EUROPEAN COMMISSION

Brussels, 24.6.2011
COM(2011) 380 final

2011/0167 (NLE)

Proposal for a

COUNCIL DECISION

on the conclusion of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America

EXPLANATORY MEMORANDUM

1. ACTA aims to establish a comprehensive international framework that will assist the EU in its efforts to effectively combat the infringement of intellectual property rights (IPR). This infringement undermines legitimate trade and the EU's competitiveness with the subsequent negative repercussions on growth and jobs. ACTA includes state-of-the-art provisions on the enforcement of IPR, including provisions on civil, criminal, border and digital environment enforcement measures, robust cooperation mechanisms among ACTA Parties to assist in their enforcement efforts, and the establishment of best practices for effective IPR enforcement.

2. Although ACTA does not modify the EU *acquis*, because EU law is already considerably more advanced than the current international standards, it will introduce a new international standard, building upon the World Trade Organisation's TRIPS Agreement (adopted in 1994). Thus, it will provide benefits for EU exporting right-holders operating in the global market who currently suffer systematic and widespread infringements of their copyrights, trademarks, patents, designs and geographical indications abroad.

3. At the same time, ACTA is a balanced agreement, because it fully respects the rights of citizens and the concerns of important stakeholders such as consumers, internet providers and partners in developing countries.

4. Further to the adoption of the negotiating directives by the Council on 14 April 2008, negotiations were launched on 3 June 2008. The agreement was concluded on 15 November 2010 and the text was initialled on 25 November, after 11 rounds of negotiations.

5. The EU Member States were kept informed of the negotiations orally and in writing via the Council's Trade Policy Committee. The rotating EU Presidency led the negotiations on matters of penal enforcement, based on positions unanimously agreed and adopted by Council in COREPER. The European Parliament has also been kept regularly informed on developments via its Committee on International Trade (INTA) and by Commissioner De Gucht in three plenary debates in 2010. On 24 November 2010, the European Parliament adopted a Resolution supporting ACTA.

6. ACTA contains a number of provisions on criminal enforcement that fall within the scope of Article 83(2) TFEU. Those parts of the agreement, in distinction to those parts falling under Article 207, fall under the area of shared competences (Article 2(2) TFEU). Where a matter falls under shared competence either the European Union or Member States may legislate and adopt legally binding acts. Regarding the signature and conclusion of ACTA, the Commission has opted not to propose that the European Union exercise its potential competence in the area of criminal enforcement pursuant to Article 83(2) TFEU. The Commission considers this appropriate because it has never been the intention, as regards the negotiation of ACTA to modify the EU *acquis* or to harmonise EU legislation as regards criminal enforcement of intellectual property rights. For this reason, the Commission proposes that ACTA be signed and concluded both by the EU and by all the Member States.

7. The Commission's position as regards ACTA and Article 83(2) TFEU is without prejudice to the position of the Commission on future exercise by the EU of the shared competences foreseen by Article 83(2) TFEU as regards other initiatives.

2011/0167 (NLE)

Proposal for a

COUNCIL DECISION

on the conclusion of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207 (4), 1st subparagraph, in conjunction with Article 218(6)(a)(v) thereof,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament[1],

Whereas:

(1) On 14 April 2008 the Council authorised the Commission to negotiate a plurilateral anti-counterfeiting trade agreement, on behalf of the European Union and its Member States.

(2) Those negotiations have been concluded and an Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America, was initialled on 25 November 2010.

(3) In accordance with Council Decision No …/2010/EU of …[2] the Agreement was signed on behalf of the Union on ….

(4) The Agreement should be approved,

HAS ADOPTED THIS DECISION:

Article 1

The Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the

[1] OJ C , , p. .

[2] OJ: please insert the number and publication reference of the decision.

Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America,[3] is hereby approved on behalf of the European Union.

The text of the Agreement to be concluded is attached to this Decision.

Article 2

The President of the Council shall designate the person empowered to proceed, on behalf of the European Union, to the deposit of the instrument of approval of the Agreement, in order to express the consent of the European Union to be bound by the Agreement.

Article 3

This Decision shall enter into force on the day of its adoption. It shall be published in the *Official Journal of the European Union.*

The date of entry into force of the Agreement shall be published in the *Official Journal of the European Union.*

Done at Brussels,

For the Council
The President

[3] OJ: please insert in footnote 1 the publication reference of the Agreement.

ANNEX

Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America

The Parties to this Agreement,

Noting that effective enforcement of intellectual property rights is critical to sustaining economic growth across all industries and globally;

Noting further that the proliferation of counterfeit and pirated goods, as well as of services that distribute infringing material, undermines legitimate trade and sustainable development of the world economy, causes significant financial losses for right holders and for legitimate businesses, and, in some cases, provides a source of revenue for organized crime and otherwise poses risks to the public;

Desiring to combat such proliferation through enhanced international cooperation and more effective international enforcement;

Intending to provide effective and appropriate means, complementing the TRIPS Agreement, for the enforcement of intellectual property rights, taking into account differences in their respective legal systems and practices;

Desiring to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade;

Desiring to address the problem of infringement of intellectual property rights, including infringement taking place in the digital environment, in particular with respect to copyright or related rights, in a manner that balances the rights and interests of the relevant right holders, service providers, and users;

Desiring to promote cooperation between service providers and right holders to address relevant infringements in the digital environment;

Desiring that this Agreement operates in a manner mutually supportive of international enforcement work and cooperation conducted within relevant international organizations;

Recognizing the principles set forth in the *Doha Declaration on the TRIPS Agreement and Public Health*, adopted on 14 November 2001, at the Fourth WTO Ministerial Conference;

Hereby agree as follows:

Chapter I: Initial Provisions and General Definitions

SECTION 1: INITIAL PROVISIONS

Article 1: Relation to Other Agreements

Nothing in this Agreement shall derogate from any obligation of a Party with respect to any other Party under existing agreements, including the TRIPS Agreement.

Article 2: Nature and Scope of Obligations

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

2. Nothing in this Agreement creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and enforcement of law in general.

3. The objectives and principles set forth in Part I of the TRIPS Agreement, in particular in Articles 7 and 8, shall apply, *mutatis mutandis*, to this Agreement.

Article 3: Relation to Standards concerning the Availability and Scope of Intellectual Property Rights

1. This Agreement shall be without prejudice to provisions in a Party's law governing the availability, acquisition, scope, and maintenance of intellectual property rights.

2. This Agreement does not create any obligation on a Party to apply measures where a right in intellectual property is not protected under its laws and regulations.

Article 4: Privacy and Disclosure of Information

1. Nothing in this Agreement shall require a Party to disclose:

   a) information, the disclosure of which would be contrary to its law, including laws protecting privacy rights, or international agreements to which it is party;

   b) confidential information, the disclosure of which would impede law enforcement or otherwise be contrary to the public interest; or

   c) confidential information, the disclosure of which would prejudice the legitimate commercial interests of particular enterprises, public or private.

2. When a Party provides written information pursuant to the provisions of this Agreement, the Party receiving the information shall, subject to its law and practice, refrain from disclosing or using the information for a purpose other than that for which the information was provided, except with the prior consent of the Party providing the information.

SECTION 2: GENERAL DEFINITIONS

Article 5: General Definitions

For the purposes of this Agreement, unless otherwise specified:

a) **ACTA** means the Anti-Counterfeiting Trade Agreement;

b) **Committee** means the ACTA Committee established under Chapter V (Institutional Arrangements);

c) **competent authorities** includes the appropriate judicial, administrative, or law enforcement authorities under a Party's law;

d) **counterfeit trademark goods** means any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country in which the procedures set forth in Chapter II (Legal Framework for Enforcement of Intellectual Property Rights) are invoked;

e) **country** is to be understood to have the same meaning as that set forth in the Explanatory Notes to the WTO Agreement;

f) **customs transit** means the customs procedure under which goods are transported under customs control from one customs office to another;

g) **days** means calendar days;

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

i) **in-transit goods** means goods under **customs transit** or **transhipment**;

j) **person** means a natural person or a legal person;

k) **pirated copyright goods** means any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country in which the procedures set forth in Chapter II (Legal Framework for Enforcement of Intellectual Property Rights) are invoked;

l) **right holder** includes a federation or an association having the legal standing to assert rights in intellectual property;

m) **territory,** for the purposes of Section 3 (Border Measures) of Chapter II (Legal Framework for Enforcement of Intellectual Property Rights), means the customs territory and all free zones[4] of a Party;

n) **transhipment** means the customs procedure under which goods are transferred under customs control from the importing means of transport to the exporting means of transport within the area of one customs office which is the office of both importation and exportation;

o) **TRIPS Agreement** means the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, contained in Annex 1C to the WTO Agreement;

p) **WTO** means the World Trade Organization; and

q) **WTO Agreement** means the Marrakesh Agreement Establishing the World Trade Organization, done on 15 April 1994.

Chapter II: Legal Framework For Enforcement of Intellectual Property Rights

SECTION 1: GENERAL OBLIGATIONS

Article 6: General Obligations with Respect to Enforcement

1. Each Party shall ensure that enforcement procedures are available under its law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

2. Procedures adopted, maintained, or applied to implement the provisions of this Chapter shall be fair and equitable, and shall provide for the rights of all participants subject to such procedures to be appropriately protected. These procedures shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

3. In implementing the provisions of this Chapter, each Party shall take into account the need for proportionality between the seriousness of the infringement, the interests of third parties, and the applicable measures, remedies and penalties.

---

[4] For greater certainty, the Parties acknowledge that **free zone** means a part of the territory of a Party where any goods introduced are generally regarded, insofar as import duties and taxes are concerned, as being outside the customs territory.

4. No provision of this Chapter shall be construed to require a Party to make its officials subject to liability for acts undertaken in the performance of their official duties.

SECTION 2: CIVIL ENFORCEMENT[5]

Article 7: Availability of Civil Procedures

1. Each Party shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right as specified in this Section.

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

Article 8: Injunctions

1. Each Party shall provide that, in civil judicial proceedings concerning the enforcement of intellectual property rights, its judicial authorities have the authority to issue an order against a party to desist from an infringement, and *inter alia*, an order to that party or, where appropriate, to a third party over whom the relevant judicial authority exercises jurisdiction, to prevent goods that involve the infringement of an intellectual property right from entering into the channels of commerce.

2. Notwithstanding the other provisions of this Section, a Party may limit the remedies available against use by governments, or by third parties authorized by a government, without the authorization of the right holder, to the payment of remuneration, provided that the Party complies with the provisions of Part II of the TRIPS Agreement specifically addressing such use. In other cases, the remedies under this Section shall apply or, where these remedies are inconsistent with a Party's law, declaratory judgments and adequate compensation shall be available.

Article 9: Damages

1. Each Party shall provide that, in civil judicial proceedings concerning the enforcement of intellectual property rights, its judicial authorities have the authority to order the infringer who, knowingly or with reasonable grounds to know, engaged in infringing activity to pay the right holder damages adequate to compensate for the injury the right holder has suffered as a result of the infringement. In determining the amount of damages for infringement of intellectual property rights, a Party's judicial authorities shall have the authority to consider, *inter alia*, any legitimate measure of value the right holder submits, which may include lost profits, the value of the infringed goods or services measured by the market price, or the suggested retail price.

---

[5] A Party may exclude patents and protection of undisclosed information from the scope of this Section.

2. At least in cases of copyright or related rights infringement and trademark counterfeiting, each Party shall provide that, in civil judicial proceedings, its judicial authorities have the authority to order the infringer to pay the right holder the infringer's profits that are attributable to the infringement. A Party may presume those profits to be the amount of damages referred to in paragraph 1.

3. At least with respect to infringement of copyright or related rights protecting works, phonograms, and performances, and in cases of trademark counterfeiting, each Party shall also establish or maintain a system that provides for one or more of the following:

   a) pre-established damages; or

   b) presumptions[6] for determining the amount of damages sufficient to compensate the right holder for the harm caused by the infringement; or

   c) at least for copyright, additional damages.

4. Where a Party provides the remedy referred to in subparagraph 3(a) or the presumptions referred to in subparagraph 3(b), it shall ensure that either its judicial authorities or the right holder has the right to choose such a remedy or presumptions as an alternative to the remedies referred to in paragraphs 1 and 2.

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

Article 10: Other Remedies

1. At least with respect to pirated copyright goods and counterfeit trademark goods, each Party shall provide that, in civil judicial proceedings, at the right holder's request, its judicial authorities have the authority to order that such infringing goods be destroyed, except in exceptional circumstances, without compensation of any sort.

2. Each Party shall further provide that its judicial authorities have the authority to order that materials and implements, the predominant use of which has been in the manufacture or creation of such infringing goods, be, without undue delay and without compensation of any sort, destroyed or disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements.

---

[6] The presumptions referred to in subparagraph 3(b) may include a presumption that the amount of damages is: (i) the quantity of the goods infringing the right holder's intellectual property right in question and actually assigned to third persons, multiplied by the amount of profit per unit of goods which would have been sold by the right holder if there had not been the act of infringement; or (ii) a reasonable royalty; or (iii) 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 authorization to use the intellectual property right in question.

3. A Party may provide for the remedies described in this Article to be carried out at the infringer's expense.

Article 11: Information Related to Infringement

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

Article 12: Provisional Measures

1. Each Party shall provide that its judicial authorities have the authority to order prompt and effective provisional measures:

   a) against a party or, where appropriate, a third party over whom the relevant judicial authority exercises jurisdiction, to prevent an infringement of any intellectual property right from occurring, and in particular, to prevent goods that involve the infringement of an intellectual property right from entering into the channels of commerce;

   b) to preserve relevant evidence in regard to the alleged infringement.

2. Each Party shall provide that its judicial authorities have the authority to adopt provisional measures *inaudita altera parte* where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed. In proceedings conducted *inaudita altera parte*, each Party shall provide its judicial authorities with the authority to act expeditiously on requests for provisional measures and to make a decision without undue delay.

3. At least in cases of copyright or related rights infringement and trademark counterfeiting, each Party shall provide that, in civil judicial proceedings, its judicial authorities have the authority to order the seizure or other taking into custody of suspect goods, and of materials and implements relevant to the act of infringement, and, at least for trademark counterfeiting, documentary evidence, either originals or copies thereof, relevant to the infringement.

4. Each Party shall provide that its authorities have the authority to require the applicant, with respect to provisional measures, to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse. Such

security or equivalent assurance shall not unreasonably deter recourse to procedures for such provisional measures.

5. Where the provisional measures 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 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 these measures.

SECTION 3: BORDER MEASURES[7, 8]

Article 13: Scope of the Border Measures[9]

In providing, as appropriate, and consistent with its domestic system of intellectual property rights protection and without prejudice to the requirements of the TRIPS Agreement, for effective border enforcement of intellectual property rights, a Party should do so in a manner that does not discriminate unjustifiably between intellectual property rights and that avoids the creation of barriers to legitimate trade.

Article 14: Small Consignments and Personal Luggage

1. Each Party shall include in the application of this Section goods of a commercial nature sent in small consignments.

2. A Party may exclude from the application of this Section small quantities of goods of a non-commercial nature contained in travellers' personal luggage.

Article 15: Provision of Information from the Right Holder

Each Party shall permit its competent authorities to request a right holder to supply relevant information to assist the competent authorities in taking the border measures referred to in this Section. A Party may also allow a right holder to supply relevant information to its competent authorities.

Article 16: Border measures

1. Each Party shall adopt or maintain procedures with respect to import and export shipments under which:

---

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

8 It is understood that there shall be no obligation to apply the procedures set forth in this Section to goods put on the market in another country by or with the consent of the right holder.

9 The Parties agree that patents and protection of undisclosed information do not fall within the scope of this Section.

a) its customs authorities may act upon their own initiative to suspend the release of suspect goods; and

b) where appropriate, a right holder may request its competent authorities to suspend the release of suspect goods.

2. A Party may adopt or maintain procedures with respect to suspect in-transit goods or in other situations where the goods are under customs control under which:

a) its customs authorities may act upon their own initiative to suspend the release of, or to detain, suspect goods; and

b) where appropriate, a right holder may request its competent authorities to suspend the release of, or to detain, suspect goods.

Article 17: Application by the Right Holder

1. Each Party shall provide that its competent authorities require a right holder that requests the procedures described in subparagraphs 1(b) and 2(b) of Article 16 (Border Measures) to provide adequate evidence to satisfy the competent authorities that, under the law of the Party providing the procedures, there is *prima facie* an infringement of the right holder's intellectual property right, and to supply sufficient information that may reasonably be expected to be within the right holder's knowledge to make the suspect goods reasonably recognizable by the competent authorities. The requirement to provide sufficient information shall not unreasonably deter recourse to the procedures described in subparagraphs 1(b) and 2(b) of Article 16 (Border Measures).

2. Each Party shall provide for applications to suspend the release of, or to detain, any suspect goods[10] under customs control in its territory. A Party may provide for such applications to apply to multiple shipments. A Party may provide that, at the request of the right holder, the application to suspend the release of, or to detain, suspect goods may apply to selected points of entry and exit under customs control.

3. Each Party shall ensure that its competent authorities inform the applicant within a reasonable period whether they have accepted the application. Where its competent authorities have accepted the application, they shall also inform the applicant of the period of validity of the application.

4. A Party may provide that, where the applicant has abused the procedures described in subparagraphs 1(b) and 2(b) of Article 16 (Border Measures), or where there is due cause, its competent authorities have the authority to deny, suspend, or void an application.

[10] The requirement to provide for such applications is subject to the obligations to provide procedures referred to in subparagraphs 1(b) and 2(b) of Article 16 (Border Measures).

Article 18: Security or Equivalent Assurance

Each Party shall provide that its competent authorities have the authority to require a right holder that requests the procedures described in subparagraphs 1(b) and 2(b) of Article 16 (Border Measures) to provide a reasonable security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. Each Party shall provide that such security or equivalent assurance shall not unreasonably deter recourse to these procedures. A Party may provide that such security may be in the form of a bond conditioned to hold the defendant harmless from any loss or damage resulting from any suspension of the release of, or detention of, the goods in the event the competent authorities determine that the goods are not infringing. A Party may, only in exceptional circumstances or pursuant to a judicial order, permit the defendant to obtain possession of suspect goods by posting a bond or other security.

Article 19: Determination as to Infringement

Each Party shall adopt or maintain procedures by which its competent authorities may determine, within a reasonable period after the initiation of the procedures described in Article 16 (Border Measures), whether the suspect goods infringe an intellectual property right.

Article 20: Remedies

1. Each Party shall provide that its competent authorities have the authority to order the destruction of goods following a determination referred to in Article 19 (Determination as to Infringement) that the goods are infringing. In cases where such goods are not destroyed, each Party shall ensure that, except in exceptional circumstances, such goods are disposed of outside the channels of commerce in such a manner as to avoid any harm to the right holder.

2. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce.

3. A Party may provide that its competent authorities have the authority to impose administrative penalties following a determination referred to in Article 19 (Determination as to Infringement) that the goods are infringing.

Article 21: Fees

Each Party shall provide that any application fee, storage fee, or destruction fee to be assessed by its competent authorities in connection with the procedures described in this Section shall not be used to unreasonably deter recourse to these procedures.

Article 22: Disclosure of Information

Without prejudice to a Party’s laws pertaining to the privacy or confidentiality of information:

a) Party may authorize its competent authorities to provide a right holder with information about specific shipments of goods, including the description and quantity of the goods, to assist in the detection of infringing goods;

b) a Party may authorize its competent authorities to provide a right holder with information about goods, including, but not limited to, the description and quantity of the goods, the name and address of the consignor, importer, exporter, or consignee, and, if known, the country of origin of the goods, and the name and address of the manufacturer of the goods, to assist in the determination referred to in Article 19 (Determination as to Infringement);

c) unless a Party has provided its competent authorities with the authority described in subparagraph (b), at least in cases of imported goods, where its competent authorities have seized suspect goods or, in the alternative, made a determination referred to in Article 19 (Determination as to Infringement) that the goods are infringing, the Party shall authorize its competent authorities to provide a right holder, within thirty days[11] of the seizure or determination, with information about such goods, including, but not limited to, the description and quantity of the goods, the name and address of the consignor, importer, exporter, or consignee, and, if known, the country of origin of the goods, and the name and address of the manufacturer of the goods.

SECTION 4: CRIMINAL ENFORCEMENT

Article 23: Criminal Offences

1. Each Party shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright or related rights piracy on a commercial scale.[12] For the purposes of this Section, acts carried out on a commercial scale include at least those carried out as commercial activities for direct or indirect economic or commercial advantage.

2. Each Party shall provide for criminal procedures and penalties to be applied in cases of wilful importation[13] and domestic use, in the course of trade and on a commercial scale, of labels or packaging:[14]

a) to which a mark has been applied without authorization which is identical to, or cannot be distinguished from, a trademark registered in its territory; and

---

11 For the purposes of this Article, **days** means business days.

12 Each Party shall treat wilful importation or exportation of counterfeit trademark goods or pirated copyright goods on a commercial scale as unlawful activities subject to criminal penalties under this Article. A Party may comply with its obligation relating to importation and exportation of counterfeit trademark goods or pirated copyright goods by providing for distribution, sale or offer for sale of such goods on a commercial scale as unlawful activities subject to criminal penalties.

13 A Party may comply with its obligation relating to importation of labels or packaging through its measures concerning distribution.

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

b) which are intended to be used in the course of trade on goods or in relation to services which are identical to goods or services for which such trademark is registered.

3. A Party may provide criminal procedures and penalties in appropriate cases for the unauthorized copying of cinematographic works from a performance in a motion picture exhibition facility generally open to the public.

4. With respect to the offences specified in this Article for which a Party provides criminal procedures and penalties, that Party shall ensure that criminal liability for aiding and abetting is available under its law.

5. Each Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability, which may be criminal, of legal persons for the offences specified in this Article for which the Party provides criminal procedures and penalties. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the criminal offences.

Article 24: Penalties

For offences specified in paragraphs 1, 2, and 4 of Article 23 (Criminal Offences), each Party shall provide penalties that include imprisonment as well as monetary fines[15] sufficiently high to provide a deterrent to future acts of infringement, consistently with the level of penalties applied for crimes of a corresponding gravity.

Article 25: Seizure, Forfeiture, and Destruction

1. With respect to the offences specified in paragraphs 1, 2, 3, and 4 of Article 23 (Criminal Offences) for which a Party provides criminal procedures and penalties, that Party shall provide that its competent authorities have the authority to order the seizure of suspected counterfeit trademark goods or pirated copyright goods, any related materials and implements used in the commission of the alleged offence, documentary evidence relevant to the alleged offence, and the assets derived from, or obtained directly or indirectly through, the alleged infringing activity.

2. Where a Party requires the identification of items subject to seizure as a prerequisite for issuing an order referred to in paragraph 1, that Party shall not require the items to be described in greater detail than necessary to identify them for the purpose of seizure.

3. With respect to the offences specified in paragraphs 1, 2, 3, and 4 of Article 23 (Criminal Offences) for which a Party provides criminal procedures and penalties, that Party shall provide that its competent authorities have the authority to order the forfeiture or destruction of all counterfeit trademark goods or pirated copyright goods. In cases where counterfeit trademark goods and pirated copyright goods are not destroyed, the competent authorities shall ensure that, except in exceptional circumstances, such goods shall be disposed of outside

[15] It is understood that there is no obligation for a Party to provide for the possibility of imprisonment and monetary fines to be imposed in parallel.

the channels of commerce in such a manner as to avoid causing any harm to the right holder. Each Party shall ensure that the forfeiture or destruction of such goods shall occur without compensation of any sort to the infringer.

4. With respect to the offences specified in paragraphs 1, 2, 3, and 4 of Article 23 (Criminal Offences) for which a Party provides criminal procedures and penalties, that Party shall provide that its competent authorities have the authority to order the forfeiture or destruction of materials and implements predominantly used in the creation of counterfeit trademark goods or pirated copyright goods and, at least for serious offences, of the assets derived from, or obtained directly or indirectly through, the infringing activity. Each Party shall ensure that the forfeiture or destruction of such materials, implements, or assets shall occur without compensation of any sort to the infringer.

5. With respect to the offences specified in paragraphs 1, 2, 3, and 4 of Article 23 (Criminal Offences) for which a Party provides criminal procedures and penalties, that Party may provide that its judicial authorities have the authority to order:

   a) the seizure of assets the value of which corresponds to that of the assets derived from, or obtained directly or indirectly through, the allegedly infringing activity; and

   b) the forfeiture of assets the value of which corresponds to that of the assets derived from, or obtained directly or indirectly through, the infringing activity.

Article 26: Ex Officio Criminal Enforcement

Each Party shall provide that, in appropriate cases, its competent authorities may act upon their own initiative to initiate investigation or legal action with respect to the criminal offences specified in paragraphs 1, 2, 3, and 4 of Article 23 (Criminal Offences) for which that Party provides criminal procedures and penalties.

SECTION 5: ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN THE DIGITAL ENVIRONMENT

Article 27: Enforcement in the Digital Environment

1. Each Party shall ensure that enforcement procedures, to the extent set forth in Sections 2 (Civil Enforcement) and 4 (Criminal Enforcement), are available under its law so as to permit effective action against an act of infringement of intellectual property rights which takes place in the digital environment, including expeditious remedies to prevent infringement and remedies which constitute a deterrent to further infringements.

2. Further to paragraph 1, each Party's enforcement procedures shall apply to infringement of copyright or related rights over digital networks, which may include the unlawful use of means of widespread distribution for infringing purposes. These procedures shall be implemented in a manner that avoids the creation of barriers to legitimate activity, including

electronic commerce, and, consistent with that Party's law, preserves fundamental principles such as freedom of expression, fair process, and privacy.[16]

3. Each Party shall endeavour to promote cooperative efforts within the business community to effectively address trademark and copyright or related rights infringement while preserving legitimate competition and, consistent with that Party's law, preserving fundamental principles such as freedom of expression, fair process, and privacy.

4. A Party may provide, in accordance with its laws and regulations, its competent authorities with the authority to order an online service provider to disclose expeditiously to a right holder information sufficient to identify a subscriber whose account was allegedly used for infringement, where that right holder has filed a legally sufficient claim of trademark or copyright or related rights infringement, and where such information is being sought for the purpose of protecting or enforcing those rights. These procedures shall be implemented in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce, and, consistent with that Party's law, preserves fundamental principles such as freedom of expression, fair process, and privacy.

5. Each Party shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures[17] that are used by authors, performers or producers of phonograms in connection with the exercise of their rights in, and that restrict acts in respect of, their works, performances, and phonograms, which are not authorized by the authors, the performers or the producers of phonograms concerned or permitted by law.

6. In order to provide the adequate legal protection and effective legal remedies referred to in paragraph 5, each Party shall provide protection at least against:

   a) to the extent provided by its law:

      i) the unauthorized circumvention of an effective technological measure carried out knowingly or with reasonable grounds to know; and

      ii) the offering to the public by marketing of a device or product, including computer programs, or a service, as a means of circumventing an effective technological measure; and

   b) the manufacture, importation, or distribution of a device or product, including computer programs, or provision of a service that:

---

16 For instance, without prejudice to a Party's law, adopting or maintaining a regime providing for limitations on the liability of, or on the remedies available against, online service providers while preserving the legitimate interests of right holder.

17 For the purposes of this Article, **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, performances, or phonograms, which are not authorized by authors, performers or producers of phonograms, as provided for by a Party's law. Without prejudice to the scope of copyright or related rights contained in a Party's law, technological measures shall be deemed effective where the use of protected works, performances, or phonograms is controlled by authors, performers or producers of phonograms through the application of a relevant access control or protection process, such as encryption or scrambling, or a copy control mechanism, which achieves the objective of protection.

i) is primarily designed or produced for the purpose of circumventing an effective technological measure; or

ii) has only a limited commercially significant purpose other than circumventing an effective technological measure. [18]

7. To protect electronic rights management information,[19] each Party shall provide adequate legal protection and effective legal remedies against any person knowingly performing without authority any of the following acts knowing, or with respect to civil remedies, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any copyright or related rights:

a) to remove or alter any electronic rights management information;

b) to distribute, import for distribution, broadcast, communicate, or make available to the public copies of works, performances, or phonograms, knowing that electronic rights management information has been removed or altered without authority.

8. In providing adequate legal protection and effective legal remedies pursuant to the provisions of paragraphs 5 and 7, a Party may adopt or maintain appropriate limitations or exceptions to measures implementing the provisions of paragraphs 5, 6, and 7. The obligations set forth in paragraphs 5, 6, and 7 are without prejudice to the rights, limitations, exceptions, or defences to copyright or related rights infringement under a Party's law.

Chapter III: Enforcement Practices

Article 28: Enforcement Expertise, Information, and Domestic Coordination

1. Each Party shall encourage the development of specialized expertise within its competent authorities responsible for the enforcement of intellectual property rights.

2. Each Party shall promote the collection and analysis of statistical data and other relevant information concerning intellectual property rights infringements as well as the collection of information on best practices to prevent and combat infringements.

---

[18] In implementing paragraphs 5 and 6, no Party shall be obligated to require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as the product does not otherwise contravene its measures implementing these paragraphs.

[19] For the purposes of this Article, **rights management information** means:

(a) information that identifies the work, the performance, or the phonogram; the author of the work, the performer of the performance, or the producer of the phonogram; or the owner of any right in the work, performance, or phonogram;

(b) information about the terms and conditions of use of the work, performance, or phonogram; or

(c) any numbers or codes that represent the information described in (a) and (b) above;

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

3. Each Party shall, as appropriate, promote internal coordination among, and facilitate joint actions by, its competent authorities responsible for the enforcement of intellectual property rights.

4. Each Party shall endeavour to promote, where appropriate, the establishment and maintenance of formal or informal mechanisms, such as advisory groups, whereby its competent authorities may receive the views of right holders and other relevant stakeholders.

Article 29: Management of Risk at Border

1. In order to enhance the effectiveness of border enforcement of intellectual property rights, the competent authorities of a Party may:

   a) consult with the relevant stakeholders, and the competent authorities of other Parties responsible for the enforcement of intellectual property rights to identify and address significant risks, and promote actions to mitigate those risks; and

   b) share information with the competent authorities of other Parties on border enforcement of intellectual property rights, including relevant information to better identify and target for inspection shipments suspected of containing infringing goods.

2. Where a Party seizes imported goods infringing an intellectual property right, its competent authorities may provide the Party of export with information necessary for identification of the parties and goods involved in the exportation of the seized goods. The competent authorities of the Party of export may take action against those parties and future shipments in accordance with that Party's law.

Article 30: Transparency

To promote transparency in the administration of its intellectual property rights enforcement system, each Party shall take appropriate measures, pursuant to its law and policies, to publish or otherwise make available to the public information on:

   a) procedures available under its law for enforcing intellectual property rights, its competent authorities responsible for such enforcement, and contact points available for assistance;

   b) relevant laws, regulations, final judicial decisions, and administrative rulings of general application pertaining to the enforcement of intellectual property rights; and

   c) its efforts to ensure an effective system of enforcement and protection of intellectual property rights.

Article 31: Public Awareness

Each Party shall, as appropriate, promote the adoption of measures to enhance public awareness of the importance of respecting intellectual property rights and the detrimental effects of intellectual property rights infringement.

Article 32: Environmental Considerations in Destruction of Infringing Goods

The destruction of goods infringing intellectual property rights shall be done consistently with the laws and regulations on environmental matters of the Party in which the destruction takes place.

Chapter IV

INTERNATIONAL COOPERATION

Article 33: International Cooperation

1. Each Party recognizes that international cooperation is vital to realizing effective protection of intellectual property rights and that it should be encouraged regardless of the origin of the goods infringing intellectual property rights, or the location or nationality of the right holder.

2. In order to combat intellectual property rights infringement, in particular trademark counterfeiting and copyright or related rights piracy, the Parties shall promote cooperation, where appropriate, among their competent authorities responsible for the enforcement of intellectual property rights. Such cooperation may include law enforcement cooperation with respect to criminal enforcement and border measures covered by this Agreement.

3. Cooperation under this Chapter shall be conducted consistent with relevant international agreements, and subject to the laws, policies, resource allocation, and law enforcement priorities of each Party.

Article 34: Information Sharing

Without prejudice to the provisions of Article 29 (Management of Risk at Border), each Party shall endeavour to exchange with other Parties:

a) information the Party collects under the provisions of Chapter III (Enforcement Practices), including statistical data and information on best practices;

b) information on its legislative and regulatory measures related to the protection and enforcement of intellectual property rights; and

c) other information as appropriate and mutually agreed.

Article 35: Capacity Building and Technical Assistance

1. Each Party shall endeavour to provide, upon request and on mutually agreed terms and conditions, assistance in capacity building and technical assistance in improving the enforcement of intellectual property rights to other Parties to this Agreement and, where appropriate, to prospective Parties. The capacity building and technical assistance may cover such areas as:

a) enhancement **of public awareness on intellectual property rights;**

b) development **and implementation of national legislation related to the enforcement of intellectual property rights;**

c) training **of officials on the enforcement of intellectual property rights; and**

d) coordinated **operations conducted at the regional and multilateral levels.**

2. Each Party shall endeavour to work closely with other Parties and, where appropriate, non-Parties to this Agreement for the purpose of implementing the provisions of paragraph 1.

3. A Party may undertake the activities described in this Article in conjunction with relevant private sector or international organizations. Each Party shall strive to avoid unnecessary duplication between the activities described in this Article and other international cooperation activities.

Chapter V

INSTITUTIONAL ARRANGEMENTS

Article 36: The ACTA Committee

1. The Parties hereby establish the ACTA Committee. Each Party shall be represented on the Committee.

2. The Committee shall:

a) review the implementation and operation of this Agreement;

b) consider matters concerning the development of this Agreement;

c) consider any proposed amendments to this Agreement in accordance with Article 42 (Amendments);

d) decide, in accordance with paragraph 2 of Article 43 (Accession), upon the terms of accession to this Agreement of any Member of the WTO; and

e) consider any other matter that may affect the implementation and operation of this Agreement.

3. The Committee may decide to:

a) establish *ad hoc* committees or working groups to assist the Committee in carrying out its responsibilities under paragraph 2, or to assist a prospective Party upon its request in acceding to this Agreement in accordance with Article 43 (Accession);

b) seek the advice of non-governmental persons or groups;

c) make recommendations regarding the implementation and operation of this Agreement, including by endorsing best practice guidelines related thereto;

d) share information and best practices with third parties on reducing intellectual property rights infringements, including techniques for identifying and monitoring piracy and counterfeiting; and

e) take other actions in the exercise of its functions.

4. All decisions of the Committee shall be taken by consensus, except as the Committee may otherwise decide by consensus. The Committee shall be deemed to have acted by consensus on a matter submitted for its consideration, if no Party present at the meeting when the decision is taken formally objects to the proposed decision. English shall be the working language of the Committee and the documents supporting its work shall be in the English language.

5. The Committee shall adopt its rules and procedures within a reasonable period after the entry into force of this Agreement, and shall invite those Signatories not Parties to this Agreement to participate in the Committee's deliberations on those rules and procedures. The rules and procedures:

a) shall address such matters as chairing and hosting meetings, and the performance of organizational duties relevant to this Agreement and its operation; and

b) may also address such matters as granting observer status, and any other matter the Committee decides necessary for its proper operation.

6. The Committee may amend the rules and procedures.

7. Notwithstanding the provisions of paragraph 4, during the first five years following the entry into force of this Agreement, the Committee's decisions to adopt or amend the rules and procedures shall be taken by consensus of the Parties and those Signatories not Parties to this Agreement.

8. After the period specified in paragraph 7, the Committee may adopt or amend the rules and procedures upon the consensus of the Parties to this Agreement.

9. Notwithstanding the provisions of paragraph 8, the Committee may decide that the adoption or amendment of a particular rule or procedure requires the consensus of the Parties and those Signatories not Parties to this Agreement.

10. The Committee shall convene at least once every year unless the Committee decides otherwise. The first meeting of the Committee shall be held within a reasonable period after the entry into force of this Agreement.

11. For greater certainty, the Committee shall not oversee or supervise domestic or international enforcement or criminal investigations of specific intellectual property cases.

12. The Committee shall strive to avoid unnecessary duplication between its activities and other international efforts regarding the enforcement of intellectual property rights.

Article 37: Contact Points

1. Each Party shall designate a contact point to facilitate communications between the Parties on any matter covered by this Agreement.

2. On the request of another Party, a Party's contact point shall identify an appropriate office or official to whom the requesting Party's inquiry may be addressed, and assist, as necessary, in facilitating communications between the office or official concerned and the requesting Party.

Article 38:Consultations

1. A Party may request in writing consultations with another Party with respect to any matter affecting the implementation of this Agreement. The requested Party shall accord sympathetic consideration to such a request, provide a response, and afford adequate opportunity to consult.

2. The consultations, including particular positions taken by consulting Parties, shall be kept confidential and be without prejudice to the rights or positions of either Party in any other proceeding, including a proceeding under the auspices of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* contained in Annex 2 to the WTO Agreement.

3. The consulting Parties may, by mutual consent, notify the Committee of the result of their consultations under this Article.

Chapter VI: Final Provisions

Article 39: Signature

This Agreement shall remain open for signature by participants in its negotiation,[20] and by any other WTO Members the participants may agree to by consensus, from 31 March 2011 until 31 March 2013.

[20] Australia, the Republic of Austria, the Kingdom of Belgium, the Republic of Bulgaria, Canada, the Republic of Cyprus, the Czech Republic, the Kingdom of Denmark, the Republic of Estonia, the European Union, the Republic of Finland, the French Republic, the Federal Republic of Germany, the Hellenic Republic, the Republic of Hungary, Ireland, the Italian Republic, Japan, the Republic of Korea, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Malta, the United Mexican States, the Kingdom of Morocco, the Kingdom of the Netherlands, New Zealand, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Singapore, the Slovak Republic, the Republic of Slovenia, the Kingdom of Spain, the Kingdom of Sweden, the Swiss Confederation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.

Article 40: Entry Into Force

1. This Agreement shall enter into force thirty days after the date of deposit of the sixth instrument of ratification, acceptance, or approval as between those Signatories that have deposited their respective instruments of ratification, acceptance, or approval.

2. This Agreement shall enter into force for each Signatory that deposits its instrument of ratification, acceptance, or approval after the deposit of the sixth instrument of ratification, acceptance, or approval, thirty days after the date of deposit by such Signatory of its instrument of ratification, acceptance, or approval.

Article 41: Withdrawal

A Party may withdraw from this Agreement by means of a written notification to the Depositary. The withdrawal shall take effect 180 days after the Depositary receives the notification.

Article 42: Amendments

1. A Party may propose amendments to this Agreement to the Committee. The Committee shall decide whether to present a proposed amendment to the Parties for ratification, acceptance, or approval.

2. Any amendment shall enter into force ninety days after the date that all the Parties have deposited their respective instruments of ratification, acceptance, or approval with the Depositary.

Article 43: Accession

1. After the expiration of the period provided in Article 39 (Signature), any Member of the WTO may apply to accede to this Agreement.

2. The Committee shall decide upon the terms of accession for each applicant.

3. This Agreement shall enter into force for the applicant thirty days after the date of deposit of its instrument of accession based upon the terms of accession referred to in paragraph 2.

Article 44: Texts of the Agreement

This Agreement shall be signed in a single original in the English, French, and Spanish languages, each version being equally authentic.

Article 45: Depositary

The Government of Japan shall be the Depositary of this Agreement.