X.7*

**Performers**

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

- (a) the fixation<sup>2</sup> of their performances;
- (b) 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;
- (c) the distribution to the public, by sale or otherwise, of the fixations of their performances;
- (d) the making available to the public, by wire or wireless means, 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;
- (e) 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; and
- (f) the commercial rental to the public of the fixation of their performances.

*Article X.8*

**Producers of Phonograms**

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

- (a) the direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part of their phonograms;
- (b) the distribution to the public, by sale or otherwise, of their phonograms, including copies thereof;

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<sup>2</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.

- (c) the making available to the public, by wire or wireless means, 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; and
- (d) the commercial rental of their phonograms to the public.

*Article X.9*

**Broadcasting Organisations**

Each Party shall provide broadcasting organisations with the exclusive right to authorise or prohibit:

- (a) the fixation of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite;
- (b) 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, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite;
- (c) 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;
- (d) the distribution to the public, by sale or otherwise, of fixations, including copies thereof, of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite; and
- (e) the rebroadcasting of their broadcasts by wireless 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.

*Article X.10*

**Right to Remuneration for Broadcasting and Communication to the Public**

1. Each Party shall provide a right in order to ensure that a single equitable 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. Each Party shall provide that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Each Party 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 the single equitable remuneration.

*Article X.11*

**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 for seventy years after his death, irrespective of the date when the work is lawfully made available to the public.
2. The term of protection of a musical composition with words shall expire seventy years after the death of the last of the following persons to survive, whether or not those persons are designated as co-authors: the author of the lyrics and the composer of the musical composition, provided that both contributions were specifically created for the respective musical composition with words.
3. 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.
4. In the case of anonymous or pseudonymous works, the term of protection shall run for seventy years 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.
5. Where a work is published in volumes, parts, instalments, issues or episodes and the term of protection runs from the time when the work was lawfully made available to the public, the term of protection shall run for each such item separately.
6. The term of protection of cinematographic or audiovisual works shall expire seventy years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work.
7. The rights of broadcasting organisations shall expire fifty years after the first transmission of a broadcast, whether that broadcast is transmitted by wire or over the air, including by cable or satellite.
8. The rights of performers shall expire not less than 50 years after the date of the performance. However, if a fixation of the performance other than in a phonogram is lawfully published or lawfully communicated to the public within that period; those rights shall expire not less than fifty years from the date of the first such publication or the first such communication to the public, whichever is earlier. If a fixation of the performance in a phonogram is lawfully published or lawfully communicated to the public within that period, the rights shall expire seventy years from the date of the first such publication or the first such communication to the public, whichever is earlier.
9. The rights of producers of phonograms shall expire fifty years after the fixation is made. However, if the phonogram has been lawfully published within this period, the said rights shall expire seventy years from the date of the first lawful publication. If no

lawful publication has taken place within fifty years after the first fixation is made, and if the phonogram has been lawfully communicated to the public within this period the said rights shall expire seventy years from the date of the first lawful communication to the public. Each Party may adopt effective measures in order to ensure that the profit generated during the twenty years protection beyond the initial fifty years are shared fairly between the performers and producers.

10. The rights of producers of the first fixation of a film shall expire fifty years after the fixation is made. If the film is lawfully published or lawfully communicated to the public during that period, those rights shall expire fifty years from the date of the first such publication or the first such communication to the public, whichever is earlier. The term “film” shall designate a cinematographic or audiovisual work or moving images, whether or not accompanied by sound.
11. The terms laid down in this Article shall be calculated from the 1<sup>st</sup> January of the year following the event.
12. The terms of protection may exceed the periods provided for in this Article.

*Article X.12*

**Resale Right**

1. Each Party shall provide, for the benefit of the author of works 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 shall 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 shall 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 shall provide that authors who are nationals of third countries and their successors in title enjoy the resale right in accordance with the Agreement and the legislation of the Party concerned only if legislation in 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.

*Article X.13*

**Collective Management of Rights**

1. The Parties shall promote cooperation between their respective collective management organisations for the purposes of fostering the availability of works and other protected

subject-matter in the territories of the Parties and the transfer of rights revenue for the use of such works or other protected subject-matter.

2. The Parties agree to promote the transparency of collective management organisations, in particular as regards the rights revenue they collect, deductions they apply to such revenue, the use of the rights revenue collected, the distribution policy and their repertoire.
3. Each Party undertakes to ensure that when 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 representing organisation does not discriminate against entitled members of the organisation represented.
4. The representing collective management organisation must pay accurately, regularly and diligently amounts owed to the represented collective management organisation and provide the represented organisation with information on the amount of rights revenue collected on its behalf and the deductions made.

*Article X.14*

**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. Each Party 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.

*Article X.15*

**Protection of Technological Measures**

1. Each Party shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he is pursuing that objective.



2. Each Party shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which:
  - (a) are promoted, advertised or marketed for the purpose of circumvention of any effective technological measures;
  - (b) have only a limited commercially significant purpose or use other than to circumvent any effective technological measures; or
  - (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitation the circumvention of any effective technological measures.
3. For the purposes of this Article, the term “technological measures” means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject matter, which are not authorised by the right holder of any copyright or related right as provided for by domestic legislation. Technological measures shall be deemed “effective” where the use of a protected work or other subject matter is controlled by the right holders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject matter or a copy control mechanism, which achieves the objective of protection.

*Article X.16*

**Obligations Concerning Rights Management Information**

1. Each Party shall provide adequate legal protection against any person knowingly performing, without authority, any of the following acts, 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:
  - (a) the removal or alteration of any electronic rights-management information; or
  - (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.
2. For the purposes of this Sub-Section, “rights-management information” means any information provided by right holders which identifies the work or other subject matter referred to in this Chapter, the author or any other right holder, information about the terms and conditions of use of the work or other subject matter, or any numbers or codes that represent such information.
3. The first subparagraph 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 Chapter.

*SUB-SECTION 2*

***Trademarks***

*Article X.17*

**International Agreements**

Each Party:

- (a) shall comply with the Trademark Law Treaty and 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”);
- (b) shall accede to 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; and
- (c) shall make all reasonable efforts to accede to the Singapore Treaty on the Law of Trademarks, done at Singapore on 27 March 2006.

*Article X.18*

**Rights Conferred by a Trademark**

1. A 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.
2. The proprietor of a registered trademark shall be entitled to prevent all third parties from bringing, in the course of trade, goods into the territory of the Party where the trademark is registered without being released for free circulation there, where such goods, including packaging, come from third countries and bear without authorisation a trademark which is identical to the trademark registered in respect of such goods, or which cannot be distinguished in its essential aspects from that trademark<sup>3</sup>.

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<sup>3</sup> The Parties may take additional appropriate measures with a view to ensure the smooth transit of generic medicines.

3. The entitlement of the proprietor of the trademark shall lapse if, during the proceedings to determine whether there was a breach of the registered trademark, evidence is provided by the declarant or the holder of the goods that the proprietor of the registered trademark is not entitled to prohibit the placing of the goods on the market in the country of final destination.

*Article X.19*

**Registration Procedure**

1. Each Party 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, duly reasoned and open to challenge.
2. Each Party shall provide for the possibility to oppose applications to register trademarks or, where appropriate, trademark registrations. Such opposition proceedings shall be adversarial.
3. Each Party shall provide a publicly available electronic database of applications and registrations of trademarks.

*Article X.20*

**Well-known Trademarks**

For the purpose of giving effect to protection of well-known trademarks, as referred to in Article 6*bis* of the Paris Convention and paragraphs 2 and 3 of Article 16 of the TRIPS Agreement, each Party shall apply 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.

*Article X.21*

**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 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 proprietor to prohibit a third party from using, in the course of trade:

- (a) his own name or address;
  - (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 good or service, in particular as accessories or spare parts; provided he uses them in accordance with honest practices in industrial or commercial matters.
3. The trademark shall not entitle the proprietor to prohibit a third party from using, in the course of trade, an earlier right which only applies in a particular locality if that right is recognised by the laws of the Party in question and within the limits of the territory in which it is recognised.

*Article X.22*

**Revocation of a Trademark**

1. Each Party shall provide that a trademark shall be liable to revocation if, within a continuous five-year period of, the trademark has not been put to genuine use in the relevant territory in connection with the goods or services in respect of which it is registered, and there are no proper reasons for non-use. However, no person may claim that the proprietor's rights in a trademark should be revoked where, during the interval between expiry of the five-year period and filing of the application for revocation, genuine use of the trademark has been started or resumed. The commencement or resumption of use within a period of three months preceding the filing of the application for revocation, which began at the earliest on expiry of the continuous period of five years of non-use, shall, however, be disregarded where preparations for the commencement or resumption of use takes place only after the holder has been informed that the application for revocation may be filed.
2. A trademark shall also be liable to revocation if, after the date on which it was registered:
  - (a) in consequence of acts or inactivity of the proprietor, it has become the common name in the trade for a good or service in respect of which it is registered; or
  - (b) in consequence of the use made of it by the proprietor of the trademark or with his consent in respect of the goods or services for which it is registered, it is liable to mislead the public, particularly as to the nature, quality or geographical origin of those goods or services.

*Article X.23*

**Bad Faith Applications**

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

### *SUB-SECTION 3*

#### *Designs*

##### *Article X.24*

#### **International Agreements**

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

##### *Article X.25*

#### **Protection of Registered Designs**

1. Each Party shall provide for the protection of independently created designs that are new and are original<sup>4</sup>. This protection shall be provided by registration and shall confer an exclusive right upon their holders in accordance with this Sub-Section.
2. The holder of a registered design shall have the right at least to use it and to prevent third parties not having the holder'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.
3. A design applied to or incorporated in a product which constitutes a component part of a complex product shall only be considered to be new and original:
  - (a) if the component part, once it has been incorporated into the complex product, remains visible during normal use of the latter; and
  - (b) to the extent that those visible features of the component part fulfil in themselves the requirements as to novelty and originality.
4. "Normal use" in subparagraph 3 (a) shall mean use by the end user, excluding maintenance, servicing or repair work.

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<sup>4</sup> For the purpose of this Article, a Party may consider that a design having individual character is original.

*Article X.26*

**Term of Protection**

The duration of protection available shall amount to twenty-five years from the date of filing the application.

*Article X.27*

**Protection Conferred to Unregistered Designs**

1. The European Union and Indonesia shall provide the legal means to prevent the use of the unregistered designs, only if the contested use results from copying the unregistered design. Such use shall at least cover the offering for sale, putting on the market, importing and exporting the product concerned.
2. The duration of protection for unregistered designs, as provided for in paragraph 1, shall amount to at least three years from the date on which the design was first made available to the public in the territory of the respective signatory.

*Article X.28*

**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 designs and do not unreasonably prejudice the legitimate interests of the holder 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. In particular a design right shall not subsist in features of appearance of a product which must necessarily be reproduced in their exact form and dimensions for the product in which incorporated or to which the design is applied to be mechanically connected to, or placed in, or around or contact with another product so that either product may perform its function.
3. By way of derogation from paragraph 2, a design may subsist in a design, which has the purpose of allowing the multiple assembly or connection of mutually interchangeable products within a modular system.

*Article X.29*

**Relationship to Copyright**

A design shall also be eligible for protection under the law of copyright of a Party 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.

#### *SUB-SECTION 4*

### ***Geographical Indications***

#### *Article X.30*

### **Scope**

*[Purpose of the Article: delimitation of scope for product category and origin]*

This Sub-Section applies to the recognition and protection of geographical indications originating in the territories of the Parties.

Geographical indications of a Party which are to be protected by the other Party shall only be subject to this Sub-Section if covered by the scope of the legislation referred to in Article X.31 (Procedures).

#### *Article X.31*

### **Procedures**

*[Purpose of the Article: confirmation of compatibility of legislation with common scope of the Parties' legislation, registration of existing GIs after prior examination]*

1. Having examined the legislation of Indonesia listed in Section A of Annex [XX]-A, the European Union concludes that this legislation meets the elements laid down in Section B of Annex [XX]-A *[those elements that are deemed compatible]*.
2. Having examined the European Union legislation listed in Section A of Annex [XX]-A, Indonesia concludes that this legislation meets the elements laid down in Section B of Annex [XX]-A.
3. Following the completion of an opposition procedure in accordance with the criteria set out in Annex [XX]-B and an examination of the geographical indications of the European Union listed in Annex [XX]-C, which have been registered by the European Union under the legislation referred to in paragraph 2, Indonesia shall protect those geographical indications according to the level of protection laid down in this Sub-Section.
4. Following the completion of an opposition procedure in accordance with the criteria set out in Annex [XX]-B and an examination of the geographical indications of Indonesia listed in Annex [XX]-C, which have been registered by Indonesia under the legislation referred to in paragraph 1, the European Union shall protect those geographical indications according to the level of protection laid down in this Sub-Section.

Article X.32

**Amendment of the List of Geographical Indications**

*[Purpose of the Article: addition to each other's registers of new GIs after examination and objection]*

The Parties agree on the possibility to amend the list of geographical indications to be protected in Annex [XX]-C in accordance with the procedure set out in Article X.69 (Institutional Provisions). New geographical indications shall be added following the completion of the opposition procedure and their examination as referred to in paragraphs 3 or 4 of Article X.31 (Procedures).

Article X.33

**Protection of Geographical Indications**

*[Purpose of the Article: setting of high protection level. Treatment of GIs that lost protection in country of origin and person's names]*

1. The geographical indications listed in Annex [XX]-C shall be protected against:
  - (a) any direct or indirect commercial use of a protected name:
    - (i) for comparable products not compliant with the product specification of the protected name, or
    - (ii) in so far as such use exploits the reputation of a geographical indication;
  - (b) any misuse, imitation or evocation, even if the true origin of the product is indicated or if the protected name is translated, transcribed, transliterated or accompanied by an expression such as “style”, “type”, “method”, “as produced in”, “imitation”, “flavour”, “like” or similar, including when those products are used as an ingredient;
  - (c) any other false or misleading indication as to the origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the product concerned, and the packing of the product in a container liable to convey a false impression as to its origin, including when those products are used as an ingredient;
  - (d) any other practice liable to mislead the consumer as to the true origin of the product.
2. Geographical indications listed in Annex [XX]-C shall not become generic in the territories of the Parties.



3. Nothing in this Agreement shall oblige a Party to protect a geographical indication of the other Party which is not, or ceases to be protected in the territory of origin. Each Party shall notify the other Party if a geographical indication ceases to be protected in the territory of that Party of origin. Such notification shall take place in accordance with procedures laid down in Article X.69 (Institutional Provisions).
4. Nothing in this Agreement shall prejudice the right of any person to use, in the course of trade, that person's name or that person's predecessor in business, except where such name is used in such a manner to mislead the public.

*Article X.34*

**Right of Use of Geographical Indications**

*[Purpose of the Article: free use of GIs by compliant users, avoidance of administrative burden]*

1. A name protected under this Agreement may be used by any operator marketing a product which conforms 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.

*Article X.35*

**Relationship to Trademarks**

1. The Parties shall, where a geographical indication is protected under this Sub-Section, refuse to register a trademark the use of which would contravene paragraph 1 of Article X.33 (Protection of Geographical Indications), provided an application to register the trademark is submitted after the date of submission of the application for protection of the geographical indication in the territory of the Party concerned.

Trademarks registered in breach of the first subparagraph shall be invalidated.

2. For geographical indications referred to in Article X.31 (Procedures), the date of submission of the application for protection referred to in paragraph 1 shall be the date of entry into force of this Agreement.
3. For geographical indications referred to in Article X.32 (Amendment of the List of Geographical Indications), the date of submission of the application for protection referred to in paragraph 1 shall be the date of the transmission of a request to the other Party to protect a geographical indication.
4. Without prejudice to paragraph 5 of the present Article, the Parties shall protect geographical indications also where a prior trademark exists. A prior trademark shall mean a trademark the use of which contravenes paragraph 1 of Article X.33 (Protection of Geographical Indications) 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 and renewed for that product notwithstanding the protection of the geographical indication, provided that no grounds for the trademark's invalidity or revocation exist in the legislation on trademarks of the Parties. In such cases, the use of the protected geographical indication shall be permitted as well as the use of the relevant trademarks.

5. A Party shall not be required to protect a name as a geographical indication under this Sub-Section if, in light of a trademark's reputation and renown and the length of time it has been used, that name is liable to mislead the consumer as to the true identity of the product.

#### *Article X.36*

### **Enforcement of Protection**

*[Purpose of the Article: own initiative protection by authorities]*

The Parties shall enforce the protection provided for in Articles X.31 (Procedures) to X.35 (Relationship to Trademarks) by appropriate administrative and judicial steps to prevent or stop the unlawful use of protected designations of origin and protected geographical indications. They shall also enforce such protection at the request of an interested party.

#### *Article X.37*

### **General Rules**

1. This Agreement shall apply without prejudice to the rights and obligations of the Parties under the WTO Agreement.
2. A Party shall not be required to protect a name as a geographical indication under this Sub-Section if that name conflicts with the name of a plant variety or an animal breed and as a result is likely to mislead the consumer as to the true origin of the product.
3. A homonymous name which misleads consumers into believing that a product comes from another territory shall not be protected even if the name is accurate as far as the actual territory, region or place of origin of the product in question is concerned. Without prejudice to Article 23 of the TRIPS Agreement, the Parties shall mutually decide the practical conditions of use under which wholly or partially homonymous geographical indications will be differentiated from each other, taking into account the need to ensure equitable treatment of the producers concerned and that consumers are not misled.
4. When a Party, in the context of bilateral negotiations with a third party, proposes to protect a geographical indication of that third party which is wholly or partially

homonymous with a geographical indication of the other Party protected under this Sub-Section, it shall inform the other Party thereof and give it an opportunity to comment before the third party's geographical indication becomes protected.

5. Any matter arising from product specifications of protected geographical indications shall be dealt with in the [joint working body defined by the Agreement] referred to in Article X.69 (Institutional Provisions).
6. The protection of geographical indications protected under this Agreement may only be cancelled by the Party in which the product originates.
7. A product specification referred to in this Sub-Section shall be that approved, including any amendments also approved, by the authorities of the Party in the territory from which the product originates.

*[Without prejudice to the placement of the relevant provisions relating to Article X.69 (Institutional Provisions), responsibilities as regards geographical indications of the joint working body defined by the Agreement are as follows:*

- X. The [joint working body defined by the Agreement] shall also see to the proper functioning of this Agreement and may consider any matter related to its implementation and operation. In particular, it shall be responsible for:
  - (a) amending Section A of Annex [XX]-A as regards the references to the law applicable in the Parties;
  - (b) amending Section B of Annex [XX]-A as regards the elements for registration and control of geographical indications;
  - (c) amending Annex [XX]-B as regards the criteria to be included in the objection procedure; and
  - (d) modifying Annex [XX]-C as regards geographical indications;

**ANNEX [XX]-A**

**SECTION A**

**LEGISLATION OF THE PARTIES**

*Legislation of Indonesia*

- (a) XX
- (b) XX

*Legislation of the EU:*

- (a) Regulation (EU) No 1151/2012<sup>5</sup> of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs and its implementing Acts;
- (b) Regulation (EU) No 1308/2013<sup>6</sup> of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation), in particular Articles 92 to 111 on designations of origin and geographical indications, and its implementing Acts;
- (c) Regulation (EC) No 110/2008<sup>7</sup> of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and protection of geographical indications of spirit drinks, and its implementing Acts;
- (d) Regulation (EU) No 251/2014<sup>8</sup> 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 its implementing Acts.

**SECTION B**

**ELEMENTS FOR REGISTRATION AND CONTROL OF GEOGRAPHICAL INDICATIONS AS REFERRED TO IN PARAGRAPHS 1 AND 2 OF ARTICLE X.31 (PROCEDURES)**

1. a register listing geographical indications protected in the territory;

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<sup>5</sup> OJ L 343, 14.12.2012, p. 1.

<sup>6</sup> OJ L 347, 20.12.2013, p.671.

<sup>7</sup> OJ L 39, 13.2.2008, p. 16.

<sup>8</sup> OJ L 84, 20.3.2014, p. 14.

2. an administrative process verifying that geographical indications identify a good as originating in a territory, region or locality of one of the Parties, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin;
3. a requirement that a registered name shall correspond to a specific product or products for which a product specification is laid down, which can only be amended by due administrative process;
4. control provisions applying to production;
5. enforcement of the protection of registered names by appropriate administrative action by the public authorities;
6. legal provisions laying down that a registered name may be used by any operator marketing products conforming to the corresponding specification;
7. provisions concerning the registration, which may include refusal of registration, of terms homonymous or partly homonymous with registered terms, terms customary in common language as the common name for goods, terms comprising or including the names of plant varieties and animal breeds. Such provisions shall take into account the legitimate interests of all parties concerned;
8. rules concerning relation between geographical indications and trademarks providing for a limited exception to the rights conferred under trademark law to the effect that the existence of a prior trademark shall not be a reason to prevent the registration and use of a name as a registered geographical indication except where by reason of the trademark's renown and the length of time it has been used, consumers would be misled by the registration and use of the geographical indication on products not covered by the trademark;
9. a right for any producer established in the area who submits to the system of controls to produce the product labelled with the protected name provided he complies with the product specifications;
10. an opposition procedure that allows the legitimate interests of prior users of names, whether those names are protected as a form of intellectual property or not, to be taken into account.

**ANNEX [XX]-B**

**CRITERIA TO BE INCLUDED IN THE OPPOSITION PROCEDURE AS REFERRED TO IN PARAGRAPHS 3 AND 4 OF ARTICLE X.31 (PROCEDURES)**

1. List of name(s) with the corresponding transcription into Latin or [script of the third country concerned] characters;
2. The product type;
3. An invitation:
  - (a) in the case of the European Union, to any natural or legal persons except those established or resident in Indonesia,
  - (b) in the case of Indonesia, to any natural or legal persons except those established or resident in a Member State of the European Union,
  - (c) having a legitimate interest, to submit objections to such protection by lodging a duly substantiated statement;
4. Statements of opposition must reach the European Commission or Indonesia within 2 months from the date of the publication of the information notice;
5. Statements of opposition shall be admissible only if they are received within the time limit set out above and if they show that the protection of the name proposed would:
  - (a) conflict with the name of a plant variety, including a wine grape variety or an animal breed and as a result is likely to mislead the consumer as to the true origin of the product;
  - (b) be a homonymous name which misleads the consumer into believing that products come from another territory;
  - (c) in the light of a trademark's reputation and renown and the length of time it has been used, be liable to mislead the consumer as to the true identity of the product;
  - (d) jeopardise the existence of an entirely or partly identical name or of a trademark or the existence of products which have been legally on the market for at least five years preceding the date of the publication of this notice;
  - (e) or if they can give details which indicate that the name, for which protection and registration is considered, is generic.
6. The criteria referred to above shall be evaluated in relation to the territory of (the European Union, which in the case of intellectual property rights refers only to the territory or territories where the said rights are protected) / (of Indonesia).

**ANNEX [XX]-C**

**GEOGRAPHICAL INDICATIONS FOR PRODUCTS AS REFERRED TO IN  
PARAGRAPHS 3 AND 4 OF ARTICLE X.31 (PROCEDURES)**

**SECTION A**

***GEOGRAPHICAL INDICATIONS FOR PRODUCTS OF THE EUROPEAN UNION TO  
BE PROTECTED IN INDONESIA***

- XXX
- XXX

**SECTION B**

***GEOGRAPHICAL INDICATIONS FOR PRODUCTS OF INDONESIA TO BE  
PROTECTED IN THE EUROPEAN UNION***

- XXX
- XXX

*SUB-SECTION 5*

***Patents***

*Article X.38*

**International Agreements**

Each Party shall comply with the Patent Cooperation Treaty, done at Washington on 19 June 1970, as amended on 28 September 1979 and last modified on 3 October 2001, shall make all reasonable efforts to comply with the Patent Law Treaty, adopted in Geneva on 1 June 2000 and [*placeholder for European Patent Convention*].

*Article X.39*

[*Placeholder for general patent provisions*]

*Article X.40*

**Patents and Public Health**

1. The Parties recognise the importance of the Declaration on the TRIPS Agreement and Public Health, adopted in Doha on 14 November 2001 by the Ministerial Conference of the WTO (hereinafter referred to as “Doha Declaration”). In interpreting and implementing the rights and obligations under this Sub-Section, the Parties shall ensure consistency with the Doha Declaration.
2. The Parties shall contribute to the implementation and respect the decision of the WTO General Council of 30 August 2003 on implementation of paragraph 6 of the Doha Declaration as well as the Protocol of 6 December 2005 amending the TRIPS Agreement.

*Article X.41*

**Extension of the Period of Protection Conferred by a Patent on Medicinal Products**

1. The Parties recognise that medicinal products protected by a patent in their respective territory may be subject to an administrative authorisation procedure before being put on their market. They recognise that the period that elapses between the filing of the application for a patent and the first authorisation to place the product on their respective market, as defined for that purpose by the relevant legislation, may shorten the period of effective protection under the patent.
2. Each Party shall provide for a further period of protection for a medicinal product which is protected by a patent and which has been subject to an administrative authorisation



procedure, that period being equal to the period referred to in the second sentence of paragraph 1, reduced by a period of five years.

3. Notwithstanding paragraph 2, the duration of the further period of protection may not exceed [...] years.
4. In the case of medicinal products for which paediatric studies have been carried out, and the results of those studies are reflected in the product information, the Parties shall provide for a further [...] months extension of the period of protection referred to in paragraph 2.

*Article X.42*

**Extension of the Period of Protection Conferred by a Patent on Plant Protection Products**

1. Each Party shall determine safety and efficacy requirements before authorising the placing on the market of plant protection products.
2. The Parties recognise that plant protection products protected by a patent in their respective territory may be subject to an administrative authorisation procedure before being put on their market. They recognise that the period that elapses between the filing of the application for a patent and the first authorisation to place the product on their respective market, as defined for that purpose by the relevant legislation, may shorten the period of effective protection under the patent.
3. Each Party shall provide for a further period of protection for a plant protection product which is protected by a patent and which has been subject to an administrative authorisation procedure, that period being equal to the period referred to in the second sentence of paragraph 2, reduced by [...].
4. Notwithstanding paragraph 3, the duration of the further period of protection may not exceed [...].

*SUB-SECTION 6*

***Protection of Undisclosed Information***

*Article X.43*

*[Placeholder for the protection of trade secrets]*

*Article X.44*

**Protection of Data Submitted to Obtain an Authorisation to Put a Medicinal Product on the Market**

1. Each Party shall protect commercially confidential information submitted to obtain an authorisation to place medicinal products on the market (“marketing authorisation”) against disclosure to third parties, unless overriding public health interests provide otherwise.
2. Each Party shall ensure that for a period of [...] from the first marketing authorisation in the Party concerned, the public body responsible for the granting of a marketing authorisation will not take into account confidential business information or the results of pre-clinical tests or clinical trials provided in the first marketing authorisation application and subsequently submitted by a person or entity, whether public or private, in support of another application to place a medicinal product on the market without the explicit consent of the person or entity who submitted such data, unless international agreements recognised by both Parties provide otherwise.
3. During a [...] year period, starting from the date of grant of the first marketing authorisation in the Party concerned, a marketing authorisation granted for any subsequent application based on the results of pre-clinical tests or of clinical trials provided in the first marketing authorisation will not permit placing a medicinal product on the market, unless the subsequent applicant submits his own results of pre-clinical tests or of clinical trials (or results of pre-clinical tests or of clinical trials used with the consent of the party which had provided this information) meeting the same requirements as the first applicant. Products not complying with the requirements set out in this paragraph shall not be allowed on the market.
4. In addition, the [...] year period referred to in paragraph 3 shall be extended to a maximum of [...] years if, during the first [...] years after obtaining the authorisation, the authorisation holder obtains an authorisation for one or more new therapeutic indications which are considered of significant clinical benefit in comparison with existing therapies.

*Article X.45*

**Protection of Data Submitted to Obtain Marketing Authorisation for Plant Protection Products**

1. Each Party shall recognise a temporary right of the owner of a test or study report submitted for the first time to achieve a marketing authorisation for a plant protection product. During such period, the test or study report will not be used for the benefit of any other person aiming to achieve a marketing authorisation for plant protection product, except when the explicit consent of the first owner is proved. This right will be hereinafter referred as data protection.
2. The test or study report should fulfil the following conditions:
  - (a) be necessary for the authorisation or for an amendment of an authorisation in order to allow the use on other crops; and
  - (b) be certified as compliant with the principles of good laboratory practice or of

good experimental practice.

3. The period of data protection shall be at least [...] years from the first authorisation granted by the concerned authority in that Party. In case of low risk plant protection products the period can be extended to [...] years.
4. Those periods shall be extended by [...] months for each extension of authorisation for minor uses<sup>9</sup> if the applications for such authorisations are made by the authorisation holder at the latest [...] years after the date of the first authorisation. The total period of data protection may in no case exceed [...] years. For low risk plant protection products the total period of data protection may in no case exceed [...] years.
5. A test or study shall also be protected if it was necessary for the renewal or review of an authorisation. In those cases, the period for data protection shall be [...] months.

#### *SUB-SECTION 7*

#### *Plant Varieties*

#### *Article X.46*

The Parties shall protect plant variety rights, in accordance with the International Convention for the Protection of New Varieties of Plants adopted in Paris on 2 December 1961, as lastly revised in Geneva on 19 March 1991 (1991 UPOV ACT), including the exceptions to the breeder's right as referred to in Article 15(2) of that Convention.

#### *SECTION C*

#### ***ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS***

#### *Article X.47*

#### **General Provisions**

1. The Parties affirm their commitments under the TRIPS Agreement and in particular of Part III thereof, and shall provide for the complementary measures, procedures and remedies under this Section, which are necessary to ensure the enforcement of intellectual property rights<sup>10</sup>. These measures, procedures and remedies shall be fair and

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<sup>9</sup> Minor use: use of a plant protection product in a particular Party on plants or plant products which are not widely grown in that particular Party or widely grown to meet an exceptional plant protection need.

<sup>10</sup> For the purposes of this Section the notion of "intellectual property rights" should include at least the following rights: copyright; rights related to copyright; *sui generis* right of a database maker; rights of the creator of the topographies of a semiconductor product; trademark rights; design rights; patent rights,

equitable, and shall not be unnecessarily complicated or costly, or entail unreasonable time limits or unwarranted delays.

2. The measures, procedures and remedies referred to in paragraph 1 shall also be effective, proportionate and dissuasive and 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.

#### *Article X.48*

### **Persons Entitled to Apply for the Application of the Measures, Procedures and Remedies**

Each Party shall recognise as persons entitled to seek application of the measures, procedures and remedies referred to in this Section and in Part III of the TRIPS Agreement:

- (a) the holders of intellectual property rights in accordance with the provisions of the applicable law;
- (b) all other persons authorised to use those intellectual property rights, in particular licensees, in so far as permitted by and in accordance with the provisions of the applicable law;
- (c) intellectual property collective rights management bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the provisions of the applicable law; and
- (d) professional defence bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the provisions of the applicable law.

### *Civil and Administrative Enforcement*

#### *Article X.49*

### **Evidence**

1. Each Party shall ensure that, even before the commencement of proceedings on the merits of the case, 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.

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including rights derived from supplementary protection certificates; geographical indications; utility model rights; plant variety rights; trade names in so far as these are protected by each Party.

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 materials and implements used in the production and/or distribution of these goods and the documents relating thereto.
3. Each Party shall take the measures necessary, in cases of infringement of an intellectual property right committed on a commercial scale, to enable the competent judicial authorities to order, where appropriate, on application by a party, the communication of banking, financial or commercial documents under the control of the opposing party, subject to the protection of confidential information.

*Article X.50*

**Right of Information**

1. Each Party shall ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order the infringer and/or any other person which is party to a litigation or a witness therein to provide information on the origin and distribution networks of the goods or services which infringe an intellectual property right.
  - (a) “Any other person” in this paragraph means a person who was:
    - (i) found in possession of the infringing goods on a commercial scale;
    - (ii) found to be using the infringing services on a commercial scale;
    - (iii) found to be providing on a commercial scale services used in infringing 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 infringing goods or the provision of the infringing services.
  - (b) Information shall, as appropriate, comprise:
    - (i) the names and addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers; or
    - (ii) information on the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained for the goods or services in question.
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 participation or that of his close relatives in an infringement of an intellectual property right; or
- (e) govern the protection of confidentiality of information sources or the processing of personal data.

*Article X.51*

**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.
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.52*

**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 infringe an intellectual property right. If appropriate, the competent judicial authorities

may also order destruction of materials and implements predominantly used in the creation or manufacture of those goods.

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.
3. In considering a request for remedies, 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.

*Article X.53*

**Injunctions**

Each Party shall ensure that, when a judicial decision finds an infringement of an intellectual property right, the competent judicial authorities may issue against the infringer as well as against an intermediary whose services are being used by a third party to infringe an intellectual property right an injunction aimed at prohibiting the continuation of the infringement.

*Article X.54*

**Alternative Measures**

Each Party 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.52 (Remedies) and/or Article X.53 (Injunctions), may order pecuniary compensation to be paid to the injured party instead of applying the measures provided for in Article X.52 (Remedies) and/or Article X.53 (Injunctions), if that person acted unintentionally and without negligence, if execution of the measures in question would cause him disproportionate harm and if pecuniary compensation to the injured party appears reasonably satisfactory.

*Article X.55*

**Damages**

1. Each Party shall ensure that the competent judicial authorities, on application 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 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 made by the infringer and, in appropriate cases, 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.
2. Where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity, each Party may lay down that the judicial authorities may order in favour of the injured party the recovery of profits or the payment of damages which may be pre-established.

*Article X.56*

**Legal Costs**

Each Party shall ensure that reasonable and proportionate legal costs and other expenses incurred by the successful party shall as a general rule be borne by the unsuccessful party, unless equity does not allow this.

*Article X.57*

**Publication of Judicial Decisions**

Each Party shall ensure that, in legal proceedings instituted for infringement of an intellectual property right, the competent judicial authorities may order, at the request of the applicant and at the expense of the infringer, appropriate measures for the dissemination of the information concerning the decision, including displaying the decision and publishing it in full or in part.

*Article X.58*

**Presumption of Authorship or Ownership**

The Parties shall recognise that, for the purposes of applying the measures, procedures and remedies provided for in this Section:

- (a) for the author of a literary or artistic work, in the absence of proof to the contrary, to be regarded as such, and consequently to be entitled to institute infringement proceedings, it shall be sufficient for his/her name to appear on the work in the usual manner;
- (b) the provision under (a) shall apply *mutatis mutandis* to the holders of rights related to copyright with regard to their protected subject matter.

*Article X.59*



### **Administrative Procedures**

To the extent that any civil remedy can be ordered as a result of administrative procedures on the merits of a case, such procedures shall conform to principles equivalent in substance to those set forth in the relevant provisions of this Section.

#### *Article X.60*

### **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 Agreement, each Party shall ensure consistency with its 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.

#### *Article X.61*

### **Voluntary Stakeholder Initiatives**

Each Party shall endeavour to facilitate voluntary stakeholder initiatives to reduce intellectual property rights infringement, including over the Internet and in other marketplaces, focusing on concrete problems and seeking practical solutions that are realistic, balanced, proportionate and fair for all concerned including in the following ways:

- (a) each Party shall endeavour to consensually convene stakeholders in its territory to facilitate voluntary initiatives to find solutions and resolve differences regarding the protection and enforcement of intellectual property rights with the aim of reducing infringement;
- (b) the Parties shall endeavour to exchange information with each other regarding efforts to facilitate voluntary stakeholder initiatives in their respective territories; and
- (c) the Parties shall endeavour to promote open dialogue and cooperation among the Parties' stakeholders, and to encourage the Parties' stakeholders to jointly find solutions and resolve differences regarding the protection and enforcement of intellectual property rights and reducing infringement.

## *SECTION D*

### ***BORDER ENFORCEMENT***

#### *Article X.62*

### **Border Enforcement Measures Related to Intellectual Property Rights**

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 of or detain goods suspected of infringing trademarks, copyrights and related rights, geographical indications, patents, utility models, industrial designs, topographies of integrated circuits and plan variety rights (hereinafter referred to as “suspect goods”).
2. Each Party shall have in place electronic systems for the management by customs of the applications granted or recorded.
3. Customs authorities shall not charge a fee to cover the administrative costs resulting from the processing of an application or a recordation.
4. Customs authorities shall decide about granting or recording application within a reasonable period of time from the submission of the application.
5. Parties shall provide for such application/recordation to apply to multiple shipments.
6. With respect to goods under customs control, customs authorities may act upon their own initiative to suspend the release of or detain suspect goods.
7. Customs authorities shall use risk analysis to identify suspect goods.
8. Each Party shall have in place procedures allowing for the destruction of goods infringing intellectual property rights, without there being any need to prior administrative or judicial proceedings for the formal determination of the infringements, in particular where the persons concerned agree or do not oppose to the destruction. In case goods determined to be infringing are not destroyed, each Party shall ensure that, except in exceptional circumstances, such goods are disposed of outside the commercial channel in such a manner to avoid any harm to the right holder.
9. Each Party may have in place procedures allowing for the swift destruction of counterfeit trade mark and pirated goods sent in postal or express couriers’ consignments.
10. 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.
11. 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.
12. The Parties agree to cooperation in respect of international trade in suspect goods and, in particular, to share information on such trade.
13. Without prejudice to other forms of cooperation, the Protocol [to complete] on Mutual Administrative Assistance in Customs Matters will be applicable with regard to breaches of legislation on intellectual property rights referred to in paragraph 1, for the

enforcement of which the customs authorities are competent in accordance with this Article.

14. [Placeholder – Committee in charge of ensuring the proper functioning and implementation of this Article, in particular providing for the framework for organising cooperation].

## *SECTION E*

*[This Section should be placed in a Chapter dealing with e-commerce, but will be discussed by the IPR team]*

### **LIABILITY OF INTERMEDIARY SERVICE PROVIDERS**

#### *Article X.63*

#### **Use of Intermediaries' Services**

The Parties recognise that the services of intermediaries may be used for activities infringing an intellectual property right and each Party shall provide for the following measures in respect of intermediary service providers.

#### *Article X.64*

#### **Intermediary Service Providers: Mere Conduit**

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, each Party shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:
  - (a) does not initiate the transmission;
  - (b) does not select the receiver of the transmission; and
  - (c) does not select or modify the information contained in the transmission.
2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.
3. This Article shall not affect the possibility for a competent authority, in accordance with each Party's legal system, of requiring the service provider to terminate or prevent an infringement.

*Article X.65*

**Intermediary Service Providers: Caching**

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, each Party shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:
  - (a) the provider does not modify the information;
  - (b) the provider complies with conditions on access to the information;
  - (c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
  - (d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and
  - (e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a competent authority has ordered such removal or disablement.
2. This Article shall not affect the possibility for a competent authority, in accordance with each Party's legal system, of requiring the service provider to terminate or prevent an infringement.

*Article X.66*

**Intermediary Service Providers: Hosting**

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, the Parties shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:
  - (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
  - (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.
3. This Article shall not affect the possibility for a competent authority, in accordance with each Party's legal system, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for the Parties of establishing procedures governing the removal or disabling of access to information.

*Article X.67*

**No General Obligation to Monitor**

1. The Parties shall not impose a general obligation on providers, when providing the services covered by Articles X.64 (Intermediary Service Providers: Mere Conduit), X.65 (Intermediary Service Providers: Caching) and X.66 (Intermediary Service Providers: Hosting), to monitor the information which they transmit or store, nor a general obligation to actively seek facts or circumstances indicating illegal activity.<sup>11</sup>
2. The Parties may establish obligations for information society service providers to promptly inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.

*SECTION F*

***FINAL PROVISIONS***

*Article X.68*

**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;

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<sup>11</sup> For greater clarity, this provision does not affect the possibility for a Party of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by domestic law, in order to detect and prevent certain types of illegal activities.

- (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) 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.
3. Each Party may make publicly available the product specifications, or a summary thereof, and relevant contact points for control or management of geographical indications of the other Party protected pursuant to Sub-Section 4 (Geographical Indications).
4. The Parties shall, either directly or through the joint working body defined by the Agreement established in Article X.69 (Institutional Provisions), maintain contact on all matters related to the implementation and functioning of this Agreement.

*Article X.69*

**Institutional Provisions**

*[Purpose of the Article: to establish the joint working body to monitor and implement the FTA with respect to the intellectual property chapter]*

*[Placeholder]*